BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FOURCORP

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 177

Case 1
No. 60961
A-6001

(Contract Interpretation Grievance)

Appearances:

Mr. Leonard Gunderson, International Representative, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 177, 7992 Weckler Road, Sturgeon Bay, Wisconsin 54235, on behalf of the Union.

Davis & Kuelthau, S.C., by **Attorney Robert W. Burns** and **Attorney Mary S. Gerbig**, 200 South Washington Street, Suite 401, P.O. Box 1534, Green Bay, WI 54305-1534, on behalf of the Company.

ARBITRATION AWARD

FourCorp (hereafter Company) and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Lodge No. 177 (hereafter Union) are parties to a collective bargaining agreement covering the years 2000-2004, which provides for final and binding arbitration of grievances. Pursuant to the parties' joint request to the Wisconsin Employment Relations Commission, the parties selected Sharon A. Gallagher to hear and resolve a dispute between them regarding the proper interpretation of Appendix 1, Evaluation section. Hearing in the matter was held on May 31, 2002, at Green Bay, Wisconsin. A stenographic transcript of the proceedings was made and received by the undersigned on June 19, 2002. The parties submitted their initial post-hearing briefs by July 2, 2002, which were thereafter exchanged by the Arbitrator. The parties reserved the right to file reply briefs, which were received by the Arbitrator on August 8, 2002. The record was then closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to an issue or issues for determination in this case. However, they stipulated to allow the undersigned to state the issue in her award based upon the relevant evidence and argument in the case, as well as the parties' suggested issues. The Union suggested the following issues:

> Did the Company violate the collective bargaining agreement by interpreting the Evaluation section (page 29 of the contract) so as to negate the negotiated changes to that language? If so, what is the appropriate remedy?

The Company suggested the following issues:

> Did the Company violate the collective bargaining agreement by reserving its management rights to determine when vacancies exist within job classifications? If so, what is the appropriate remedy?

Both of these issues states the dispute between the parties in an argumentative fashion. However, based upon the relevant evidence and argument in this case, the undersigned finds that the District's issue statement should be determined herein. 1/

1/ Although the Union sought broader relief, it agreed herein that this case concerns only the proper interpretation of the Evaluation section. (Tr. 12-13).

RELEVANT CONTRACT PROVISIONS

. . .

3. MANAGEMENT

All rights not abridged by the terms of this Agreement shall remain the sole rights of management including, but not limited, the right to determine the size and make-up of the work force, hire, discipline and discharge for good

cause, to transfer and to relieve employees from duty due to lack of work or for other legitimate reasons, to prescribe rules of conduct not inconsistent with this Agreement, to subcontract, and to change methods of operation or design of product. It is understood by both parties that the rights of management which are not abridged by the Agreement are not subject to grievance or arbitration. Such management rights shall not be used for the purposes of discriminating against any employee, nor shall they be applied in any manner inconsistent with any of the terms of this Agreement.

APPENDIX 1

. . .

Assignment: The Company shall have the right to assign any employee to a temporary job as needed regardless of his classification provided the Company pays the employee the rate of his classification.

Evaluation: The Company will evaluate employees with respect to qualifications for a higher classification every six (6) months. This evaluation will be based in part, on objective testing standards to be implemented prior to 12-31-01. This formal process will be based on the employee's anniversary date in order to spread out the process over 12 months. A monthly list will be published in advance and the company must conduct the review within two (2) weeks either way of the published anniversary date. Each employee will have a written document evaluating his performance, with positive milestones to achieve for consideration of higher classification status (when a job opening exists). Employee [sic] found qualified by the Company upon such evaluation will be promoted to such higher classification.

Postings: Notices of vacancies and new positions excluding leadmen shall be posted on the appropriate bulletin board for six (6) working days but the Company may fill such opening [sic] temporarily pending final selection of an applicant. Any employee desiring to fill any posted vacancy or new position shall make application in writing to the Company. The senior applicant who is qualified, that is, has the ability to do the job and has desirable qualities such as work attitude and habits, shall be awarded the position. If no employee applies for the position or is qualified, the Company may fill the job from any source.

BACKGROUND

The parties submitted pertinent language from the 1994-1997 and 1997-2000 labor agreements. Such language from the 1994-97 agreement reads in relevant part as follows:

APPENDIX 1

. . .

Assignment: The Company shall have the right to assign any employee to a temporary job as needed regardless of his classification provided the Company pays the employee the rate of his classification.

Evaluation: The Company will evaluate employees with respect to qualifications for a higher classification every six (6) months. Employee [sic] found qualified by the Company upon such evaluation will be promoted to such higher classification when a job opening exists in such higher classification and is posted and such employee applies for and is awarded the job.

Postings: Notices of vacancies and new positions excluding leadmen shall be posted on the appropriate bulletin board for six (6) working days but the Company may fill such opening [sic] temporarily pending final selection of an applicant. Any employee desiring to fill any posted vacancy or new position shall make application in writing to the Company. The senior applicant who is qualified, that is, has the ability to do the job and has desirable qualities such as work attitude and habits, shall be awarded the position. If no employee applies for the position or is qualified, the Company may fill the job from any source.

Relevant language from the 1997-2000 agreement reads as follows:

. . .

Assignment: The Company shall have the right to assign any employee to a temporary job as needed regardless of his classification provided the Company pays the employee the rate of his classification.

Evaluation: The Company will evaluate employees with respect to qualifications for a higher classification every six (6) months. This formal process will be based on the employee's anniversary date in order to spread out the process over 12 months. A monthly list will be published in advance and the company must conduct the review within 2 weeks either way of the published anniversary date. Each employee will have a written document evaluating his performance, with positive milestones to achieve for consideration of higher classification status when a job opening exists. Employees found qualified by the Company upon such evaluation will be promoted to such higher classification when a job opening exists in such higher classification and is posted and such employee applies for and is awarded the job.

Postings: Notices of vacancies and new positions excluding leadmen shall be posted on the appropriate bulletin board for six (6) working days but the

> Company may fill such opening temporarily pending final selection of an applicant. Any employee desiring to fill any posted vacancy or new position shall make application in writing to the Company. The senior applicant who is qualified, that is, has the ability to do the job and has desirable qualities such as work attitude and habits, shall be awarded the position. If no employee applies for the position or is qualified, the Company may fill the job from any source.
>
> . . .

It is undisputed that prior to the effective date of the 2000-04 labor agreement, Company supervisors regularly evaluated employees pursuant to the Evaluation section of Appendix 1, considering their skills as well as such subjective items as attendance and work habits. During this evaluation process, which occurred around the anniversary date of the employee, employees were considered by supervisors for advancement to the next pay level, under the labor agreement, Appendix 1. However, even if an employee were recommended for pay grade advancement, he/she would not be advanced unless also recommended by the Company's president and unless a job opening at that pay/skill level existed. If no opening in the pay/skill level existed, employees found qualified for that level would be placed in a pool of available workers for advancement when the Company had a job opening or had received additional regular work at that skill level to justify advancement of an employee or employees to a higher pay level. Once at the higher pay level, employees received that higher rate of pay even when performing work requiring less skill.

FACTS

The Union has represented the Company's production and maintenance employees for many years. For the past 25 years, the Company has fabricated a variety of custom designed pressure vessels (including stainless steel vessels) and equipment for the pharmaceutical and specialty chemical industries.

During negotiations for the 1994-1997, 1997-2000 and 2000-2004 labor agreements, the Union proposed various changes in Appendix 1, Evaluation. During negotiations for the 2000-2004 labor agreement, the Company brought no demands to the bargaining table. The Union made at least 13 proposals to modify the 1997-2000 agreement, which included changes in wages, adding a leadman pay schedule, increasing the 401K plan, a shift premium increase and a change to the Appendix 1, Evaluation.

Regarding the Evaluation change, it is undisputed that the only change proposed by the Union was to place a period after "classification" in the last sentence (sentence six) of that section, thereby deleting the phrase "when a job opening exists in such a higher classification and is posted and such employee applies for and is awarded the job." In addition, the parties

are in agreement that the Union never proposed to delete the phrase "when a job opening exists" which should also appear at the end of the fifth sentence of the current Evaluation section. The evidence in this case showed that the latter deletion was either made in error by the outside printing vendor hired to print the agreement or it was made in error by Company employees who typed the agreement for the printing the vendor. 2/

2/ No evidence was offered to show how this error in fact occurred.

The Company's bargaining notes (kept by Brad Boncher) 3/ shows that on at least one occasion, the Company told the Union that "performance reviews are not automatic wage increases." Company Chief Spokesman Ben Meeuwsen stated herein that he made this comment several times during negotiations. Union witnesses Enderby and Zittlow confirmed that Meeuwsen made this statement at least once during negotiations over the 2000-2004 labor agreement (Tr. 62 and Tr. 32, respectively). 4/ Enderby also stated that Meeuwsen told the Union at bargaining that evaluations had to include objective and subjective standards; that "we can't just give the stuff out. You have to earn it" (Tr. 62). In addition, the Company's bargaining notes from negotiations on August 11, 2000, show that Union Agent Gunderson suggested a "skill testing program -- pay-for-skill program," that Gunderson referred to Kewaunee Fabricating Company and gave the Company a "Marinette Marine skill list sheet" (Employer Exhibit No. 2).

3/ As of the date of the instant hearing, Boncher had left the Company's employ. He did not testify herein.

4/ Although Zittlow later changed his testimony on this point (Tr. 40-41), I credit his initial testimony regarding his having heard Meeuwsen make this statement in negotiations.

Union Representative Zittlow also stated herein that the Union never explained to the Company that the deletion of the language from the last sentence of the Evaluation section would mean that employees would receive automatic pay increases upon meeting the evaluation standards even when a vacancy did not exist, although this was the Union's intent in bargaining this change (Tr. 28-29). It is undisputed that the Union never offered the Company any *quid pro quo* for their agreement to change the Evaluation section language.

It is also undisputed that with very little discussion, Company Chief Spokesman Meeuwsen, who had not been at the bargaining table on behalf of the Company prior to negotiations over the 2000-2004 contract, agreed to go to a more objective testing program. Meeuwsen stated that the Union asserted in negotiations that evaluations were too subjective

and that the Union wanted to make them more objective. Meeuwsen agreed with this approach immediately (Tr. 71) because he did not want employees to feel that they were being held back due to the subjective whim of a supervisor.

The Union gave the Company examples from Kewaunee Fabricating Company and Marinette Marine as a basis on which the Company could build a more objective evaluation program. The new program would use objective standards but would also rely on subjective standards, as insisted upon by Meeuwsen during negotiations. On this point, Meeuwsen proposed the addition of the "in part" language to the Evaluation section during bargaining, which he felt made clear that the Company was reserving its right to consider subjective standards (such as attendance and good work habits), as well as the objective standards proposed when evaluating employees.

Union witness Zittlow admitted that he understood Meeuwsen's insistence upon the "in part" language was to insure the Company's right to continue to consider subjective standards when granting promotions. Meeuwsen stated that when the Union brought forth the pay-for-skill program at Kewaunee Fabricating, Meeuwsen objected and stated at that time that performance evaluations at the Company were not going to be automatic pay increases (Tr. 72-73). Meeuwsen noted that Boncher's bargaining notes confirmed this.

Meeuwsen stated that he was focused on making evaluations more objective during the parties' discussions. 5/ Meeuwsen stated that changing the last sentence of the Evaluation section had no significance to him because the posting language of the contract continued unchanged and would cover advancements as had been done in the past. Meeuwsen stated that if the Union were to prevail herein, the Company would have no control over pay advancements and it would likely have to lay off employees frequently when it lacked high level work, in order to save costs. Meeuwsen stated that the posting language, as well as a portion of the management rights language, would be rendered meaningless were the Union were to prevail in this case.

5/ Meeuwsen confirmed that the change made in sentence five of the Evaluation section was never discussed or agreed to by the parties, the deletion of the phrase "when a job opening exists" (Tr. 84).

The Union ratified the 2000-2004 based upon the following document, prepared by the Company:

Agreement # 1

> The company will pay time and one-half (1 ½) **daily** for hours worked after the regularly scheduled work shift. The key word is daily. We would add a LETTER OF UNDERSTANDING which would be on page 31 of the contract:

LETTER OF UNDERSTANDING

Time and one-half (1 ½) to be paid daily for hours worked after the regularly scheduled shift.

The company, while extending this benefit, will closely monitor its use in the unlikely event that it is abused. When it is, such as an unauthorized absence or habitual casual absenteeism, we will deal with it accordingly.

Agreement # 2

Regarding Triple Time.

Add to section 4 on page seven (7).

Triple time (3) shall be paid for scheduled work performed on holidays.

Agreement # 3

Revise language pertaining to call - in pay. (page 9)

The statement will now read:

Any employee who is called in to work shall be paid a minimum of (4) hour, pay, (End of Sentence)

The change is that the following sentence was deleted.

An employee may be required to perform available work within his department or in the plant during the hours for which the call-in pay provided for in this section is applicable.

Agreement # 4

Revise language on page 14, Section 2. National Guard/Reserves.

The section will now read.

A seniority employee, who is required to attend a military encampment of the Reserve of the Armed Forces or the National Guard shall be granted a leave of absence.

The next sentence is the additional language:

The company will pay the difference in what the employee collected from the government and what he should have collected from Four Corporation.

Agreement # 5

The company will change how it pays for holidays:

With regards to holiday pay, the employees will receive pay according to their regularly established shift hours. For instance, if you were scheduled to work 8.5 or 10 hours, you would be paid accordingly and not a straight 8 hours. The intent is to get to 40 weekly hours and avoid a makeup of time situation due to the holiday.

Agreement # 6

The company will increase wages as follows:

1. Ratification **3.1%** 6/
2. Second year **3.1%**
3. Third year **3.1 %**

Agreement # 7

Revise Language, regarding employee Evaluation. Page 26, last sentence.

Employees found qualified by the company upon such evaluation will be promoted to such higher classification. (End of Sentence)

The following last half of the sentence was deleted.

…….when a job opening exists in such higher classification and is posted and such employee applies for and is awarded the job.

Agreement # 8

The lead-man pay schedule will become part of the bargained agreement.

Agreement # 9

The company will increase the shaft premium to the following:

2nd Shift	**.35 cents**
3rd Shift	**.40 cents**

Agreement # 10

The company will add the following referral bonus to the contract:

The company will provide referral taxable bonus to those named in the "referred by" section of the application for employment to those who have completed the probation period.

Semi-skilled	**$50**
Skilled	**$100**

Agreement # 11

Page 11, Section 7. Foremen Working.

We will revise the language to read

Section (a) After **"Foreman and the principal owner"** add **"related employee"**

6/ Written next to these figures were the following: 3.25, 3.5, 3.5, 3, apparently referring to percentage wage increases in each year of the four-year contract.

The parties never agreed upon or constructed the objective testing standards referred to in the amended Evaluation section. Rather, the Company indicated it would put these standards together and submit them by December 31, 2001. After contract ratification, questions arose regarding the effect of the changes made to the Evaluation section. In addition, the Company could not meet the contractually referenced deadline of December 31, 2001, for implementation of the objective standards. In a letter dated January 7, 2002, Meeuwsen wrote to Union Representative Zittlow regarding the objective testing standards as well as his earlier letter of December 21st. 7/ The letter of January 7th read as follows:

. . .

As noted in my letter to you (dated 21DEC) and discussed today, the revised due date for completion of the objective testing standards will be 31 March 2002. This date has been determined with the following consideration.

If an employee has a performance review between 01 January 2002 and the time when the standard is issued (31 March), and is subsequently eligible for advancement as a result of completing the standard, the increase in pay will be retroactively reimbursed to the date of the performance evaluation.

For example if;
"John Doe" has a performance evaluation scheduled for 02 February and meets the "performance" requirement for advancement and

meets the "objective testing standards requirement for advancement" when implemented (31 March) then

His pay adjustment will be reimbursed from 02 February.

. . .

Discussions between the Union and the Company occurred after January 7th and culminated in Meeuwsen issuing the following memo to the Union membership concerning "Personnel Evaluation and Advancement" dated February 13, 2002:

. . .

We are currently revising the performance evaluation process in order to make it a more objective and measurable standard. During the course of this review, several issues have become apparent, two of which are advancement to higher pay-grades and performance raises. There is clearly a general misunderstanding of the process used to determine advancement and performance raise opportunities and this memo will clarify those issues.

Advancement to higher pay-grades is based on 3 pre-requisites;

1. Skills. Does the employee have the skill for the next higher pay-grade? This is clear in itself. An employee must be capable of doing the work required for the next higher grade.

   Example: A welder must be able to read x-rays and do x-ray repairs in order to be eligible for advancement to Class 7.

2. Performance. Is the employee reliable and do they give a "good days work for a good days pay?"

   Example: If an employee has the skills for the next higher pay-grade, but only shows up for work intermittently, their performance is not reliable and they will not be eligible for advancement.

3. Position availability. Is there an open position for the next higher pay-grade?

> The company only has a limited amount of positions for Leadmen or Foremen (see matrix on the reverse). On the matrix, you'll see the company only has 1 position for a Class 9 Leadman Fabricator. This position must become open or a requirement for another Leadman must be made before someone can advance from Class 8 to Leadman. This applies to all positions in the company beginning with the President and including everyone else.
>
> Performance Raises are discretionary and based on exemplary performance above what is normally expected. I'll stress here that you should not "anticipate a pay raise" during performance reviews, nor should you feel degraded if you don't receive a raise during your review. Performance based raises can be and have been given at any time. Furthermore, a strong annual raise has been built into the union contract and this impacts the company's financial ability to offer performance based raises. Bottom line is that performance raises are difficult to achieve and will not be given to everyone. However, when they are warranted - they will be given, just as they have been in the past.

. . .

Meeuwsen recalled that the meetings between the Union and Company at which he discovered the Union's interpretation of the changes to the Evaluation section of Appendix 1 occurred when it became clear that the Company would not be able to meet the December 31st deadline for implementation of the objective testing standards. During these meetings, Zittlow stated that employees wanted to know if they passed the standards that they would get advanced immediately and Meeuwsen responded that employees would be advanced in part based upon objective standards that were going to be written. Prior to January 7th, Meeuwsen stated that position availability had not come up and therefore his letter to Zittlow did not mention position availability being a necessary pre-requisite for advancement. Therefore, the issue of automatic advancement came up between the parties sometime between January 7 and February 13, 2002.

7/ Meeuwsen's December 21st letter was not placed in the record in this case.

On February 22, 2002, the Union filed the instant grievance which is before the undersigned:

. . .

> The Company has violated our Labor Agreement. The Evaluation language in the Appendix 1 of the Labor agreement was modified, Ratified and placed into effect on August 15th 2000, to be in full force and effect until August 14th, 2004.

The Company has unilaterally created a "PERSONNEL EVALUATION AND ADVANCEMENT" clarification document dated 2/13/2002.

Number 3 of this document states there are a limited number of jobs in each Classification. The Union contends the intent of that language is the same as the language that was deleted from the Evaluation section of the agreement.

To Recap: The Company Violated the Evaluation section on page 29 of the agreement, including any sections or articles that may apply.

Remedy: Allow all employees found qualified by the Company to be promoted to the next higher classification. The Company must quantify, Number two of the Evaluation letter how many write-ups constitutes not moving.

. . .

POSITIONS OF THE PARTIES

The Union

The Union noted that in the past three contracts, the Evaluation section of Appendix 1 has been modified; that the following language was deleted in the last bargain: "when a job opening exists in such higher classification and is posted and such employee applies for and is awarded the job;" and that the Company prepared Union Exhibit 1, a summary upon which the union membership based their ratification vote. In this context, the Union argued that contract interpretation rules require the Arbitrator to interpret the clear and unambiguous contract language in order to enforce the parties' agreement to create a pay-for-skill program. The Union noted that the Company agreed to changes suggested by the Union and the Company should be made to abide by these.

The Company's argument that it was not their intent to move employees to a higher classification as soon as they pass the testing process, was not supported by the evidence, in the Union's view. The Union objected to Company Exhibits 1 and 2 because the Union was not sure who authored them or when hand-written material placed thereon had been added; that regarding Company Exh. 1, the Union noted that it was not addressed to anyone and in regard to Company Exh. 2, this document actually supported the Union's argument that the Union had given the Company skill sheets and contract language on a pay-for-skill programs. In addition, the Union noted that the Company's note-taker, Boncher, did not place any Union responses to alleged commentary by the Company on his notes.

The Union noted that the Company has never laid off by classification, but that it has laid off the least senior workers and temporary employees, and only thereafter would the Company reach employees in the Class 8 Welder group. In addition, the Union argued that the

posting language contained in Appendix 1 would still be operable if an opening occurred due to retirement or death and that employees could still be advanced automatically upon passing objective and subjective tests given by the Company under the Union's pay-for-skill program.

The Union observed that the parties have been fighting over evaluation language for at least the last nine years, the last three collective bargaining agreements. The Union asserted that it thought it had made headway on pay-for-skill in the most recent agreement and that it believed it had achieved a pay-for-skill program which it presented to the Union membership for ratification in the 2000-04 agreement. The *quid pro quo* that the Union gave for the pay-for-skill program was the Union's ratification of the agreement without a strike. In addition, the Union noted that Joint Exhibit 6 was not part the parties' negotiations.

In conclusion, the Union asserted that the Company has violated the labor agreement by not allowing employees to move to higher skill levels automatically upon successful completion of testing. The Union urged the Arbitrator to order that all employees be made whole "for all losses suffered as a result of" the Company's "breach" and that the Company should be ordered to cease and desist from refusing to live up to Appendix 1, Evaluation section, as amended. Finally, the Union urged that the employer has "failed to provide training/testing and promotions to employees entitled thereto under the clear language of the agreement." The Union urged the Arbitrator to sustain the grievance in its entirety, to order the Company to offer training/testing immediately to employees to make employees whole for lost wages and contract benefits and that the Arbitrator retain jurisdiction regarding the implementation of the remedy in this case.

The Company

The Company argued that this grievance is an attempt to expand the Evaluation provision contained in Appendix 1 beyond what was negotiated at the bargaining table. In such a case, the Arbitrator's sole duty is to find out what was meant by the language of the contract instrument and to enforce the language thereof. Even if the parties disagree as to the meaning of the disputed language, the Arbitrator who finds contract language to be clear, must enforce the clear meaning of that language. Here, the Company urged that because the language of the Evaluation section, Appendix 1 is clear and unambiguous, the Arbitrator must enforce the language, as written.

The Company noted that Ben Meeuwsen had repeatedly rejected the Union's suggestions that the parties agree to a pay-for-skill program. In the most recent round of negotiations, the Company had no proposals for the Union. The Union never put a specific, full-blown pay-for-skill proposal on the table for the Company to consider. The Union focused on the evaluation language contained in Appendix 1, and urged that the Company adopt objective standards for promotion.

In this context, Meeuwsen agreed to changes in the Evaluation section because he agreed that the Company's testing standards should be more objective. Therefore, Meeuwsen's agreement to delete "when a job opening exists . . ." from sentence six of the Evaluation section had no significance to him in regard to managing advancements to higher pay levels. Furthermore, the posting paragraph contained in Appendix 1 remained unchanged and Meeuwsen believed it was still effective to control the advancement of employees. In addition, Meeuwsen insisted on the phrase "in part" being placed into the amended Evaluation language, thus reserving to management the right to look at subjective measures for advancement of employees to higher pay levels when considering promotions.

The Company noted that the Union made no statements at the bargaining table that the changes the Union sought in the Evaluation section would mean that the Company had agreed to automatic pay increases for employees. In addition, the Union admitted that a pay-for-skill program would have been a significant change in the parties' relationship and dealings for which the Union gave no *quid pro quo*. The Company also noted that Meeuwsen stated several times at bargaining that "performance reviews are not automatic wage increases" and that Union witnesses admitted that Meeuwsen had made these statements. Union witnesses also admitted that there was no discussion at the bargaining table regarding how the Union's pay-for-skill program would impact other contract provisions, including vacancies, layoffs and recalls as well as postings. Thus, the Company urged that the Union had attempted by "end run" or "back door" methods to gain an advantage over the Company which Meeuwsen's statements at the bargaining table showed were not agreed to the Company.

The Union has not met its burden of proof to show that its interpretation of the labor agreement is appropriate, fair or equitable. In addition, there was no evidence that there was ever a meeting of the minds that the Evaluation section would control advancement and that the amended contract language would abrogate the management rights as well as the posting language contained in Appendix 1.

The Company urged the Arbitrator to give meaning to the contract as a whole, according to arbitral rules. All words in the agreement should be given their full effect and the entire contract should be analyzed to determine the true intent of the parties. If the Arbitrator finds alternative interpretations of contract language are possible, the Arbitrator should use the interpretation that gives all provisions their full effect.

The Union's position in this case is contrary to these arbitral principles as it would render meaningless the management rights clause as well as the posting language contained in Appendix 1. In addition, the Union's position would read out the "in part" language insisted upon by Meeuwsen during the most recent round of negotiations, which he felt reserved his management right to use subjective measures in determining whether employees should be advanced to the next higher pay level. Indeed, Union Representative Zittlow admitted that Meeuwsen's insistence on the "in part" language referred to the subjective components of testing and evaluation.

The Company argued that the bargaining history shows that the Company retained its management right to the determine the size and make-up of the work force, including the right to determine the number of employees in each classification necessary to do the work. In this regard, the Company noted that the Union never proposed to delete any portion of the management rights clause. It would be inappropriate to abrogate these important rights by deleting surplus language contained in the Evaluation section, as the Union has attempted to do here. The Company cited SAUK COUNTY, DEC. NO. 25947-A (GRECO, 1/9/89), wherein Mr. Greco, acting as an arbitrator, held that no automatic pay increase would be allowed upon completion of a joint job and wage study in light of the contract's strong and unchanged management rights clause (SLIP OP AT 5). Greco also noted that the Company was correctly paying wage rates as listed in the contract and otherwise following the contract.

In the instant case, the Company argued that the Union's position, if adopted, would result in an undue burden on the Company whereby the Company would be forced to repeatedly layoff and recall employees if levels of work decreased. This would constitute a harsh and absurd result.

Thus, when read as a whole, the Company urged that the contract language is clear and that the bargaining history and past practice support that clear language. If the parties had intended to change the contract as the Union claims, more discussions would have occurred and more contract language changes would have been made. In all the circumstances of this case, the Company urged that the grievance be denied and dismissed in its entirety and that the language of the agreement, as the Company has interpreted it be affirmed.

In Reply

The Union

The Union argued that it was the Company that prepared the summary (Union Exh. 1) upon which Union members relied to ratify the effective labor agreement. The Union noted that the Company failed to place any reference to the phrase "performance reviews are not automatic wage increases" into Union Exhibit No. 1 and that the reference to this phrase in Employer Exhibit No. 1 does not show that Ben Meeuwsen in fact said it or the date upon which it was stated at bargaining. Therefore, the Union denied that it attempted to get a pay-for-skill program through the "back door," as asserted by the Company.

Regarding Employer Exhibit 2, the Union stated that this exhibit actually supports its arguments in this case, as it indicates that Union Agent Gunderson discussed pay-for-skill at bargaining with the Company. In addition, the Union argued that Union Representative Zittlow stated at the instant hearing that he never heard Meeuwsen make the statement "performance reviews are not automatic wage increases" (Tr. 41). It was not until after ratification by both parties that the Company decided that it would not move employees on the pay scale until the Company "felt like it."

The Union disputed the Company's assertion that there were no clear signals given in negotiations regarding the meaning of the changes to the evaluation section. The Union pointed out that the fact that the Union requested modifications to the Evaluation section in the last three contracts was proof that the Company should have known the meaning of the changes sought by the Union. In addition, Union bargaining members Enderby and Zittlow testified that the reason for addressing and changing the language regarding evaluations from contract to contract was to give the employees an opportunity to be trained and to move to top pay without restriction. The Union also noted that higher paid employees do in fact perform lower level work on a daily basis when higher level work is not available.

The Union asserted that the Company is trying to renege on the deal it struck with the Union to provide employees with automatic movement to higher wage levels. In this regard, the Union noted that the Company agreed to delete language in sentence six of the Evaluation section and the Union agreed to add the phrase "in part" to provide for the consideration of subjective factors in moving employees to higher pay levels. In addition, the posting language remained unchanged as there was no need to change it. The Union argued that the posting language would remain in full force and effect and that the Company is merely trying to avoid the bargain it made by raising the specter of the abrogation of the posting language. For these reasons, the Union urged that the grievance be sustained.

The Company

The Company argued that the Union has neglected to recognize other rules of appropriate contract construction such as the rule that the Arbitrator should construe the contract as a whole, giving meaning to all provisions of the agreement if possible and that any arbitral construction should avoid absurd or harsh results. Here, the language of the revised Evaluation section, in the Company's view, clearly reserves to the Company the right to determine if employees are qualified for a promotion. In addition, the Company noted that its typing of Union Exhibit 1 (ratification summary) should have no significance in this case. Because the Company's interpretation of the language of the amended agreement gives meaning and affect to all contract provisions, it is preferable over the Union's approach.

The Company noted that the evaluation, posting and layoff sections of the contract are separate and each of these describes a different element of the employment relationship and status. In this regard, the Company urged that evaluations are not synonymous with promotions and that if the parties had intended to "automatically advance" or "automatically promote" employees, they could have used these words or the like to properly describe this intent. The parties failed to do so.

In regard to the bargaining notes placed in the record, the Company urged that these are relevant and properly a part of this record; that Ben Meeuwsen's testimony is credible regarding the insertion of the phrase "in part" as well as why he believed the parties were

deleting the last portion of the first sentence of the evaluation section. In addition, the Company noted that Union Representative Zittlow admitted herein that Meeuwsen objected to automatic wage increases at the bargaining table.

Regarding the layoff language, the Company observed that the Union presented no evidence regarding the layoff practice at the Company and its unsupported assertion that the Company has never laid off by class should be disregarded by the Arbitrator. Beyond this point, the Company argued that if it had agreed to automatic advancements, the parties would very likely have discussed the impact of such advancements on the layoff provision of the contract as well as the posting provision, which would have been impacted thereby. The parties did not do so.

In addition, the Company noted that there was no notation in the bargaining notes that the Company had actually agreed to a pay-for-skill program. Concerning the posting language, the Company argued that the Union's position in this case would abrogate parts of the posting provision of the contract, take away the Company's stated right to determine when a vacancy or new position becomes available, whether there was a need for the position as well as the requirement that employees apply for positions. In this regard the Union's assertion that it did not strike as a *quid pro quo* for receiving automatic advancements for employees, the Company noted that no record evidence supports a Union claim that a strike was ever threatened or that the Evaluation section was amended in order to avoid a strike.

Finally, the Company urged that this grievance is only related to whether the Company violated the contract by its interpretation of the amended Evaluation language. The Company noted that the parties stipulated at the instant hearing that this case is not concerned with the objective testing standards the parties agreed to develop and implement in the future. In these circumstances, the Company urged the grievance should be denied.

DISCUSSION

The Union has asserted that the language of the 2000-04 labor agreement is clear and unambiguous and that by agreeing to delete the phrase "when a job opening exists . . ." in sentence six of the Evaluation section of Appendix 1, the parties thereby agreed to a pay-for-skill program and that that program should be enforced against the Company in this case. It is a well-established arbitral principle that arbitrators are bound to enforce clear and unambiguous contract language. However, I do not find the language of the Evaluation section to be clear and unambiguous.

In this regard, I note that the Union's argument overlooks the fact that the parties never agreed to remove the phrase "when a job opening exists" from the end of sentence five of the Evaluation section. The retention of the latter phrase, while the longer phrase was deleted from sentence six, causes an ambiguity to arise concerning whether a job opening must actually exist before an employee may move to a higher pay rate/classification upon receiving a satisfactory evaluation.

Because of this ambiguity on the face of the section, evidence regarding bargaining history is relevant and admissible to determine the parties' true intent in changing the language of Appendix 1, Evaluation. The record in this case demonstrates that there was no "meeting of the minds" regarding the intent and affect of the deletion of the quoted language from sentence six of the Evaluation section. This conclusion is supported by various facts and circumstances in this case, as follows.

For example, the bargaining notes submitted herein (Company Exhibits 1 and 2) showed that Company negotiator Ben Meeuwsen never intended for performance reviews to trigger automatic pay increases and that Meeuwsen clearly conveyed this thought to the Union on at least one occasion. 8/ Indeed, Union witnesses Zittlow and Enderby corroborated that at the bargaining table, Meeuwsen stated he did not want performance reviews to trigger automatic pay increases. Enderby also stated that during negotiations, Meeuwsen said that the Company would use objective and subjective testing standards in evaluating employees and that the Company would not just give out raises.

8/ The Union objected to the receipt in the record of Company Exhibits 1 and 2 based on various grounds, such as who authored them, when the hand-written material was placed on them, that they were not addressed to anyone and that they were incomplete. These objections were overruled on the ground that these notes were business records and based upon Ben Meeuwsen's testimony explaining the notes.

It is significant that there was very little discussion of pay-for-skill at bargaining over the 2000-04 agreement. Rather, Union negotiator Gunderson suggested "a skill testing program" (Company Exh. 2) and discussions centered on making the Company's evaluation process more objective. The Union did not proffer any documents in this case to show that it proposed a true pay-for-skill program to the Company or that it submitted pay-for-skill program documents to the Company for its consideration during negotiations for the 2000-04 contract. Meeuwsen also insisted on placing the phrase "in part" into sentence two of the Evaluation section to assure that the Company could continue to use subjective standards to determine whether employees should be advanced in skills/pay levels. Given these facts, as well as the uncontested fact that the Union bargaining team never explained that the deletion of the quoted phrase from sentence six of the Evaluation section would mean that employees would receive automatic pay increases, I cannot find that the parties intended to create a true pay-for-skill program.

Had the parties wished to move to a true pay-for-skill program, there would have been no reason to retain the Evaluation section in their labor agreement, as all movement would have been automatic upon satisfactory evaluation — pay-for-skill. Similarly, there would have been no need for language to appear in the agreement in sentence five of the Evaluation section concerning "positive milestones to achieve for consideration of higher classification status

when a job opening exists" (emphasis added). Yet, this language remained unchanged in the 2000-04 agreement. In addition, if the parties had agreed to a true pay-for-skill program, they would likely have also agreed upon an automatic pay grid and they would have at least discussed altering the job posting language for clarity.

The Union asserted that the Company must have known it was trying to get a pay-for-skill program into the contract as the Union had over the last three contracts improved language and made statements that it wished to have employees paid for their skill rather than the type of work they happened to be doing. However, I note that Ben Meeuwsen was not present at the two contract negotiations prior to the negotiations that occurred regarding the 2000-04 contract. Therefore, Meeuwsen could not have known the thrust of the Union's overall strategy; Meeuwsen only knew what he was told by Union representatives at the negotiation table over the 2000-04 agreement.

In addition, I note that Union Exhibit 1, the agreement summary essentially contained language as it would appear in the 2000-04 agreement, so that commentary like an assertion that performance reviews would not be automatic wage increases would have been out of place. Furthermore, I find that the Company's typing of the summary of the agreement reached between the parties regarding the 2000-04 agreement is not conclusive regarding what the Company knew these provisions would mean in the future: That document did not attempt to explain the deletion from sentence six of the Evaluation section.

It is also significant that the Union offered no *quid pro quo* for the Company's alleged agreement to move to a pay-for-skill program by deletion of the last portion of sentence six of the Evaluation section. Although the Union asserted that the *quid pro quo* for the pay-for-skill program was its agreement not to strike, no evidence was proffered to show that a strike was ever threatened or that the change in sentence six of the Evaluation section was given to avoid a strike. As all Union witnesses essentially admitted that a pay-for-skills program was highly valuable to unit members and would have involved a significant change in the relationship of the Union and the Company in the future, I find it difficult to believe that the Company would not have insisted upon an appropriate *quid pro quo* for such a significant substantive change in the contract language.

Finally, I note that no change was proposed by the Union to the management rights section of the agreement which continues to date to reserve to the Company the right to "determine the size and make-up of the workforce." In addition, the parties failed to make any amendments to the posting provision or to the layoff language during bargaining. Indeed, no discussions on these topics took place. No bargaining notes or other documents were submitted herein to show that the Company specifically agreed to a pay-for-skill program. These facts also tend to support the Company's claim that it never intended to agree to a pay-for-skill program by agreeing to delete the language in sentence six of the Evaluation section.

In all of the circumstances of this case, I find that there was no meeting of the minds between the Union and management, thus no agreement to a pay-for-skill program by the parties' deletion of the quoted language in sentence six of the Evaluation section and I issued the following

AWARD 9/

The Company did not violate the collective bargaining agreement by reserving its management rights to determine when vacancies exist within job classifications. The grievance is therefore denied and dismissed in its entirety.

10/ Given the result in this case, it is unnecessary for the Arbitrator to comment upon arguments made by both the Union and the Company regarding how the Company has in the past laid off workers and how it might lay workers off in the future. There is also no need to reach or discuss the Union's request for a "make whole" remedy herein.

Dated at Oshkosh, Wisconsin, this 15th of October, 2002.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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