

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN DIE CASTING, LLC

and

**UNITED ELECTRICAL, RADIO & MACHINE WORKERS OF AMERICA
LOCAL 1112**

Case 2

No. 64172

A-6142

Appearances:

Timothy Curtin, International Representative, United Electrical, Radio & Machine Workers of America (UE) Local 1112, 816 West National Avenue, Milwaukee, Wisconsin 53204, appearing on behalf of UE Local 1112, hereinafter Union.

Marna Tess-Mattner, Brigden & Petajan, Attorneys at Law, 600 East Mason Street, Milwaukee, Wisconsin 53202-3831, appearing on behalf of Wisconsin Die Casting, LLC, hereinafter Company.

ARBITRATION AWARD

Wisconsin Die Casting, LLC and UE Local 1112 are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Company, requested the Wisconsin Employment Relations Commission to provide a panel of arbitrators from which the parties would select an arbitrator to hear and decide the instant grievance. Susan J.M. Bauman was so selected. A hearing was held on May 13, 2005, in Milwaukee, Wisconsin. The hearing was not transcribed. At the close of evidence the parties made oral argument and agreed that additional written argument, if any, would be postmarked by no later than June 3, 2005. The record was closed on June 6, 2005, upon receipt of briefs from both parties.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUES

The parties stipulated to the following procedural issue:

Was the Union's arbitration request processed in a timely fashion, in accordance with the provisions of the collective bargaining agreement?

The parties were unable to stipulate to the issue on the merits. The Employer would phrase it as:

Did the Company violate the collective bargaining agreement by awarding the foundry inspector position to a bargaining unit employee other than Grievant, using qualifications other than seniority consistent with past practice? If so, what is the appropriate remedy?

The Union would phrase the issue as:

Did the Employer violate the existing collective bargaining agreement in not awarding the position of foundry inspector to Marie Lohrke? If so, what is the proper remedy?

The parties agreed that the arbitrator would frame the issues to be decided, which are as follows:

1. Was the Union's arbitration request processed in a timely fashion, in accordance with the provisions of the collective bargaining agreement?
2. Did the Employer violate the agreement by assigning the position of foundry inspector to someone other than Marie Lohrke?
 - a. Does the collective bargaining agreement require the Employer to assign positions to the most senior applicant, if qualified to perform the duties of the job?
 - b. Is the grievant qualified to perform the work of the foundry inspector?
3. If so, what is the remedy?

FACTS

Wisconsin Die Casting, LLC, hereinafter Company or Employer, was created in April 2002 when Randy Lubben purchased the assets of Badger Die Casting, Inc., a company that had operated at the same location, with virtually the same employees, for many years prior to

the events giving rise to the instant matter. The Employer negotiated a new collective bargaining agreement with the Union which is in effect for the period November 1, 2002 through November 1, 2005. Grievant, Marie Lohrke was employed by Badger Die Casting, Inc. commencing in November 1987. Among other positions that she held, Ms. Lohrke was a foundry inspector for approximately seven years. She left the inspection classification on November 15, 2001, at which time she was transferred into a position in shipping. She has continued to be employed by Wisconsin Die Casting, LLC since its inception.

Lohrke has taken courses and received certificates from the Technology Institute of Milwaukee, Milwaukee Area Technical College and Milwaukee School of Engineering. These courses covered computer technology, machine blueprint reading, quality control, as well as basic and advanced geometric dimensioning and tolerancing.

Dave Popodi has been the Quality Manager for the Employer since April 2002. He was initially employed by Badger Die Casting and was the Grievant's supervisor from 1999 until Ms. Lohrke left the foundry inspector position in 2001. During Grievant's tenure as a foundry inspector, including the period when she was under Popodi's supervision, Grievant received merit increases for her performance and was never written up for the manner in which she performed her job responsibilities. In fact, throughout her employment by both Badger Die Casting and Wisconsin Die Casting, Lohrke was never written up for arguing with other employees nor for refusing to communicate with anyone in management.

In June 2004, a position of foundry inspector became vacant and the Company posted an internal notice for it. Three current employees posted for the position: Grievant Marie Lohrke, Robert Mikorski, and Lonnie Bethely. After reviewing the employment applications of Mikorski and Bethely, both relatively new employees, briefly interviewing each of the three applicants, and discussion with Human Resource Director Denise Walrath and the applicants' supervisors, Popodi selected Mikorski to fill the foundry inspector position. As Popodi was familiar with Lohrke and the courses she had taken, he did not review her personnel file and his interview with her was somewhat briefer than with the others.

The Employer based its decision to select Mikorski for the foundry inspector position because it felt he was the best candidate, without regard to seniority considerations. In reaching this decision, the Company relied, in part, on the position description it had prepared in December 2002 in connection with Wisconsin Die Casting's process of qualifying for ISO 90000 certification, a description that the Employer admits it never shared with the Union. The job description reads as follows:

Job Description
Inspector – Foundry

Job requirements: Good communication skills, verbal and written. Ability to work well with others. Knowledge of blue print reading. Familiarity with common inspection gauges. *Ability to read work instructions.*

Job description: Perform first piece inspection as required by foundry work instructions. Maintain SPC/Cpk data for special characteristics, as required. Perform check of casting quality for accuracy and compliance to customer print and work instructions.

The Employer contends that seniority amongst qualified candidates is not controlling or, alternatively, that Grievant does not meet the minimum qualifications of the position inasmuch as she lacks good communication skills. Jim Ostrowski, the first shift supervisor of 15 people, including the Grievant, testified that Lohrke is difficult, hard to talk to. He said she doesn't like to listen to things she doesn't want to hear, and won't listen to instructions when she thinks she knows the information already. According to Ostrowski, Lohrke has "good days and bad days." He contends that people are "on egg shells" around her because they don't know what she'll do.

Dave Popodi testified that when Lohrke was a foundry inspector under his supervision she had difficulty communicating with operators, and that she would involve him rather than going to the operator directly. The feedback he received from others was that they didn't believe what she said. In addition, Popodi testified to arguments that Lohrke had with Jeff Balko, the foundry manager. According to Popodi, her inability to communicate with Balko, including her statement that she would communicate with him by writing notes and difficulty communicating with other operators in the shop made her unqualified for the position of foundry inspector.

Human Resources Director Denise Walrath also testified to Grievant's offer to communicate with Balko by using notes, and to the unacceptability of the foundry inspector communicating in that fashion. Company President Randy Lubben also testified that the writing of notes by the foundry inspector to the plant manager was not an appropriate or acceptable manner of operating the Company. He testified that he did not believe Lohrke met minimum qualifications because she can't communicate with the plant manager, the trim manager or customers.

Dale McKissick, a CMM inspector for approximately 16 years, testified that the foundry inspector position does not involve regular contact with customers, and that there has not been a significant change in the position of foundry inspector in the past several years. McKissick agreed that the characteristics of an inspector include good communication skills and the ability to work well with other employees.

The Employer, unbeknownst to the Union, apparently has assigned new positions to less senior employees who applied for a particular position where the Employer made a determination that the less senior individual was more qualified than a more senior qualified applicant. This occurred, at a minimum, in the transfers of Tanya Pocian and Ricardo Bonilla.

In accordance with the applicable provisions of the collective bargaining agreement, the Union timely filed a grievance on Lohrke's behalf contending that as the applicant with the

most seniority and the ability to perform the duties of foundry inspector, she should have been awarded the job. This grievance was processed through the steps of the grievance procedure, culminating in a Grievance Response dated October 12, 2004 in which the Employer denied the grievance. By memo dated August 13, 2004¹ Sandra Jaskie, Vice President of the Union, advised the Employer of its intent to arbitrate “Marie Lohrke’s grievance on Seniority and Qualification for Inspector Position.”

According to Ms. Jaskie, she mailed a Request to Initiate Grievance Arbitration and an accompanying check in the amount of \$125 to the Wisconsin Employment Relations Commission (WERC) on October 15, 2004. An undated copy of this form was faxed to the Employer on October 13, 2004. Having not heard from the WERC, Ms. Jaskie re-sent the Request to Initiate Arbitration under cover of letter dated November 7, 2004. In this letter, she asked to be contacted in the event the check had to be re-issued. On November 11, a check in the amount of \$250.00 was issued by the Union Treasurer and sent to the WERC. Subsequently the parties were provided with a list of arbitrators from which the undersigned was selected to decide the instant matter. The Employer contends that the Request to Initiate Arbitration did not comply with the timelines of the grievance procedure and, therefore, the grievance should be dismissed.

Additional facts are included in the DISCUSSION section, below.

RELEVANT CONTRACT PROVISIONS

1. Recognition and Mutual Support.

...

b. Job Titles and Classifications.

- (1) The specific departments, job titles and classifications covered by this Agreement are detailed in Appendix A to this Agreement.
- (2) An employee may be moved to a different job title or a different classification within a job title based upon the employee’s skills, physical abilities, dependability and performance.

...

8. Management Rights.

¹ The actual date of the memo was October 13, 2004.

- a. Company Rights. The Company shall remain vested with full and exclusive control of all regular and customary management and operations functions, including the right to plan, direct, schedule, and control the operations and workforce of the Company; to determine products to be manufactured, purchased, or sold; to establish and enforce reasonable work rules, safety rules and production standards; to increase or decrease the size of the workforce; to hire, discipline, suspend and discharge employees; to assign or transfer employees; to lay off employees; to reduce the hours of work within the parameters of section 14(c) of this Agreement; to install, move or remove equipment; all except where expressly limited by this Agreement.

...

13. Seniority.

...

- c. Uses of Seniority. Seniority shall be used to determine the order of layoff, recall after layoff, bidding for vacant positions within the bargaining unit, transfers, vacation selection, and other purposes only as expressly provided within this Agreement.

...

21. Grievance Procedure.

- f. Grievance Procedure: All grievances filed by an individual employee, group of employees or the Union shall follow the following steps:

...

STEP 4 If the grievant is not satisfied with the Company's response to Step 3, within five (5) working days the Union shall notify the Company in writing that the Union wishes to arbitrate the grievance. Failure to do so within five (5) working days shall constitute a waiver of any further action on the grievance. Within five (5) working days thereafter, the Union shall ask the Wisconsin Employment Relations Commission to provide a list of arbitrators from which the parties shall alternately strike arbitrators, with the Union having the first strike and the final remaining arbitrator being selected to arbitrate the grievance.

- g. Arbitration. Each party shall bear its own expenses related to the arbitration, and the parties shall equally bear the costs of the arbitrator. The arbitrator's authority shall be limited to matters concerning the interpretation and application of this Agreement, and appropriate remedies for any violation of the Agreement.
- h. Waiver of Steps. By mutual written consent between the parties, any step(s) in the grievance process may be waived.

22. Wages.

...

- d. Temporary Assignment. Any employee who is temporarily assigned to work in a different classification shall be paid at the employee's usual hourly rate up to thirty (30) calendar days. If the temporary assignment lasts longer than thirty (30) days, the Company shall post the position as vacant and all qualified employees within the bargaining unit may bid on the position. From those individuals who bid for the vacant position, the Company shall select the person with the most seniority provided that person is qualified to perform all duties of the position.

POSITIONS OF THE PARTIES

The Union

Timeliness of Request for Arbitration:

The grievance in this matter was filed on August 16, 2004.² On August 18, the Union Vice President Sandy Jaskie, Union Steward Silva, and Grievant Marie Lohrke met with Company President Randy Lubben, Human Resources Director Denise Walrath and Quality Manager Dave Popodi to discuss the grievance. On August 20, the Company denied the grievance in writing. The Company agreed to another meeting on September 3rd, which UE International Representative Tim Curtin and UE President Jim Byrd attended as well as the others in attendance at the August 18 meeting. By memo dated October 12, the Company again denied the grievance.

By memo dated August 13³, Jaskie sent a note "putting Wisconsin Die Casting Corp. on notice that we (Local 1112) intend to arbitrate Marie Lohrke's grievance on Seniority and Qualification for Inspector Position." The request for arbitration is timely because Jaskie then

² Unless otherwise indicated, all dates referenced herein are in 2004.

³ As indicated previously, the actual date of the memo was October 13.

prepared a document entitled “Request to Initiate Grievance Arbitration”, WERC-24, and mailed it to the WERC on October 15, three days after the written notification that the grievance had been again denied. Jaskie forwarded check #3171 with this form.

On November 7, Jaskie wrote to the WERC:

Re: Request to Initiate Grievance Arbitration

I am representing Local 1112, I have sent a “request to initiate Grievance arbitration form,” grievance letter, and check for \$125.00 to the WERC. I sent these papers in on 10-15-04, and have not gotten a response. The check number is 3171. If someone could check into this situation I would truly appreciate it. I am sending the application and grievance copies I sent in earlier. If you need us to re-issue another check please let me know. Thank you!

A new check, #3180, was issued on November 11 and forwarded to the WERC. Union bank statements for October, November and December show that the initial check, #3171, never cleared the bank. Whatever happened to the initial Request to Initiate Grievance Arbitration, whether it was lost in the United States mail or at the WERC, the Union did everything it could to ensure that it was filed on time, in accordance with the provisions of the collective bargaining agreement.

Merits of the Grievance:

Of the three individuals who signed the posting to transfer to the Foundry Inspector positions, grievant Lohrke, Robert Mikorski, and Lonnie Bethely, Lohrke was the most senior of the applicants. The clear language of the collective bargaining agreement provides “[f]rom those individuals who bid for the vacant position, the Company shall select the person with the most seniority, provided that person is qualified to perform all duties of the position.” Lohrke was qualified for the position: she had performed it for 7 years for Badger Die Casting, the predecessor to Wisconsin Die Casting, LLC, without being written up in any fashion for failure to perform properly. Lohrke was the most senior of the applicants: she was employed by the Company and its predecessor since 1987, whereas the successful bidder, Mikorski, had only six month’s seniority, and the other applicant had even less.

Lohrke should be given the position of Foundry Inspector and should be made whole by receiving back pay from the time that Mikorski was placed in the position, including overtime hours that he earned.

The Company

Timeliness of Request for Arbitration:

The Company argues that the Request to Initiate Grievance Arbitration was not filed within five (5) days of the notification of the intent to arbitrate or, alternatively, five (5) days of the Step 3 response denying the grievance. The Company was not aware that the Union filed the Request to Initiate Arbitration until sometime in November, after Jaskie filed the second copy with the WERC. Additionally, the Employer received an undated copy of the Request to Initiate Arbitration and it contests the claim of the Union that the Request had been sent to the WERC on October 15, as Jaskie contends. Because the Request was not received by the WERC within the five (5) days specified in the contract, the Company contends that the Request to Arbitrate was untimely and the grievance should be dismissed.

Merits of the Grievance:

According to the Company, it is under no obligation to transfer or promote the most senior of the qualified applicants for a position. It contends that the past practice of the Company, throughout its three (3) year existence has been to select the most qualified applicant for a particular position. In the event there is a tie between qualified applicants, then and only then is seniority used as a tiebreaker. Under the management rights clause of the collective bargaining agreement, the Company is entitled to establish the qualifications for a position. In addition, Article 1b of the collective bargaining agreement permits the Employer to move an employee to a different job, based on skills, abilities, dependability and performance. Walrath, the Human Resources Director, testified that when she has received all the postings for a position, she meets with the supervisors who express their opinions regarding the applicants. In determining who will get the position, she looks at attendance, past experience, how the person would relate on the job. The Company always picks the most qualified person for the job regardless of who is most senior.

According to the Company, the grievant, Marie Lohrke, is not qualified to perform the position of foundry inspector, so her greater seniority is not relevant. The Company contends, and the Union does not dispute, that good communications skills and the ability to get along with others are important requirements for the Foundry Inspector position. Lohrke lacks these qualifications, and she has acknowledged this, in part by indicating her desire to communicate with the plant manager, Jeff Balko, by written notes rather than orally. The use of notes in this manner is unacceptable to the Company, as they could be misinterpreted or lost. It is necessary to take action immediately if something comes up, and written communication is insufficient to address the needs of the Company. In addition to communication with other staff, the Foundry Inspector must also communicate, on occasion, with customers. Lohrke does not get along well with her co-workers and she does not communicate well with others. She is not qualified to perform the position. The grievance should be denied.

DISCUSSION

TIMELINESS OF THE REQUEST FOR ARBITRATION

The collective bargaining agreement between the parties, at Article 21, provides that

If the grievant is not satisfied with the Company's response to Step 3 of the grievance procedure, within five (5) working days the Union shall notify the Company in writing that the Union wishes to arbitrate the grievance. Failure to do so within five (5) working days shall constitute a waiver of any further action on the grievance. Within five (5) working days thereafter, the Union shall ask the Wisconsin Employment Relations Commission to provide a list of arbitrators from which the parties shall alternately strike arbitrators, with the Union having the first strike and the final remaining arbitrator being selected to arbitrate the grievance.

In this case, there is no question that the grievance was filed on a timely basis, that it proceeded through the steps of the grievance procedure, including an extra meeting involving the Company president and the Union's international representative. Similarly, there is no doubt that the Union advised the Employer within five working days of the Step 3 denial that it intended to proceed to arbitration on the Lohrke grievance. On the same day as it sent the written notice of intent to proceed to arbitration, the Union faxed the Employer a copy of an undated form WERC-24, Request to Initiate Grievance Arbitration. According to the uncontradicted testimony of Sandra Jaskie, Union President, the form was sent to the WERC on October 15, together with Union Check #3171 to cover the Union's portion of the filing fee.⁴

By letter dated November 7, Ms. Jaskie wrote to the Commission to ascertain the status of the request for arbitration, inasmuch as she had not heard from anybody at the WERC. She enclosed another copy of the Request to Initiate Arbitration, and asked that she be contacted if the check needed to be re-issued. This Request to Initiate Arbitration was received and processed by the Commission. The Employer contends that receipt by the Commission of the Request sometime after November 7 should result in the dismissal of the grievance as being outside the timelines.

The employer has to establish that the request to initiate arbitration was filed outside the timelines. This is a procedural defense, in whose absence this matter would proceed directly to the merits. The Employer contends that the merits should not be addressed, due to the Union's failure to satisfy the timelines of the grievance procedure. To have this matter

⁴ The evidence is unclear as to whether the check was in the amount of \$125, or the proper amount of \$250. The Union used an older form that indicates that the fee is \$125, but it is clear that the Union paid \$250 in order for this matter to proceed to hearing. The Employer objects to consideration of the check stubs and bank records as hearsay. Although the documents were admitted into the record over the Employer's objection, they were not considered in reaching a conclusion on the arbitrability of the grievance.

dismissed on the basis of such a claim it is for the Employer to establish the facts necessary to that defense. Failure to establish such facts results in the matter proceeding to the merits.

The pertinent section of the Grievance Procedure states:

Within five (5) working days thereafter, the Union shall ask the Wisconsin Employment Relations Commission to provide a list of arbitrators from which the parties shall alternately strike arbitrators, with the Union having the first strike and the final remaining arbitrator being selected to arbitrate the grievance.

The Union, through credible testimony of Ms. Jaskie, has established that by no later than October 15, well within the requisite five days, she forwarded the Request to the WERC. The contract language does not specify that the request shall have been received by the Commission. We do not know what happened to the initial Request to Initiate Grievance Arbitration. We do, however, know that it was not processed by the WERC and that Ms. Jaskie followed up and the instant proceeding ensued. The Employer appears to argue that Ms. Jaskie is untruthful about when she sent the Request to the Commission, in part because it did not receive a copy of the Request at the same time as Ms. Jaskie sent it to the WERC, and in part because the copy it did receive, faxed to it on October 13, was not dated. Although the undersigned believes it would be the better practice for the Union to provide the Employer with a copy of the Request and cover letter, if any, at the same time as such is forwarded to the Commission, this is not required by the collective bargaining agreement.

In addition, the contract language is clear that failure to notify the Company within five days of intent to arbitrate “shall constitute a waiver of any further action of the grievance.” Similar language does not follow the language regarding requesting the Wisconsin Employment Relations Commission to provide a list of arbitrators. One must assume that the parties knowingly negotiated the placement of this waiver language and the undersigned will not modify the agreement between the parties by reading into it something that they did not negotiate: that failure to file with the WERC within five days waives further action on the grievance. Waiver must knowingly be made, and cannot be assumed.

Because the Employer has not established that Ms. Jaskie did not forward the Request to the WERC within the contractual guidelines, and the contract is silent with respect to the consequence of failing to comply with that timeline in the event that occurred, I find that the Request was timely and this matter can be decided on the merits.

MERITS OF THE GRIEVANCE

Does the contract require the selection of the most senior applicant, provided s/he is qualified to perform the duties of the position?

The Union argues that because Marie Lohrke was the most senior of qualified applicants for the position of foundry inspector, she should have been appointed to the

position. The Employer argues that the practice of the Company is to consider the qualifications of all applicants and if there are two or more who have equal qualifications, seniority is used as a tie-breaker. In the alternative, the Employer argues that Marie Lohrke is not qualified to be the foundry inspector.

We turn first to the collective bargaining agreement which provides at Section 13c:

Seniority shall be used to determine the order of layoff, recall after layoff, **bidding for vacant positions within the bargaining unit**, transfers, vacation selection, and other purposes only as expressly provided within this Agreement. (emphasis added).

The agreement also provides at Section 22d:

From those individuals who bid for the vacant position, the Company **shall select the person with the most seniority** provided that person is qualified to perform all duties of the position. (emphasis added).

Taken together, these two clauses establish that seniority is to be used in the assignment of personnel seeking to fill a vacancy. This is a strict seniority provision that requires the employer to assign the employee with the longest continuous service to the position, provided only that the individual is qualified to perform the work in question.

The Employer has attempted to read the contract as containing a modified seniority clause under which it is contractually entitled to consider factors other than seniority in filling vacant positions. See Elkouri and Elkouri, *How Arbitration Works* (Sixth Edition, 2003) at 872. Having failed to negotiate a modified seniority clause, an employer cannot seek at arbitration to introduce such a clause or argue for the ability to place a restriction in order to claim the retention of rights not specifically obtained at the bargaining table. Here, the parties have negotiated a strict seniority clause.

The Employer relies on Article 1b (2):

An employee may be moved to a different job title or a different classification within a job title based upon the employee's skills, physical abilities, dependability and performance.

and on Article 8a, Management Rights:

Company Rights. The Company shall remain vested with full and exclusive control of all regular and customary management and operations functions, including the right to plan, direct, schedule, and control the operations and workforce of the Company; to determine products to be manufactured, purchased, or sold; to establish and enforce reasonable work rules, safety rules

and production standards; to increase or decrease the size of the workforce; to hire, discipline, suspend and discharge employees; to assign or transfer employees; to lay off employees; to reduce the hours of work within the parameters of section 14(c) of this Agreement; to install, move or remove equipment; all except where expressly limited by this Agreement.

as bases for its claim that it may consider factors others than seniority in filling the vacant foundry inspector position with other than the most senior of the qualified applicants. The Company also claims a clear past practice of considering other qualifications when filling vacancies: Tanya Pocian was selected for the machining set-up position over others with more seniority, in part because she had a better attendance record. The Employer also cites the selection of Ricardo Bonilla for a vacant machining position over the more senior Eric Majerus, because he showed better aptitude for the job.

As to its reliance on Articles 1b (2) and 8, it is well established that the specific language of Articles 13 and 22 take precedence over the more general language contained in the Recognition and Mutual Support and Management Rights clauses. Article 1b (2) refers, on its face, to movement of an employee, not a transfer upon posting of a position and application by individuals for that position. The language of Article 8a makes very clear that it is controlling “except where expressly limited by this Agreement.” Inasmuch as the Agreement limits management’s rights to assign or transfer employees, the specific language of Articles 13 and 22 make clear that among qualified applicants for the foundry inspector position, the most senior must be selected.

The Employer contends that that even if somehow the contract does state that seniority controls, past practice allows it to take other factors into consideration. Past practice is generally a concept that comes into play when a collective bargaining agreement is silent or ambiguous on a particular subject. Under such circumstances, an arbitrator will look to past practice to determine the apparent agreement between the parties. In order to be a binding practice, it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. Often, past practice is described as having “clarity, consistency, and acceptability.” Another factor often considered is mutuality, an implied mutual agreement.⁵ Here, the Employer argues that there is a past practice of considering factors other than seniority inasmuch as the Employer has made transfer decisions such as that involving Pocian and Bonilla without objection from the Union.

When contract language is clear and unambiguous, an arbitrator should not look beyond the four corners of that agreement to decide a grievance. Where the contract language itself is subject to interpretation, arbitral practice calls for a review of extrinsic evidence, such as past practice. In the present case, I find that the contract language is clear and unambiguous, that

⁵ See, Elkouri & Elkouri, *How Arbitration Works*, pp. 607 – 609 (6th ed., 2003)

the Union has not waived its right to enforce it by failing to object to the Pocian and Bonilla situations.⁶ There was no unequivocal, mutually agreed upon practice of allowing the Employer to consider factors such as attendance or aptitude when evaluating applicants who are qualified for a particular position.⁷ As the clear language of the agreement provides, “[f]rom those individuals who bid for the vacant position, the Company shall select the person with the most seniority, provided that person is qualified to perform all duties of the position.” Thus, given that Lohrke was the most senior of the applicants, if she is qualified to perform the duties of foundry inspector, she should have been placed in the position.

Was Marie Lohrke qualified to perform the duties of the position of foundry inspector?

At issue, then, is whether Marie Lohrke is qualified to perform the duties of the foundry inspector. The Employer has provided a job description for the foundry inspector that was developed in conjunction with the Company’s qualifying for ISO 90000 certification. That description reads as follows:

Job Description
Inspector – Foundry

Job requirements: Good communication skills, verbal and written. Ability to work well with others. Knowledge of blue print reading. Familiarity with common inspection gauges. *Ability to read work instructions.*

Job description: Perform first piece inspection as required by foundry work instructions. Maintain SPC/Cpk data for special characteristics, as required. Perform check of casting quality for accuracy and compliance to customer print and work instructions.

The Union objects to consideration of this job description inasmuch as it had not seen it prior to the hearing in this matter and argues that it should be given no weight as a result. Normally consideration of this position description would not be proper in view of the fact that the Union has never seen it, it was prepared by the Employer and is clearly self-serving. However, it is not necessary to consider the job description itself, given that the parties agree that the position has not changed since the Grievant had performed the job for a period of more than seven years for Badger Die Casting, the predecessor of the Employer, with the possible exception of some additional contact with customers. In addition, the parties agree that good communication skills and the ability to work well with others are part of the job requirements.

⁶ In fact, the Union claims that it was not aware that a less senior individual was selected for the positions in question.

⁷ It should also be noted that this is the first collective bargaining agreement between these parties, making a claim of past practice that is clear and unequivocal quite difficult. The failure of the Union to enforce the seniority provision, assuming that it was aware of the situations cited by the Employer, would not constitute a waiver of the contract language, nor would it thereby become a mutually agreed upon past practice.

The Employer's witnesses, Dave Popodi and Randy Lubben, testified that good communication skills and the ability to work with others are essential to the job, as did the Union's witnesses: Sandy Jaskie, Dale McKissick, and Ms. Lohrke herself.

The question to be decided then is whether Lohrke's communication skills and ability to get along with her co-workers are sufficient so that she can perform the duties of the foundry inspector.⁸ While Lohrke was a foundry inspector for Badger Die Casting, she was supervised for a number of years by Dave Popodi, now the Quality Manager for the Employer. Although Lohrke received merit increases while Popodi was her supervisor, and he never wrote her up or disciplined her for her performance at the time, Popodi testified that her work did not meet his standards in several ways. According to Popodi, towards the end of the time that Grievant was the foundry inspector, she would come to him if things needed correcting, rather than going to the operator as she should have. He also testified that Lohrke was not always accurate when she verified settings and that at least once her actions had caused the addition of four hours to a set up. He also claimed that she had difficulty communicating with operators and that people didn't believe what she told them.

Popodi testified that although Lohrke's behavior required intervention, it was not enough to write her up for it. He did have discussions with her regarding her communications, but did not issue formal discipline. Information about these discussions went into her file, but this documentation was not available at this time because these were records of Badger Die Casting, not the Employer. Popodi also stated that there was a time that things with Grievant blew up into a shouting match on the shop floor, something he clearly thought to be inappropriate for a person functioning as the foundry inspector.

Lohrke's current supervisor, Jim Ostrowski, testified that Lohrke is difficult, hard to talk to. He claimed that she doesn't like to listen to things she doesn't want to hear, that she is hard to understand. He also stated that a lot of people stay away from her, because she has good days and bad. People are on egg shells; don't know what she'll do: yell at them or whatever. Despite his concerns about Grievant's behavior vis-à-vis her fellow employees, Ostrowski has not written her up because he doesn't like to write up employees. Although he testified that he keeps notes, none were offered as evidence to support his testimony.

It is clear that the Employer has legitimate concerns regarding Lohrke's communication skills and her ability to get along with her co-workers. It is not apparent from the above information, however, that she is not qualified to perform the work of foundry supervisor and, if there were nothing more, the undersigned would require the Employer to place Lohrke in the foundry inspector position, especially given that Article 22e provides for a trial period in the position during which Grievant's ability to communicate and work with her fellow employees would be tested, with opportunity for reversal of the assignment:

⁸ Although Popodi testified about issues regarding Lohrke's accuracy as foundry inspector, there was insufficient evidence that this was the basis for determining that Mikorski would receive the position rather than the Grievant.

Transfer Reversal. If an employee transfers to another position for which the employee is qualified within the bargaining unit, but within fifteen (15) calendar days the Company or the employee or both determine(s) that the employee is not suited to the new position or is not meeting the requirements for the position, the employee shall return to the position the employee held within the bargaining unit at the same wage rate the employee held prior to the transfer, provided the employee is qualified to hold that position.

However, Lohrke's difficulty in communicating with other employees of the Company is not only a perception of the Employer. During her testimony, on direct examination by the Union, Lohrke acknowledged that she had agreed during the grievance process that she has problems communicating with the plant manager, Jeff Balko. Lohrke acknowledged that she offered to communicate with him by notes. She denies a history of problems with him, but does acknowledge having an argument with him. In addition, Lohrke admits that disagreements with co-workers in the shipping department resulted in her move to another position, but she contends that another employee was the troublemaker. Lohrke denies getting into arguments with co-workers on a regular basis, but does not deny that she does argue with them on occasion. There were no witnesses that testified positively about Lohrke's communication skills and ability to work with others.

The Employer's synopsis of the October 5 Step 3 grievance meeting contains the following:

. . . Grievant has previously acknowledged having communication problems, and at this meeting admitted that she has communication problems with Plant Manager Jeff Balko, but suggested that she could "write notes to Jeff." The Company does not consider writing notes as the sole means of communication between the Plant Manager and the Inspector to be acceptable.

At hearing, Grievant clarified this to mean that she would leave notes for Balko if he was too busy to respond. She denied asking to not have contact with the plant manager and affirmed that she does not believe the main means of communication should be writing notes, although she acknowledged offering the writing of notes as a means of communicating with Balko.

Grievant is seeking a position that requires her to be able to communicate regularly with the plant manager and other Company employees with regard to issues arising in the foundry. In particular, she must be able to tell co-workers that the product they produced does not meet requirements. It is always difficult to tell someone that the work they have done is not adequate. It requires a skill, an ability to advise that something is wrong and requires re-doing. It requires good communication skills and an ability to deal well with people. The Grievant acknowledged that she does not have good communication skills. While she may be an excellent employee in all other respects, and may have the technical skills needed to be an inspector, on this record I cannot find that Marie Lohrke is qualified to perform the duties of the foundry inspector.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Request to Initiate Arbitration was sent to the Wisconsin Employment Relations Commission in accordance with the timelines set forth in the collective bargaining agreement.

2. The collective bargaining agreement requires the Employer to assign the position to the most senior applicant qualified to do the work.

3. The most senior applicant, Marie Lohrke, was not qualified to perform the work of foundry inspector.

Therefore, the grievance is dismissed.

Dated at Madison, Wisconsin, this 1st day of July, 2005.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

