BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CROWN CORK & SEAL COMPANY, INC.

and

TEAMSTERS LOCAL UNION NO. 200

Case 2
No. 65190
A-6186

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Yingtao Ho**, 1555 North RiverCenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the Union

Fred W. Veil, Attorney at Law, 1331 Sherry Peaks Drive, Prescott, Arizona 86305, appearing on behalf of the Employer.

ARBITRATION AWARD

Teamsters Local Union No. 200, herein referred to as the "Union," and Crown Cork & Seal Company, Inc, herein referred to as the "Employer," having jointly selected the undersigned from a panel of arbitrators provided by the Federal Mediation and Conciliation Service and, upon the undersigned's employment with the Wisconsin Employment Relations Commission, having consented to have the undersigned continue to serve as the impartial arbitrator to hear and decide the dispute specified below; and the undersigned having held a hearing on April 20, 2006, in Oshkosh, Wisconsin; and each party having filed post-hearing briefs, the last of which was received June 2, 2006.

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Employer violate the Agreement when it refused to allow Grievant Scott Leavens to bump into a Fork Lift Driver position?

2. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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ARTICLE 4 – MANAGEMENT'S RIGHTS

Section 1. The Company reserves and retains, solely and exclusively, the rights to manage the business, determine the facts and make related decisions. This includes, but is not limited to, the right to hire, recall, promote, demote, discipline, suspend, discharge (for cause); relieve employees from duty, lay off or terminate employees because of lack of work or other legitimate reasons; subcontract work from the outside, direct the working forces, transfer or assign employees; select and determine or redetermine from time to time, (1) the number and classification of employees required or not required, (2) products to be manufactured or not manufactured, (3) operations, methods, processes, material and equipment to be employed or not employed, (4) quality and work standards, (5) new and improved facilities, or change existing methods of facilities and to create new jobs or change existing jobs as the result thereof, (6) daily and/or weekly work schedules and shifts, including overtime and holidays, reduce costs, and otherwise take such measures as determined necessary for the orderly, efficient and profitable operation of the business – all except to the extent expressly and explicitly abridged by a specific provision of this Agreement.

. . .

ARTICLE 11 – SENIORITY

. . .

Section 5. Should the Company deem it necessary to cut back the work force it shall be done in the following order:

a) The least senior employee in the classification shall be the first to be cut back. With respect to Group Classifications I, II and III employees at a higher level of progression within their classification will be interpreted as having a greater seniority over other trainees within their classification.

b) The affected employee shall exercise his seniority to displace the least senior employee in a job class, which is (first) equal to or (second) lower than the job class from which he was cut back.

Section 6. Should the Company deem it necessary to increase the work force, recall shall be in reverse order of cutback and layoff.

Section 7. In the application of this Article it is understood that retained employees must be qualified to perform the remaining work to be done, otherwise they will be cut back or laid off. It is also understood that there will be no promotions as a result of the application of the reduction in force provisions of the Article.

. . .

ARTICLE 13 – ARBITRATION

Section 1. . . . The decision of the Arbitrator shall be final and binding upon the Company, the Union and the employee(s).

. . .

FACTS

The Employer operates container plants throughout the U.S. It operates a food can manufacturing plant in Oshkosh, Wisconsin. The Union represents production and maintenance employees at the Oshkosh plant, including Grievant Scott Leavens. The operation works on a three-shift schedule. Mr. Leavens had substantial experience in a number of jobs before applying for a mechanic position with the Employer. The last job he held was with 7-Up Bottling Corp. in Oshkosh. He was originally hired there as a fork lift truck operator in May, 1993. He obtained a certificate required by the Occupational Health and Safety Administration ("OSHA") regulation in order to operate a fork lift. The certificate remained in effect when he initially applied for work with the Employer. 7-Up promoted Mr. Leavens to a mechanic position near the end of his employment.

Mr. Leavens applied to the Employer for appointment to a B-Mechanic position in September, 1995. Mr. Leavens filled out an application for employment which emphasized the mechanic work he had performed. He intentionally omitted reference to his fork lift experience and did not state he had a fork lift certification in the "Licenses/Certification" section of the application.

The Employer hired Mr. Leavens as a B-Mechanic effective October 30, 1995. He was subsequently promoted to a A-Mechanic position. The B-Mechanic performs the following duties under the direction of the A-Mechanic:

1. Running/feeding of the slitter, bodymaker, double seamer, testers and spray clad equipment.

2. Quality of Production

3. Make adjustments required to keep line operating and producing quality cans

4. Make minor repairs to equipment and assist the A-mechanic

The A-Mechanic maintains, overhauls and lubricates all line equipment - feeders, slitters, welders, conveyors, elevators, overhead conveyors, flangers, beaders, double seamers, tester, palletizers, palletizer conveyor strapper, etc., in addition to record keeping and lead responsibilities for the B-mechanics. He worked in that position until the reductions in force at issue in this case in which Mr. Leavens unsuccessfully sought to bump into a Fork Lift Driver position.

At all times prior to an arbitration award issued by Robert Williams on June 30, 2003, (herein "Coles" case), the Employer took the position that in all reduction in force situations an employee had to have previously held, by bid, a lower rated position in order to bump into that position. The impact of the Coles case is discussed below.

In August 11, 2004, the Employer posted the schedule for the week beginning August 16, 2004. Mr. Leavens was laid off from his classification as an A Mechanic and bumped into a Palletizer position. Mr. Leavens was senior to at least one person in the Fork Lift Driver classification. He unsuccessfully complained to the Employer that he should have been allowed to bump into that classification. Grievant filed a grievance with respect to this matter on August 13, 2004. A similar situation occurred with respect to the week starting October 11, 2004. Mr. Leavens was paid at the A Mechanic rate during these weeks, but was not able to have his shift preference. He also has some back trouble. The Palletizer job was difficult for him to do.

Fork Lift Drivers perform the following functions:

1. They keep the line supplied with proper material: plate ends, pallets, top frames, chipboard, copper wire, etc.

2. They load truck with cans, ends, plates, etc. according to bills of lading.

3. They remove any defective can, ends, plate, etc, from pallets when loading truck.

4. They store cans, ends, plates, top frames, pallets, drums, copper wire, etc., by specification.

5. They pick up scrap, weigh and record the weights, and dump it in designated containers.

6. They pick up trash and put it in the proper containers.

7. They drive safely.

8. They check the oil, water and gas. They report mechanical problems to their supervisor.

9. They fill out all required forms.

The Employer requires that employees who become Fork Lift Drivers be both certificated and trained. Under 29 CFR Sec. 1910.178, employees must be trained in the safe operation of fork lifts. This consists of the following:

1. an afternoon training course of a video safety presentation;
2. a written test after the presentation;
3. the instructor then gives the employees about an hour of familiarization with a real fork lift;
4. a five-minute demonstration by the employee that he or she can operate the fork lift.

Employees who pass receive a certificate which remains in effect for three years. The certificate can be renewed with a brief video presentation for three years.

The Employer has two types of Fork Lift Driver, an inside Fork Lift Driver and an outside Fork Lift Driver. The inside Fork Lift Driver performs the fork lift duties in the plant. The outside Fork Lift Driver performs fork lift duties in the warehouse and loading dock. The Fork Lift Drivers are generally cross-trained to perform both inside and outside duties. Employees who are certificated received about one week's training in each position under the direction of an experienced Fork Lift Driver. The training period may be shorter or longer depending on the prior experience of the new driver. For this reason, the Employer ordinarily will not allow employees to bump into fork lift positions who do not have both the certificate and training.

POSITIONS OF THE PARTIES

Employer

The Union improperly seeks to expand the scope of the grievance to include events that occurred after the filing of the grievance. Even if the Union argues that this is a "continuing" grievance, the grievance procedure does not contain any provision authorizing a "continuing" grievance. It is clear from the grievance procedure that a grievance must relate to facts which have already occurred. For example, Article 12, Section 2 requires that a grievance be submitted within three (3) days after the occurrence. Section 2 also limits the authority of the arbitrator to a period of thirty days before the filing of the grievance. If it limits the arbitrator in this way, it is axiomatic that he has no authority to consider events after the grievance is filed. There should be no inference that the grievance is expanded by virtue of the fact that the

Employer discussed the grievance in the grievance procedure. The Employer is required by law to do so.

The grievance should also be denied on its merits. The claim is that the Grievant should have been permitted to bump into a fork lift position. The Union did not establish an essential element of its case; that Grievant had previously worked as a Fork Lift Driver at any time relevant to this case. When the Employer challenged the Union's case on this point, it came up with evidence that the Grievant was scheduled to work as a Fork Lift Driver nearly two months after this case was filed.

In any event, the Union failed to prove that Grievant was qualified as a Fork Lift Driver. The Union's case, even if believed, would fall short of evidence that he was qualified as a Fork Lift Driver. If believed, Grievant would have worked as a Fork Lift Driver at 7-Up more than 10 years prior to the incident leading to the grievance. Also, if believed, he would have been assigned to do tasks with a fork lift an indeterminate number of times to perform only routine lifting and moving functions. Even if this were true, it does not establish that Grievant is qualified for the position of Fork Lift Driver.

Grievant's claims of prior work experience using a fork lift truck for the Employer are not credible. He was able to identify only two times when he was assigned by a supervisor to use a fork lift truck, when he was asked about specifics in the grievance procedure. The supervisor in charge denied having him work on the fork lift on one of those times; i.e.Master Foods "top-frames " Plant Manger Smith testified that Grievant did not raise the allegation that he had been assigned to operate fork lifts at Crown in later grievance meetings.

Grievant's testimony that he operated a fork lift at 7-Up 10 years ago is contradicted by the fact that he did not list his having done so on his employment application with Crown.

Grievant's alleged work experience did not qualify him to perform the duties of a Fork Lift Driver. Grievant's experience as a Fork Lift Driver, if any, at 7-Up occurred before the federal regulatory requirements requiring fork lift drivers to be certified came into effect. His alleged other experience which occurred with the Employer is too limited to qualify him to be a Fork Lift Driver. Specifically, his experience, if any, was limited to routine and repetitive movements. His experience would only have been limited to working inside in the manufacturing area of the plant. Dan Hohenstein testified that it takes up to four weeks to train a Fork Lift Driver. A person with Grievant's alleged experience would about take 2 weeks experience. Accordingly, Grievant was not "qualified" as that term is used in Article 11, Sections 5 and 7. The parties did not provide for a training component when there is a reduction in force. The Employer argues that Grievant is not certified as a Fork Lift Driver and, therefore, he is not "qualified" for the position within the meaning of Article 11, Sections 5 and 7.

Finally, The Employer argues that the Union conceded that Grievant was not qualified to perform the fork lift duties. In its opening statement the Union stated that the evidence

would show that neither Grievant nor Bartlett were qualified for the fork lift. It also sought a remedy of requiring the Employer to train the Grievant. If adopted, the Union's theory could lead to a requirement that all senior employees be trained in all jobs for which they might want to bump into in the event of a reduction in force. The sole reason the Employer trained and certified Bartlett was that he fell into the class of employees who had been permitted to work in a position. Under Arbitrator William's award, the Employer was required to train him. Grievant was not identified as qualified under that award. Accordingly, the grievance should be denied.

Union

The Employer violated Article 11, Section 7 of the agreement by not permitting Mr. Leavens to bump from his normal A-Mechanic job into a Fork Lift Driver position. Under Arbitrator Williams' prior award, Mr. Leavens is qualified as a Fork Lift Driver. The Williams award was based on the fact that Mr. Coles had taken fork lift classes, had obtained a license, and had operated a fork lift on 5-6 occasions without objection by supervisors. The Union notes the decision does not state that a supervisor ever ordered Mr. Coles to drive a fork lift. Arbitrator Williams specifically found that it was not necessary that the employee have performed or be prepared to perform all of the duties of the classification. It was only necessary that he or she be able to perform the duties of the position to which he or she wished to bump. The Employer waived the fork lift license requirement because it interpreted the award as requiring it to train and certify Mr. Bartlett because he might bump into a fork lift position under the doctrine of the award. Having done that for one employee, it must do that for other similarly situated employees. In any event, it only takes a half day to certify an employee. Mr. Leavens was certified until 2003 and sought to renew his certification. The Employer refused to let him renew his certification. Mr. Leavens has the requisite experience to do the inside Fork Lift Operator job. Between 1995 and 2002, Leavens used the fork lift for short periods of time twice per week. He also used a fork lift for eight hours once per month to do scrap work. He also operated the fork lift on the Master Foods project in October, 2003. Alternatively, the Union argues that by the middle of August, 2004, the Employer knew that it would have to cut back a number of mechanics, and that whoever it offered fork lift training to would be qualified to bump into the Fork Lift Driver position. The Employer was obliged to offer fork lift training to Leavens as the senior employee. It seeks a remedy that declares him qualified to work as a Fork Lift Driver or directs the Employer to provide the training in order that he might be a Fork Lift Driver.

DISCUSSION

The main issues in this case are:

1. Whether the Employer ever directed Mr. Leavens to, or knowingly permitted Mr. Leavens to, perform the duties associated with the Fork Lift Driver classification?

2. If so, whether Mr. Leavens' history of performing those duties qualifies him to bump into the Fork Lift Driver classification on the days in question?

Arbitrator Williams' award addressed the parties' dispute over the interpretation of Article 11, Section 7, as to the meaning of the words ". . . must be qualified to perform the remaining work to be done . . . ." [Emphasis supplied.] The facts of the Coles' case are as follows: Mr. Coles was a B-Mechanic. He took fork lift classes and obtained a license. He performed some fork lift exercises in class. He recalled performing Fork Lift Driver functions on five or six occasions. Each occasion was 2 to 8 hours. The Company view was that there was a past practice that one could bump into a lower job only if they had held the classification before. In the week of April 8, 2003, the Employer laid off Mr. Coles while it retained a junior worker classified as a Fork Lift Driver.

The Arbitrator disagreed with the Employer's position that the employee must have held the position by bid at some time in the past in order to bump. He found Article 11, Section 7 was clear and unambiguous. Arbitrator Williams' key contract interpretation can be found on pages 11-12 of his award, in relevant part, as follows:

> "Section 7 provides ". . . retained employees must be qualified to perform the remaining work to be done. . ." This language is revealing in what it does not say. It does not say "employees must be qualified to perform all of the tasks in a job classification." To be qualified under Article II an employee must be capable of performing the actual work scheduled or needed to be performed in a job classification. In this case only the inside assignment needed to be performed by the Grievant. Another employee was available to perform the outside assignment on the third (3d) shift. . . . . "

Accordingly, the test adopted by Arbitrator Williams was limited to the ability to perform the available work, not all of the tasks of the job classification. Arbitrator Williams did not address the issue of whether an employee could bump into the Fork Lift Driver classification if that employee could perform the work but did not have the required Fork Lift Driver's license required by federal regulation. It appears the Mr. Coles had a fork lift license at the time of the reduction in force. Arbitrator Williams found that Cole had worked the inside assignment on 5-6 occasions without criticism from supervisors. He concluded that the Employer violated Section 7 by not allowing Mr. Coles to bump into the Fork Lift Driver classification.

Article 13, Section 1, requires that the parties accept the decision of an arbitrator as final and binding of the dispute before him or her. The Employer acknowledges that it has adopted Arbitrator Williams' award as final and binding in similar disputes. Employer witnesses testified that they implemented the award by asking supervisors to identify everyone who had been permitted to work in the fork lift classification. They then put the named employees through fork lift certification classes and the regular training for Fork Lift Drivers.

Mr. Leavens' supervisor denied having had Mr. Leavens perform Fork Lift Driver work. Accordingly, he was not trained. The parties have negotiated a successor agreement without substantively changing the applicable Agreement language. Accordingly, Arbitrator Williams' interpretation of the applicable language is binding in this proceeding.

Mr. Leavens testified at the hearing as to his experience at 7-Up and as to his fork lift work at Crown as follows. He drove the fork lift approximately twice per week when the Fork Lift Driver went on break. The driver left the fork lift near the line so that Mr. Leavens and, possibly, others could put up plate or ends by themselves. He also used the fork lift to move scrap cans to the scrap processing machine approximately once every six months This work would ordinarily be a full shift, but sometimes was as little as 2 hours. He would use the fork lift to load the scrap cans in the compressing machine and use it to take the "slug" of condensed cans to a big dumpster outside. This work continued after he became an A-Mechanic in 2000. He renewed his fork lift license through the Employer, which license expired in February, 2003. He tried to renew the license, but the Employer would not include him in the classes because he was not then becoming an active Fork Lift Driver. Mr. Leavens expressed his view that he needed to renew his certificate were there to be a situation in which he might need to bump down. Had the Coles award been issued at the time, it is likely Mr. Leavens would have been allowed to renew his certificate. Mr. Leavens also said that in October, 2003, he was directed by his supervisor, Brian Floyd, to use a fork lift as a regular part of the Master Foods top frames job. That job involved using the fork lift to bring in top frames from the warehouse, sorting them by hand, painting ones chosen to go with Master Foods and returning all of the frames to the warehouse.

The crucial factual determination is whether Mr. Leavens actually had the experiences driving fork lift at Crown to which he testified. Employer witnesses challenged the credibility of Mr. Leavens in several ways. First, they challenged his credibility as to his 7-Up fork lift experience because the same was not listed in his application for employment. Plant Manager Smith testified that he met with Scott Leavens on three occasions about his claim that he should be allowed to bump into a fork lift position. The first meeting was solely between him and Mr. Leavens prior to the filing of the grievance, the second was at the third step meeting and the third was at an unofficial meeting after the third step. He stated at no time did Grievant give him those specific instances. He also stated that in investigating the potential grievance he asked all of the supervisors if they had ever directed Mr. Leavens to operate a fork lift or had knowingly allowed him to do so. All denied having done so.

The second step answer reflects that Mr. Leavens made the argument that he operated the fork lift at Employer behest as follows:

> ". . . he cites two cases where he says he was instructed to drive by Management. Scott's contention that he drove forklift is not sufficient to qualify him to displace a certified forklift driver."

The grievance documents support the Employer's perception that the Union changed its argument at the third step, abandoning the view that he had been required to, or knowingly allowed to do fork lift duties. The Employer's January 18, 2005, response to post-grievance procedure discussions about Mr. Leavens grievance succinctly states in relevant part the Employer position:

> "The union further claimed that since the Company already provided fork lift training to Travis Burns and Rodney Bartlett, then the Company should also provide training to Mr. Leavens as well.
>
> The Company reiterated its obligation under the terms of the Keith Cole arbitration award which required that Travis Burns and Rodney Bartlett both receive fork lift training. The Company also reemphasized the fact that it is under no obligation to provide fork lift training to Mr. Leavens because there is no indication that he has ever driven a fork lift for Crown and there is no need for the Company to train and certify every employee to drive a fork lift."

Bob Doro testified in rebuttal that he was a Union Steward in 2004. He disagreed with management witnesses. He was present during the second and third step meeting concerning this grievance. He said that at the second meeting, Mr. Leavens answered a question about his fork lift experience. They asked about his pre-Crown experience and they said that earlier experience did not matter. They asked about his experience at Crown and Scott said that he worked on an as-needed basis using the fork lift. He said when people working on the back end need material, they used the fork lift. They asked if a supervisor had ever told Leavens to drive a fork lift and Mr. Leavens answered; "yes." The meeting was held October 29, 2004. The supervisor was Brian Floyd. Mr. Leavens said that Brian Floyd told him to do whatever is necessary. He did not know when the incident occurred or what Grievant stated he had been directed to do. He said that he did not believe this exchange related to the Master Foods.

Brian Floyd, Grievant's shift supervisor in 2004. He stated that with positive assurance that he never told him to use, or knowingly allowed him to use, a fork lift on the Master Foods top frames project, or any other job.

Union Steward Norman Boese was recalled and he said he had seen Mr. Leaverns use a fork lift to do the Master Foods job. He also said that he stated this when they discussed the matter in the grievance procedure. He did not know if a Supervisor told Mr. Leavens to do so. He did see Koffke and Spat use fork lifts for that job, as well.

Grievant testified that he was certain that the Master Foods job was in 2003. He said he was on the fork lift 2 hours of an eight hour shift. No supervisor told him that he should not use the fork lift. He said he was certain of the year because it happened before the grievance was filed and further, that he was certain that it occurred in October.

I am satisfied that Mr. Boese's corroborating testimony is credible. His memory was more accurate than most. He had no incentive to fabricate his testimony, whereas it was not in the supervisors' interest to acknowledge that they had directed, or allowed, Mr. Leavens to use a fork lift in violation of company policy. In any event, it is reasonably likely that supervisors have forgotten the minor directions to Mr. Leavens to use a fork lift. Based upon this judgment, I conclude that Mr. Leavens testimony at the hearing as to the fork lift work he did at Crown is credible. I am satisfied that it is highly unlikely that this could have occurred without supervisory acquiescence. It is also understandable that Grievant may not have fully articulated all of the work he did at the second step and the nature of the answer by the Employer may have negated any attempt to do so at the third step.

Having, thus, concluded that Grievant's testimony about the fork lift work he did was credible, the next question was whether he fell within the confines of the contract interpretation made by Arbitrator Williams in the Coles award.

The test adopted by Arbitrator Williams was limited to the ability to perform the available work and not all of the tasks of the job classification. In the case before Arbitrator Williams, the grievant had a fork lift driver's license. The Employer is not ordinarily required to provide certification training for employees seeking to bump into the Fork Lift Driver classification. Mr. Leavens had a fork lift driver's license which expired February 21, 2003. Mr. Leavens credibly testified that he repeatedly sought to renew that license. Renewal of the license is a relatively routine process, but involves a slight expense by the Employer. A logical corollary of Arbitrator Williams' award is that there is a presumption inherent in Section 7 that an employee has a right, upon request, to expect Employer assistance in retaining whatever qualifications he or she has unless the Employer can show a good reason why it should be allowed to let the qualification lapse. Cost or lack of resources might have been a defense by the Employer, but it was not the case here. The Employer's decision to not renew the license was based upon its incorrect understanding in 2003 of Section 7 prior to Arbitrator Williams' award and, later, upon its erroneous understanding that Mr. Leavens had not been directed or allowed by supervisors to do Fork Lift Driver work Accordingly, Mr. Leavens is entitled to have his fork lift certificate renewed as soon as practical to do so.

The rest of the Employer's arguments in this case essentially re-litigate Arbitrator Williams' decision. The Employer has not shown that on the weeks in question that it expected the inside fork lift driver to perform outside fork lift duties. Indeed the records show that for the weeks beginning August 16, 2004 and October 7, 2004, it had scheduled two other fork lift drivers with less seniority than Mr. Leavens. Mr. Leavens was paid at his A-Mechanic rate, but suffered the loss of his shift preference rights and the Palletizer work exacerbated his back condition. The strongest argument made by the Employer was that merely because Mr. Leavens has done some inside work with a fork lift does not necessarily mean that he can do all of the tasks which might have been required of an inside fork lift driver during those weeks. Mr. Hohenstein testified that based upon Grievant's self-stated qualifications, he would nonetheless have to be certified and trained for about 10 days to do all of the tasks of a fork lift driver both inside and outside. However, the tenor of his testimony

was that he would view him as qualified to do the inside work, but would have to train him for about 10 days to do the outside work. I am satisfied from Mr. Leavens' testimony that with his experience and with the inside work he has done with fork lifts inside the plant, he can readily do the inside fork lift job were he certified.

AWARD

The Employer violated Article 11, Section 7, by failing to re-certify Mr. Leavens and by failing to allow him to exercise his seniority right to bump into the Fork Lift Driver classification. The Employer shall give Mr. Leavens the necessary training to re-certify as a fork lift operator as soon as practical and thereafter comply with the terms of Article 11, Section 7 by permitting him to bump junior employees in the Fork Lift Driver classification. I reserve jurisdiction over issues concerning training if either party request that I exercise my jurisdiction to do so in writing, with a copy to opposing party, within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 19th day of July, 2006.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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