

IN THE MATTER OF ARBITRATION BETWEEN

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|--|---|-------------------------------------|
| GCC/IBT UPPER MIDWEST |) | |
| LOCAL 1-M |) | ARBITRATION |
| |) | AWARD |
| Union, |) | |
| |) | |
| and |) | |
| |) | LAYOFF SCHEDULING |
| |) | GRIEVANCE |
| |) | |
| AMERICAN SPIRIT GRAPHICS CORP.) |) | |
| |) | |
| Employer. |) | FMCS CASE NO. 091125-51716-3 |
| |) | |

Arbitrator: Stephen F. Befort

Hearing Date: March 3, 2009

Date post-hearing briefs received: March 24, 2009

Date of decision: April 28, 2009

APPEARANCES

For the Union: Richard A. Williams, Jr.

For the Employer: Daniel R. Wachtler

INTRODUCTION

GCC/IBT Upper Midwest Local 1-M (Union) is the exclusive representative of a unit of print shop employees employed by the American Spirit Graphics Corporation (Employer). The Union claims that the Employer violated the parties' collective bargaining agreement by unilaterally altering its layoff scheduling practices with respect to unit employees. The grievance proceeded to an arbitration hearing at which the parties

were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Did the Employer violate the parties' collective bargaining agreement when it unilaterally modified layoff scheduling practices applicable to unit employees?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 5 - SENIORITY

Section 3. Layoff and Recall.

a. Employees shall be laid off and recalled in their classification based on classification seniority date and in the bargaining unit, based on date of hire in the department (press or pre-press), if they are capable of performing the available work; provided, however, that employees may only bump into a lower rated classification.

ARTICLE 9 – WAGE RATES

Section 3. When an employee is scheduled or required by the Employer to work in a classification other than the one to which he/she is permanently assigned, for three (3) hours or more, the employee shall be paid for the hours worked as follows:

- a. If the employee works in a higher rated classification, he/she shall be paid the rate for the classification in which he/she is working.
- b. If the employee works in a lower rated classification, he/she shall be paid the rate for his/her permanent classification.

When an employee voluntarily works in a classification other than the one to which he/she is permanently assigned, for three (3) hours or more, the employee will be paid the rate for the classification in which he/she is working for the hours worked. All replacements must be qualified and approved in advance by the Company.

ARTICLE 24 – GENERAL PROVISIONS

Section 6. Neither party shall be bound by rules, regulations, or oral agreements not covered by this contract.

FACTUAL BACKGROUND

The Employer operates a commercial printing operation in Minneapolis, Minnesota specializing in direct mail and insert products. The Employer currently employs 105 employees, 40 of whom are represented by the Union. The majority of the unionized employees work in the pressroom where they operate three printing presses. The Employer generally assigns a five-person crew to staff the two larger presses and a three-person crew to staff the smaller press. The crews consist of four job classifications in a descending order of skill, responsibility, and pay: 1) first press operators; 2) second press operators; 3) feeders; and 4) joggers.

The language of the parties' collective bargaining agreement governing layoffs and wage rates has remained constant since 1991. At that time, a new owner purchased the company, which previously had published community newspapers, and converted the operation to that of a commercial printing operation. Contemporaneous with that change, the Employer and the Union negotiated the current contract staffing language which is typical of that utilized by commercial print shops in the Twin Cities area.

From 1991 to 2008, the parties interpreted the layoff and recall language of Article 5 so that layoffs were determined on the basis of classification seniority, but scheduling was determined on the basis of department, or date-of-hire, seniority. Under this arrangement, if the operation of less than three presses caused a reduction in the workforce, the more junior employees in each job classification would be bumped from

their regular classification. In preparing the work schedule, the Employer automatically would reassign bumped employees to work in a lower classification for which they were qualified based on date-of-hire seniority. Under this practice, layoffs would trigger a domino effect by which junior employees in higher classifications would bump employees in lower classifications if they held greater departmental seniority than those in the lower classifications. The parties both acknowledge this practice, but the Employer contends that layoffs were not a common occurrence for most of this period.

In accordance with the parties' prevailing interpretation of Article 9 of the contract, the Employer paid these reassigned workers at their regular classification rate of pay, rather than at the lower rate specified for the job they were performing. As an example, a junior first pressman who was reassigned to work as a feeder during a partial layoff would be paid at the higher first pressman rate of pay even when performing the lower classified work on reassignment.

Article 9 contains an exception, however, for an employee who "voluntarily" seeks to work in a lower classification. In this instance, the reassignment would occur only if the Employer approved the request, and the employee would be paid at the rate for the lower position rather than the higher classification. The Union elicited testimony that this exception was adopted in order to prevent employees from "gaming" the system by claiming lower class work on desirable shifts at premium rates of pay.

In 2008, the overall economic downturn hit the printing industry hard, and the Employer curtailed operations, frequently operating only one of its three presses. As the Employer's post-hearing brief explains:

It became clear that American Spirit needed to reduce costs in order to survive the recession. In looking at production costs, the Company realized that its practice

of automatically re-assigning and re-scheduling employees during layoffs counteracted the savings to be achieved by layoffs because it resulted in having to pay first- and/or second-press-operator wages for feeder or jogger work. The difference in rates for a single employee could potentially be as much as \$20.26 per hour if a first press operator, who normally earned \$30.34 per hour, replaced a jogger with less than 6 months of experience, who normally earned \$10.08 per hour.

Given these circumstances, the Employer took a fresh look at the pertinent contract language and decided to alter its layoff scheduling practices.

The Employer called a meeting in July 2008 with two Union shop chairs. Tim Franzen, the Employer's Vice President of Operations, advised the chairs that the Employer had decided to stop the practice of automatically reassigning laid-off employees on the basis of departmental seniority. Instead, such employees would be permitted to bid on lower positions, with the effect that such "voluntary" reassignments would earn only the pay rate of the lower classification. The Employer explained that it would continue to pay individuals currently working at lower positions at their regular classification pay, but that the new interpretation would be applied in a prospective fashion.

In October 2008, the Employer implemented a new practice of posting a weekly sign-up sheet on which employees were asked to designate those lower classifications that they would be willing to fill in the event of a layoff in their regular classification. Only those employees who affirmatively made such a designation would be assigned by the Employer to one of the lower classified positions. The Employer also began to pay these bumped employees at the rate of pay applicable to the lower classification assignment, and the Union responded by filing a grievance. The parties do not dispute

that the Employer unilaterally implemented the new scheduling arrangement without first bargaining with the Union.

POSITIONS OF THE PARTIES

Union:

The Union contends that the Employer's modification of layoff scheduling practices violated the parties' collective bargaining agreement. The Union interprets Section 3 of Article 9 as providing that the Employer may lay off employees on the basis of classification seniority, but that those employees have the right to claim other bargaining unit work for which they are qualified based upon date-of-hire seniority. According to the Union, those laid-off employees working in a lower classification are entitled under Article 9 to be "paid the rate of his/her permanent classification." The Union points out that the Employer's practices for seventeen years adhered to this interpretation in that the Employer automatically reassigned temporarily laid-off workers to lower classifications on the basis of departmental (date-of-hire) seniority while paying those reassigned workers at their higher regular classification pay rate. The Union argues that the Employer's unilateral reinterpretation of the contract during the summer of 2008 so as to deny the regular classification pay rate to reassigned employees on layoff status offends both the explicit language of the parties' contract and the notion of past practice. Under the latter theory, an employer cannot terminate a longstanding, mutually-recognized benefit of employment on a unilateral basis.

Employer:

The Employer maintains that nothing in the parties' collective bargaining agreement requires that it automatically reassign employees on the basis of date-of-hire

seniority in the event of a layoff. Instead, Article 5 only provides that employees “may” bump into a lower rated classification. Consistent with this language, the Employer redesigned its scheduling practices in 2008 to permit employees laid off by virtue of classification seniority to voluntarily bid on work in a lower classification. In accordance with Article 9, the Employer is obligated to pay an employee who “voluntarily” works in a lower classification only at the lower class rate of pay. As a result, the Employer argues that its new practice complies with the literal terms of the parties’ agreement. With regard to the Union’s past practice argument, the Employer argues that the Employer’s scheduling practices are “shop practices” reserved for the Company’s exclusive discretion. In addition, the Employer asserts that the contract’s zipper clause precludes any binding effect based on custom or past practice.

DISCUSSION AND OPINION

A. The Contract Language

The Union initially claims that the Employer’s change in scheduling practices is inconsistent with the explicit language of the parties’ collective bargaining agreement. This claim implicates two separate, but related contract provisions. Article 5, Section 3 provides the following guidelines with respect to layoff scheduling:

Employees shall be laid off and recalled in their classification based on classification seniority date and in the bargaining unit, based on date of hire in the department (press or pre-press), if they are capable of performing the available work; provided, however, that employees may only bump into a lower rated classification.

Meanwhile, Article 9, Section 3 provides as follows with respect to pay for out-of-classification work:

When an employee is scheduled or required by the Employer to work in a classification other than the one to which he/she is permanently assigned, for

three (3) hours or more, the employee shall be paid for the hours worked as follows:

- a. If the employee works in a higher rated classification, he/she shall be paid the rate for the classification in which he/she is working.
- b. If the employee works in a lower rated classification, he/she shall be paid the rate for his/her permanent classification.

When an employee voluntarily works in a classification other than the one to which he/she is permanently assigned, for three (3) hours or more, the employee will be paid the rate for the classification in which he/she is working for the hours worked. All replacements must be qualified and approved in advance by the Company.

The Union contends that these provisions obligate the Employer to reassign laid-off employees on the basis of date-of-hire seniority and to pay those reassigned employees at their regular classification rate of pay. The Union, accordingly, argues that the Employer's revised scheduling policy violates these provisions since it results in paying reassigned employees at the rate of pay applicable to the lower classification in which the employee is assigned. The Employer, in contrast, maintains that its revised policy is consistent with the contract language in that laid-off workers who voluntarily choose to work in a lower classification are entitled by Article 9 only to the lower rate of pay applicable to the reassigned classification.

While both interpretations are conceptually plausible, the Union's position is more compatible with the relevant contract language. Article 9 provides that an employee who is "scheduled or required" to work in a lower classification is entitled to permanent classification pay. On the other hand, an employee who "voluntarily" works in a lower classification is entitled only to the lower classification pay rate. The apparent principle embodied in these provisions is that a shift change that occurs due to an action taken by the Employer for its own benefit is to be paid at the higher rate, while a shift

change that occurs because an employee independently makes a request for his or her own benefit is to be paid at the lower rate. In the context of this grievance, a laid off employee who works out of classification is not truly “volunteering” for such work simply because they place their name on a sign-up sheet. Their status, instead, is directly attributable to the Employer’s layoff decision. The substitution of a sign-up sheet for an automatically-generated schedule cannot disguise the fact that the resulting work schedule is one that initially is triggered by a decision made by the Employer for its own benefit.

B. Past Practice

The Union’s alternative past practice argument is even more persuasive. As the Union asserts, a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A “past practice” arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 605-30 (6th ed. 2003).

The layoff scheduling arrangement utilized by the parties from 1991 to 2008 qualifies as such a binding past practice. For seventeen years, the Employer consistently reassigned laid-off employees on the basis of date-of-hire seniority and paid them at their regular classification rate of pay. This practice clearly was accepted by the parties and represented their mutual understanding of the pertinent contract language. Although the Employer argues that this was a non-binding “shop practice,” this longstanding course of

conduct goes far beyond a mere operational method and determines matters of substantial benefit for affected employees such as one's work assignment and rate of pay. ELKOURI & ELKOURI, at 611-17.

The Employer also argues that the contract's "zipper" clause negates the binding effect of such a practice. That provision, in Article 24, states that "neither party shall be bound by rules, regulations, or oral agreements not covered by this contract." A general provision of this type, however, does not "negate practices that are relied on for the purpose of casting light on ambiguous contract language." ELKOURI & ELKOURI, at 621.

When a binding past practice exists, an employer cannot unilaterally abrogate such a practice without first engaging in the collective bargaining process. Although I have sympathy with the Employer's present economic plight, it has long been recognized under the National Labor Relations Act that an employer cannot unilaterally alter a wage agreement - at least short of bankruptcy - without engaging in the bargaining process. Oak Cliff-Golman Baking Co., 207 NLRB 1063 (1973). Thus, just as the Employer in this matter cannot unilaterally refuse to pay the contractually established price for the ink and paper supplies that it uses, so too it cannot unilaterally decide to pay less than the contractually established price that it has agreed upon for its labor needs. Since the Employer in this instance did not seek redress through resort to the collective bargaining process, it is bound by the bargain that it previously struck.

AWARD

The grievance is sustained. The Employer is directed to pay employees who are laid off from their regular classification and claim work in a lower classification on the basis of date-of-hire seniority at their regular classification rate of pay. The Employer

further is directed to make whole those employees who lost pay as a result of the Employer's unilateral change in scheduling and pay practices. The arbitrator will retain jurisdiction for 60 days to address such remedial issues as may be necessary.

Dated: April 28, 2009

Stephen F. Befort
Arbitrator