BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

UNITED BROTHERHOOD OF CARPENTERS, LOCAL 1349

and

EGGERS INDUSTRIES, INC.

Case 59
No. 66601
A-6267

Appearances:

Gillick, Wicht, Gillick and Graf, by **Attorney Sandra Graf Radtke**, 6300 West Bluemound Road, Milwaukee, Wisconsin 53213, on behalf of the Union.

Michael, Best & Friedrich**, by Attorney Jonathan O. Levine,** 100 East Wisconsin Ave., Suite 3300, Milwaukee, Wisconsin 53202-4108, on behalf of the Employer.

ARBITRATION AWARD

At all times material, United Brotherhood of Carpenters, Local 1349 (herein the Union) and Eggers Industries, Inc. Employer (herein the Employer) were parties to a collective bargaining agreement covering the period from February 18, 2004 to August 19, 2007. On January 8, 2007, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the Employer's demotion of James Retzlaff (herein the Grievant). The undersigned was appointed to hear the dispute and a hearing was conducted on June 22, 2007. The proceedings were transcribed and the transcript was filed on July 2, 2007. Briefing was completed by September 17, 2007, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

> Did the company have good cause to demote the Grievant from his Operator A position?
>
> If not, what is the appropriate remedy?

The Employer would frame the issues as follows:

> Whether the company violated the contract when it denied the Grievant's bid for an Operator A position?
>
> If so, what is the appropriate remedy?

I characterize the issues as follows:

> Did the Company violate the contract when it determined that the Grievant was not qualified for an Operator A position and reclassified him as a General Helper?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE III
Grievances

Section 1. When any dispute or misunderstanding arises as to wages, or wage standard, hours, working conditions, lay-offs, transfers and promotions, rehiring or discharge of individual employees affected by this agreement, such dispute shall be presented as outlined in Section 2, either by the individual employee or employees affected or, if the individual requests the Union to do so, by the Union Steward or Bargaining Committee Chairman within one (1) week of the occurrence.

Section 2. (a) The employee verbally contacts the Department Coach with or without the Union Steward. (The Department Coach will respond within 2 working days).

(b) If the employee is not satisfied by (a), then the employee and Union Steward will submit the grievance in writing within 2 working days to the Department Coach. (The Department Coach will respond within 2 working days in writing).

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ARTICLE IV
Arbitration

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Section 2. Upon written demand of either the Company or the Union for arbitration covering wages (by wages is meant only individual disputes or complaints relative to hourly and not blanket or group increases), hours, working conditions and seniority, each party shall within five (5) days of such demand designate one (1) representative to act on the arbitration board and the two (2) representatives so named shall meet promptly and designate a third member to act as chairman on the board of arbitration. Should the parties fail to agree upon an arbitrator, either party may request the WISCONSIN EMPLOYMENT RELATIONS COMMISSION to furnish a panel of five (5) arbitrators. Each party, starting with the party asking arbitration, shall alternately strike off a name from this list until four (4) are scratched, leaving one (1) party to be the impartial arbitrator. The arbitrator shall meet as promptly as possible and hear the arguments of the Company and the Union regarding the grievance. After due consideration of the grievance, the arbitrator shall render a decision which shall be binding on the parties. The arbitrator shall have no authority to delete or modify any provisions of this agreement. The fees and expenses of the arbitrator shall be shared equally by the Union and the Company.

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ARTICLE X
Transfers and Promotions

Section 1. When an employee is permanently transferred by the Company to another job classification, he shall carry with him his regularly hourly evaluated rate of pay and shall be paid on this basis for five (5) working days, after which he shall be paid at the hourly evaluated rate of the job to which he was transferred, if he is capable of performing such work. If an increase in evaluated rate on the new job is required, such increase will be carried out in accordance with Schedule A, paragraph (b), except as provided in Article XII, Section 1.

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ARTICLE XVI
Management

The Management of the Company and the direction of the working forces, including the right to hire, suspend, discipline, or discharge for proper cause,

and the right to relieve employees from duty because of lack of work, or for other legitimate reasons is vested exclusively in the Company, provided that in exercising these rights the Company will not use them for the purpose of discriminating against any employee for Union activities. Unless specifically exempted in this agreement, the conduct of all other phases of operations of the Company are reserved exclusively to the Company.

BACKGROUND

Eggers Industries, Inc. (herein the Company) is a manufacturing company that produces architectural plywood and doors at two plants in Two Rivers, Wisconsin. Its represented employees are members of United Brotherhood of Carpenters Local 1349 (herein the Union) Prior to 2005, the Company employed twenty-one bargaining unit employees in nine different classifications in the Splicing Department who performed the different operations involved in the manufacture of architectural plywood and doors. James Retzlaff (herein the Grievant) has been employed by the Company since 1990 and, prior to 2006, worked in the Splicing Department as a Special Veneer Operator.

In 2005-06 the Company instituted a number of cost saving measures in order to reduce costs, improve efficiency and generally become more competitive. Among these changes was a restructuring of the workforce in the Splicing Department. With the knowledge and approval of the Union, the Company reduced the workforce by attrition and consolidated the nine classifications into two. The Architectural Veneer Operator classification was retained and the other classifications were consolidated into the position of Operator A. The reclassification to Operator A resulted in a wage increase for most employees. In consequence of this action, it was necessary for the employees to become familiar with and demonstrate knowledge and competence in a variety of different operations. Thus, the Company instituted a training program in the summer of 2006, to be followed by the Operator A employees being given a test to demonstrate their knowledge of the functions of the job, such as appropriately grading veneer material, to which the Union agreed.

In June the Company provided training and tested several employees, who scored poorly. The training protocol was revised and new study and test materials were selected. On September 18, Vice President of Operations Mary Streu, Human Resources Director Hartley Arsta and Plant Manager Tony Gauthier met with the Union representatives George Shimulunas and Loren Becker to discuss the new training and testing protocol. Streu told the Union members that the new test would be 30-40 questions. The employees would be given an hour to take the test, which would be open book, and were expected to score no less than 95% to pass because the Company emphasizes excellence and customers can reject shipments if there are any mistakes. The parties had discussions about the ramifications of failing the test. The Union expressed concerns about anyone losing their job because they failed the test and the Company, as well, expressed its intent that no one be terminated for failing the test. The Company's position, however, was that anyone who failed twice would be deemed unqualified for the Operator A position and would be reassigned.

Employees Carol Olp and Aimee Ferguson took the exam first. They completed it in less than an hour and both passed. Afterward they met with Streu to discuss the test. They agreed the questions were relevant to their work, but that some of them were tricky in that the correct answers weren't obvious. After the first tests, the Company decided to test the rest of the Splicing Department employees.

James Retzlaff had been off work from September 2005 to February 2006 due to a heart attack and stroke. In February 2006, he returned to his duties as Special Veneer Operator and, later, Operator A. During the summer he was given training in Operator A duties. In the fall, he learned that he would need to pass a written test. He was given a book on the exam material to study and took part in training to prepare, wherein he was able to ask questions about the test. In October, he was given the test and got two wrong, which was not a passing grade. Thereafter, he was given more training and also went over the questions and answers with the trainers. He took the exam again, which consisted of the same questions, but in different order, and did more poorly than the first time. Retzlaff ultimately took the test a third time and failed again.

On November 8, Streu and Arsta met with Union representatives to discuss the consequences of Retzlaff's failure to pass the test. The Company took the position that he was unqualified for the Operator A position and should not receive the same pay as those employees who passed the test. The Union members agreed that something should be done and stated they would discuss the matter further and return with a recommendation. No recommendation was made, so the parties met again on November 27 to discuss the Retzlaff matter. The meeting was attended by Bob Reel, Mike Molendus, Jeff VanEss and Greg Coenen for the Union and Hartley Arsta and Mary Streu for the Company. At that time it was agreed that Retzlaff would be reclassified to the status of General Helper as of December 4, which would be explained to him in the next week together by Company and Union representatives. He would continue to receive Operator A wages of $14.56 per hour for 500 hours, according to contract, but then would be reduced to the General Helper rate of $12.66.

On November 29, a meeting took place between Retzlaff, Bob Reel and Jeff VanEss, representing the Union, and Hartley Arsta and Mike Chynoweth, representing the Company, to discuss Retzlaff's reclassification. At the meeting, Reel stated that the Union felt that Retzlaff was qualified "…to do more than backs," and that the Union would no longer agree to his reclassification. Arsta reiterated the Company's position that the reclassification was based on Retzlaff's failure to pass the test on two occasions and that the Company intended to go forward. VanEss stated that the Company could go ahead as it planned, but that Retzlaff would apply for the Operator A position when it was posted and would grieve if it wasn't awarded to him, whereupon the meeting ended.

Retzlaff was subsequently reclassified as a General Helper. The Operator A position was posted and was not awarded to Retzlaff, whereupon he filed a grievance on December 6, 2006 on the basis that the job description for the Operator A position didn't list a test requirement, seeking as relief the return of his Operator A position. The grievance was denied

and moved through the contractual process to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that this matter is arbitrable. Article III sets forth the types of grievances the parties deemed to be arbitrable, including transfers and promotions. Further the contract permits an individual employee to file a grievance and, thus, assumes that a person without sophistication in contract interpretation and application might file a grievance. Policy favors resolution of contract disputes through arbitration, so the assumption should be that a matter is arbitrable unless specifically excluded.

The Union argues that the Grievant was qualified for the Operator A position and should not have been demoted. Over many years of employment, there is no record of him not being able to read or follow written instruction or work orders or failing to perform his job adequately. The Company's contention that he was only able to do "backs" is unsupported.

The Company's sole basis for the demotion is his failure to pass a written test, which is not mentioned in the job description. The test is flawed, is not fair and was not negotiated with the Union. Employees who took and passed the test stated the questions were tricky. To demote him on that basis is a violation of the "good cause" standard established by the contract. There is nothing in the contract that mentions demotion. Thus, management's claim that it has an unfettered right to demote should be subject to the good cause standard.

A written test is not the best criterion for determining qualification. Some employees who are competent do not do well on written tests, so experience and ability should be the major determinants of qualification. Further, due to the Grievant's health condition, he should have been provided more training and tutoring to prepare for the test, although the record doesn't indicate any deficiencies in his work performance.

The Company

The Company asserts that the grievance is not arbitrable because there is no allegation of a specific contractual violation and the grievance is not of a type the parties have agreed to arbitrate. The only subjects that are arbitrable are those involving wages, hours, working conditions and seniority. None of those apply here. Promotions and transfers were intentionally excluded from the arbitration provision.

The Company further asserts that this case does not invoke the good cause standard, rather it is about the Company's right to determine qualifications for positions. The Company acted at all times within its contractual and inherent management rights. The Union did not challenge the Company's right to consolidate several classifications into the Operator A

position and agreed the action would be an effective means of improving efficiency and controlling costs. The Union also did not challenge the Company's right to use performance on a written test as a qualification for the position. Determining job requirements and qualifications is an exclusive right of management and in this case the contract does not limit management's rights in this area in any degree. Indeed, there is language in Articles X and XII that refers to management's rights to transfer and reassign employees and eliminate classifications.

The Union's reliance on the good cause standard is an attempt to circumvent its need to establish a contract violation. The good cause standard applies to discipline, which is not the issue here. The Grievant was removed because he was unqualified, not for disciplinary reasons. The Grievant failed the HPVA test three times. The Company and Union agreed that anyone who could not pass after two attempts would be deemed unqualified and the Union's only concern was that no one be fired for failing. The testimony of George Shimulunas that the Union did not agree to anyone losing their Operator A classification is not credible. Likewise, the testimony that the Union agreed that the Grievant could be removed for failing twice is contradictory with its later position that no one could be removed. Finally, the contemporaneous notes of Hartley Arsta reveal that the parties did, in fact, agree to remove the Grievant from his position. Nonetheless, the Union's agreement or disagreement is irrelevant since it was in the Company's discretion to remove the Grievant regardless of the Union's position.

The Union's argument that the Grievant was qualified based on his assertion that he could perform all job functions ignores the fact that passing the written test was a prerequisite for the job. Being able to read veneer grade tables, which the test addressed, is essential to the job. Further, there is no objective evidence that the Grievant could perform all the tasks of the position, just self-serving testimony. Also, the Operator A position was more comprehensive than his former Special Veneer Operator position, so his ability to perform his former duties was irrelevant.

The decision to remove the Grievant was not unreasonable or discriminatory. The ability to properly grade veneer is essential in the Company's need to control costs and the testing allowed the Company to determine that the employees in the new Operator A position were qualified to do that. Despite the Union's assertion that the test questions were tricky, other employees passed it and testified that the questions were relevant to their duties. The Company acknowledges that other employees who failed the test once or did not take it still work in veneer, but no other employee has failed the test three or even two times. The Company permitted the Grievant to take the test three times and provided him with training and tutoring at its own expense to assist him in preparing, thus there was no discrimination and the grievance must fail.

DISCUSSION

Arbitrability

The first issue raised by the parties is whether the grievance is arbitrable. The Employer contends that it is not on two grounds. First, the Employer points out that the grievance does not identify a particular contract provision alleged to have been violated and asserts that if the Grievant cannot point to a specific violation of the contract by the Employer the grievance must be dismissed. Second, the Employer asserts that the issue raised by the grievance, that of involuntary job transfer, is not a subject that the parties have contractually agreed to arbitrate. In that regard, the Employer points out that Article III – Grievances specifically mentions grievances based on wages, hours, working conditions, lay-offs, transfers and promotions or, rehiring or discharge of individual employees affected by the agreement. However, Article IV- Arbitration refers only to matters concerning wages, hours, working conditions and seniority. The Employer argues, therefore, that only those subjects specifically mentioned in the arbitration provision were intended to be subject to arbitration and by not making specific reference to transfers the parties intended to exclude that subject from arbitration. The Union, to the contrary, asserts that the contract does not require a grievance to specify a violation of a particular contractual provision and, further, that since the contract contemplates grievances filed by laypersons who aren't experts in labor law, some latitude with particular filing requirements should be extended. Also, it is the Union's position that the list of subjects in the arbitration provision is not intended to be exhaustive and that any subject deemed grievable under Article III should also be arbitrable under Article IV.

I find the grievance to be arbitrable. Article III – Grievances creates the mechanism for addressing contractual disputes. Section 3 states:

> If grievance is not settled by (d), the Union or the Company may request that the matter be submitted to arbitration per Article IV, except as may be noted elsewhere in this agreement.

The plain meaning of this language is that any grievance not resolved under Article III is arbitrable under Article IV, unless specifically excluded. The term "noted elsewhere" requires that to exclude a subject from arbitrability it must be specifically referenced as excluded in the contract. There is no language in the contract stating that grievances concerning job qualifications or involuntary transfers are not arbitrable.

If the Company's argument were carried to its logical conclusion, no grievable matter not specifically listed in Article IV could be arbitrated. The only listed items are wages, hours, working conditions and seniority. Thus, taking a literalist interpretation, no grievance not encompassed by that list would be arbitrable. That would include such matters as discipline and discharge. Yet, Article XVI clearly imposes a just cause standard on management's right to discipline and discharge employees. Clearly, the contract does not contemplate a just cause standard for discipline without a mechanism for challenging it. Such an outcome would be unreasonable and, since there is a presumption against unreasonable outcomes in interpreting

contract language, it cannot have been the parties' intent to restrict access to arbitration in this way.

Likewise, Article III does not set forth a specific format or any particular requirements for the filing of a written grievance, including any requirement that a grievance identify particular provisions of the contract alleged to have been violated. The provision also allows an individual employee to file a grievance, which implies that the author of the grievance may not necessarily be schooled in the finer points of labor and/or contract law. That said, the grievance here clearly challenges the basis for the Grievant's demotion, his failure to pass the written test, which would qualify as a challenge to a transfer under Article III. Further, there is nothing in the response to the grievance to suggest that there was any confusion on the Employer's part as to the basis of the grievance, hindering its chances to adequately respond. Since, therefore, the form of the grievance does not fall short of any contractually mandated requirements and there was no prejudice in fact to the Employer, I find that the grievance was adequate to the purpose and the matter is arbitrable.

The Merits

At its core, this case is a challenge to management's decision to demote the Grievant based on his inability to pass the written test imposed on Operator A employees. The contract gives management the unfettered right to hire and transfer employees and does not restrict management's right to determine qualifications. As I stated in a recent case dealing with qualifications for employment:

> Typically, management is granted broad discretion in such matters and its determinations are likely to be upheld unless they are arbitrary, capricious, or unreasonable. This is a very high standard to overcome, essentially requiring a finding that there was virtually no rational basis for management's determination, or that management's decision was based on improper considerations. When applying this standard, therefore, arbitrators will not merely substitute their judgment for that of management, but will uphold the action where there is a reasonable basis for doing so, even if the arbitrator might have made a different determination. BAY AREA MEDICAL CENTER, WERC CASE 19, NO. 66488, A-6259 (Emery, 1/22/08)

Here, the Company decided to consolidate eight different job classifications in the Splicing Department into one classification, that of Operator A. The Union was apprised of this decision and supported it, in part because it would improve efficiency in the plant, but also because it would result in wage increases for most of the bargaining unit employees in the department. The job description for the Operator A position is as follows:

Operator A Job Description

PRINCIPAL FUNCTION

To prepare veneer faces and other plies for unmatched or simple matched orders.

KEY RESPONSIBILITIES AND WORKING PROCEDURE

1. Follow oral and written instructions from work orders and associated documents.
2. Perform clip to length, width, spray and splice, size, and patch operations according to established procedures, with the exception of architectural and sketch face orders.
3. Mark veneer, leaves, and faces as necessary.
4. Inspect materials during operations to ensure materials are up to the grade and color specified.
5. Performs operator maintenance.
6. Keeps work area clean.
7. Keeps in mind recurrent customer needs and in cutting flitches, puts aside in racks, veneer suitable for future needs.
8. Performs other miscellaneous tasks as assigned by Coach.

SKILLS, KNOWLEDGE AND ABILITIES

- Must be able to operate al machines in the department with the exception of the laser.
- Must have a thorough knowledge of face veneer specifications.
- Must know how to do simple matching of pairs, sets, end, flitch and sequence match.
- Must have basic ability to produce faces meeting esthetic as well as quality requirements.
- Must be able to work with other operators to produce materials correctly, in the manner requested.
- Must know the required sequence of operations in the splicing department.
- Performs work using methods that maximize product yield, while at the same time maximizing efficiency.

On May 22, 2006 the Union was informed by Mary Streu, Vice President of Operations, that there would be a training period for Splicing Department employees intending to migrate to the Operator A position. At the end of training the employees would be required to take a comprehension test to demonstrate sufficient skill and ability for the position. At a meeting on September 18, 2006, there was further discussion of the comprehension test. The

Union leaders were informed that the test would be open book and the employees would be given the materials in advance and an opportunity to study them. Employees needed to achieve a 95% score to pass. Those who did not pass who would be given a review session to go over the answers and ask questions and then would be given another opportunity to take the test. The Union took the position that no one should lose their job due to failure to pass the test. The Company was clear that it did not intend to terminate employees who could not pass, but that employees who failed the test twice would be reclassified.

The Union argues that the testing requirement for the Operator A position was unreasonable. At the outset, it must be recognized that the reasonableness or appropriateness of the testing requirement does not depend on the Union's agreement to it. Much testimony was offered at the hearing to the effect that the Union did not agree that employees who failed the test could be reclassified on that basis alone. Establishing qualifications for positions, however, is a management prerogative and does not require Union collaboration or agreement and there is no evidence that management made any representations that it would not use the test in classifying employees without Union approval. So, whether the Union did or did not agree to the test as a basis for determining qualifications is irrelevant. What is relevant is whether performance on the test was a reasonable basis for management to determine qualifications for the Operator A position. I find that it was.

This was a new position combining several others, so employees from multiple different classifications were required to acquire and demonstrate competence in new skills and areas of knowledge. As agreed by Company and Union witnesses alike, this was important in order to make the plant more efficient and cost effective, which all acknowledged was an important goal. The Company determined the written test was a valid tool for determining whether the employees had the necessary knowledge and did considerable research in selecting a test that met its requirements. The testing procedure appears to have been designed in such a way as to make it as easy as possible for employees to succeed and yet have the test be a valid measure of necessary knowledge and skills. Employees were provided the materials on which the test would be based in advance and were given training sessions and opportunities to study in advance of the test. The test was open book. Employees who did not pass the first time were given a second chance to take the same test, only with the sequence of questions altered, and were provided an opportunity for additional training and to go over the test questions and answers with a trainer before the retest. In all it appears that the testing process was reasonable, both in terms of fairness of administration and as a way to determine whether the employees had the necessary knowledge and skills.

The Union argued, and several witnesses testified, that some of the test questions were "tricky," because the correct answers were not always clear. The same witnesses agreed, however, that the test was relevant to the knowledge they needed to perform the duties of the Operator A position. Further, there was no testimony as to which particular questions were considered to be tricky and there was no evidence that the fact that the questions were tricky made them inherently unfair. One assumes that some of the judgments an Operator A must make in evaluating grades of materials are also not always clear cut and an ability to do so

correctly is a valuable and necessary skill. The Union also points out that not all employees do well on written tests, which may be the case. Nevertheless, much of what an Operator A does involves properly reading and interpreting written instructions and work orders. I cannot say, therefore, that it is necessarily unfair to require a demonstration of those reading and interpretation skills as a prerequisite to the position, or that a written test is an inappropriate method of evaluating that ability. Finally, it should be noted that, other than the Grievant, apparently no employee failed the test more than once. Some chose to retake the test and passed. Some chose not to retake the test and were not, therefore, classified as Operator A's. That fact militates against a finding that the testing process was unreasonable or unfair.

The Union also argues that the way the test was specifically used vis-à-vis the Grievant was unfair. This is primarily based on the fact that the Grievant had some severe health problems in late 2005 and early 2006 that allegedly affected his performance on the test. The Grievant returned to work in February 2006, however, and there is no evidence that the Grievant had not sufficiently recovered by October 2006 to take the test. Certainly, no information was provided to the Company at the time, by the Grievant or the Union, to suggest that he should be excused from taking the test based on health considerations. The Grievant was also permitted to take the test three times, even though the Company had made it clear that an employee would be reclassified after two unsuccessful attempts. There is no evidence, therefore, that the testing process was in some fashion less fair to the Grievant than to other employees. The Union points out that other employees who failed the test and then moved or were reassigned to other departments have, from time to time, been assigned to work in Veneer. The implication is that, unlike the Grievant, these employees have been, in effect, permitted to work as Operator A's even though they could not pass the test. There is no evidence, however, that they hold an Operator A classification, or are paid at that rate. Further, all such employees had only failed the test once. Finally, their use in this fashion is consistent with the Company's position that employees who did not pass the test would occasionally be used as "floaters," who would be assigned to different departments, including Veneer, as needed. In any event, there is no evidence that the Grievant was treated disparately with respect to how the test was administered to him, or how his failure to pass it was dealt with by the Company.

The Union also asserts that its change of heart regarding the Grievant's reassignment was based on its discovery that the Company's assertion that the Grievant "could only do backs" was untrue. In effect, the Union states that the Company represented that its decision to reclassify the Grievant was based not just on the test, but also on the fact that the Grievant could only perform limited functions in the Veneer Department. The Union initially agreed, but changed its position when the Grievant stated that he in fact had much more comprehensive skills. The Company denied making any such representation and the notes of Hartley Arsta chronicling the meeting on November 27, 2006 between the Company and the Union regarding the Grievant make no mention of any such consideration, although it is clear in the November 29 meeting notes that the Union felt differently. The Company's position is supported by the fact that its dealings with the Grievant were consistent with how it dealt with other employees who did not pass the test, regardless of their skills. And again, whether the

Union did or did not agreeto the Grievant's reassignment is irrelevant to the Employer's authority to do so based on its assessment of his qualifications or lack thereof. In sum, therefore, I do not find that the Company's use of a written test to determine qualifications for the Operator A position was arbitrary, capricious, or discriminatory, either generally, or as it was specifically administered to the Grievant.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The Company did not violate the contract when it determined that the Grievant was not qualified for an Operator A position and reclassified him as a General Helper. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 29th day of February, 2008.

John R. Emery /s/
John R. Emery, Arbitrator

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