

**IN THE MATTER OF ARBITRATION BETWEEN**

AINSWORTH ENGINEERED (USA), LLC Grand Rapids, Minnesota Employer/Company	     DECISION AND AWARD     
-and-	FMCS Case No. 07-57675   Grievance No. 6-07   Recall from Layoff Grievance 
UNITED STEEL WORKERS OF AMERICA And its Local 1095 Union	       Award Dated: January 9, 2008 

Date and Place of Hearing:                      November 14, 2007  
   Sawmill Inn  
   Grand Rapids, Minnesota

Date of Receipt of Post Hearing Briefs:      December 18, 2007

**APPEARANCES**

For the Union:                      Gerard A. Parzino, Staff Representative  
   United Steel Workers of America – District 11  
   2929 University Avenue S.E., Suite 150  
   Minneapolis, Minnesota 55414

For the Company:                      Douglas R. Christensen, Esq.  
   Dorsey and Whitney LLP  
   50 South Sixth Street, Suite 1500  
   Minneapolis, Minnesota 55402-1498

**ISSUE**

Did the Company violate the Collective Bargaining Agreement when it notified laid-off employees of their recall to work by using certified mail letters which ordered them to return to work within five days or be discharged? Did the Company violate the Collective Bargaining Agreement when it denied certain laid off senior employees an opportunity to refuse a recall to work? If so, what is the remedy?

## **WITNESSES TESTIFYING**

### Called by the Union

Jon Jensen,  
Millwright

Jim Rasley,  
President Local 1095

### Called by the Employer

No witnesses were called

## **ALSO PRESENT**

### For the Union

Ray Guertin,  
Financial Secretary Local 1095

### For the Employer

Rochelle A. Bristol  
U.S. Group Benefits Administrator

Randall S. Richardson,  
Supervisor

R. J. Roberts,  
Human Resources Supervisor – Minnesota

## **JURISDICTION**

The issue in grievance was submitted to James L. Reynolds as sole arbitrator for a final and binding resolution under the terms set forth in Article XI of the Collective Bargaining Agreement between the parties (Joint Exhibit 1). The Arbitrator was mutually selected by the parties from a list of names of arbitrators submitted to them by the Federal Mediation and Conciliation Service of the United States Government. The parties stipulated at the hearing that the Arbitrator had been properly called, and that the grievance was properly before him for a decision. At the hearing the Arbitrator inquired if the parties had any objection to the award in this case being offered for publication through the Minnesota Bureau of Mediation Services or recognized labor relations publication organizations. No

objection was raised and an appropriate release form was signed.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was by post hearing briefs which were timely received. With the receipt of the post hearing briefs the record in this matter was closed. The issue is now ready for determination.

### **STATEMENT OF THE ISSUE**

The parties deferred a final framing of the issue to the Arbitrator. The Union described the issue as whether or not the Company violated Article 9.03 of the Collective Bargaining Agreement by not allowing senior employee's to voluntarily accept a layoff. The Company described the issue as whether or not it violated the terms of the Collective Bargaining Agreement by sending letters to bargaining unit members informing them that their failure to return to work within five days of their receipt of the letters would result in their discharges. After hearing all the testimony and reviewing the exhibits entered at the hearing the Arbitrator determined the issues to be:

Did the Company violate the Collective Bargaining Agreement when it notified laid-off employees of their recall to work by using certified mail letters which ordered them to return to work within five days or be discharged? Did the Company violate the Collective Bargaining Agreement when it denied certain laid off senior employees an opportunity to refuse a recall to work? If so, what is the remedy?

The grievance was filed on April 25, 2007, and entered into the record of this hearing as Joint Exhibit 2. It reads in relevant part as follows:

**Describe issue:** When people were called back to work they were told if they did not report to work they would be terminated. When asked if they could use the option given them in Article 9.03 and accept the lay off they were told they did not have that option.

**List any article in the Collective Agreement or Policy that was violated:** 9.03 and any other article that may apply.

**What is the desired settlement:** People be allowed to accept the lay off as it states they may.

**Supervisors Response:** This is not a lay off but a recall.

The Company replied to the grievance at Step 1 of the grievance procedure as follows:

**Step 1 Disposition** This was a recall and proper contract notification was followed. 9.03A(6)

The parties were not able to reach an accord in this dispute and it was moved to arbitration. (Joint Exhibit 3).

The sections of the Collective Bargaining Agreement that bear on the issue are found in ARTICLE II – GENERAL PURPOSE OF AGREEMENT, ARTICLE IX – SENIORITY, and ARTICLE XI – GRIEVANCE PROCEDURE. In relevant part they read as follows:

**ARTICLE II – GENERAL PURPOSE OF AGREEMENT**

\* \* \* \*

2.04 Except as otherwise specifically provided in this agreement, the Company retains the sole and exclusive right to exercise all the rights and functions of management. Should the Company fail to exercise any of its rights or exercise them in a particular way, it shall not be deemed to have waived such rights or be precluded from exercising them in some other way.

**ARTICLE IX – SENIORITY**

\* \* \* \*

9.03 Layoffs and Shutdowns

. . . . . Should a shutdown or layoff become necessary, the company will allow senior employees to voluntarily accept a layoff unless circumstances require otherwise.

A. When it may become necessary to reduce the overall number of employees in the mill, the following will apply:

\* \* \* \*

6. An employee who is laid off and fails to report back to work within five (5) calendar days after being notified by certified mail will be subject to immediate discharge.

\* \* \* \*

ARTICLE XI – GRIEVANCE PROCEDURE

\* \* \* \*

11.02

\* \* \* \*

C. The functions of the Arbitrator shall be to interpret and apply the Agreement and shall have no power to add to, subtract from, or to modify any of the terms of the Agreement . . . . .

\* \* \* \*

H. The expense of the Arbitrator shall be borne by the party against whom the decision is rendered. . . . .

The parties entered into a settlement agreement in another grievance which the Union offered into evidence as Union Exhibit 3. It reads as follows:

As a resolution to Grievance 15-06 USW #1095 and Ainsworth Engineered USA, LLC, Grand Rapids, MN agrees to the following:

\* \* \* \*

\* This resolution will apply to total layoff intermittent work opportunities only.

\* During the layoff intermittent production work opportunities will be offered to the senior employees who have been qualified and worked the job in the last 5 years.

\* If there is no senior employee who has previously qualified and worked the job, the current senior qualified employee will be offered the intermittent work opportunities.

\* \* \* \*

## **FACTUAL BACKGROUND**

Involved herein is a grievance that arose when the Company threatened to discharge employees if they did not report to work after being recalled to perform what was referred to as “intermittent” work assignments. Company manufactures oriented strand board at its plant in Grand Rapids, Minnesota. The Union is the exclusive bargaining representative of the production and maintenance employees at the plant. Strand board is used in home construction. Due to the depressed nature of the home building industry the plant has been shut down since September 22, 2006 and remained shut down at the time of the incident on April 25, 2007 that gave rise to the grievance.

For all relevant times, the grievants in this case were covered by the Collective Bargaining Agreement between the parties. The Collective Bargaining Agreement initially ran between Potlatch Corporation and the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE), Local 7-1095. Subsequently Potlatch was acquired by Ainsworth and PACE merged with the United Steel Workers of America. The predecessor 2002-2004 Agreement was extended by mutual agreement of the parties until October 14, 2005. A new labor contract (Joint Exhibit 1) became effective on October 15, 2005 and continues in full force and effect through October 14, 2011.

In the extension to the previous labor contract the parties agreed to new language to Article 9.03. The agreed to language was drafted by the Union as reads as follows:

“Should a shutdown or lay off become necessary, the company will allow employees to voluntarily accept a layoff unless circumstances require otherwise.”

That identical language was incorporated into the introductory paragraph of Article 9.03 of the 2005-2011 labor agreement.

Even though the plant was shut down there were occasions in which bargaining unit employees were called back to perform intermittent duties such as winterizing the plant, snow removal and maintenance work. The Union testified without contradiction that for each such recall prior to those that precipitated the instant grievance the Company would telephone the senior employee and offer the work with the option of remaining on voluntary layoff pursuant to the language of Article 9.03 supra.

In October 2006 the Company called back several employees. The Company was able to reach all but one, Eric Locken, by telephone. Union President Rasley was contacted, and it was mutually agreed, as a one time occurrence, to go to next senior employee without issuing Mr. Locken a certified letter recalling him to work or face being discharged. (Company Exhibit 2)

At a November 30, 2006 Shop Committee Meeting (Company Exhibit 3) a need to recall laid off employees to perform duties related to hauling wood was discussed. The work was for four days per week in December, 2006, and three days per week in January, February and March 2007. The Company indicated in the meeting that “calls will be starting tomorrow”. Union President Rasley inquired what would happen if an employee did not want to return to work until January. Plant Manager Sorby stated that “he will have to make a choice and we understand it’s tough but that’s what the contract states

and we will follow the contract.” The Company prepared notes of the meeting do not state what the “tough” result would be that the employee would face.

On or about April 6, 2007 the Company notified some employees by certified mail that they were being recalled and that if they failed to report they would be immediately discharged (Union Exhibit 1). In an April 7, 2007 e-mail (Company Exhibit 5) Union President Rasley replied to Company representative Showen that he understood the April 6<sup>th</sup> letter to mean that “senior people who would rather stay laid off instead of being called back to work don’t have a choice”. Mr. Rasley inquired of Mr. Showen what “the special circumstances are that require them to be there instead of a less senior person”. Mr. Showen replied on April 11<sup>th</sup> that the Company was “recalling the most senior people, [and that] the contract allows for an option when you’re laying them off, not when recalling them to work.” (Company Exhibit 5) In a subsequent exchange of e-mails (Company Exhibit 4) the Union and the Company clarified the number of days an employee had to report back to work. Company representative Showen stated in an April 9, 2007 e-mail (Company Exhibit 4) to Union President Rasley that employees who did not abide by the clarified timing would be subject to immediate discharge according to Article 9.03 A. (6).

On or about May 25, 2007, approximately one month after the instant grievance was filed, the Company attempted to reach laid off employee Steve Larson recalling him back to work. A certified letter was sent to him, and Company representative Diane Feldt telephoned his home. Mr. Larson was not there and Ms. Feldt advised Mrs. Larson that

Mr. Larson had to report on Monday, May 28<sup>th</sup>, a holiday. Mrs. Larson contacted Union President Rasley who e-mailed Plant Manager Sorby (Company Exhibit 6) explaining that Mr. Larson was out of town working and that he could not pick up the letter at the Post Office because it was closed for the holiday. Mr. Rasley also challenged the intention of the Company to fire Mr. Larson. Mr. Rasley stated in his May 25<sup>th</sup> e-mail that he had previously informed Mr. Sorby that Mr. Larson “was out of town and would very likely not be back until Memorial Day if not later.” Mr. Rasley advised that if the Company intended to terminate Mr. Larson for not being at work on Monday the Union would grieve the termination. Mr. Larson had not been terminated as of the date of the arbitration hearing in this matter.

The instant grievance was filed on April 25, 2007. It proceeded through the required steps of the grievance procedure without resolution, and was heard in arbitration on November 14, 2007.

## **POSITION OF THE PARTIES**

### **Position of the Union**

It is the position of the Union that the grievance be upheld and an order be entered compelling the Company to:

1. Honor the language in Article 9.03 and the Letter of Agreement.
2. Resume the practice of calling senior qualified employees to offer them the work and allow them their rights to accept a voluntary layoff within the language of the last sentence of the opening paragraph of Article 9.03 and the Letter of Agreement.

3. Stop the use of Article 9.03 A (6) for intermittent work opportunities while the mill is temporarily shut down, and only use that Article for mill startup and permanent recall from layoff as is the intent of that language.

In support of that position the Union offers the following arguments:

1. A long standing practice exists wherein the senior qualified employee is recalled by telephone for intermittent work opportunities. The Company changed that practice in April 2007 in violation of Article 9.03 when it issued certified letters recalling senior employees for intermittent work when junior qualified employees were available and willing to perform the tasks involved.
2. The Letter of Agreement (Union Exhibit 3) was agreed to based on the fact the work was to be offered by seniority and the employee retained the right to accept or decline as in the past. It does not mandate that the employee who was offered the work must accept it.
3. The Shop Committee notes published by the Company indicate that employees would be called by telephone. The “tough” result of concern in those notes was not that the Mechanic would be terminated , but that if he volunteers to remain on layoff he could not exercise his seniority and bump back in later, after he had completed his class.
4. The Company never identified any special “circumstances” that would have required a senior employee to accept the recall.

### **Position of the Company**

It is the position of the Company that the grievance be denied in its entirety. In support of that position the Company offers the following arguments:

1. The Union must prove by a preponderance of the evidence that the Company violated the Collective Bargaining Agreement. They have failed to do so.
2. The Arbitrator lacks authority to add to, subtract from, or modify any of the terms of the labor contract.
3. The pertinent contract language is clear, unequivocal, and unambiguous; it compels denial of the grievance. The last sentence of the first paragraph of Article 9.03, which is relied on by the Union, says nothing about recalls, it provides employees with no “rights” whatsoever regarding recalls, and does not prohibit the Company from discharging

employees who refuse recalls – whether those recalls are to perform intermittent work or otherwise. Rather, it merely provides that, should a layoff become necessary, the Company will allow senior employees to volunteer to be laid off. Article 9.03 A (6), on the other hand, speaks directly about recalls, and unambiguously provides that an employee who fails to report back to work within five days of receiving notification of a recall will be subject to discharge. Nothing in that Article suggests that it does not apply in situations where the recall is for intermittent work.

4. The Union's implausible proposed interpretation of the language at issue here would read Article 9.03 A (6) out of the labor agreement, or, at the least would read it out where the recalled employees are to perform intermittent work.

5. To the extent any ambiguity is found in the last sentence of the first paragraph of Article 9.03 and Article 9.03 A (6) those two contract sections must be construed in a manner whereby they are compatible with one another. The only way to give substantial effect to each provision is to sensibly find that the last sentence of the first paragraph of Article 9.03 only applies to situations where an employee asks to be laid off and that 9.03 A (6) applies to the right to require that any employee who is laid off return to work at the Company's demand.

6. The bargaining history of the parties confirms the Company's reading of the pertinent contract language. Negotiations over the last sentence of the first paragraph of Article 9.03 never touched upon the subject of recalls – intermittent or otherwise. If the Union intended that language to modify the provisions of Article 9.03 A (6) it was responsible, as the drafter of the provision to explain its intentions or to use language that left the matter free from doubt. It did neither.

7. There is no consensual, mutually binding past practice in support of the Union's position. Even there were, it cannot be considered because it would conflict with clear, unequivocal and unambiguous contract language. Here there is no binding past practice. The Union showed only a few occasions over a relatively short period of time when the Company phoned employees to recall them and allowed them to choose whether they wished to return or not. This is simply not enough to prove up a binding past practice. More importantly, the evidence shows no mutuality in such a practice. Starting in early 2006 the Company informed the Union that it intended to exercise its rights under Article 9.03 A (6), and require employees to report to work when recalled or face discharge. Clearly, the claim by the Union of a binding past practice does not rise to a level sufficient to trump the clear language of the contract.

#### **ANALYSIS OF THE EVIDENCE**

This case presents issues of seniority rights on the one hand and management rights on the other. Such issues are of critical importance to labor and management, and that fact is not lost on the Arbitrator. Here the Company seeks to have assurances that laid off employees will return when recalled. The Union seeks the ability for senior employees to be able to defer a recall to a junior employee under some circumstances. This contest occurs against a backdrop of difficult economic times for the Company and its employees.

The controlling language is found in Article IX of the Collective Bargaining Agreement. At issue is the interpretation and application of the last sentence of the first paragraph of Article 9.03 (hereinafter the 'last sentence') and Article 9.03 A (6). It is noted that the 'last sentence' was first agreed to in October 2004, whereas the language of Article 9.03 A (6) has been in the contract for some time, and was not among the provisions that were renegotiated in the current contract.

Basically, the Company contends that the contract provisions are clear and unambiguous and should control prima facie. The Union basically claims that the practice of the parties in applying these provisions should control. There are two contract provisions at issue in this case. Taken together they provide ambiguous guidance on the matter of recalls from layoff. The Company is correct in its assertion that the 'last sentence' makes no mention of recalls, whereas Article 9.03 A (6) speaks directly to recalls. Ordinary rules of contract construction normally direct that the specific reference to recalls in Article 9.03 A (6) would trump the 'last sentence'. Closer examination indicates

otherwise. The recently agreed to language of the ‘last sentence’ clearly gives senior employees the right to volunteer for a layoff unless circumstances require otherwise. In this case a general lay off was in place, and all employees were on lay off status when the Company sought to recall some of them for intermittent work assignments. Senior employees attempted to exercise rights under the new language of the ‘last sentence’ but were denied. The question thus presented is whether a senior employee has a right to continue on layoff affording an opportunity for a junior employee to be recalled when the Company has not offered any circumstances that would require otherwise. In other words, is there a right to remain on layoff status just as there is a right to elect to be laid off under the ‘last sentence’ language in the first place? The record compels a finding there is.

The Company argues that the recall language of Article 9.03 A (6) trumps the ‘last sentence’ language. The difficulty with that theory is shown when considering a situation where a senior employee elects to be laid off, and then the Company immediately recalls him without offering any circumstances that would “require otherwise”. The Company position here would permit that to happen. That position would effectively eliminate the ‘last sentence’ language from the contract.

Undoubtedly there are circumstances where the right of a senior employee to elect to be laid off or remain on layoff status does not control. The parties have provided for those circumstances in their labor contract by permitting the Company to assert circumstances that would ‘reasonably require otherwise’. When those circumstances are present the

language of the 'last sentence' and the legitimate business interests of the Company would permit denial of a senior employee's request to elect a layoff or to remain on layoff if he or she is already in that status. All that has to be shown is that the circumstances requiring otherwise are reasonably present. No such showing was made in this case. Such circumstances could include a situation where the only employee with the necessary job classification, skills, training, licensure, etc. was the senior employee who was making the request. No such showing was made in the case here.

The evidence in this case shows that under the circumstances present here, the Company has, in the past called the senior employee to offer the work available. No evidence was offered that in those previous recalls the employee was mandated to accept the recall or be discharged. To the contrary, Union witnesses testified without serious challenge that there was never a demand to accept a recall in the past or be discharged. No opposing testimony or exhibits were offered to refute that testimony. The Company argued that the number of such occurrences was not sufficient to create a binding past practice. Nonetheless, the practices of the parties, limited as they were, provides considerable guidance as to how they were applying the controlling language. There is little to no evidence that they intended the language of Article 9.03 A (6) to be applied in this situation as the Company did. The Union's unrefuted testimony that the language of Article 9.03 A (6) was intended to apply only to general/permanent or start up recalls is compelling.

When a start up, general or permanent recall, or “circumstances requiring otherwise” are present the Company has a right to insist that employees report back to work pursuant to the recall notice. If employees do not return under such circumstances, they would appropriately face the prospect of discharge. The terms “start up” and “general or permanent recall” were used by parties in this arbitration, but not defined. For purposes of this award those terms are taken to mean that substantially all employees are recalled back to work for an indefinite period. The award is not intended to require that all employees be recalled before a “start up” or “general/permanent” recall is found to exist. Rather, those terms are to have the meaning the parties have previously applied to them. When a “start up” or “general/permanent” recall is in place, the record is clear that the right of a senior employee to decline a recall would not apply.

The Union grieves the use of certified mail to notify employees of their being recalled, and contends that the Company should use telephone calls instead. There is nothing in the contract to prevent the use of certified mail for such notifications. Indeed the paper trail created by certified mail could prove to be of value to both the Company and the employees involved.

A plant wide shut down in a town the size of Grand Rapids undoubtedly has a profound effect on the employees and the community. Testimony at the hearing indicated that at least one laid off employee was seeking educational advancement during his lay off. It is reasonable to conclude that his education was related to his pursuit of employment prospects in the future. It is also reasonable to find that employees may have to obtain

employment elsewhere to provide for their families. It is reasonable to conclude that the parties intended the flexibility afforded through the 'last sentence' language to relate to these circumstances. Unrefuted testimony of witnesses at the hearing indicated that in the past the Company was compassionate and flexible in recalling employees for intermittent work. They are to be applauded for that. Similarly, testimony at the hearing indicated that senior employees would elect a lay off so that the available work could be given to a less senior employee, and they are to be applauded for that.

In summary, careful analysis of the testimony and evidence adduced at the hearing compels a finding that the grievance be sustained.

**IN THE MATTER OF ARBITRATION BETWEEN**

AINSWORTH ENGINEERED (USA), LLC  
Grand Rapids, Minnesota  
Employer/Company

DECISION AND AWARD

-and-

FMCS Case No. 07-57675  
Grievance No. 6-07  
Recall from Layoff Grievance

UNITED STEEL WORKERS OF AMERICA  
And its Local 1095  
Union

Award Dated: January 9, 2008

**AWARD**

The grievance is sustained in substantial part. The Company may notify employees on lay off of their recall to work by using certified mail, telephone, or other usual and ordinary means. Unless a start up, or general/permanent recall is made, or “circumstances requiring otherwise” are reasonably shown to exist, a senior employee on layoff may decline a recall without risk of discharge. This award is not to be construed to mean that every employee must be recalled in a start up or general/permanent recall before the Company can invoke the threat of discharge.

Dated: January 9, 2008

/s/ James L. Reynolds

James L. Reynolds  
Arbitrator