BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CARPENTERS LOCAL 2832 – CARPENTERS INDUSTRIAL COUNCIL

and

EGGERS INDUSTRIES, INC.

Case 70
No. 70812
A-6469

(Holiday Pay Grievance – Grievance 1117)

Appearances:

George Graf, Attorney, Gillick, Wicht, Gillick & Graf, 6300 West Bluemound Road, Milwaukee, Wisconsin 53213, appearing on behalf of Carpenters Local 2832.

Jonathan Levine, Attorney, Littler Mendelson, P.C., 111 East Kilbourn Avenue, Suite 1000, Milwaukee, Wisconsin 53202, appearing on behalf of Eggers Industries, Inc.

ARBITRATION AWARD

Carpenters Local 2832, Carpenters Industrial Council, hereinafter referred to as the Union, and Eggers Industries, Inc., hereinafter referred to as the Employer or the Company, requested a list of five arbitrators from the Wisconsin Employment Relations Commission from which to select a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' collective bargaining agreement. Raleigh Jones, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on October 14, 2011 in Two Rivers, Wisconsin. The hearing was transcribed. The parties submitted briefs by December 9, 2011, whereupon the record was closed. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following issue:

Under the terms of the parties' collective bargaining agreement, are the grievants and any other affected employees entitled to holiday pay for the Good Friday holiday on April 22, 2011? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2007-2011 collective bargaining agreement contained the following pertinent provisions:

ARTICLE I – Recognition

Section 1.

A. The East Plant and West Plant Divisions of Eggers Industries, Inc., hereinafter called the "Company", recognizes Union Local 1439 affiliated with the Carpenters Industrial Council of the United Brotherhood of Carpenters and Joiners of America, as the bargaining agent for all production and maintenance employees of the Company, exclusive of executive, administrative, office, and clerical workers and all supervisory employees with the authority to hire, discharge, discipline or effectively recommend changes in the status of employees.

. . .

ARTICLE V – Seniority

Section 1. New employees shall have no seniority until they have been in the continuous employ of the Company for five hundred (500) hours, after which such new employees' seniority shall be computed from the date of hiring. New employees shall be on probation for the five hundred (500) hour period and the Company shall have the right to lay them off or discharge them with or without cause.

Section 2.

. . .

Paragraph 4

Qualified employees laid off from either the East Plant Division or West Plant Division will be offered any job openings at the opposite plant before any new employees are hired. After five hundred (500) hours of employment at the opposite plant, the employee will receive full credit for all bargaining unit seniority.

. . .

Section 4. An employee shall not lose seniority rights.

. . .

(b) Employees who transfer after August 19, 2001 to a non-bargaining position will have up to six months to return to the bargaining unit with full Union seniority. If and when they again become a bargaining unit member, they will not have any seniority rights for five hundred (500) hours. After such time, they can immediately apply their seniority to job vacancies.

. . .

ARTICLE VIII - Vacation and Paid Holidays

. . .

Section 4. The following shall be considered paid holidays:

Memorial Day	New Year's Day
Fourth of July	Christmas Day
Labor Day	Christmas Eve
Thanksgiving Day	New Year's Eve
Day after Thanksgiving	Good Friday

One Personal Day, mutually agreeable to the Company and the individual employee, numbers 1 & 2 below will apply.

Eligible employees shall receive holiday pay for each of the above holidays. Holidays that fall on Saturday or Sunday shall be observed in the preceding or following week. This Holiday shall be observed following or preceding a non-work day. Pay for regular full-time employees shall be determined on the basis of eight (8) hours per day at the employee's permanently assigned rate. . .

All of the following requirements must be met in order to qualify for holiday pay for any of the above holidays.

1. Must have passed his probationary period.

2. Must be regular (i.e. neither probationary nor temporary).

. . .

ARTICLE XI - Vacancies

Section 1. When a vacancy occurs on some job within the plant and the Company decides to fill it, or in the event a new job develops, a notice of job vacancy will be posted on the bulletin boards before the job is filled unless it has been posted in the prior thirty (30) days. Any employee wishing to be considered for the job in question may fill out an application form and they will then be considered along with everyone else.

Employees will be eligible to bid for job vacancies in either plant (East or West). If a posting is not filled in the plant involved, then employees from either Division will be considered before the opening is filled from an outside source.

. . .

If the employee changes division through the job bidding procedure, after a five hundred (500) hour probationary period, the employee's full company seniority will transfer to the other division.

BACKGROUND

Prior to September, 2010, the Company operated two plants in Two Rivers, Wisconsin. They were known as the East Plant Division and the West Plant Division.

While the two divisions were covered by a single labor agreement, the divisions were separate and distinct operations. Each division manufactured different products that involved different machines and processes and required different job skills. Additionally, each division had different production standards enforced by different managers and supervisors. Additionally, each division had different hours of work and labor grades.

Because of these differences, and because the parties had agreed that movement by employees from one division to another could be disruptive, they had decided – via their contract language - to not make it easy for employees from one division to use their seniority to displace employees at the other division. The following shows this. Each division had separate seniority lists and were distinct units for purposes of seniority. Thus, cross-division bumping was prohibited. As an example, a long-term West Division employee facing layoff could not bump a junior East Division employee because West Division employees had no seniority rights at the East Division, and vice-versa. Additionally, employees were not permitted to bid on posted vacancies at the opposite division unless the Company was unable to fill the posting from within the division where the vacancy existed. When employees did move from one division to another, their moves were completely voluntary.

In 2010, the Company decided to close the West Plant Division plant and lay off the employees who worked there. Before that happened though, the parties engaged in effects bargaining. They had a bargaining session on August 9, 2010. In that meeting, the Union bargainers posed a variety of questions to Company bargainers about the impact of the West Plant Division closing. The next day, Company attorney Jonathan Levine sent Union Business Representative Greg Coenen an e-mail which contained the new positions the Company was creating at the East Plant Division and the wage rates that would be associated with those positions. Attached to that e-mail was a document the Company had prepared that purported to memorialize the questions which the Union had raised at the August 9 meeting and the responses which Company bargainers had given to them. That document provided in pertinent part:

> Q: When consolidating jobs into one department will total seniority of both plants be put together and given to the most senior in classification?
>
> A: Not sure what this question means regarding "given to the most senior in classification." East Plant employees would not be allowed to bid on the jobs being offered to West Plant employees. West Plant employees who accept job offers at the East Plant will need to pass the 500 hour probationary period in the contract before they have East Plant seniority. Once they pass their 500 hours, their East Plant seniority will be their total Eggers seniority.

Over the course of the next several days, Levine and Coenen exchanged several e-mails concerning the closing of the West Plant Division. In those e-mails, Coenen made various proposals regarding the rights the Union wanted West Plant Division employees to have if they were offered or recalled to jobs at the East Plant Division. In an e-mail on August 11, 2010, Coenen specifically proposed that the Company "Waive the 500 hour probationary period since the West and East plants are both learning new jobs." In that same e-mail, Coenen also proposed that West Plant Division employees be allowed to "bid on job openings immediately." The next day, Levine responded to Coenen's e-mail. In his response, Levine posed several questions to Coenen. One question was why did the Union want the Company to "waive the 500 hour probationary period." Coenen responded to that question by saying that the West Plant Division employees "fear that the Company is to bring them over to the East plant and say that they cannot do the job and lay them off and not recall them." Another question which Levine posed to Coenen in that same e-mail concerned the meaning of the Union's proposal for immediate job bidding rights. Specifically, Levine asked Coenen the following two questions:

> 3. When you say employees on layoff or transferred into the EP can bid on job openings immediately, what are you referring to? Are you referring to WP employees using their full seniority to bid against EP employees for openings?

Coenen responded to Levine's question number 3 by saying: "3) yes, there would be no probationary period."

The Company ultimately rejected all the Union's proposals.

On September 2, 2010, the Company closed the West Plant Division and laid off all the employees who worked there. Three of the employees who were laid off were John Finnel, Rick Hermann and Tom Reich.

. . .

Over time, the Company offered positions at the East Plant Division to laid off West Plant Division employees. Each time that happened (meaning each time a laid off West Plant Division employee accepted a recall to the East Plant Division), the Company notified the recalled employee that they were on probation for 500 hours. No grievances were filed challenging the Company's right to require those employees to pass another 500 hour probationary period.

After being on layoff status for about six months, Finnel, Hermann and Reich were offered and accepted positions at the East Plant Division. This happened between March 14 and 28, 2011. Like other laid-off West Plant Division employees who were recalled to the East Plant Division, those three employees were notified that they were on probation for 500 hours.

FACTS

At the hearing, the parties stipulated to the following facts:

1. The parties have a collective bargaining agreement.

2. The three employees involved in this case (John Finnel, Rick Hermann and Tom Reich) were employees in the West Plant which was closed on September 2, 2010. Those three employees were laid off.

3. The three employees were later recalled to the East Plant. Herman was recalled March 14, 2011, and the other two employees were recalled March 28, 2011.

4. After they were recalled, there was a holiday, namely Good Friday, (April 22, 2011), and the Company did not give the three employees holiday pay.

5. None of the employees involved had worked 500 hours at the East Plant as of the time of the holiday.

. . .

The Union grieved the Company's denial of holiday pay for the three employees referenced above. The Company denied the grievance, and it was subsequently appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union's position is that the grievants are contractually entitled to the holiday pay they were denied. As the Union sees it, its reading of the collective bargaining agreement (to grant the grievants' holiday pay) is supported by the contract language itself, common sense and accepted rules of contract construction. Conversely, the Union believes that the Company's reading of the collective bargaining agreement (to deny the grievants' holiday pay) is wrong. It elaborates as follows.

The Union begins its argument by noting that the holiday pay provision contains several eligibility requirements which must be satisfied in order to receive holiday pay. The Union avers that the eligibility requirements which pertain to this case are the first two, which provide thus:

1. Must have passed his probationary period.

2. Must be regular (i.e. neither probationary nor temporary).

As the Union sees it, all the grievants met those two requirements. This contention is based on the premise that those employees were not new hires. Rather, they were long term employees who, after being laid off from the West Plant, were offered job openings at the East Plant per Article V, Section 2, paragraph 4. The Union maintains that these employees retained their seniority. To support that premise, it notes that in the parties' factual stipulation, it said that the three employees were "laid off" employees who were "recalled" to the East Plant. According to the Union, these facts alone establish that the grievants met the two eligibility requirements enumerated above for receiving holiday pay. The Union summarizes its argument on this matter as follows: "Being seniority employees with recall rights, they obviously have long ago passed their probationary period and have to be considered 'regular' employees and cannot be classified as either 'probationary' or 'temporary' employees."

As part of its argument on this point, the Union disputes the Company's assertion that per Article V, Section 2, paragraph 4, the employees who were recalled to the East Plant were probationary (and thus not entitled to holiday pay). The Union contends that there is no language in that provision which demonstrates an intent to demote the incoming West Plant employees to "probationary" status or to deny them benefits such as holiday pay. Elaborating further, the Union notes that the Company relies on various communications that it (i.e. the

Company) had with the Union and bargaining unit employees in 2010 and 2011 to support its interpretation of Article V, Section 2, paragraph 4. The Union characterizes those documents as being self-serving statements of the Company's interpretation of the disputed contract language that have no probative value. To support that premise, the Union notes that the communications that the Company relies on all came into being many years after the contract language was inserted into the collective bargaining agreement. Aside from that, the Union also points out that following the exchange of e-mails between Levine and Coenen, each side was left with its own view of what the language meant. The Union submits that it never agreed with the Company's interpretation of Article V, Section 2, paragraph 4.

The Union contends that when the 500 hour language of Article V, Section 2, paragraph 4 is given its common sense meaning, it means that when the laid off West Plant employees were recalled to the East Plant, they could not use their full seniority to bump incumbent East Plant employees with less overall seniority out of their jobs until they had worked in the East Plant for 500 hours. Instead, the former West Plant employees had to be content with filling "job openings".

The Union argues that if the parties had intended to convert the status of the recalled former West Plant employees to that of "probationary" employees, they certainly knew how to do it because several contract provisions use those words (i.e. the words "probation" and "probationary period"). The Union emphasizes that the parties did not use either of those words in the last (i.e. the fourth) paragraph of Article V, Section 2. The Union then cites the following contract provisions. First, it points out that Article V, Section 1 spells out that "new employees" would have no seniority and "shall be on probation" for the 500 hour period. That same section also spells out that the Company has the right to lay off these new employees or discharge them with or without cause. The Union points out that no comparable wording is found in the last paragraph of Article V, Section 2, where the 500 hours is referenced with respect to laid-off employees moving to a different plant. Second, the Union cites Article XI, Section 1. That provision states that an employee changing divisions "through the job bidding procedure" must serve a 500 hour "probationary period". In other words, an employee who goes from one plant to another via "job bidding" must serve a probationary period. The Union contrasts this reference to a specific "probationary period" with the language in Article V, Section 2, paragraph 4 which does not use the phrase "probationary period". Third, the Union points to Article V, Section 4 which states that employees returning to the bargaining unit after transferring to a non-bargaining unit position will have no seniority rights for 500 hours. Finally, the Union notes that the language in Article V, Section 2, paragraph 4 is not new language; it has existed since the parties' 2004 collective bargaining agreement. The Union argues that when the foregoing contract clauses are read as written and considered together, the logical conclusion is that the grievants were not probationary employees within the meaning of the holiday provision (Article VIII).

The Union avers that that reading of the contract is supported by the normal rules of contract construction. It cites Elkouri for the well-known arbitral propositions that an arbitrator is not to ignore clear-cut contractual language, the contract is to read as a whole and

to mention one thing is to exclude another. It submits that when these propositions are applied to this case, it means that if the parties had intended to create a probation period in Article V, Section 2, paragraph 4, they would have so stated it as they did in other portions of the collective bargaining agreement. Since they did not, it's the Union's view that the arbitrator should not superimpose on Article V, Section 2, paragraph 4 a probation status for recalled employees where the parties have not written one.

Finally, the Union comments on the following matters. First, it notes that in the parties' 2007 bargaining, they added the word "Qualified" to the final (fourth) paragraph of Article V, Section 2. According to the Union, the addition of this word strengthens its case and further diminishes the Company's claim that the laid-off former West Plant employees were probationary. Here's why. By adding that one word, the Company assured itself that only already "qualified" employees were getting the chance to fill the vacancies in the East Plant, and the 500 hour provision protected incumbent employees from being bumped until the incoming employees got "full credit" for their seniority. Said another way, the laid-off West Plant employees were recalled to job openings at the East Plant, the Company made sure it got qualified workers, and the incumbent East Plant employees were protected from being bumped for approximately three months (i.e. until the recalled employees had worked at the East Plant for 500 hours). Second, it's the Union's view that Union Representative Coenen's testimony buttresses the Union's interpretation of the 500 hour provision in the last paragraph of Article V, Section 2.

In sum then, it's the Union's view that the laid-off former West Plant employees who were recalled to the East Plant were not probationary employees. Since they were not probationary employees, they met the contractual requirements for holiday pay and are entitled to same. The grievance should therefore be sustained.

Company

The Company's position is that the grievants were not contractually entitled to the holiday pay at issue. According to the Company, laid off employees who accept a job opening at the opposite division must pass another 500-hour probationary period in order to get their seniority back. The Company maintains that since the grievants were still probationary employees (meaning they had not passed their East Division probationary period as of April 22, 2011), they were not eligible for holiday pay for the Good Friday holiday. It elaborates as follows.

The Company argues at the outset that the burden of proving a contract violation is on the Union. The Company asserts that it's not enough for the Union to offer a plausible interpretation of the contract. Instead, the Company opines that the Union must prove by a preponderance of clear and convincing evidence that its contractual interpretation is the correct one, intended by the parties. It's the Company's view that the Union did not meet its burden of proving that its interpretation of the contract is the correct one, let alone a plausible one.

Next, the Company makes the following arguments about the contract language involved here. First, it notes that the holiday pay provision says that "in order to qualify for holiday pay", the employee "(1) must have passed the probationary period; [and] (2) must be regular (i.e. neither probationary nor temporary). . ." The Company maintains that this language means that probationary employees are not eligible for holiday pay. Building on that premise, the Company further maintains that the grievants were probationary employees. Second, the Company contends that the 500-hour service requirement appears in several places in the contract and has always been recognized, wherever it appears, as a "probationary period". It cites the following provisions to support that contention: Article V, Section 1 which contains the phrase "New employees shall be on probation for the five hundred (500) hour period. . ."; Article V, Section 4(b) which again references 500 hours; and Article XI which says that employees changing divisions through the job bidding procedure serve a "five hundred (500) hour probationary period." While the contract provisions just noted use the words "probationary period", the Company acknowledges that Article V, Sections 2 and 4 do not. Be that as it may, it's the Company's view that the 500 hour service requirement referenced in those sections is still a "probationary period." As the Company sees it, interpreting the "probationary period" as anything other than 500 hours would be illogical. The Company asks rhetorically if the 500 hour service requirement referenced in Article V, Sections 2 and 4 are not a "probationary period", what could they possibly be? As the Company sees it, the parties had no reason to add the words "probationary period" to the 500-hour service requirement in Sections 2 and 4 because those sections were already part of the same article in which "probationary period" was defined. The Company contends that the Union's argument that the 500-hour service requirement in Article V, Section 1 and Article XI is a "probationary period" but the same requirement in Article V, Sections 2 and 4 is not cannot be squared with the language itself when viewed in the context of the entire contract. The Company again asks rhetorically how can the 500-hour service requirement in both articles have the same purpose but have a different meaning? According to the Company, accepting the Union's argument would render the 500-hour service requirement in Article V, Section 2, paragraph 4 meaningless. It cites the standard arbitral principle that when an arbitrator is presented with alternative interpretations, one of which would give meaning and effect to the contract, while the other would render portions of the contract meaningless and ineffective, the arbitrator should apply the interpretation that would give effect to all provisions of the contract.

Next, the Company argues that if the arbitrator finds that Article V, Section 2, paragraph 4 is not clear, then he should review the parties' bargaining history to help him interpret the ambiguous language. According to the Company, the contract language at issue in this case has its roots in bargaining that took place in 2004 in anticipation of the Company's construction of and relocation to a new East Division. Among other things, the Union proposed that laid-off employees from one division be offered job openings at the opposite division before any new hire or part-time employees. The Union also proposed that employees be allowed to bid on vacant positions at the opposite division (if the posting was not filled from within the division) before the Company used an outside source. In either case, however, the Union proposed that employees changing divisions serve another 60-day probationary period

before gaining seniority rights at their new division. The parties ultimately agreed to a 500-hour probationary period instead of the 60-day period proposed by the Union in order to account for the fact that West Division employees worked four 10-hour days instead of five 8-hour days like the East Division employees. The Company avers that at the hearing, Coenen admitted that the key purposes of the 500-hour service requirement was to protect seniority, recognize the differences between the divisions, and limit potential disruptions by requiring employees moving to a new division to "prove themselves" again. As the Company sees it, when set against this bargaining history, the Union's claim that the 500-hour service requirement in Article V, Section 2, paragraph 4 of the current contract is somehow different than the 500-hour service requirement in Article XI (and is not a "probationary period") makes no sense, and is at odds with the parties' bargaining history. Thus, the Company believes that the parties' bargaining history also supports the Company's interpretation of Article V, Section 2, paragraph 4.

As part of its bargaining history argument, the Company also addresses what happened during the 2010 effects bargaining process (after the Company announced its decision to close the West Division and engaged in effects bargaining with the Union). Specifically, the Company points out that the Union proposed that the Company "waive the 500-hour probationary period." The Company asserts that the e-mails which were exchanged between the parties "confirm that the Union made these proposals because it understood the 500-hour service requirement in both Articles [V and XI] to be a 'probationary period' in the truest sense of the words." The Company notes that it ultimately rejected the Union's proposals because it did not want to waive its contractual rights. The Company believes that the Union's specific request that the Company "waive the 500-hour probationary period" is significant for two reasons. First, the Company sees it as further evidence that the parties had a mutual understanding and agreement that the 500-hour service requirement in Article V, Section 2, paragraph 4 is and always has been a "probationary period." Second, the Company cites Elkouri for the arbitral principle that a party may not obtain through arbitration what it could not acquire through negotiations. Building on the foregoing, the Company avers that if the arbitrator grants the grievance, he will be providing the very waiver of the 500-hour probationary period that the Union asked for during the 2010 effects bargaining process and did not get.

Finally, the Company addresses the fact that denying the grievants holiday pay seems to be an unfair result. The Company acknowledges that the grievants had worked at the West Division for a long time before they were laid off and subsequently recalled to the East Plant. Be that as it may, the parties had previously agreed in Article V, Section 2, paragraph 4 that when laid-off employees accepted jobs at the opposite division, they had to serve a 500-hour probationary period. According to the Company, that is not unusual because parties routinely bargain contract provisions which address the rights of employees who change job classifications or locations, including additional probationary periods. It maintains such is the case here. The Company therefore requests that the grievance be denied.

DISCUSSION

This case involves whether the grievants were contractually entitled to the holiday pay they were denied, so I'm going to start my discussion by first looking at the holiday pay provision (Article VIII). That provision contains several eligibility requirements which must be satisfied in order to receive holiday pay. The parties agree that the eligibility requirements which pertain to this case are the first two, which provide thus:

1. Must have passed his probationary period.

2. Must be regular (i.e. neither probationary nor temporary).

The reason these eligibility requirements pertain to this case is because the Company contends the grievants were probationary employees. The Union disputes that contention. Based on the rationale which follows, I find the grievants were probationary employees as of the time of the Good Friday holiday, and thus are not contractually entitled to holiday pay for that day.

My discussion begins by noting that while the words "probationary period" and "probationary" are used in the Article VIII language quoted above, those words are not defined in that contract provision. That being so, I obviously need to look elsewhere in the collective bargaining agreement to see if those terms are defined or given meaning anywhere else in the collective bargaining agreement.

They are, in Articles V and XI. The following discussion shows this.

The first sentence in Article V, Section 1 provides that "new employees" have no seniority until they've been employed by the Company for 500 hours. The next sentence in that section goes on to provide that during that 500 hour period, the "new employee" is on "probation", and the Company can lay them off or discharge them "with or without just cause". While this section does not explicitly define the word "probation", I think its meaning is nonetheless clear from its context. It means that for a certain period of time (namely 500 hours), the new employee is required to prove that he or she has the attitude, skill and ability to do the job and when certain contractual rights and protections (namely protection against arbitrary layoff and discharge) do not apply. In the labor relations community, this time period is generally called an employee's probationary period.

While some collective bargaining agreements provide that a probationary period only applies to brand new employees, parties sometimes bargain contract provisions that add additional probationary periods to other types of employees and/or situations (such as employees who change job classifications or locations). That's what the parties decided to do here. The following discussion about Article XI, Section 1, paragraph 4 shows this. In that provision, the parties also established a probationary period for those employees who change divisions "through the job bidding procedure." I think it stands to reason that someone who changes divisions via the job bidding procedure has to be an existing employee (as opposed to

being a brand new employee). That section, which deals with the filling of vacancies, specifically uses the phrase "probationary period". Once again, the service requirement that applies during this "probationary period" is 500 hours.

When the language of Article V, Section 1 is juxtaposed with the language of Article XI, Section 1, paragraph 4, we see that both provisions provide for a 500 hour service requirement period (also known as a probationary period). Once again, the former provision (i.e. Article V, Section 1) creates a probationary period for brand new employees (i.e. those employees whom I previously characterized as being hired right off the street) while the latter provision (i.e. Article XI, Section 1, paragraph 4) creates a probationary period for certain existing employees, namely those who change divisions through the job bidding procedure. In both instances, the employee is considered to be on probation for a certain time period. The time period is 500 hours.

Having reviewed that contract language, I'm now going to apply that language to the facts. The record shows that the employees involved here (i.e. the grievants) are not brand "new employees" within the meaning of Article V, Section 1. What I mean is that they were not hired right off the street, so to speak, in March, 2011. Instead, all of them used to work at the West Plant before it closed in September, 2010. When it closed, they were all laid off. Six months later, they were recalled from their layoff status to the East Plant. While the grievants certainly "changed divisions" within the meaning of Article XI, Section 1, paragraph 4, they did not do so "through the job bidding procedure". That being so, Article XI, Section 1, paragraph 4 does not cover their situation either.

The parties agree that the contract provision which applies to the grievants here is Article V, Section 2, paragraph 4. The first sentence in that paragraph provides thus:

> Qualified employees laid off from either the East Plant Division or West Plant Division will be offered any job openings at the opposite plant before any new employees are hired.

That's what happened here. As noted above, the grievants were laid off from the West Plant when it closed, and were subsequently offered jobs at the East Plant, which they accepted.

What's at issue here is whether those (recalled) employees had to serve another probationary period after they were recalled to the East Plant. The answer to that question depends upon the meaning of the very next sentence in Article V, Section 2, paragraph 4, which provides thus:

> After five hundred (500) hours of employment at the opposite plant, the employee will receive full credit for all bargaining unit seniority.

As the Company sees it, this sentence means that laid off employees who accept a job opening at the opposite division must pass another 500 hour probationary period in order to get their

seniority back. The Union disagrees. It argues that if the parties had intended to convert the status of the recalled employees to that of "probationary" employees, they certainly knew how to do it, and would have used more explicit language setting a probationary period (if that was their mutual intent).

It's true that the word(s) "probation" or "probationary period" are not used in the last sentence of Article V, Section 2, paragraph 4, or Section 4(b) the way they are in the contract language already reviewed (namely Article V, Section 1 and Article XI, Section 1, paragraph 4). While those exact words are not used in Article V, Section 2, paragraph 4 or Section 4(b), I think it's nonetheless clear that the 500 hour service requirement referenced in those sections is still a probationary period. Here's why. Interpreting the probationary period as anything other than 500 hours would be illogical. Article V, Sections 2 and 4 immediately follow Section 1. In other words, they are part of the same article. In Section 1, the probationary period is expressly defined as a 500-hour service requirement. Rhetorically speaking, if the same 500-hour service requirement expressed in Sections 2 and 4 is not a probationary period, what could it possibly be?

As the Union sees it, the 500-hour service requirement in the last sentence of Article V, Section 2, paragraph 4 is not a probationary period, but rather simply means that the recalled employees could not use their full seniority to bump incumbent East Plant employees with less overall seniority out of their jobs until they had worked in the East Plant for 500 hours. Instead, the former West Plant employees had to be content with filling "job openings" (for their first 500 hours at the East Plant). While the Union's proposed interpretation is plausible, that's certainly not how the Company reads the language. As previously noted, the Company reads that provision as saying that laid-off employees who accept a job opening at the opposite division must pass another 500-hour probationary period in order to get their seniority back. The Company's interpretation has an internal consistency about it that the Union's interpretation lacks. In saying that, what I mean is that the Union's interpretation gives the 500-hour service requirement a different meaning than what it has elsewhere. Once again, where the 500-hour service requirement appears elsewhere in the contract, it is recognized as a probationary period. That being so, I find that when the last sentence of Article V, Section 2, paragraph 4 is viewed in conjunction with the other contract provisions which recognize the 500-hour service requirement as a probationary period, it means that those employees who are recalled from layoff to work at the opposite plant have to serve another 500-hour probationary period. Said another way, the last sentence of Article V, Section 2, paragraph 4 demotes those recalled employees to probationary status until they have worked there (i.e. at the opposite plant) for 500 hours.

Next, I further find that the parties' bargaining history supports my interpretation of Article V, Section 2, paragraph 4. Bargaining history is a form of evidence arbitrators commonly use to help them interpret ambiguous contract language and ascertain the parties' intent regarding same.

First, I'll address the parties' 2004 bargaining history. The record indicates that the language in Article V, Section 2, paragraph 4 (with the exception of one word not relevant here), was negotiated in 2004 when the Company was in the process of constructing a (new) East Plant. Among other things, the Union proposed that laid-off employees from one division be offered job openings at the opposite division before any new hire or part-time employees. The Union also proposed that "after sixty (60) days of employment at the opposite plant, the employee will receive full credit for all bargaining unit seniority." The parties ultimately agreed to a 500-hour probationary period instead of the 60-day period proposed by the Union in order to account for the fact that the West Division employees worked four 10-hour days instead of the five 8-hour days like the East Division employees. When considered against this bargaining history, the Union's claim that the 500-hour service requirement in Article V, Section 2, paragraph 4 is somehow different than the 500-hour service requirement referenced elsewhere in the collective bargaining agreement makes little sense.

Besides the 2004 bargaining history just noted, there's also the matter of what happened after the Company announced its decision to close the West Division and the parties engaged in effects bargaining (over that decision). In that bargaining, the Union specifically proposed that the Company "Waive the 500 hour probationary period". While the Union never specified in the e-mail exchange which "500 hour probationary period" it was referring to (i.e. was it Article V, Section 1; Article V, Section 2, paragraph 4; Article V, Section 4(b); or Article XI, Section 1, paragraph 4), I'm persuaded that the Union was referring to those probationary periods for existing employees (as opposed to the probationary period for brand new employees). Building on that, I'm further persuaded that the reason the Union made this proposal to "waive the 500 hour probationary period" is because it understood that the 500-hour service requirement in all those provisions is a "probationary period" in the truest sense of the words, and it wanted the West Plant employees to not have to serve another probationary period if they were recalled to work at the East Plant. The Company rejected the Union's proposals. The Union now asks me to grant the result it did not get in negotiations in 2010. Were I to uphold the grievance – and find that those laid-off West Plant employees who were recalled to the East Plant did not have to serve another 500 hour probationary period – I would be giving the Union what it was unable to obtain through negotiations (i.e. waiving the 500 hour probationary period). It would be a circumvention of the arbitral process for me to grant a result that was unsuccessfully sought in bargaining. As Elkouri puts it, "in a nutshell, a party may not obtain through arbitration what it could not acquire through negotiation." (6th Ed., p. 454).

Having found that the grievants were probationary employees for another 500 hours after they were recalled from layoff from the West Plant and accepted jobs at the East Plant, it follows that they did not qualify for holiday pay for the Good Friday holiday in 2011. Accordingly, the grievance is denied.

In light of the above, it is my

AWARD

That under the terms of the parties' collective bargaining agreement, neither the grievants nor any other affected employees are entitled to holiday pay for the Good Friday holiday on April 22, 2011. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 15th day of February, 2012.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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