

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**CARPENTERS INDUSTRIAL COUNCIL, LOCAL 1363**

and

**COMBINATION DOOR COMPANY**

Case 9  
No. 67958  
A-6327

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**Appearances:**

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

Edgarton, St. Peter, Petak & Rosenfeldt, by **Attorney John A. St. Peter**, 10 Forest Avenue, Suite 200, Fond du Lac, Wisconsin 54936-1276, on behalf of the Employer.

**ARBITRATION AWARD**

At all times material, Carpenters Industrial Council, Local 1363 (herein the Union) and the Combination Door Company (herein the Company) were parties to a collective bargaining agreement covering the period from June 1, 2007 to May 31, 2011. On April 21, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the Company's failure to recall Becky Fink (herein the Grievant) from layoff status ahead of a less senior employee. The undersigned was appointed to hear the dispute and a hearing was conducted on June 20, 2008. The proceedings were not transcribed. The parties filed briefs by July 20, 2008, and on August 6, 2008 informed the Arbitrator that they would not be filing replies, whereupon the record was closed.

**ISSUES**

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

Did the Company properly apply Article 7, Section 2 of the collective bargaining agreement on or about March 10, 2008, when it elected to bring back Bob Sabel from layoff over Becky Fink?

The Employer would frame the issue as follows:

At the time the position needed to be filled, did Becky Fink have both the ability to perform, and could she perform, the work in an efficient and satisfactory manner?

I characterize the issues as follows:

Did the Employer violate Article 7, Section 2 of the collective bargaining agreement when it recalled Bob Sabel from layoff on or about March 10, 2008 instead of Becky Fink?

If so, what is the appropriate remedy?

### **PERTINENT CONTRACT LANGUAGE**

#### **ARTICLE I – RECOGNITION**

Section 2. Management Rights. The parties agree that, except as modified and limited by this agreement, the management of the Company and its business and the direction of its working force is vested exclusively in the Company, and that this includes, but is not limited to, the following: to direct and supervise the work of its employees; to hire, promote, transfer, classify or lay off employees or demote, suspend, discipline or discharge employees; to plan, direct and control operations; to determine the amount and quality of the work needed, by whom it shall be performed, to determine to what extent any process, service or activities of any nature whatsoever shall be added, modified, eliminated or obtained by contract with any other employer, to modify or eliminate existing service practices, methods and facilities, to schedule hours of work and assignment of duties; and to make and enforce reasonable rules and regulations.

. . .

#### **ARTICLE VII – Seniority**

Section 2. Lay-off and Rehiring. Seniority will be plantwide for all employees and shall be based on the length of service with the Company except for Shop Stewards who have super seniority. When laying off or rehiring, the Company shall observe the principle of seniority, except as modified by this agreement, provided the senior employee has the ability to perform and can

perform the available work in an efficient and satisfactory manner. The Company agrees to give as much notice as possible to any employee or group of employees in case of recall, promotion or transfer, and a three (3) day notice in case of layoff except for an emergency. All probationary employees must be layed [sic] off before the normal work week is reduced below forty (40) hours, unless the reduction in hours is because of an extended weekend in which Monday or Friday are a paid holiday. In case of a layoff, it is the responsibility of the employee to keep the Company notified as to a change of address or telephone number.

. . .

#### **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**

The Combination Door Company, the employer herein, has been in the business of making wooden doors for commercial and residential uses for many years. At its production facility in Fond du Lac, Wisconsin it employs a number of different classifications of employees to manufacture its products and perform various other functions in the plant. The employees are members of Carpenters Industrial Council, Local 1363. Becky Fink, the Grievant herein, has been employed by Combination Door for over twenty-five years and, at the time of the events giving rise to the grievance, was working as a Machinist. In the past, she has worked as an Off-Bearer, has done double-hung assembly and has worked as a Material Handler, filling in for others while they were on leave or vacation. During early March, 2008, the Company was experiencing a slowdown and had laid off a number of employees, including the Grievant. At that time, the Company had a need for a few workers during the week of March 10-15 to handle some orders, and specifically had a need for a Material Handler. The Company recalled Robert Sabel, who was classified as a Material Handler, instead of the Grievant, even though she had greater seniority. A grievance was filed, alleging that the Company had violated the contract by not recalling the Grievant first, in that she was the more senior employee and was qualified to do the available work. The Company denied the grievance and the matter was processed through the contractual grievance

procedure to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union asserts that Article VII, Section 2 governs recalls from layoff and reveals that recalls are to be based on plantwide seniority based on the numbers of years worked for the Company. The language does not permit calling back junior employees merely because the available position happens to be within their classifications. It also does not permit the Company to recall employees based on relative ability to perform the work. It is clear that the Company must recall the most senior employee who has sufficient skill and ability to do the work efficiently and satisfactorily.

The Grievant has worked as a Material Handler on many occasions in the past, sometimes for extended periods. There has never been a question about the quality of her work and she has demonstrated the skill and ability to perform the functions of the position. There is no reason to believe her work in the future would be of any lower quality. The Company may argue that her lack of forklift certification disqualifies her from working as a Material Handler, but this is not a valid criterion for several reasons. She has been certified to use a forklift in the past and knows how to use one. At one point, she was offered the position of Material Handler, but turned it down. There is also considerable evidence that the Company has ignored forklift certification for other employees in the past and apparently has not previously considered a current certification to be a requirement to operate one. There is no evidence in the record that Sabel was certified to operate a forklift on the days in question and the testimony of Plant Manager Mark Tautges as to his knowledge of employees' skills is not credible. Further, while it is true that the Union collaborated in developing the Job Evaluation Manual that specifies forklift operation as part of a Material handler's duties, it is also true that the Company has ignored forklift certification as a requirement in the past, so it should not be able to use this requirement arbitrarily as an excuse to not recall the Grievant from layoff status. The evidence reveals that the Grievant had sufficient ability to perform the duties of a Material Handler when Sabel was recalled and the grievance should be sustained.

#### **The Company**

The Company asserts at the outset that the right to determine skill and ability is reserved to management under its residual powers. Where fitness and ability are factors to be considered under a modified seniority clause, the Company is entitled to make such a determination and the standard of review in arbitration is whether its action was arbitrary, capricious, or discriminatory. The Union has the burden to prove not only that the Grievant was senior to Robert Sabel, which is uncontested, but also that she had the ability to perform all the functions of the Material Handler position, without a trial or break-in period, in an efficient and satisfactory manner. The Union failed to meet its burden.

Here, while Sabel was less senior than the Grievant at the time of his recall from layoff, he was the most senior Material Handler on layoff status. One of the specific duties of a Material Handler is forklift operation. A Machinist, such as the Grievant, is not required to operate forklifts. As of March 10, 2008, the Grievant was not certified to operate a forklift and had not done so for over 3½ years. When she has subbed for other Material Handlers in the past, others drove the forklift and there is no evidence that she has ever performed all the functions of a Material Handler. Company Supervisor Keith Krueger testified that the Grievant cannot operate a forklift, keep machines supplied and relieved of materials without assistance, or operate the gang rip saw or planer without assistance. To provide the Grievant with extra assistance to perform the job would not be efficient and the Company is under no obligation to accommodate her. The Company supervisors are in the best position to know whether an employee is competent to do a particular job and the Arbitrator should defer to their superior knowledge and expertise.

The Company was also motivated by valid safety concerns. OSHA regulations require the Company to provide a safe workplace. Driving a forklift is inherently dangerous, a fact which id acknowledged in the Job Evaluation Manual approved by the Union. The Grievant has not operated a forklift in 3½ - 4 years and there is no provision for a break-in or training period. Given the risk, the Company acted reasonably when it did not recall her to the Material Handler position.

Finally, it is the Company's prerogative to decide, as set forth in the Management Rights clause, to select workers for a job who have the skill and ability to do the work satisfactorily and efficiently. This discretionary decision can only be revered if it is found to be arbitrary, capricious, or discriminatory. The Job Evaluation manual, which is incorporated into the contract by reference supports management's decision and the Union cannot not now disavow it. The Company is not repudiating the concept of seniority, but asserts that its action was within its purview under its management rights and served to promote the safety and welfare of the employees as well as the best interests of the business. The grievance should be denied.

### **DISCUSSION**

In this case, the Grievant, a Machinist, was on layoff status at a time when the Company needed an employee to work as a Material Handler. Another employee, who was a Material Handler, but who was also less senior than the Grievant, was recalled instead. The collective bargaining agreement provides for plantwide seniority and has a modified seniority clause for purposes of layoffs and recall, providing that in cases of recall the most senior employee on layoff status who is capable of doing the available work in a satisfactory and efficient manner will be recalled first. This is what is commonly known as a sufficient ability clause, which does not require that a senior employee be the most qualified to do the work, or even relatively equal in ability to a less senior employee, but only need be minimally qualified.

The Company points out that the contract is silent as to who the decision maker is with respect to qualifications and that, in such cases, this is a right typically reserved to management. As such, management has wide latitude with respect to making such decisions. I agree. As I have observed in the past, "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." BAY AREA MEDICAL CENTER, WERC Case 19, No. 66488, A-6259 (Emery, 1/22/08).

Here the Company has clearly enunciated its position that it properly exercised its discretion in recalling Brian Sabel instead of the Grievant to work as a Material Handler on March 10. It argues that she was not minimally qualified to perform the functions of the Material Handler position and, therefore, was not entitled to recall, despite her greater seniority. In particular, the Company claims she is not qualified to operate a forklift, which it describes as an essential core function of the position.

The Company has listed the minimum requirements for the Material Handler position, as follows:

**Material Handling/RF Gluer Operator B**  
**Minimum Requirements**  
7-31-07

Supervisor \_\_\_\_\_

Trainer \_\_\_\_\_

Employee Name \_\_\_\_\_

The following skills have been determined to be necessary to maintain or achieve B status. Both the supervisor and the trainer if applicable, by their signature will verify that the employee has demonstrated each skill to an acceptable level of proficiency.

Must be able to proficiently and completely perform 1 of the following jobs.

- |  | Date Achieved |
|--|---------------|
| 1. Shipping  |               |
| a. Safely operate forklifts                        | _____         |
| b. Be familiar with all products, names and number | _____         |
| c. Be familiar with all aspects of cartooning      | _____         |
| d. Crating/packaging for common carrier shipments  | _____         |
| e. Properly load and unload trailers               | _____         |

2. Receiving
  - a. Safely operate forklifts \_\_\_\_\_
  - b. Keep machines supplied and relieved of materials \_\_\_\_\_
  - c. Check and tag incoming materials \_\_\_\_\_
  - d. Keep clip boards and chalk boards up to date \_\_\_\_\_
  - e. Be familiar with all raw materials and their locations \_\_\_\_\_
  - f. Setup and operate chop saw, radial arm saw, gang  
rip saw, and planers meeting their standards \_\_\_\_\_
3. RF Gluer Operator
  - a. Understand all setup, gluing and cleanup operations \_\_\_\_\_
  - b. Understand proper gluing settings \_\_\_\_\_
  - c. Understand glue application and mills of glue needed \_\_\_\_\_
  - d. Meet or exceed minimum production standards \_\_\_\_\_
  - e. Inspect materials for defects and glue joint issues \_\_\_\_\_

By the signature below, we verify that the above named employee has demonstrated the skills required to be classified at the A level

_____ Supervisor	_____ Date	_____ Trainer	_____ Date
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Clearly, operation of a forklift is a core function of the Material Handler position. Not only is it listed as such in the job description contained in the Company's Job Evaluation Manual (Jt. Ex. #4), but virtually every witness testified that Material Handlers operate forklifts to move materials as part of their routine daily duties and the Company asserts that Material Handlers are required to be certified in forklift operation. The Company points out that forklift operation is not a required skill for the Machinist position and that the Grievant is not currently certified to operate a forklift, nor has she operated one for at least 3½ years. For these reasons, the Company asserts that she is not competent to operate a forklift and, therefore, she was not entitled to be recalled on March 10 to work as a Material Handler.

Ability to perform the core functions of a job seems to me to be the essence of the concept of minimum qualifications. Thus, ordinarily, the foregoing analysis would dispose of the issue as long as management's exercise of its discretion was not impermissibly flawed. There is, however, additional evidence which complicates the situation. The uncontroverted testimony of the Grievant was that she has, in fact, worked as a Material Handler on several occasions over the years, usually filling in for another Material Handler who was on vacation or sick leave. In approximately 2003, she worked as a Material Handler for 6-8 weeks while Brian Sabel was off work due to a heart ailment. Most recently, she had been assigned to work as a Material Handler for another absent employee on February 4, 2008 and February 27, 2008, within a few weeks of the events at issue herein. She further testified that she was certified for forklift operation from 1998-2001, at which time her certification lapsed, but that she had received additional forklift training as recently as 2005. She has been required

to operate a forklift since her certification lapsed in 2001, although she could not recall if she did so on either Feb. 4 or Feb. 27. She stated that she has never gotten complaints about her work as a Material Handler. As recently as May 2005, she was offered a position as a Material Handler, but turned it down because it would have resulted in a reduction in wages. Accepting management's contention that the contract provides for no trial or break-in period, and that an employee starting a new job must be able to perform it adequately from the outset, one assumes that by offering the Grievant the Material Handler position, management believed at the time that she was qualified to do the job. The Grievant's co-workers, Patrick Disterhaft, Gerald Ford and Jason Bellmer, all testified to the Grievant's ability to operate a forklift and perform the other functions of a Material Handler based on personal observation.

In addition to the foregoing, there was no testimony from any of the management witnesses indicating any performance problems when the Grievant had worked as a Material Handler in the past. One of those witnesses, Keith Krueger, is the Grievant's foreman and, although he supported management's decision in this instance, because he believed Sabel to be the more qualified employee, testified that he had assigned the Grievant to work as a Material Handler in the past and, in fact, had assigned her to that position on February 4 and February 27. In that regard, he stated that when she was working as a Material Handler he assumed she performed whatever tasks she was assigned and that he had no recollection of any concerns about her performance. Plant Manager Mark Tautges, who made the decision to recall Sabel over the Grievant, stated that her inability to operate a forklift was the disqualifying factor. Nonetheless, he too stated that he was aware the Grievant had previously been assigned as a Material Handler and was unaware of any concerns regarding her abilities or performance. Jeffrey Orme, Vice-President of Marketing and Sales, testified that he spoke to the Grievant after the grievance was filed and that she told him she would need a refresher before driving a forklift. The Grievant disputed this, but, in any event, the conversation occurred after the event and could not have been used by management in assessing the Grievant's ability to do the work.

It is true that the Grievant was not certified to operate a forklift on March 10, 2008 and Tautges was aware of this when he recalled Sabel. The certification process is apparently a recommendation promulgated by the Occupational Safety and Health Administration (OSHA), which suggests recertification every three years. It appears, however, that the Company regards this as a guideline rather than an absolute. Union Ex. #1 lists employees scheduled to work the week of March 10. Disterhaft testified that the forklift certifications for seven of the employees on the list had lapsed in September 2007 and had not been reissued by March 10. Further, Sabel's certification had lapsed, as well. Material Handler Jason Bellmer testified that on the day of the hearing he was operating a forklift, despite his certification having previously lapsed, although Tautges had previously maintained that his certification was in force.

It appears to me based on all the facts in evidence that, while the Company was within its rights to make the determination as to the Grievant's qualifications as a Material Handler on March 10, it did so in an impermissibly unreasonable manner. I make this finding because the



sole criterion upon which this decision was based appears to have been the Grievant's qualifications as a forklift driver, or lack thereof. Yet the same managers who made this decision had assigned her as a Material Handler in the recent past, without any apparent problems or concerns, and the Company could cite no change in conditions, circumstances, or requirements as of March 10 that would have made her less qualified than on February 4, or February 27. While it may be true that she didn't operate a forklift on those occasions, it was clear that she was assigned to work as a Material Handler and, by Krueger's own admission, would have had to perform any necessary function, including, presumably, operating a forklift if called upon to do so. It seems to me that when the Company's recalled Sabel on March 10 it did so by interpreting the recall language as being, in effect, a relative ability clause, rather than as a sufficient ability clause. Since Sabel had, in their opinion, superior ability, he was recalled despite his lower seniority. The Company's discretion in determining qualifications does not permit this. Where there is language establishing plantwide seniority for purposes of recall, accompanied by a sufficient ability clause, the most senior employee who can meet the minimum qualifications for the job is entitled to be recalled. The evidence establishes that as recently as two weeks previously the Grievant was considered by her supervisor to be capable of working as a Material Handler. There is, in my view, no credible evidence in the record supporting the Company's contrary determination here based on a proper application of the facts to the contract language.

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

### **AWARD**

The Employer violated Article 7, Section 2 of the collective bargaining agreement when it recalled Bob Sabel from layoff on or about March 10, 2008 instead of Becky Fink. The Company shall make the Ms. Fink whole by paying her for all hours to which she was entitled had she been recalled on March 10 and thereafter at her regular rate of pay in effect at the time.

The arbitrator will retain jurisdiction for a period of thirty days to resolve any issues arising in the implementation of this award.

Dated at Fond du Lac, Wisconsin, this 6th day of October, 2008.

John R. Emery /s/

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John R. Emery, Arbitrator

JRE/gjc  
7351

