

**IN THE MATTER OF ARBITRATION
BETWEEN**

**UNITED STEEL WORKERS,
LOCAL No. 2002-15**

**Union,
and**

ELK RIVER MACHINE COMPANY,

Employer.

**ARBITRATION DECISION
AND AWARD
FMCS Case 09-57874
(Recall, Seniority)**

Arbitrator: Andrea Mitau Kircher
Date and Place of Hearing: November 9, 2009, Plymouth, MN
Date Record Closed: January 7, 2010
Date of Award: February 10, 2010

APPEARANCES

For the Union:

Keith Grover
Staff Representative
United Steel Workers
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For the Employer:

Richard J. Dryg
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Employers Association, Inc.
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INTRODUCTION

The United Steelworkers of America, on behalf of Local Union 2002 (“Union”) and Elk River Machine Company (“Employer” or “Company”) are parties to a Collective Bargaining Agreement (“Contract”), Joint Exhibit 1. The Contract is effective April 1, 2009 through March 31, 2012. The Union filed a grievance on May 20, 2009, which the parties were unable to resolve, and in accordance with the Contract, the matter was referred to

arbitration. The parties duly selected the undersigned as the arbitrator from a list provided by the Federal Mediation and Conciliation Services.

On November 9, 2009, the Arbitrator convened a hearing at the offices of the Employer's Association, Inc. in Plymouth, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties agreed to file briefs simultaneously on December 11, and later agreed to extend that time to January 4, 2010. The record closed when the Arbitrator received the last brief on January 7, 2010.

ISSUE

Did the Employer violate the Contract when it recalled Corey Ashmore from layoff for two weeks rather than the most senior welder, Kevin Taatjes, to weld a belly tank as part of the RGI 4 project?

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 SENIORITY

...

Section 4. When, in the sole judgment of the Employer, it becomes necessary to effect a reduction in force, employees will be laid off by Job Group in inverse order of seniority, provided that the employees remaining have the skill and abilities to perform the work available. Recall shall be by Job Group in order of seniority-provided that the employees returning have the skill and abilities to perform the work available....
(Emphasis provided.)

...

ARTICLE 1

B. ENTIRE AGREEMENT

Section 1. ...The Employer may, at its sole discretion and with no continuing obligation, implement and provide for benefits and/or terms and conditions of employment outside this Agreement.

C. MANAGERIAL RIGHTS

Section 1. ...The Employer retains the exclusive authority to manage and operate the business in all respects; to hire all employees and make all decisions regarding the employment conditions, such as work force complement; to direct the employees in the performance of their duties and to assign work;...None of the management rights

previously referred to shall be limited except by an express provision of the Agreement and then, only by specific language of the Agreement.

FACTS

On May 1, 2009, welders Kevin Taatjes, Jeffrey Sandwick, Duane Childs, Michael Dillon and Corey Ashmore were laid off due to lack of work. On May 14, Corey Ashmore, the least senior of these men, was recalled for two weeks to work on a project that required special welding skills. On May 14, Ashmore was the only employee who had these skills. After the two weeks, he was laid off again. The Grievance alleges that recalling Corey Ashmore instead of Kevin Taatjes violated Article 8, set out above. It is undisputed that Ashmore was the only employee qualified to undertake the particular welding job needed, and how this came about is at the heart of the problem.

Elk River Machine Company is a specialty machine shop with welding and assembly production taking place in two buildings. The Company employs about 80 people, of whom approximately 38 are Union members, including the welders. All of the welders are required to meet certain welding standards, known as AWS tests, to assure that their skill level is appropriate for the work. In the last couple of years, at least one major customer wanted specialized welding that meets a new, more stringent standard, known as the "EN" standard, for European Railway welding. To pass the EN standard, employees needed training in a new method, practice in that method, and repeated opportunities to test. The Company believed that the new standard might be the wave of the future, but to date, few projects have needed welds that meet the EN standard.

Rick Grafft, the welding supervisor, was responsible for training welders to use the new methods, involving an "accupulse" welder. Grafft selected Ashmore to use the new accupulse welder and gave him opportunities to learn how to meet the new EN standards. Grafft believed

that the “younger guys” were more eager to learn new technology. Ashmore had just graduated from Vo-Tech school and appeared to catch on more quickly, according to Grafft. Some older workers were reluctant to use the new accupulse machine, so Grafft continued to allow them to use the flex-wire. In October or November of 2008, some senior employees failed EN tests because it appeared that the new standards could not be met without using an accupulse welder. In May 2009, Ashmore was the only employee who had passed the welder qualification test for European welding standard EN 15085-2 subset PQR-236 to weld a large “belly tank” for the RGI 4 project. The Company offered to at least one senior employee, Leroy Neuman, an opportunity to pass that standard in May, but he failed to pass the test. It is not clear whether he used an accupulse welder for the test or whether he was given training and opportunities to practice before attempting the test, as Ashmore was. The Company offered training and testing to a number of welders, but according to the Company’s own witness, the supervisor by-passed senior employees because he preferred to work with the junior employee, Ashmore, on accupulse training to meet the welding standard EN 15085-02. He worked with Ashmore “one-on-one” to help him pass the test because he believed that Ashmore had excellent welding skills, and Grafft thought it would be easier to train the younger employee to do the work exactly as he wanted it done. With this training, the Company recalled Ashmore to do the work needed in May, despite his lack of seniority. This was the first time any of the witnesses remembered that the Company had recalled employees out of seniority order.

UNION POSITION

The Union argues that if the Company chooses to train only the junior employees to meet the demands of new technology, the seniority clause will essentially be negated; a “skill

and abilities clause” was never meant to destroy the integrity of the seniority provision in the contract.

COMPANY POSITION

The Company argues that the contract is very clear that skill and abilities, as well as job group seniority should be considered in determining layoffs and recalls. The Company claims that it looks first to seniority, but where only one employee had the necessary skills to accomplish this job, the Company was justified in recalling him and to do so did not violate the Contract.

DISCUSSION AND DECISION

Seniority provisions in collective bargaining agreements are difficult to interpret when they include consideration of both seniority and “skill and ability” without further indicating how much weight should be given to each factor. *See*, Elkouri & Elkouri, “How Arbitration Works”, BNA, 6th Ed. (2003). Arbitrators considering a seniority plus “abilities” clause have stated that the following is an appropriate standard for arbitral review: “Management is entitled to make the initial determination, subject to challenge by the union on the ground that management’s decision was unreasonable under the facts, or otherwise capricious, arbitrary or discriminatory.” *Id.* at 877 (citation omitted). The Employer’s right to make the initial determination stems from its right to manage the workplace and direct the workforce. *Id.* In this case, management’s decision to by-pass seniority and recall Ashmore will stand only if it is a reasonable one, and not influenced by improper elements.

Although at first glance, it appears that the Employer had no choice but to recall the junior employee, it is important to look at the circumstances surrounding that decision. Interpretation of contract language requires the arbitrator to consider the likely intent of the

parties who negotiated a disputed provision. When the parties negotiated Article 8, they intended that seniority should be a primary factor in recall decisions. Yet, through inadvertence, lack of planning, or bias, the Company did not give senior employees access to the new technology, opportunities for training and practice for the EN tests to the same degree as it did for junior employees. There is no evidence that Grafft offered Taatjes the training and practice in the new methods or that Taatjes turned down training opportunities. Rather, Supervisor Grafft expressed opinions that the older, senior employees were either unable or unwilling or too slow to learn the new process. These presumptions raise a question of improper bias. If test results are to be used to decide who should be recalled, opportunities for training, practice, and testing must be distributed equitably. Otherwise, as the Union points out, the seniority clause is read out of the contract for work needing new skills.

Giving Ashmore an advantage over more senior employees could have been avoided if the Company had directed that training be offered based on seniority; or the Company could have conferred with the Union outside of the negotiation process and listened to Union concerns. John Vekved, Union grievance chair, testified that concerned welders spoke to him about the decision to train Ashmore first. Vekved stated that he questioned Grafft about his decision, and Grafft told him that he was training Ashmore first because Ashmore would be the first out of work in a layoff. Grafft, who also testified, did not deny this conversation. This reasoning reverses the intent of Article 8, that those with the least seniority should be the first laid off and the last recalled.

It is axiomatic that arbitrators apply a presumption that the parties intended all clauses of a contract be given effect. Where, as here, there is a dispute about the meaning of a contract provision with two clauses, the provision as a whole should be interpreted in a way to give

meaning to both the seniority clause and the “skill and abilities clause”. It is obvious that the parties did not intend to adopt a seniority provision that could be nullified by using selective or age-related training practices. Thus, by its actions, the Company violated Article 8.

Remedy. The Company should consider developing an equitable training system that distributes training, practice, and an opportunity to test for new standards so that senior employees have access to work that requires new technology. The Union seeks two weeks pay and lost benefits for the Senior Welder, Kevin Taatjes, for this violation of the Contract. Had he been offered the same level of training, experience and testing that Supervisor Grafft offered Ashmore, it is reasonable to assume that Taatjes would have had the same ability to pass the EN standard test and would have been selected for recall first. Although somewhat speculative based on the facts, this measure of damages is appropriate.

AWARD

The Grievance is sustained, and Kevin Taatjes is awarded all pay and benefits he lost for the two weeks from May 13, 2009 to May 29, 2009.

Dated: February 10, 2010

Andrea Mitau Kircher
Arbitrator