

the parties to act as the neutral member of the panel. During the hearing, evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties when it laid off the grievant, Del L. Soiney.

Post-hearing briefs were received by the neutral member of the panel of arbitrators on April 20, 2008. The neutral arbitrator requested a supplemental memorandum clarifying the parties' arguments on one of the issues raised in the original briefs, which he received on July 27, 2008. After the second day of hearing, on October 24, 2008, the parties presented additional post-hearing briefs, which were received by the neutral arbitrator on November 7, 2008.

The neutral arbitrator is the author of this Decision and Award and is responsible for the wording of its particular findings of fact and rulings. As noted below, however, one of the other members of the panel joins in the award, and one dissents from it.

FACTS

The Employer, an automobile dealer in Duluth, Minnesota, sells and services automobiles under franchise agreements with three manufacturers -- the Dodge Division of Chrysler Corporation ("Dodge"), Mitsubishi Motors North America, Inc. ("Mitsubishi"), and American Suzuki Motor Corporation ("Suzuki"). The Union is the collective bargaining representative of the non-supervisory employees of the Employer who work in the Employer's Service and Parts Departments, including those who

work in the classifications identified just below, in my reproduction of the job descriptions given in Article XIII, Section 12, of the parties' labor agreement. That agreement has a duration from May 1, 2004, through April 30, 2008. Hereafter, I may refer to it as the "current labor agreement" because it was in effect at the time of the grievant's layoff, in December of 2007.

The current labor agreement is one of a series of multi-employer labor agreements between the Union and the members of the Duluth Automobile Dealers Association (the "Association"). The Employer was one of six automobile dealers who, as members of the Association, bargained for and executed the current labor agreement, thereby agreeing with the Union to establish the terms and conditions of employment that apply to the classifications covered by the agreement. The labor agreement that preceded the current labor agreement, also a multi-employer agreement, had a duration from May 1, 2000, through April 30, 2004 (hereafter, the "2000-2004 labor agreement"). During the summer of 2008, between the two hearing dates in this matter, the Union and the Association negotiated a new multi-employer labor agreement, with a duration from July 17, 2008, through April 30, 2012 (hereafter, the "2008-2012 labor agreement"), which was executed by the Union and the Employer in late summer of 2008.

Article XIII, Section 12, of the current labor agreement establishes the following job descriptions for "Leadman Technician," "Automobile Technician, Class A," "Automobile

Technician, Class B," "Greaser, Washer, Rustproofer," "Lot and Storage Man," and "Semi-skilled Technician":

a. A Leadman Technician will perform as an advanced motor technician as described under the recognized journeyman classification contained herein, and, in addition, act as an assistant to the service manager when required and assigned to the premium classification by management. Duties in this capacity shall include acting as leadman, performing any phase of the work required, assigning work, maintaining records, filling out forms and making reports to management. A leadman may be required to diagnose and discuss service requirements, write up job tickets, schedule work into the shop and make work estimates. He shall not perform any disciplinary activity and shall hold seniority in accordance with the seniority provisions of this Agreement. It is understood and agreed that the working leadman shall hold seniority in accordance with his date of hire. This position shall be proffered to the incumbent employees in an establishment prior to the Employer hiring from without the bargaining unit. The working leadman's classification shall be non-incentive.

b. Automobile Technician, Class A [hereafter, merely "A Technician"], is one who is thoroughly familiar with automobile mechanisms and can perform major and minor repairs satisfactorily on motors, transmissions, differentials, ignition and lighting systems, cooling systems and other automobile parts and equipment, all without supervision, and who has had at least four (4) years' experience at the trade.

c. Automobile Technician, Class B [hereafter, merely "B Technician"], is one who has good working knowledge of automobile mechanisms and can perform major and minor repairs and adjustments satisfactorily under the supervision of the shop foreman, who shall have had at least two (2) years' experience at the trade.

d. Greaser, Washer, Rustproofer, is one who has thorough knowledge of automobile lubrication systems and techniques, who washes, polishes or simonizes automobiles, and who performs automotive rustproofing, undersealing, paint and fabric protection, and performs any combination of duties during at least half of his working time. In the event a man of higher classification is used as a temporary man for undersealing, he shall receive wages equal to his regular classification.

e. Lot and Storage Man, is one whose duties are to wash, clean and move new and used cars and do very minor work

on them such as minor adjustments, battery changes and starting of cars, but not to include mechanical or new car get ready.

f. [I omit the description of an "Errand Person," given in subsection f, because its text provides that this classification is not covered by the labor agreement.]

g. Semi-Skilled Technician, (non-incentive) The work performed by this classification will be limited to complete internal work for the Employer, new car get-ready, used car get-ready, used and new car body work. A Semi-skilled Technician and a [Greaser Washer Rustproofer] may perform certain installation functions on retail customer cars, [including battery testing, battery installation, tire rotation, head lamp alignment, wheel balancing, and other similar tasks].

On December 19, 2007, Burrell Nadeau, Manager of the Employer's Service Department sent the following letter to the grievant:

Due to changes in the market place and the corresponding decrease in the high-skilled work available in our shop, we find it necessary to eliminate the position of an "A" skilled Dodge Technician effective December 19, 2007. As the least senior "A" skilled Dodge Technician, your position is being eliminated as of the close of business December 19, 2007.

Under the provisions of Article 6, Section 4e, you have the right to exercise one "bump" by seniority. This "bump" needs to be exercised by 1:00 p.m. on [December 26, 2007]. Based on your training, you may exercise seniority to "bump" into the following classifications: Automobile "B" Tech, Semi-skilled, Greaser-Rust Proofer-Washer-Polisher and Lot and Storage. . . .

The grievant decided not to exercise bumping rights, and on December 26, 2007, he initiated the present grievance, alleging that his selection for layoff violated Article VI of the labor agreement.

The grievant was hired by the Employer on September 11, 1995, the date used to rank his seniority. At the time of his layoff, the Employer employed eight A Technicians, one B Technician and two Semi-skilled Technicians. Three A Technicians

were junior to the grievant -- Mark Heistercamp, whose seniority date was October 25, 2004, Steven Estby, whose seniority date was October 1, 1996, and Dale Taylor, whose seniority date was June 4, 1999. The sole occupant of the B Technician's classification was Jason King, whose seniority date was June 8, 1999. In addition, there were two Semi-Skilled Technicians junior to the grievant, Sarah Bolstad and Richard Story.

The grievant had been President of the Union for three years when the layoff occurred, and he was the Shop Steward for bargaining unit members employed by the Employer.

The following provisions of the current labor agreement are relevant to this dispute:

ARTICLE VI - SENIORITY

Section 1. Seniority shall be on a plant basis for technicians (including greasers, undersealers, lot and storage, washer, polisher and rustproofer), and on a departmental basis for parts department employees. In the event of a layoff or recall, bumping shall not be allowed between the Service Department and/or the Parts Department.

Section 4. Layoff and Recall. When there are layoffs, the following procedures shall be followed:

- a. All probationary employees shall be laid off first.
- b. [This subsection, which relates to layoff notices, is not relevant to the present grievance.]
- c. When an increase in force becomes necessary those employees who have been laid off shall be rehired in the reverse order of layoff. [The remainder of this subsection relates to partial recalls.]
- d. Any deviation on layoffs to maintain the guaranteed forty (40) hour work week must be by mutual agreement between the Union and the Employer.
- e. An employee will have only one (1) bump, seniority permitting, which must be exercised at the time of layoff.
- f. No overtime shall be worked during a layoff except in the case of an emergency.

Section 6. If further layoffs are necessary to maintain guaranteed forty (40) hour work week, employees shall be laid off in the reverse order of seniority on a plant

basis, (parts-departmental basis) provided there are employees who are competent to do the work of the employees displaced.

DECISION

First. Ambiguities in Article VI. No express provision of the labor agreement states an antecedent to the word "further" in the phrase that opens the single sentence of Article VI, Section 6* -- "If further layoffs are necessary." Though Section 4 establishes procedures to be followed when there are layoffs, the only express statement it makes about the order of layoff appears in its Subsection (a) -- that probationary employees are to be laid off first. Subsection (c) of Section 4 establishes the order of recall from layoff -- in the reverse order of layoff with preference given to senior employees in stated circumstances. This provision, though it does not expressly establish an order of layoff, implies that layoffs are to be in reverse order of seniority.

Thus, the single sentence of Section 6 states the order of "further" layoffs, but the agreement contains no provision that expressly states the layoff order for a layoff that precedes a "further" layoff. Nevertheless, the parties' arguments assume that Section 6 establishes the order and conditions that apply to any layoff, including the one at issue, and I adopt the parties' interpretation thus indicated -- that the contract required that the grievant's layoff occur in the order and under the conditions

* Hereafter, for ease of reference, I omit use of the article number when discussing the relevant contract sections, because all of those sections appear in Article VI.

stated in Section 6, i.e., "in the reverse order of seniority on a plant basis, (parts-departmental basis) provided there are employees who are competent to do the work of the employees displaced."

Second. The Appropriate Seniority Group. The parties do not agree, however, how employees are to be grouped when determining which employee is least senior and must be laid off first. Their disagreement centers on their differing interpretations of the phrase, "on a plant basis." That phrase appears both in Section 1, which states that seniority "shall be on a plant basis," and again in Section 6, which states particularly that layoffs (both "further" layoffs and, as discussed above, those that precede "further" layoffs) are to be "in reverse order of seniority on a plant basis." The full definition of the phrase is given in Section 1, as follows:

Seniority shall be on a plant basis for technicians (including greasers, undersealers, lot and storage, washer, polisher and rustproofer), and on a departmental basis for parts department employees.

A literal reading of this language would require the grouping of all classifications mentioned in one seniority group for purposes of layoff and recall. Thus, read literally, the phrase, "on a plant basis" would mean that virtually all bargaining unit employees in the Service Department are to be included in one seniority group as "technicians" -- the Leadman Technician, the A Technicians, the B Technicians and the Semi-Skilled Technicians, as well as the classifications referred to in the descriptive parenthetical that appears after the word

"technicians," i.e., "(including greasers, undersealers, lot and storage, washer, polisher and rustproofers)."

The parties agree that this literal interpretation of the phrase, "on a plant basis," was not intended, but they disagree about how the language should be interpreted. The Union argues that, notwithstanding the broad definition of "technicians," as given in Section 1, the appropriate seniority group for ranking the seniority of Technicians should be restricted to A Technicians and B Technicians as one seniority group. The Union urges, therefore, that, even if it is assumed (as the Employer argues) that all of the A Technicians who were junior to the grievant at the time of layoff -- Heistercamp, Estby and Taylor -- had special skills that protected them from layoff, the Employer should have laid off Jason King, who at the time of the layoff was classified as a B Technician and was junior to the grievant.

The Employer argues that the phrase, "on a plant basis" is not only ambiguous, but anomalous -- because, literally interpreted, it would require the grouping of virtually all Service Department employees in one seniority group for purposes of layoff, thus preventing the layoff of personnel not needed in the well populated classification, A Technician, and, instead, requiring reduction in a classification occupied by an employee who happened to be junior to the most junior A Technician, such as a recently hired Semi-Skilled Technician or a Lot and Storage Person. The consequence of such an interpretation would require that the work of the laid off employee in such a lower paid

classification be performed by a skilled and highly paid employee in a higher classification. The Employer urges that such a literal interpretation is so anomalous that it should be considered clearly not to have been intended by the drafters of the language.

I rule as follows with respect to the appropriate seniority group for determining the order of layoffs. The language of Article VI was substantially the same in the 2000-2004 labor agreement for many years previous. The evidence shows that the language has not been literally followed in past layoffs either by the Employer or by others in the multi-employer group, but that, instead, layoffs have been made using each classification as the appropriate seniority group. This evidence is sufficient to show that, despite the ambiguous language of Article VI, the Union and the members of the Association have grouped employees by classification for purposes of layoff and recall, thus indicating their agreement about its meaning.

This ruling is supported by the following occurrence. In the summer of 2008, after the first day of hearing in this matter, the Union and the Association completed their bargaining for the 2008-2012 labor agreement, amending Section 1 of Article VI, to provide:

Assignments to newly created or vacant shifts, layoffs, and recalls shall be based on seniority within the classification, provided that in all cases, there may be departures from seniority where skills or certifications are necessary to perform the work.

The 2008-2012 labor agreement readopted the rest of Article VI, including Section 6, without amendment.

The Employer argues that the impetus for the amendment of Section 1 was the parties' understanding, made apparent in the present grievance dispute, that neither of them sought a literal interpretation of Section 1 as written in the current labor agreement -- one that grouped all Service Department employees in one seniority group. As the Employer argues, it appears that the amendment of Section 1, stating expressly that the classification selected for reduction is the appropriate seniority group for layoff and recall, was a clarification of ambiguous language consistent with the way in which, in practice, the parties have always agreed that layoffs should occur.

Third. Seniority Among the A Technicians. The evidence shows that, when the Employer decided to reduce its staffing of the Service Department in December of 2007, it did so because of a decline in business and that the decision to reduce staffing in the A Technician's classification was made because the Employer determined that that classification, with eight incumbents, was overstaffed.

As decided above, Section 6 of the current labor agreement applies to all layoffs -- both "further" layoffs and layoffs that precede "further" layoffs. As I have also decided above, Section 6 requires that layoffs be in reverse order of seniority, with the classification selected for layoff as the appropriate seniority group for determining the order of layoff. In addition, Section 6 includes the proviso (the "Section 6 Proviso") that, after the layoff, "employees who are competent to do the work of the employees displaced" should continue to be employed.

The remaining primary issue, therefore, is whether, at the time of the layoff, there was an A Technician junior to the grievant whose skills were not required because, after the layoff of that junior A Technician, one or more other employees would have remained who were competent to do the work of that laid off junior A Technician.

The Union argues that any of three A Technicians, Estby, Taylor and Heistercamp, all of whom were junior to the grievant, should have been laid off before the grievant. The Employer concedes that all three were junior to the grievant, but it argues that each of them had a special skill that was necessary to operations and that, if any one of them had been laid off, no remaining employee had the competence to replace that skill.

With respect to Estby and Taylor, the Employer argues that their skills were necessary to its operations because the franchise agreement with Suzuki requires that the Employer have two employees trained to service Suzuki automobiles and that Estby and Taylor were the only two employees fully trained to service Suzuki automobiles. Further, the Employer argues that retention of their skills was necessary in order to avoid violation of the franchise agreement with Suzuki. Though the Union argues in response that other employees were sometimes asked to work on Suzuki automobiles, the evidence does not show that other employees had adequate training to meet the franchise requirements of Suzuki. I rule, therefore, that though Estby and Taylor were junior to the grievant, the Employer's decision not to lay them off was justified under the Section 6 Proviso

because other employees did not have the competence Estby and Taylor had acquired by meeting Suzuki's training requirements and thus qualifying as trained technicians under the Suzuki franchise agreement.

With respect to Heistercamp, the Employer makes a similar argument -- that his skills were necessary to its operations because the franchise agreement with Mitsubishi requires that the Employer have an employee with the training and experience to service Mitsubishi automobiles and that Heistercamp was the only employee with training and experience adequate to meet the requirements of the Mitsubishi franchise agreement.

The Union argues that King, though a B Technician, had sufficient training and experience in the servicing of Mitsubishi automobiles to meet the requirements of the franchise agreement with Mitsubishi, and, in response, the Employer argues that he did not. The Employer urges that, because Heistercamp was an A Technician and King was a B Technician, the superior level of Heistercamp's skill should be presumed -- based upon the superior skills required of an A Technician as established by the descriptions of each classification as given in Article XIII, Section 12, which is set out above. I do not interpret the Section 6 Proviso, however, to mean that only an employee in the same classification can be competent to do the work of an employee selected for layoff. As the Union argues, if King, though a B Technician, was competent to do the work of Heistercamp at the time of the layoff, Heistercamp should have been laid off rather than the grievant.

A substantial amount of the evidence presented by both parties compared the training and experience of Heistercamp and King in the servicing of Mitsubishi automobiles. I summarize that evidence as follows.

Robert M. Hansen testified for the Employer that he has been the Service Department's Dispatcher for four years. As such, he decides which Technicians will do work coming into the Department. He testified that, until early December of 2007, he sent Mitsubishi work (except for small repairs and emergency work) to three employees who had some training in servicing Mitsubishi automobiles -- to Donald Norman, to Heistercamp and to King. In early December, Norman resigned, leaving only Heistercamp and King with some Mitsubishi training. Heistercamp testified that forty to fifty percent of his time was spent servicing Mitsubishis. Neither Heistercamp nor King had completed all of the training courses required by Mitsubishi, but Mitsubishi had accepted Heistercamp as sufficiently qualified to fulfill the requirements of its franchise agreement with the Employer.

Nadeau testified that after King was sent to a Mitsubishi training school, a representative of Mitsubishi called Nadeau and told him that King's performance was not satisfactory. Peter M. Stone, the Employer's General Manager, testified that a Mitsubishi representative told him with respect to King's training, "this is not working out."

Heistercamp testified that, just before the first day of hearing in this matter, King had improperly repaired a

Mitsubishi transmission, destroying it and requiring that he, Heistercamp, rebuild it.

King testified that he works on Mitsubishi and Dodge automobiles, but that he is probably considered to be a Dodge Technician. He testified that he has not been told either by a representative of the Employer or of Mitsubishi that he was not trained for Mitsubishi work. He conceded that only Norman and Heistercamp are listed on a Mitsubishi document as a Mitsubishi Technician, but he testified that, after Norman resigned on December 11, 2007, he, King, began to get more Mitsubishi work. King also testified that, since Norman left, about a third of the work he is assigned to do is Mitsubishi work and that he thinks himself able to do any Mitsubishi work.

King also testified that the grievant was the primary transmission specialist for the Employer and that, after the grievant was laid off, no one was left who could rebuild a transmission -- though Nadeau told him that Heistercamp and John McGuirck, another A Technician, would be doing transmission rebuilds. King testified, however, that he has never seen Heistercamp or McGuirck rebuild a transmission and that, if necessary, they simply replace transmissions that may need rebuilding.

King denied that he had ruined a Mitsubishi transmission a few weeks before the March 11, 2008, hearing date, as Heistercamp testified. Rather, King testified, the destruction of that transmission had been caused by improper assembly at the Mitsubishi factory. He testified that he had no doubt

that he could do the required Mitsubishi work if Heistercamp were laid off. He conceded on cross-examination that he consults Heistercamp sometimes about the Mitsubishi work that he does, though he pointed out that technical advice is available on a Mitsubishi phone help line and website. King also conceded that a Mitsubishi representative was dissatisfied with his work on a Mitsubishi transmission several weeks before the hearing and that Heistercamp completed the work -- though King testified that he thought Heistercamp may have replaced the transmission.

The grievant -- who, at the time of the layoff, was the Union's President and the Steward for bargaining unit employees employed by the Employer -- testified that he thought the Employer was motivated to lay him off because of anti-Union bias. In support of that argument, he testified that Stone had wanted to use a part-time employee in the Service Department, and that he, as Steward, had objected because part-time work was not authorized under the labor agreement. He also testified that Stone was upset because of his defense of an employee who was discharged from the Parts Department.

The grievant conceded that he has refused to work on a Mitsubishi transmission because he had not been trained for that work. The grievant asked the Dispatcher to send the job to Heistercamp because he felt that Heistercamp was the Mitsubishi Technician and should do the work. The grievant testified that most of Heistercamp's work, as Lead Technician, is diagnostic work rather than actual "down and dirty" mechanic's work.

Nadeau testified that, if he had laid off Heistercamp, the Employer would have lost the Mitsubishi franchise because

Mitsubishi would not accept King as a qualified Mitsubishi Technician. He testified that the grievant had occasionally done light Mitsubishi work, but had refused a Mitsubishi transmission job, saying that he was not trained for such work.

I make the following additional rulings. The evidence shows that Heistercamp, though he had not completed all of the Mitsubishi training courses, was the only employee of the Employer who was accepted by Mitsubishi as adequately trained to do such work and that, if he had been laid off, neither King, the grievant or any other employee was sufficiently qualified by training and experience to meet the requirements of the Mitsubishi franchise agreement. Accordingly, the refusal of the Employer to lay off Heistercamp was justified under the Section 6 Proviso. I also rule that the evidence shows that the Employer was not motivated by anti-Union bias when it made the decision to lay off the grievant. He was the least senior employee in the classification selected for layoff, given the Section 6 Proviso, which permitted the Employer to retain the needed skills of Estby, Taylor and Heistercamp, the three employees in the classification who were junior to the grievant.

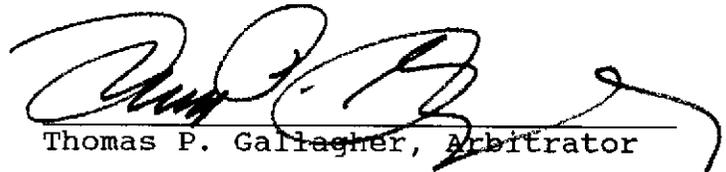
The Union makes the following additional argument. It argues that, by past practice, some specialists in the Service Department are protected from layoff -- those who specialize in transmissions, in motors and in front ends -- and that the grievant, as a transmission specialist should have been protected from layoff by that practice. I rule that the evidence does not show either the existence of such a practice or its acceptance by the Employer.

I conclude that the grievant's layoff did not violate the current labor agreement. I note that the arbitrator for the Union dissents from this award and that the arbitrator for the Employer joins in it.

AWARD

The grievance is denied.

December 2, 2008


Thomas P. Gallagher, Arbitrator