

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CONSTRUCTION AND GENERAL LABORER'S
LOCAL UNION NO. 330, AFL-CIO**

and

SPANCRETE INDUSTRIES, INC.

Case 22
No. 68787
A-6364

(Seniority Layoff/Recall Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, by **Attorney Mathew R. Robbins**, 1555 North RiverCenter Drive, Milwaukee, Wisconsin 53212-0993, appearing on behalf of the Union.

Gill & Gill, S.C., by **Attorney Patrick P. Gill**, 128 North Durkee, Appleton, Wisconsin 54911, appearing on behalf of the Employer.

ARBITRATION AWARD

The Construction and General Laborer's Local Union No. 330, AFL-CIO, hereinafter referred to as the Union, and Spancrete Industries, Inc., hereinafter referred to as the Employer or the Company, are parties to a collective bargaining agreement (Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the layoff and recall of certain employees, hereinafter referred to as the Grievants. The undersigned was appointed as the Arbitrator. A hearing into the matter was held in Valders, Wisconsin, June 1, 2009, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed and is the official record of the hearing. The parties filed post-hearing briefs by July 30, 2009 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUE

The parties were unable to stipulate to a statement of the issue and asked the Arbitrator to frame the issue.

The Union would frame the issue as follows:

Did the Company violate the agreement, the collective bargaining agreement, by laying off employees out of seniority and by simultaneously recalling certain employees?

If so, what is the appropriate remedy?

The Employer would frame the issue as follows:

Did the Company comply with Article 5, Section 1, of the CBA in its layoff and recall of certain bargaining unit employees in March 2009?

If not, what is the appropriate remedy?

The Arbitrator adopts the issue as set forth by the Union.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5. SENIORITY

Section 1. Seniority shall be determined by length of service. In laying off employees because of reduction of forces, the employees shortest in length of service shall be laid off first, provided those retained are capable of carrying on the Company's usual operations. In re-employing, those employees having the greatest length of service shall be called back first, provided, in the opinion of the Company, they are qualified to perform the available work.

BACKGROUND

Spancrete Industries, Inc. is engaged in the construction of multiple building projects and operates a number of facilities at various locations, including a plant at Valders, Wisconsin. The issues giving rise to this grievance relate to its operation at Valders. In September, 2008, the Valders plant employed about 151 Local 330 unit members. Between September, 2008 and March 20, 2009 many of the Company's projects had been placed on "hold" or had ceased operations completely due to poor economic conditions. Consequently a number of union members had been laid off, and by February of 2009 only about 40 of the original 151 remained on the job. On March 23, 2009, the Company found it necessary to lay off additional employees in its wetcast operation. Prior to March 23, two of the Company's

projects, originally intended for production at different locations, had been moved to the Valders location in order to provide work for the majority of the roughly forty remaining employees. These two projects were referred to as the “Sayle Street” project and the “Hurricane Home” project.

THE PARTIES’ POSITIONS

The Employer

This case involves a “modified strict seniority clause”. As such, the Union suggests that the burden of proof is of a ‘shifting’ nature such that the Union needs to establish that senior people were laid off in favor of less senior people and , once having proved that, the burden shifts to the Employer to justify its actions in doing so. While the Employer agrees that we are dealing with a modified seniority clause, it proposes another approach to analyzing the case. The Employer simply urges the Arbitrator to consider all of the evidence and arguments of the parties and “decide from a consideration thereof whether the [Employer’s] determination should be upheld.” This is the best approach because this case is complicated and may not be properly analyzed with the use of a defined test or criterion. Using this approach it is clear that the Employer has proved that it was justified in its actions. Even using the standard as suggested by the Union the actions of the employer must still be deemed appropriate.

The Employer followed the provisions of the Agreement in determining who should be laid off and recalled at the March 20, 2009 meeting. The Employer does not dispute that it deviated from strict seniority in determining the layoffs, but the agreement allows for this. It says “. . .in laying off employees because of reduction of forces, the employees shortest in length of service shall be laid off first, provided those retained are capable of carrying on the company’s usual operations.” During the twenty days prior to the layoffs the production levels were not where they needed to be due to the work of the then working senior employees. Hence the Company was not working at a level which constituted its “usual operations.” Substantial re-work was required in its forming process; estimates were not being met; production was slow and getting behind; there were issues with caulking and lack of knowledge in the wet cast area; the frequency of errors was high and there was an inability or inexperience reading blue prints; problems with form preparation in terms of puttying and sealing the forms; framing work was taking twice as long as normal. Work was not being done at the level of quality or the efficiency needed. All of these things evidenced that the Company was not enjoying “usual operations.”

In order to rectify these problems, the Company gave the existing work force a three to four week period for evaluation and improvement. It engaged in a systematic evaluation of all employees working at the time to determine who was best suited to return operations to business as usual or “usual operations.” It also created a skills matrix to confirm management’s assessment of the people currently working. This matrix looked at seniority, attendance, personal file review points and special skills with the most important skills considered being those that the Company felt were important for it to return to usual

operations. All of this was an opportunity for the working employees to show the Company that it could do the job necessary to return to usual operations. Although the company kept some more senior employees it found that a number of the senior people “were not where they needed to be in order to permit the Company to return to “usual operations.” So, some of the more senior people who fell short in the skills department were laid off and some less senior people who had the skills required to return the Company’s status to “usual operations” were recalled.

There have been at least sixteen prior incidents in which there had been a need to deviate from strict seniority, none of which were grieved.

The Union’s argument that slow performance (by the more senior people) should have been acceptable to the Company because the projects at the time were prototypes is without merit. The productivity increased by 24.5 percent following the layoff and recall. Also, every product is based on an estimate and when work is not getting done as estimated the Company is unable to conduct business as usual. The Union was not able to rebut that prior to the March reduction the Company was not operating at a level of “usual operations” or that more senior crew could have achieved this level. It also failed to establish that the reasons proffered and the method by which the Company selected individuals to return to business as usual was flawed. After the changes were made business did return to usual levels and production was more organized with production levels increased.

The Company followed the CBA’s provisions when determining who to recall during the March 20, 2009 meetings. The four individuals selected to be recalled could accomplish the Company’s goals of boosting production and returning to usual operations. The language in the CBA states that: “In re-employing, those employees having the greatest length of service shall be called back first, provided in the opinion of the Company, they are qualified to perform the available work.” Each of the re-employed workers had special skills which were above the ability of those laid off and, while less senior, they could boost production and bring the Company back to usual operations.

The Union did not clearly articulate who was aggrieved. At the hearing the Union argued there were thirteen aggrieved members whereas the Request to Initiate Grievance document identified seven. The Union agreed that there were instances when deviations from strict seniority were allowed when special skills were needed and further agreed that eight of them had special skills. When the special skills people are subtracted out there are significantly less than 13 remaining.

The grievance should be denied.

The Union

The Company violated Article 5, Section 1 of the CBA when it retained six employees and recalled for others with less seniority. This is a “sufficient ability” clause and, as such, it

is the Employer's burden to prove that any deviation from seniority is necessary because the bypassed employees are not competent to do the job. The fact that a junior employee is more competent is irrelevant.

The terms of the CBA prohibit the Company from deviating from (strict) seniority unless the senior employees are incapable of "carrying on the Company's usual operations." Also, the CBA prevents the Company from recalling less senior employees when more senior employees are "qualified to perform the available work." The Company has failed to prove that the more senior employees were unqualified or incapable to perform the available work. None of the employees in wetcast had ever been disciplined for doing their work poorly and by April 20, 2009 they were returned to work suggesting that the Company viewed them as qualified and capable.

The Company failed to show that the six employees retained out of seniority had special skills which made it proper to deviate from strict seniority. In any event, that argument ". . . fails to address the actual issues of this case: whether or not the *senior* employees it laid off *lacked* the capability to carry on the Company's usual operations, and whether those same employees *lacked* the qualifications to perform the available work." Special skills are irrelevant. "Only the minimal qualifications and capabilities of those improperly laid off employees are relevant." The employees laid off out of seniority were capable of performing the work necessary for the Company to continue its usual operations.

Spancrete improperly compared the relative abilities of its employees when determining which employees it would retain and which it would recall. Under a "sufficient abilities" clause senior employees are entitled to retain their position so long as he or she meets the minimum qualifications. It is improper for the Company to engage in comparisons between employee's performances and qualifications. As a result, "a senior qualified employee will be entitled to preference even though a junior employee possesses greater skill and ability." Citing *BABCOCK & WILCOX*, 117 Lab. Arb. Rep. 601, 606 (Howell, 2002); other cites omitted. The senior employee must only possess minimum qualifications and necessary abilities in order to prevail. *SHIELDING SYSTEMS CORPORATION*, 98 Lab. Arb. Rep. 209 (Torres, 1991). In choosing four individuals currently on layoff that it felt were "*more productive*" at wetcast than some of the existing employees, the Company violated this rule. Also, it improperly compared the relative abilities of its employees when it created the layoff matrix on March 20, 2008 to justify its layoff and recall decision. This matrix scored employees in the pivotal Green Categories based on a scale of one to five, with five being the highest possible score. A score of two did not mean the employee was incapable of performing the work. It meant only that the employee could not perform the work as fast as someone who scored a three in the same category. Consequently, the nature of the scoring rubric itself required the creators of the matrix to compare employees' relative abilities.

The Company's method of determining which employees were capable and qualified was arbitrary and unfair. "When a collective bargaining agreement grants the employer the right to determine whether an employee possesses qualifications and abilities under a sufficient

ability clause, but is silent with respect to *how* the employer is to make its determination, the employer must choose a method that is not unfair, unreasonable, arbitrary, capricious or discriminatory. CITY OF RED WING, 105 Lab. Arb. Rep. 1105; SWEETHEART CUP CORPORATION, 80 Lab. Arb. Rep. 289 (Kelliher, 1982). It is unclear what method Spancrete used to choose which employees to layoff, retain, and recall. While it appears it used the layoff matrix, it still fails as being arbitrary. It did not use a single objective factor creating the matrix. The only documents it used were attendance and discipline record, neither of which had a bearing on the layoff or recall decision. The evaluations were subjective and not limited to any set time frame. Management arbitrarily scored employees based on their general impressions, memories, and feelings about the employees' performances over an indeterminate, open-ended period of time.

The matrix was also patently unfair to employees. In the past it had never used such a matrix or the skill categories therein to determine which employees would be laid off, nor did it inform its employees it intended to use this matrix. Hence, the employees never knew they were being evaluated and compared to each other with respect to their "Wetcast Versatility, Wetcast Productivity, and Wetcast Forming" abilities nor were they given an opportunity to contest the results of the evaluation.

There is no past practice which validates the Company's position. To establish a binding past practice the Company must prove that the practice was "clear, uniform, consistent or repetitive, and accepted or condoned by both parties." This the Company has failed to do.

The Company's position would render the seniority clause meaningless. Special skills cannot mean that someone can work faster or more efficiently than another employee. Business as usual cannot mean "at the highest level of efficiency." The Company had the burden of proof to justify its deviation from modified seniority and has failed to prove that it could not continue operations with the more senior employees. The grievance should be sustained, the employees made whole and the Arbitrator should retain jurisdiction in the event the parties are unable to work out the remedy.

The Employer's Reply

The Company established that the laid off employees were incapable of performing the work necessary for the Company to operate as usual. The testimony clearly reflected that the Company was not enjoying "usual operations."

The Union has never identified the aggrieved persons while the Company evaluated all working employees in its effort to determine who would be laid off. Testimony shows that one such employee admitted that he was not able to do the work required. The conduct of the Company in deciding who would be recalled was consistent with the CBA which placed the decision solely in the hands of the Company. The Union was not able to rebut this.

Spancrete's comparison of the relative abilities of its employees was appropriate. The Union's argument that employees needed only to meet minimum qualifications is inapplicable to this situation. The CBA sets forth specific standards for employee evaluation in instances such as this. It allows the Company to deviate from strict seniority when, in the opinion of the Company, the most senior employees are not qualified to perform the available work. The Company's systematic evaluation, including a trial period, in conjunction with its consideration of seniority, was sufficient. No evidence suggests that the Company abused its discretion or used faulty judgement in its decision making. The Company's evaluation was fair and well reasoned. Special skills do warrant a deviation from strict seniority.

The aggrieved party is less than thirteen, if not zero. Of the thirteen laid off individuals, six were retained out of seniority. If one adds the four recalled individuals one gets ten affected people. Past practice establishes that special skills people were able to be retained without complaint from the Union. The Union recognized that eight of the retained employees had special skills so it is clear that less than thirteen employees were aggrieved, if any.

The Union's Reply

The employer bears the burden of proving that bypassed senior employees are not competent for the job where a collective bargaining agreement contains a sufficient abilities clause. (Citations omitted.) The Company's assertions that Article 5 does not contain a sufficient abilities clause but rather has some unique language which places the burden on the Union is wrong and it was not able to provide any arbitral authority for its position. Under a sufficient abilities clause the most senior employee should get the work if qualified to do the work. Article 5 is properly classified as a sufficient abilities clause and so the employer bears the burden of proving that its deviation from seniority was warranted. In spite of this, the Company asks the Arbitrator to hold that its was justified in deviating from strict seniority due to the state of the Company's production levels prior to the March layoff and recall. The language does not allow this deviation due to "the state of the Company" or because production levels are not as high as the Company would like. If the Arbitrator were to side with the Company he would have to re-write the terms of the CBA and he is not empowered to do that.

The Union clearly identified the aggrieved parties by name in its brief. All of the identified individuals were more senior than those recalled and the Company failed to show it did not recall these employees because it made an individualized determination that they were not qualified to perform the available work. Further, they are all aggrieved because the Company failed to show it laid them off because it made an individualized determination that they were not capable of carrying on the Company's usual operations.

DISCUSSION

The parties fundamentally disagree as to the nature of the seniority clause found in Article 5, Section 1 of the Agreement. The Union characterizes it as a “sufficient ability” clause, a type of modified seniority clause which generally provides that seniority controls layoffs and recalls if the most senior person is able to do the work available even if he or she is unable to do it as well or as fast as a less senior employee. In other words, even though a less senior person is able to do the work more efficiently than a more senior employee, but the more senior employee is *able* to do the work, albeit less efficiently, the more senior person should be given the work. Under a “sufficient ability” clause the Union argues that the skill and ability of the more senior employee vis a vis the skill and ability of the less senior employee is irrelevant so long as both are able to do the work. The Union is correct in its analysis of the “sufficient ability” clause. The Union also argues, again correctly, that under a “sufficient ability” clause it is the Union’s burden to show that layoffs/recalls deviated from strict seniority and, once having shown that, the burden shifts to the Employer to justify its actions in deviating from strict seniority. The justification for such a deviation would be that the more senior employee was not capable of performing the available work at all, requiring that the more senior person be laid off in preference to a less senior one who was able to do the work or, in the alternative, a less senior person who could do the work be recalled in favor of a more senior person who could not do the work.

On the other hand, the Employer argues that Article 5, Section 1, while a modified seniority clause, is not a “sufficient ability” clause by virtue of the language of Article 5, Section 1. This language, says the Employer, allows it to consider the relative abilities of the employees to be laid off or recalled because it gives the Employer the sole right to determine who is qualified to perform the available work in order to carry on the Employer’s “usual operations.” Hence, the Employer argues that the Arbitrator should disregard a burden of proof standard in favor of a standard whereby the Arbitrator would examine the totality of the evidence “and from there determine if the Company’s decision should be upheld.”

In the instant case the parties have negotiated, in Article 5, Section 1, the following language:

Seniority shall be determined by length of service. In laying off employees because of reduction of forces, the employees shortest in length of service shall be laid off first, *provided those retained are capable of carrying on the Company’s usual operations*. In re-employing, those employees having the greatest length of service shall be called back first, *provided, in the opinion of the Company, they are qualified to perform the available work*. (My emphasis.)

The parties have thus agreed to modify the strict seniority restrictions by adding the above italicized language. Given this language it is not possible to pigeon-hole this clause by calling it a “sufficient ability” clause because the language specifically provides that an employee must be able to carry on the Company’s *usual operations* (i.e. business as usual) to

avoid layoff, and to be able to perform the available work *in the opinion of the Company* in order to be recalled. In this sense the clause is more of a “ hybrid” which characteristically gives consideration to both seniority and to relative ability. The Union suggests that the phrase “usual operations” gives no consideration to the level of productivity or to the quality of the work but only requires the senior employee be able to do the work even if it is at a reduced level of productivity and/or quality of performance normally enjoyed by the Company. Said another way, it suggests that the Company’s “usual operations” embraces work of inferior production and quality. On the other hand the Company concludes that “usual operations” means operations at a high level of quality and productivity. The Arbitrator agrees with the Company’s conclusion in this regard and the evidence unconditionally and without rebuttal supports this conclusion.

The question then becomes who makes the determination as to whether the current work force is able to conduct business as usual. The parties have clearly given the Company the sole right to determine who is qualified to perform the available work when determining who will be recalled following a layoff. Any recall certainly envisions recalling persons who *are capable of carrying on the Company’s usual operations*. So if it is the Company who decides who is capable of performing the available work to return the Company to usual operations upon recall it is obviously the Company who decides who will be retained to accomplish the same objective upon layoff. Any other construction of this language would render the second sentence in Section 1 meaningless since there would be no one to decide who is able to carry on the Company’s usual operations or what the term “usual operations” actually means. If this were the case, this clause would be nothing more than a strict seniority clause (at least with reference to layoffs) and neither side suggests this to be the case. Also, if I determined this to be the case, I would, in effect, be re-writing the contractual language, authority the Union rightly observes I do not have.

Based on the above, I do not find this clause to require only the “sufficient ability” to do the available work. It requires that the employees retained or recalled be able to do the available work at a level which brings the Company’s operations back to what the Company determines to be “usual operations.” In this case the Company determined that “usual operations” require a higher level of skill, production and efficiency than it was able to achieve with the employees it would have been forced to retain and recall if it had been subjected to the more restrictive “sufficient ability” standard the Union suggests. The proper standard relating to burden of proof is as the Company has suggested, i.e. that the Arbitrator look to the totality of the evidence and determine from it whether the Company’s actions were appropriate.

It is, of course, necessary that the actions of the Company be taken in good faith and not be arbitrary or capricious. It must also give consideration to both seniority and relative ability (skill). The weight accorded to each may vary from case to case given the facts of each. The evidence in this matter supports the Company’s position that it gave consideration to both seniority and to relative ability. After making its initial determination that business as usual or “usual operations” were not being met by the individuals it initially retained, it gave the retained (more senior) employees a number of weeks to bring their productivity and work

quality up to speed. The retained employees were not able to accomplish this goal due to their inability to do the available work assigned to them in a manner consistent with the usual operations of the Company. Mistakes were being made, estimates were being missed, the work in many instances was shoddy and below the standards normally maintained by the Company and jobs were taking much longer than they should have taken. The Company's quality control supervisor was required to assist them and to frequently look over their shoulder to correct their work. In general, productivity and product quality was poor. The Union argues that these problems should not have mattered because, especially in the case of the Hurricane House, this was a new prototype project and these types of problems should have been anticipated. And, in any event, says the Union, the employees retained were able to do the work and should have been given the work. This position ignores the fact that by contract it was the Company who determined what business as usual meant and that it decided it needed more highly skilled people to bring its operations back to that level. The Union did not rebut the evidence that, once the more highly skilled employees were recalled, the Company's operations did return to normal and its quality and productivity did substantially improve.

I do not find that the Company's actions were unreasonable, unfair or arbitrary. The Union faults the use of the "matrix" employed by the Company to aid it in determining which employees were most qualified to return to normal operations. The matrix was a tool developed by the Company's supervisors who considered the actual abilities of the employees recalled and gave serious consideration to specifically which people were best able to accomplish the Company's goal of returning its operations to business as usual. This approach is reasonable and fair and constitutes the antithesis of arbitrariness. As mentioned above, if the seniority clause in question were really a "sufficient ability" clause as the Union urges, the Union's argument would be correct, but it was not a "sufficient ability" clause.

The evidence does not support a binding past practice in this case nor does it have to. The language in the parties' Agreement is not ambiguous. It clearly gives the Company the right to make the determinations and decisions it made here. Thus, evidence of past practice is neither necessary nor appropriate. The language within the four corners of the Agreement is sufficient for the Arbitrator to determine its meaning without ambiguity.

Finally, the Union argues that the employees were not given an opportunity to contest the results of the Company's evaluations. The record demonstrates that they were given a number of weeks to show that they could perform the available work up to the Company's normal standards and that they failed to do so. The Company observed their performance and concluded that they were not up to the task. Once having made this observation further discussion would have been unnecessary.

In light of the above, it is my

AWARD

The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 18th day of September, 2009.

Steve Morrison /s/

Steve Morrison, Arbitrator