

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SPANCRETE INDUSTRIES, INC.

and

**CONSTRUCTION & GENERAL LABORERS' UNION,
LOCAL 330, AFL-CIO**

Case 17
No. 65225
A-6188

(Material Handler/Inventory Job Award)

Appearances:

Mr. Patrick Gill, Esquire, Gill & Gill, S.C., 128 North Durkee Street, Appleton, Wisconsin 54911, on behalf of the company.

Mr. Matthew R. Robbins, Esquire, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of the Union.

ARBITRATION AWARD

According to the terms of the 2005-08 labor agreement between the captioned parties, the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and resolve a dispute between them regarding the award of the Material Handler/Inventory Control position to Mike Kautzer. Hearing was scheduled and held at Valders, Wisconsin on January 24, 2006. A stenographic transcript of the proceedings was made and received by February 9, 2006. At the hearing, the parties agreed to postmark their briefs by March 15, 2006 and they waived the right to file reply briefs. However, the parties later advised the Arbitrator that they had agreed to an extension of time on the briefs to April 14, 2006. The Arbitrator received the last brief by May 10, 2006, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues to be determined in this case. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The Union suggested the following issues for decision:

- 1) Did the Company violate the labor agreement when it awarded the disputed position to Mike Kautzer rather than to either of the two more senior employees, Schnell and Schleis?
- 2) If so, what is the appropriate remedy?

The Company offered the following issues for determination:

- 3) Did the Company properly award the Material Handler/Inventory Control position consistent with the clear language of Article 5, Section 4 of the labor agreement?
- 4) If not, what is the appropriate remedy?

Based upon the relevant evidence and argument and having considered the parties' suggestions, I find that the Union's issues accurately state the controversy between the parties (without inclusive argument) and they shall be determined herein.

RELEVANT CONTRACT PROVISION: ARTICLE 5. SENIORITY

. . .

Section 4. The Company agrees to post all vacancies for a period of five (5) working days. Vacancies can be filled for thirty (30) working days temporarily. The Company will consider seniority, skill and ability, and overall Company needs in filling those vacancies. Job postings shall be placed at each time clock for employee information.

If there is a transfer in personnel from one shift to another, the senior employee has right of refusal, not subject to discipline, providing the less senior employee replacing the senior employee is qualified.

. . .

BACKGROUND

The Company produces hollow core and wetcast concrete products for the construction industry at its Valders, Wisconsin facility. Hollow core panels are extruded from a machine in 4 to 8 foot lengths and are of varying thicknesses and shapes; reinforcing steel bars are then attached to the panels for durability and ease of assembly/construction. In wetcast, Company employees ready, set up, form and pour larger pre-cast cement pieces such as columns, beams, double T's, doorways and windows which cannot be made in hollow core. Panels and other concrete products are also manufactured at the Valders plant for inventory. These items are then stored at the Valders plant for use on future projects.

Bargaining unit employees are assigned to work in groups or crews of from 3 to 6 workers, headed by a leadman who is also a unit employee. There are four wetcast crews; there are several Hollow Core crews. All unit employees must be certified to drive a forklift. At all times relevant hereto Dallas Skarda was a Leadman in wetcast and also a Union Steward; James Schuh was Plant Superintendent with overall responsibility for the Valders plant; Clarence Bodart was wetcast supervisor and the only Company witness who knew the work of Kautzer, Schnell and Schleis.

Approximately four years ago, the Company instituted the SLAM Program at the Valders plant. SLAM stands for Spancrete Lean Approach to Manufacturing. As part of this Program, the Company established a joint labor/management committee to help accomplish the goals of the Program and to meet monthly to trouble-shoot the Program, to assure the efficient flow of work through the facility and to decrease down time at the plant.

Prior to March, 2005 and the establishment of SLAM, Leadmen or an employee assigned by the Leadman had to find all plates, forms and other materials needed to complete the crew's work each day and then transport the materials by forklift to the appropriate work area.¹ This was inefficient as it often caused down time since Company inventory was not well organized and crews had to wait to receive the necessary materials before they could get to work on a project.

As a result, the SLAM committee decided that a new position should be created to keep track of inventory, to order supplies and materials, to organize and store inventory and to remove, inventory and store products delivered to the plant and to put together and bring to each work area the necessary supplies and materials for each crew prior to the start of each work day. Based upon the SLAM committee's recommendation, the Company then created, advertised for, interviewed and hired an Inventory Control Manager, a non-unit position.

¹ For many years, the Company had employed Ken Zipperer as a forklift driver but he was not able to perform all of the needed duties regarding inventory control and material handling that the SLAM committee believed had become necessary in 2005.

Unit employees Kautzer and Schleis applied for this management position and were interviewed for it.² No evidence was proffered to show what written information Kautzer submitted in applying for this management position. Schleis' application was placed in the record and read as follows:

For the benefit of the Interviewers who may not know your background, please fill out the following and return to John Schnell prior to February 2nd.

. . .

Prior work experience:

I have been working various types of construction since 1985, from building roads and streets, building trades, and the last 10 years here at Spancrete. My years at Spancrete have given me some idea of what is needed and used on a daily basis for production and erection.

Reason you are interested in the position:

oppertunity (sic) to work independently and create an efficient and cost effective inventory plan.

Briefly describe your understanding of the position:

The "Supply Manager's" job will include ordering materials used in daily operations of production: wetcast and spancrete. Staying in contact with production managers as to maintaining necessary (sic) amounts of inventory to keep production efficient. This job also includes ordering materials and maintaining inventory for the erection personnel for their daily needs. It will be the "Supply Manager's" job to create and standardize this new system.

Schleis failed to mention his prior material handling and inventory control/warehousing experience in his written application but Kautzer mentioned his experience (prior work experience at Kreuger International of Manitowoc, an office furniture manufacturer in inventory control and material handling) at his interview.³ The Company rejected both Schleis and Kautzer for this management position, hiring Roy Hephner from outside the Company.

2 The Company normally interviews for and takes written applications for all management positions but it has not traditionally done either of these things in hiring for unit positions. The Company has never tested for any open unit position.

3 The Company did not submit Kautzer's "Supply Manager" application.

After Hephner's hire, he began analyzing the Company's material handling and inventory control needs and he wrote a memo proposing that the Company hire two material handlers which read in relevant part as follows:

Goal: To maximize production by accurately storing material and keeping manageable quantities on hand with a systematic delivery of material throughout the company.

I Staffing:

A. Manager:

1. Supervision of personnel.
2. Receive, store and shake out material as needed for departments.
3. Keep daily logs of material received. Enter material into computer system.
4. Categorize material requisitions received. Obtain material from stock and/or request non-stockable material from purchasing.
5. Daily inventory checks and reorder material as needed.
6. Work with the Scheduler, Production, and Drafting for material status on up coming jobs.
7. Maintain organization of all supply chain areas.

B. Personnel #1: (0 – 6 month hire)

1. Compare invoices to shipments ordered.
2. Work with Manager on accuracy of orders received.
3. Enter items into computer as to location in and around plant.
4. Check on items that need to be restocked.
5. Assist other managers with scheduling.
6. Separate orders for jobs and departments accurately.
7. Put material away.
8. Fork lift operation.
9. Work with Yard Manager to get erection materials ready to go to job sites.
10. Pick and deliver material to assigned area throughout production areas.
11. Maintain order in Supply Chain operations.

...

II Plant Layout:

A. Floor plan:

1. Material will be stored in an orderly fashion.

2. Production and Erection Jobs will be broken down and sorted by job in a picking order.
3. Safety Supplies will be ordered for the company and stored in designated locations.
4. Erection Shed will be used for a secured area of miscellaneous supplies
5. Bent Rebar for jobs as needed will be separated and stored.
6. Use of Min-Max Reports will be used to reordering along with spot checks.

The Supply Chain personal (sic) are going to be a support function for Production and Erection crews. This will help with the organization of plates and raw material and assure that crews get work completed timely. When production is ready for plates and other raw material, it will be sitting by the beds so that Production personnel can concentrate on setup and pouring beds. This will save time and keep personnel from searching for material needed for that day. This will also help control lost inventory and over stocking of unnecessary material.

III. Goals:

A. 6 Months:

Have production plates ready 1 day in advance and by the proper beds for pouring. Organize and setup at all areas for supplies and production material to be stored. Prepare for winter storage of some items. Clean up and reorganize areas in the plant to better serve us. Maintain these new and existing areas.

B. 12 Months:

Have stocking and material delivery plan implemented. Have a partial stock plate inventory supply in order. Weekly planners being used to insure better delivery of materials. Bin stocking. Maintain (kanban) of all items we inventory. Have specific plant/yard locations for storage of all materials implemented.

The “Manager” referred above was Hephner and “Personnel #1” was the Material Handler/Inventory Control position in dispute in this case. It should be noted that Hephner was not and is not a certified forklift driver. At some point, the SLAM committee also recommended the hire of the Material Handler/Inventory Control position.

The 2000-05 labor agreement contained the following language in Article 5, Seniority:

Section 4. The Company agrees to post all vacancies for a period of five (5) working days. Vacancies can be filled for thirty (30) working days temporarily. The Company shall have the sole discretion in filling those vacancies, first from within the bargaining unit, and thereafter from the outside. The Company will consider skill and ability and overall Company needs in filling those vacancies.

The Union met with employees prior to the start of negotiations with the Company over the 2005-08 agreement, to get employee thoughts regarding what they wanted to see in the 2005-08 labor agreement. Union Representative Mertens stated herein that employees wanted acknowledgement of seniority in the selection of employees for open, posted positions. Therefore, the Union proposed the language found in Article 5, Section 4 (quoted above in the Relevant Contract Provision portion of this Award) to be included in the 2005-08.

In bargaining, the Union insisted on its language which deleted the “sole discretion” language of Section 4 and listed seniority first among the factors the Company would have to consider to fill open positions. The Company ultimately agreed to the Union’s language as originally proposed, although Superintendent Schuh stated herein that the Company had wanted jobs to be filled after consideration of skills, abilities and overall Company needs. Schuh stated that the Company agreed to the Union’s language change believing that seniority would be only one factor to be considered in filling positions. In contrast, Union Representative Mertens stated herein that he believed that the change in the language of Article 5, Section 4, and the fact that seniority was listed first meant that the Company would have to give the greatest weight to seniority in awarding open positions.

FACTS

Prior to September 6, 2005, Plant Superintendent Schuh and Supervisor Bodart approached and spoke to Hollow Core employee Mike Kautzer asking whether Kautzer might be interested in taking a new Material Handler/Inventory Control position the Company was considering filling. Kautzer told Schuh and Bodart that he was uncomfortable taking such a position and Kautzer asked that the job first be posted.⁴

Thereafter, the disputed position was posted, as follows:

THROUGH THE SLAM PROGRAM IT HAS BEEN DETERMINED THAT WE NEED A INDIVIDUAL TO ASSIST ROY HEPHNER. THIS INDIVIDUAL WILL REPORT TO ROY AND ASSIST HIM WITH NUMEROUS FUNCTIONS. THIS INDIVIDUAL WILL BE RESPONSIBLE FOR INVENTORY CONTROL, RECEIVING, AND DISTRIBUTION OF PLATES AND SUPPLYS (sic) TO ALL WETCAST FORMS. THIS INDIVIDUAL WILL ALSO NEED TO ORGANIZE AND INFORM ROY OF ITEMS THAT NEED TO BE ORDERED. THIS INDIVIDUAL MOST BE SELF MOTIVATED AND ABLE TO WORK ALONE. ANYONE THAT IS INTERESTED PLEASE CONTACT JIM SCHUH BY TUESDAY SEPTEMBER 6TH.

⁴ Kautzer reported this conversation to Union Steward Skarda.

All employees who were interested were expected to speak to Schuh who then wrote their names on the posting. The following employees spoke to Schuh and asked to be considered for the position:

MIKE KAUTZER
SCOTT LARSON
JUSTIN ZUTZ
STEVE REONE
MARK SCHLEIS
JASON MAERTZ
DENEIL PAITZL
TIMM BEYER
TIM PAHNKE
GARY SCHNELL
ERIC KORIWEK
RUSSELL DUESCHER

At the time he wrote the employees' names on the posting, Schuh stated that he did not interview any of the interested employees or ask them any questions regarding why they felt they were qualified for the position. Schuh admitted that if any of those interested in consideration volunteered their experience or other information he would have listened to it and considered it in deciding who to place in the position. No interviews, no written applications and no tests were given to determine which candidate should be awarded the position.

Background And Qualifications Schnell, Schleis and Kautzer:

The two employees on whose behalf the Union has brought this case, Gary Schnell and Mark Schleis, have more seniority than Mike Kautzer, the employee who was selected to fill the Material Handler/Inventory Control position (hereafter MH/IC position). At the time of the instant hearing, Schnell had 13 years with the Company, the first 11 of which were in Wetcast and the last two years (since his January, 2004 transfer) were in Hollow Core. Regarding his 2004 transfer, the Company produced an informal note allegedly from Schnell's personnel file written by Bodart which stated that Schnell was being transferred from the Tucker Operator position because Schnell was unable to work timely and well with others. On cross-examination, Schnell initially stated that he chose to stop working as the main Tucker Operator in Wetcast and went to a crew job in Hollow Core (with no cut in pay) on his own motion, because he wanted a change. Later in his testimony, Schnell stated that he believed that Bodart transferred him to Hollow Core because he (Schnell) had refused to work in the yard when the temperature was -30 F, pursuant to Article 5, Section 6 of the 2000-05 labor agreement, which read as follows:

Employees refusing to work in sub-zero weather shall not be subject to discipline, however, junior employees may be substituted in their place without being subject to the restrictions of the seniority clauses contained in this Agreement.

In his testimony herein, Bodart did not specifically deny Schnell's assertions regarding the reasons why Schnell transferred into Hollow Core in 2004. It is undisputed that the Company never gave Schnell a copy of Bodart's note and that it never issued any formal discipline to Schnell in 2004. Although Bodart stated that he must have spoken to Schnell about his poor performance he stated that he could not recall doing so (Tr.138-141). In contrast, Schnell stated herein that Company managers never talked to him in 2004 or at any other time (except in connection with the formal written warning issued him in 1997) about his job performance or his relationship with other workers.⁵

In regard to the formal written warning issued to Schnell on January 8, 1997, for sub-standard work, limiting output and violation of Company rules (not detailed in the warning) by his then-supervisor (who was not called as a witness herein), Schnell's supervisor stated in the warning as follows:

...

During generally observation in Plt. I & II from 6¹⁰ to 7⁰⁵ Gary brought attention to himself as I never saw him in any productive activities. Gary walk (sic) from the West end of Plt II to the East end talked to a few other employee's and eventually walked to the lunch rm. When Gary came out he was eating a candy bar and walked back to East.

...

Schnell stated that he had performed forklift driving duties in his prior jobs at Mirro Corp. (3 years) and Valders Stone & Marble (4-5 years). As Company managers never interviewed Schnell or otherwise talked to him about his qualifications for the MH/IC position, they were unaware of this experience when they selected Kautzer for the opening. Schnell did not apply for the Supply Manager position.

Mark Schleis was hired by the Company in January, 1995. The last 7-8 years of his tenure with the Company, Schleis worked in the yard on the loading/stockpiling crew where he had no contact with Bodart as a supervisor. Schleis stated that he regularly uses a forklift on the loading/stockpile crew and that he knows where inventory is stored at the Company. For his first three years at the Company, Schleis worked in Wetcast under Bodart.

Schleis stated herein that for the 11 years prior to his hire at the Company, he worked as a Mason Tender and he also did concrete flatwork during the construction season for general contractor, Jos. Schmitt & Son in Sheboygan, WI. During the winter, Schleis was not laid off but did material handling/inventor/warehousing work at Schmitt. In both of these positions, he was required to have "people skills" and to organize and manage inventory and he regularly used a forklift. Schleis stated that as a Mason Tender he was required to move fast to make sure the bricklayers had all of the materials they needed to complete their work.

⁵ In March, 1996, another informal note was placed in Schnell's file regarding Schnell's apparent request to be transferred out of Wetcast and the Company's refusal to transfer him. On its face, this note did not constitute informal discipline, and it has not been considered as discipline herein.

In early February, 2005, Schleis applied for the Supply Manager position (ultimately given to Hephner). Schleis put in an application (quoted above) regarding his background and he was interviewed for the position. Schleis admitted herein that he failed to put his prior material handler and inventory control experience on this application. No evidence was submitted herein to show what questions were asked of applicants regarding their experience/qualifications for the Supply Manager position.

Schleis admitted herein that 10 years ago the Company wrote him up for his work performance but he stated that he has received no discipline from the Company since then. No evidence was placed in this record to show that Schleis had actually received a formal written warning from the Company at any time. In his testimony, Bodart never mentioned issuing Schleis a written warning. However, Bodart stated that from time to time, Schleis insisted on using the tractor that he normally uses in the mornings to do his loading/warehousing work, not allowing Bodart's Wetcast crew to use that tractor. However, Bodart admitted that he never warned or disciplined Schleis for Schleis' actions.⁶

Kautzer was hired by the Company in July, 1995. For his entire tenure at the Company he worked in Hollow Core. Bodart was never his supervisor. In February, 2005, Kautzer applied for the Supply Manager position. Kautzer stated herein that during his interview for this position, he told the Company managers about his 3 to 5 years experience in shipping and receiving at Kreuger International (an office furniture manufacturer) and about the organizational skills and invoicing experience he gained at Kreuger. Kautzer's Supply Manager application was not placed into this record and he did not state herein that he wrote down his experience on that application. Kautzer stated that since he has performed the MH/IC job, he has spent 10 to 20% of his time using a forklift and that he now spends a lot of his time in the office making copies (prints of plates) or ordering supplies with the current Supply Manager, Becky.⁷ No evidence was presented to show that Kautzer received any formal discipline during his employment with the Company.

The selection process for the MH/IC position:

Schuh, Hephner and Supervisor Bodart met informally several times to discuss the employees whose names Schuh had written on the posting as those names went up on the posting. Hephner had very little input into the decision who to award the position to as he did not know the employees or their work. No standards/benchmarks were set for a successful candidate prior to the commencement of these discussions. Schuh stated that before the changes were made in Article 5, Section 4, that in 95% to 98% of the cases, the Company selected the most senior employee for posted positions.

⁶ Bodart has not been Schleis' supervisor for 8 years.

⁷ Becky was a Company secretary who had data entry duties that overlapped Hephner's Supply Manager work. Becky was given the Supply Manager position when Hephner left it to take a Project Superintendent position with the Company sometime in October, 2006.

Company managers Schuh and Bodart stated herein that they decided they needed a candidate who had inventory control experience and who could work efficiently and relatively independently, without regular supervision; that the top two candidates were Kautzer and Scott Larson as they both had prior inventory control experience; that although Larson had greater experience and a college degree in Inventory Control, as Larson was the least senior candidate, the Company awarded the position to Kautzer as he was more senior than Larson.⁸ Schuh admitted herein that he did not approach or speak to Schleis or Schnell about the disputed position prior to its being posted as he did with Kautzer; and that he never asked Schleis and Schnell why they thought they were qualified for the position.

Wetcast supervisor Clarence Bodart stated herein that he supervised Schnell, Schleis and Kautzer in the past. However, Bodart stated that he has had very little contact with Schleis in the past 8 years since Schleis has worked on the plant loading dock during that time; that he has had little contact with Kautzer and Schnell in the past two years since Kautzer and Schnell were then employed in Hollow Core. Bodart specifically stated that he was fully able to conclude that Kautzer was the best candidate for the disputed position despite the fact he had not had significant contact with Kautzer, Schleis or Schnell in years. Bodart stated that Kautzer's work ethic and attitude were superior to Schleis and Schnell's.

Kautzer was selected for the position. The Company did not issue any letters of explanation to Schleis and Schnell or otherwise tell them why they had not been selected for the opening. The Union then filed the instant grievance on September 28, 2005.⁹

POSITIONS OF THE PARTIES

The Company

The Company contended that it specifically and strictly followed the language of the 2005-2008 labor agreement (at Article 5, Section 4) in selecting Kautzer for the disputed position during management meetings held thereon by Schuh, Bodart and Hephner. Here, the

8 Schnell was 23rd, Schleis was 28th, Kautzer was 38th and Larson was 115th on the seniority list at the time the disputed position was filled (Jt.Exh.3).

9 The Company raised Schnell's work record, offering one verbal warning reduced to writing and issued in January, 1997 for sub-standard work, limiting output and violation of Company rules, which Schnell acknowledged he received. The Company also offered documentation of two counselings of Schnell which occurred in 1996. A third document did not appear to be discipline, but was a note from Bodart stating why Schnell was removed from the Tucker Operator position in January, 2004. As the contract requires that discipline be reduced to writing, because Schnell stated that he never received copies of the 1996 and 2004 documents, and because the Company waited too long to raise these matters—presenting them for the first time at the instant hearing-- they have not been considered herein. The 1997 verbal warning is relevant to this case and will be discussed below.

Company noted that it properly posted the Material Handler position and after the posting came down, management then took 3 weeks to evaluate the 12 employees who had requested consideration. The Company argued that the record facts showed that its managers considered all contractual criteria--seniority, skill, ability and overall Company needs--and found Mike Kautzer was "head and shoulders" above the other 11 applicants.

In this case, the Company urged that the Union's approach, if adopted, would make seniority the controlling/prevaling factor which is contrary to the clear language of Article 5, Section 4. In addition, the Company argued that the Union's approach is neither supported by the testimony nor the bargaining history herein. On this point, the Company noted that Article 5, Section 4 uses the verb "will consider," a permissive not mandatory verb. Thus, the language makes clear that the Company was required to do no more than "consider" seniority (as well as the other listed factors) and the facts herein showed that the Company did this in selecting Kautzer.

The Company asserted that if the Union were to prevail on this point, one would be required to read the three factors not involving seniority out of Article 5, Section 4. Such a result would be contrary to the arbitral principle that all contracts be construed to give effect to all words, making none surplusage. In addition, General Manager Schnell stated that at no time during bargaining for the 2005-08 agreement was it agreed that seniority would be the prevailing factor in Article 5, Section 4 decisions and that the position of the word seniority, (first in the factors series) in Section 4 was neither an issue in negotiations nor was it done by design.

In regard to Schnell and Schleis' qualifications visa vis Kautzer's qualifications, the Company noted the following. In regard to Schnell, the Company urged that Schnell did not have the "self-motivation needed for the position;" that his nickname was "Turtle"; that he had been removed from the Tucker Operator position in 2004 due to his work performance and attitude; and that in 1997, Schnell received a written warning for work performance which the Company argued it could use in refusing to award the instant job to Schnell despite to the language of Article 14, Section 10.

In regard to Schleis, the Company noted that although Schleis had applied for a management job in material handling/inventory control, Schleis failed to list his prior work experience on his written application for this management position. In addition, the Company observed that Supervisor Bodart stated herein that he had "noticed numerous instances when Schleis would disrupt the workforce preventing and slowing other workers down" (Tr. 147).

In contrast, Kautzer's credentials showed he was "head and shoulders" above the slightly more senior Schnell and Schleis. Kautzer was selected because he was highly motivated, had a great work ethic, he did not need to be watched and he had past work experience in material handling and inventory control. Therefore, the Company urged the Arbitrator to deny and dismiss the grievance.

The Union

The Union contended that the Material Handler/Inventory Control position should have been awarded to either Schnell or Schleis who are more senior than Kautzer. The Union argued that because the effective labor agreement contains a “hybrid” selection clause, the Company had the burden to prove why the ability factor(s) were given greater weight than the seniority factor in by-passing the more senior employees. On this point, the Union cited several cases and a treatise.

In addition, the Union urged the Arbitrator to accord little or no weight to the opinions of the three managers (Schuh, Bodart and Hephner) because they neither spoke to nor interviewed Schnell and Schleis to determine their qualifications for the position; none of these managers was familiar with Schnell and Schleis’ work over the past 3 and 8 years respectively; and that neither Bodart nor Hephner had any significant contact with Kautzer prior to his being given the disputed position.

In regard to the January 29, 2004 and March 7, 1996 documents critical of Schnell’s work, the Union argued that as Schnell was given no notice of these reports at the time they were created and he received no formal discipline at the time, the Company cannot, in fairness, rely upon them to disqualify Schnell from the disputed position and Arbitrator should accord them little if any weight.

In addition, the Union asserted that the January 8, 1997 disciplinary report given to Schnell should be disregarded as it is too stale to be considered pursuant to the clear language of Article 14, Section 10. The Union cited several discipline cases as well as one case (HELM, INC., 92 LA 1295 (FELDMAN, 1989) concerning the denial of a job bid based upon a 12 year old discharge for theft to support its argument herein.

The Union contended that in “hybrid” cases, arbitrators have consistently held that where neither applicant is better qualified “by a substantial and demonstrable margin,” then their qualifications are considered approximately the same and seniority must control. The Union argued in its brief that Kautzer, Schnell and Schleis’ skills and abilities are approximately the same, as follows:

. . . Kautzer is not better qualified, by a substantial and demonstrable margin, than Schnell or Schleis for the material handler position. Like Kautzer, Schnell and Schleis had prior work experience driving a forklift and unloading, stockpiling and inventory (sic) materials. Similarly, prior to the creation of the material handler position, Schnell and Schleis, at times, had to retrieve materials and plates and make sure the plates were the right size and shape. Schnell and Schleis, therefore, have the necessary experience to fulfill the responsibilities and duties of the material handler position and either one should be awarded the position. (U. Br. p.16)

Therefore, the Union sought an Award sustaining the grievance and ordering the Company to award the Material Handler/Inventory Control job to the more senior employee, either Schnell or Schleis and make the selected employee whole for all losses.

DISCUSSION

The initial question in this case is what affect the change in the language of Article 5, Section 4, should have had on the selection of the incumbent of the MH/IC position. Union Representative Mertens stated that he believed that by putting seniority first in the series of factors the Company was thenceforth required to consider under amended Article 5, Section 4, in selecting the successful candidate for an opening, this demonstrated the parties' mutual intent to make seniority the determining/overriding factor in selecting applicants for vacancies. However, no evidence was submitted herein to show that Mertens conveyed his beliefs on this topic to the Company during bargaining and Mertens' belief was not otherwise supported by any testimonial or documentary evidence. Indeed, the Company's witnesses on this point specifically denied ever being told that listing seniority first in Section 4 would mean that seniority would become the most important factor in deciding who should be awarded a position. In addition, the language of Article 5, Section 4, is permissive on its face—using the verb “consider”— and it does not expressly state the relative weight seniority should be given or that seniority is to be the determining factor in deciding who should receive a position.

However, the Union is correct in its assertion that the type of modified seniority clause contained in Article 5, Section 4, is a “hybrid” clause, and that therefore, the burden is on the Company in this case to show that it compared and weighed the differences in seniority of the various candidates as well as the differences in the skills/abilities of the candidates and the needs of the Company in deciding who should get the opening. Thus, in a “hybrid” case, if the seniority of two or more candidates is close in time, more weight may be given to their comparative skill and ability, while in a case where the seniority of one or more candidates is greater, seniority should be given greater weight than skill and ability and other factors.

In this case, Schnell's seniority was greater than that of Schleis and Kautzer whose seniority was almost equal. However, Schnell received a formal written warning in 1997 for his work/attitude. The question arises whether the Company appropriately considered that warning in denying the open position to Schnell. In this regard, I note that Article 14, Section 10, Discharge and Suspension, states in relevant part:

...Any written violation shall not remain in effect for a period of more than twelve (12) months from the date of said written notice.

In my view, this language is insufficiently specific to require a conclusion that the parties intended by the language written to preclude the use of formal written warnings for all purposes more than 12 months after their issuance. Rather, it appears to this Arbitrator that

the implication of the language when read in context of Article 14, Section 10, Discharge and Suspension, is that it should be used for progressive disciplinary purposes only. In these circumstances, it is clear from the record that Schnell had one formal written warning, issued in 1997, for poor work performance which the Company could reasonably consider in deciding who should be given the MH/IC position. This is so despite the fact that the warning was issued more than 12 months before the Company made its decision to give Kautzer the disputed position. However, a different conclusion is required (but for other reasons) regarding the use of the 2004 transfer of Schnell out of the Tucker position and the March, 1996, informal note allegedly from Schnell's personnel file. In neither of these cases was any formal discipline issued as required by Article 14, Section 10, and no manager ever spoke to Schnell about his work, so that Schnell never knew his conduct was unacceptable. Therefore, Schnell never knew there was a problem and he never had the opportunity to file grievances to contest the Company's actions. In these circumstances, in fairness, the Company cannot use these documents against Schnell. Similarly, the Company's attempt to use Schnell's nickname "Turtle" against him is also irrelevant to this case: No evidence was proffered to show that the designation of nicknames at the Company was disciplinary.

As an integral part of the analysis of any posting case, the arbitrator must determine whether the employer fully and fairly considered all of the contractually listed factors and acted, without arbitrariness, capriciousness and without discrimination, in deciding which of the candidates should receive the position. As stated above, the Company was privileged to consider Schnell less qualified for the position due to the formal discipline for work performance he had received in 1997 — a key element of the job—despite his greater seniority. However, as Schleis and Kautzer's seniority was approximately equal, their skill and ability had to be properly and fairly assessed and judged.

In the circumstances of this case, the record herein showed that the Company's decision to give Kautzer the position was arbitrary and capricious. In this regard the evidence undisputedly showed that Bodart and Schuh already had Kautzer in mind when the idea of creating the MH/IC position was considered by the SLAM committee; that Kautzer was the only employee that Schuh and Bodart approached, either before the position was posted or thereafter, to ask if he would be interested in taking such a position; that only after Kautzer stated that he would not feel comfortable taking the position unless it were posted, did the Company post the position.

In addition, I note that no applications or resumes were taken, no interviews or tests were given, no benchmarks were set for a successful candidate and no detailed job description or educational or experience requirements existed for the position at any time. Therefore, no objective standards existed by which the Company managers who would make the hiring decision could judge the skills and abilities of the candidates. Furthermore, I note that one of the decision-makers, Hephner had no contact and no knowledge of the candidates and he admitted herein that he merely deferred to or rubber-stamped the decision of Bodart and

Schuh.¹⁰ Although Bodart, Schuh and Hephner met informally several times regarding the candidates, they took no notes of their discussions and their testimony regarding their deliberations was conclusatory at best, insufficient in detail and depth to demonstrate the kind of analysis of skill and ability and of seniority which is required in any posting case. These Company managers stated that they decided to give Kautzer the MH/IC position based upon their conclusion that Kautzer was “head and shoulders” above Schnell and Schleis because Kautzer had inventory control experience at a prior employer, he could work alone and he was self-motivated. This Arbitrator must wonder how these managers came to these conclusions when there was no evidence proffered to support them. In regard to the inventory control requirement, the Company never stated in any document or otherwise that having inventory control experience was a requirement of the job. In addition, Kautzer’s job at Kreuger was not an inventory control position per se. Schleis had similar material handling and inventory control experience at Schmitt and Schleis held his position with Schmitt for 11 years, between 6 and 8 years longer than Kautzer was employed at Kreuger. Also, this Arbitrator wonders how Schuh, Bodart and Hephner would know that Kautzer was self-motivated and could work alone when they never asked his direct supervisor whether Kautzer had these qualities and Kautzer regularly worked on a Company crew as did Schnell and Schleis, and never worked alone. In addition, I note that there is no evidence that anyone at the Company called Schleis and Kautzer’s prior employers to inquire about their material handling/inventory control experience. Finally, the MH/IC position was paid at the same rate as Schleis and Kautzer made at the time they applied for it, which tends to show the MH/IC job had the same level of difficulty/complexity at Schleis and Kautzer’s then – current jobs. Normally, an immediate supervisor’s opinion is given weight in this type of case. Here, the Hollow Core supervisor and the Yard supervisor¹¹ were not interviewed and did not participate in the Company’s decision to give Kautzer the MH/IC position. Neither of these individuals testified herein. Only Bodart testified and although he admitted that he had had no supervisory contact with any of the three candidates in years, yet Bodart boldly asserted that he knew the work of all three candidates well enough to cast a deciding vote regarding which one of them should get the disputed position. Bodart’s assertions on this point defy logic and I have therefore discounted his testimony.

The Company has argued that were an Award to issue in favor of the Union in this case, the effect would be that all factors would be read out of the agreement except the seniority factor. I disagree. Although I have found that Article 5, Section 4, does not state that seniority controls the outcome, the Company must be able to prove that it weighed the

10 Hephner admitted that he only saw Kautzer as Kautzer walked through the facility and that he always looked busy. In these circumstances, I have completely discounted the input of Hephner. This reason for selecting Kautzer over any other candidates is arbitrary on its face.

11 The record showed that the Hollow Core supervisor was Ken Lippert at the time of the instant hearing. Lippert did not testify herein. Although Schuh stated that he was the direct supervisor of Kautzer, Schuh as the Plant Superintendent could not have had the day-to-day, regular contact with Kautzer in the yard that a direct yard supervisor would have had.

contractual factors appropriately and fairly in reaching its decisions. In this Arbitrator's opinion, the Company failed to meet this burden of proof in this case. Therefore, the Company must remedy the situation.

As stated above, the Company could reasonably find that Schnell's 1997 warning indicated that he was less qualified than Kautzer who had no discipline in his file. I turn now to what affect, if any, Schleis' admission that he received a written warning during the first year of his 11 year employment with the Company should have on the outcome of this case. In this regard, I note that the Company put no documentary evidence into this record to show that the Company had in fact issued Schleis a formal written warning. In my view, had the Company issued such a warning to Schleis it should have submitted a copy thereof into this record. As it did not do so and as there was ample evidence that the Company has failed to issue formal warnings in the past while keeping copies of informal notes to use against employees in the future (as it did to Schnell), I find that insufficient record evidence was presented to prove that Schleis had in fact received a formal written warning pursuant to the contract. In any event, the warning allegedly issued to Schleis occurred early on in his employment and no other warnings were issued to him, making this evidence of little probative value. Therefore, I find that Kautzer and Schleis are on even footing in regard to discipline.

The question remains whether Kautzer should have been selected over the more senior Schleis. As noted above, Schleis had 6 months more seniority than Kautzer but he had 11 years of work at Schmitt, a construction general contractor, which involved material handling and inventory control, while Kautzer had only 3 to 5 years of such work at Kreuger, a furniture manufacture not involved in any type of construction. In these circumstances, the record showed that Schleis had greater relevant experience and greater seniority and that but for the Company's arbitrary and capricious assessment of his and Kautzer's skill and ability and seniority, the Company would have selected Schleis to fill the disputed position.¹² In this Arbitrator's view, it is also significant that Company witness Schuh admitted that in approximately 98% of past cases the Company has selected the most senior employee for unit openings. Therefore, I issue the following:

¹² The fact of "overall Company needs" is but one factor in four and it has not been addressed herein as the Company's failure to properly assess and weigh skill, ability and seniority prompted the Company's arbitrary and capricious decision. Again, the evidence regarding Company needs was conclusory only.

AWARD¹³

The Company violated the labor agreement at Article 5, Section 4, when it awarded the disputed position (Material Handler/Inventory Control) to Mike Kautzer rather than Mark Schleis. The grievance is therefore sustained on this point but it is dismissed regarding Gary Schnell. The Company shall immediately remove Kautzer from the position and place Schleis therein. The Company shall make Schleis whole for any losses he may have suffered from the date that Kautzer was placed in the position forward.

Dated at Oshkosh, Wisconsin, this 16th day of June, 2006.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

13 The evidence showed that the pay for the disputed position was the same as that of the Grievants, so a question regarding backpay is unlikely to arise. However, I shall retain jurisdiction of this case for 60 days from the date of this Award for purposes of the remedy only.