BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

STANLEY-BOYD AREA SCHOOL DISTRICT

Case 77
No. 62124
MA-12168

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing for the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Richard J. Ricci**, 3624 Oakwood Hills Parkway, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing for the District.

ARBITRATION AWARD

The Union and the District are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The Union requested and the District concurred, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a dispute as set forth below. The Commission appointed Dennis P. McGilligan, a member of its staff. Hearing on the matter was held on May 14, 2003, in Stanley, Wisconsin. The hearing was not transcribed, and the parties completed their briefing schedule by June 23, 2003.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES

1. Did the District violate Article 5 of the collective bargaining agreement by assigning Roger Duce to "Night Maintenance (Stanley)"?

2. If so, what is the appropriate remedy?

DISCUSSION

Roger Duce, herein "Grievant," has worked for the District for 16½ years in the maintenance department. Until December 2002, the Grievant held one of the day maintenance positions at Stanley High School. He has the second-most seniority in the bargaining unit.

In December 2002, following the retirement of a night cleaner, the District decided to eliminate a day maintenance position at Stanley High School and have a night maintenance position with some cleaning responsibilities in its stead. The District did not post a bid sheet to see who was interested in the night maintenance position. By letter dated December 11, 2002, the District simply reassigned the Grievant to the position. He immediately expressed his dissatisfaction with the assignment to his supervisor.

Less senior maintenance employees maintained their day shift positions. Gary Franzen, who has almost two years less seniority, remained on the day shift at Boyd Elementary School. Tim Troyer, who has about eight years less seniority, stayed in the pool maintenance position at Stanley on the day shift.

District Administrator Rodney Gardner placed the Grievant in the night maintenance position because he thought that moving him would be the least disruptive way to fill the new position.

On December 13, 2002, the Grievant filed a grievance claiming that the District violated the collective bargaining agreement by assigning him to the night shift without posting the position. The District's Board of Education denied the grievance at a meeting on December 17, 2002.

The Union argues that the parties' agreement requires posting of vacancies. The Union relies on the following language of Article 5, Section 7: "all bargaining unit vacancies are subject to seniority and shall be posted." The Union states that this language is neither ambiguous nor discretionary. It cites J.W. COSTELLO BEVERAGE CO., 106 LA 356, 359 (Bickner, 1996) for the proposition that where a contract says "job vacancies . . . shall be communicated to in-house personnel by posting a notice . . ." the employer's obligation to post is clear.

The Union correctly points out that the record is undisputed that the District disregarded seniority when it assigned the Grievant to the new position because it judged that unilaterally assigning the Grievant to the position would result in the least disruption. The question is whether this violates the aforesaid contractual language. For the reasons discussed below, the Arbitrator finds that it does not violate Article 5 of the agreement.

Article 5, Section 7 provides that "all bargaining unit vacancies are subject to seniority and posting. (Emphasis added). As pointed out by the District, only "vacancies" need to be posted. This is not a position vacated by someone else. The District decided not to fill the night "cleaner's" position. Nor is it a new maintenance position that needs to be filled. The District simply added a few cleaning duties to an already existing maintenance position. This is not a job "vacancy" that needs to be posted pursuant to Article 5, Section 7 of the agreement.

The District determined that one of the day positions filled by a custodial/maintenance person was not needed and instead another custodial/maintenance position that could also be assigned cleaning was necessary at night. The District transferred the Grievant to nights assigning him different hours. His day position was not filled. The District, by virtue of the its management rights clause, has the right to transfer and/or assign employees without reference to the posting of vacancy provision of the contract. In this regard, the Arbitrator points out that Article 1, Board Functions, provides that the District has the right to "transfer or layoff because of lack of work or other reason." (Emphasis in the Original). Said provision also reserves to the District the right "to determine the number of employees to be employed, the duties of each and the manner, nature and place of their work, to determine what constitutes good and efficient School practices or operation." (Emphasis in the Original).

The instant dispute is distinguishable from J.W. COSTELLO BEVERAGE CO., *supra*. In J.W. COSTELLO BEVERAGE CO., the company terminated an employee in the day Warehouse Foreman position. Instead of posting the job vacancy, the company simply transferred another employee into the vacant position. After the union protested the employer's failure to post the position, the company then posted the position and the grievant (a night Warehouse Foreman) requested transfer into the position. The company awarded the position to the employee who had temporarily filled the position for two months because he "had actually proven that he could perform the day job." J.W. COSTELLO BEVERAGE CO. *supra*, p. 360. By failing to post the position, the arbitrator found that the company had violated the job posting provision of the agreement requiring it to post "job vacancies." In reaching a conclusion, the arbitrator harmonized the company's right to select a candidate with its obligation to post vacancies and fill them based on seniority where employees possessed equal abilities and qualifications. J.W. COSTELLO BEVERAGE CO. *supra*, p. 358. The arbitrator wrote:

> Does the language of the Agreement give the Company the freedom to select anyone, regardless of seniority, to fill a vacant position until it belatedly posts the vacancy, in violation of the Agreement, and then choose this employee over others with far greater tenure because he "had actually performed that job." To agree to such an interpretation would be to reduce the seniority provision in Section 11.5 of the Agreement to a nullity. The Company's right to be sole judge of qualifications cannot be stretched so far without obliterating any significance seniority might have in the promotion and transfer of employees. J. W. COSTELLO BEVERAGE CO. supra, p. 360.

As pointed out by the Union, there are good reasons to post a vacancy (a remedy requested by the Union herein):

> One is to afford every employee who has the qualifications and interest in the vacant position an equal opportunity to be considered for the position. Another is to make it less feasible for the Employer to play favorites and to treat employees in an arbitrary and possibly discriminatory manner by informing some employees of a vacancy but not others. J.W. COSTELLO BEVERAGE CO. supra, p. 359.

However, there is no vacant position herein subject to contractual seniority protections and posting requirements. Therefore, the Arbitrator finds J.W. COSTELLO BEVERAGE CO., is inapplicable to the present dispute.

The cases relied upon by the District support the Arbitrator's conclusion that the District acted properly herein.

In BARRON COUNTY, Case 132, No. 56070, MA-10165 (Jones, 8/98), the County's management rights clause covered, among other things, the right to transfer. In BARRON, the posting requirement was contained in a contractual provision entitled "Promotions." It applied to vacancies and new jobs. However, the grievant was not seeking a promotion when he asked to be considered for the vacancy. Instead, he was using the posting provision as a vehicle for selecting his job duties. The County denied the grievant's request to be transferred to a newly posted position partly due to the fact that the employer felt it would be difficult for a newly hired social worker to work on the hard cases the grievant was then handling. Arbitrator Raleigh Jones distinguished between an employee's right to bid into a position considered a promotion based on his seniority versus the employer's reserved right to transfer or deny a transfer, which the District did in this case. Thus, Arbitrator Jones held that the posting provision did not apply to transfers and the assignment or reassignment of duties within the same classification. In the instant case, the posting provision is not limited to "promotions" like BARRON. However, it does not apply to transfers or to the assignment of duties like BARRON.

As pointed out by the District, the instant matter is also similar to several grievance arbitrations arising out of the Nekoosa School District in which two Wisconsin Employment Relations Commission arbitrators ruled in favor of the employer.

In SCHOOL DISTRICT OF NEKOOSA, Case 21, No. 39390, MA-4806 (Bielarczyk, 3/88), the District normally employed two maintenance/custodians and one cleaner in each of its three buildings. After the resignation of one of the custodians, the District established a second cleaner position in the building where the vacancy occurred and left the custodial position vacant. As a result of this decision, the remaining second maintenance/custodian in the school building where the resignation occurred no longer was able to rotate his shift.

Even though the District's decision resulted in a change in the second maintenance/custodian's shift, Arbitrator Edmond J. Bielarczyk ruled that the contract provision entitled "Board Functions" reserved to the District certain management rights including the right to determine the size and composition of the work force employed by the District. Arbitrator Bielarczyk found that the agreement was silent concerning any limitations on this right. In this regard, he noted that there was no minimum manning requirement or provision mandating the makeup and assignment of the work force as in the instant agreement. Therefore, Arbitrator Bielarczyk found that the District, when the employee terminated his employment, was not bound by any specific contractual provision to post the vacated position simply because there was a posting provision similar to the one contained in the Stanley-Boyd School District agreement.

In NEKOOSA SCHOOL DISTRICT, Case 23, No. 39659, MA-4871 (Greco, 7/99), the District, like in STANLEY-BOYD, decided to change its maintenance and custodial operations to make them more efficient and economical. The decision that instigated the grievance was the fact that a cleaner was hired instead of filling a vacated custodial position that was a higher paying position.

Arbitrator Amedeo Greco held that by so specifying in the "Board Functions" provision that the District retains the right to hire employees and make changes in its operations, the District did not violate the contract by failing to post and fill the custodial vacancy.

In NEKOOSA SCHOOL DISTRICT, Case 24, No. 39660, MA-4872 (Greco, 7/88), a case arising out of the same fact situation, the District reassigned the grievant from the middle school to another school in the District. The grievant grieved the reassignment asserting that placing him from the night shift to the day shift violated the hours of works requirements and the recognition clause of the contract.

In holding for the District, Arbitrator Greco found that nothing in the recognition clause referred to shifts. Arbitrator Greco again pointed to the District's reserved rights saying

it retained the right to reduce part of its staff and increase other parts so that when there was only one custodian at a particular school, the District was no longer obligated to allow the grievant to rotate shifts. Moreover, Arbitrator Greco pointed out that there was nothing in the job posting language of Article V restricting the District's exercise of its management rights "as the latter only comes into play after the District has chosen to fill a vacancy. (Emphasis in the Original). Likewise, in the instant case, the job posting language of Article 5, Section 7 in the Stanley-Boyd contract only comes into play after the District has chosen to fill a vacant position. (Emphasis added).

Finally, in THE CITY OF RICE LAKE, Case 62, No. 56546, MA-10318 (Levitan, 1/99), Arbitrator Stuart Levitan found for the City, which had unilaterally changed an assignment of the second least senior employee from one platoon shift to another.

Again, the Arbitrator pointed to the management rights clause of the contract recognizing the City's right to transfer employees within the department, to direct employees in their duties and determine the personnel to conduct its operations. (Emphasis in the Original).

In the Stanley-Boyd School District contract, the management rights clause specifically grants the District the right to transfer employees and there is no language restricting or limiting in any way the District's authority to transfer employees. There is no language in the agreement guaranteeing employees the right to choose, based on seniority, which shift they want to work. In these respects, the instant case mirrors the RICE LAKE scenario.

The Union also argues that the agreement requires the application of strict seniority in filling vacancies. The Union is correct in pointing out that that agreement contains strong seniority protections in this area. As noted by the Union, Article 5, Section 1, states: "Seniority rights for employees shall prevail under this Agreement . . . unless it is specifically noted otherwise in any Article or Section." Article 5, Section 7, specifically reiterates that "The senior employee who bids on the job opening shall be awarded the job." The problem is that there is no job opening or vacancy in the instant case. Therefore, as noted above, there is no requirement that the Grievant's night shift position be posted since Article 5, Section 7, only requires that all unit "vacancies are subject to seniority and shall be posted for bids." (Emphasis added).

The Union further rejects the District's argument that assigning the least senior employee to the night maintenance position would result in an unqualified employee filling the vacated position. However, as noted above, there are no restrictions on the District's management right to transfer employees. In addition, the District retains the authority "to determine what constitutes good and efficient School practices and operations." The District transferred the Grievant to the night shift in order to avoid disruptions to its operations and

efficiently manage its services. (Testimony of District Administrator Rodney Gardner). Like BARRON, there has been no showing that the District exercised this authority in an arbitrary or capricious manner. BARRON COUNTY, *supra*, p. 11. To the contrary, the District sought input from the Union on its plan to more efficiently utilize maintenance and cleaning personnel without success. (Testimony of District Administrator Rodney Gardner).

Finally, the Union argues whatever you call what happened to the Grievant he clearly moved from the day shift to the night shift. The Union maintains that seniority applies with equal force to shift assignments citing KUHLMAN CORP., 97 LA 132 (Odom, 1991) in support thereof. However, in KUHLMAN CORP., the seniority provision explicitly stated that the employee "with the most seniority" had the right to shift preference in the same classification. KUHLMAN CORP. *supra*, p. 133. There is no such contract provision in the case at bar.

Based on all of the above, the Arbitrator finds that the answer to the stipulated issue is NO, the District did not violate Article 5 of the collective bargaining agreement by assigning Roger Duce to "Night Maintenance (Stanley)."

In light of all of the foregoing, it is my

AWARD

The instant grievance is hereby denied, and the matter is dismissed.

Dated at Madison, Wisconsin, this 24th day of July, 2003.

Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator

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