

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

ELLSWORTH FARMERS UNION CO-OP OIL
COMPANY

Case 9
No. 51453
A-5280

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by
Ms. Renata Krawczyk, appearing on behalf of the Union.

Doherty, Rumble & Butler, Professional Association, by Ms. Lisa Hurwitz Dercks,
appearing on behalf of the Employer.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter referred to as the Union, and Ellsworth Farmers Union Co-op Oil Company, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as the Chairman of a three member Board of Arbitration to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was designated Chairman of the Board of Arbitration. Mr. Michael Thoms was designated the Union representative and Mr. Larry Dokkestul was designated the Employer representative on the Board of Arbitration. Hearing was held on October 26, 1994, in Ellsworth, Wisconsin. The hearing was not transcribed and the parties submitted post-hearing briefs and reply briefs, the last of which were exchanged on December 30, 1994. The parties waived that provision of the contract requiring a written decision within one (1) week after final submission of the dispute to the Board.

BACKGROUND:

The grievant, Rex Stewart, was employed by the Employer for 16 years until his layoff on August 9, 1994. The grievant worked in various positions with the Employer, including in the gas station where he pumped gas, fixed tires, worked on cars, waited on customers and assisted in mechanical work, in the Fertilizer department driving bulk trucks and delivering and applying

anhydrous ammonia and in the feed mill where he hauled corn and feed, operated the mill, waited on customers, bagged feed and performed maintenance. The grievant worked in the feed mill until July 1, 1994, when the Employer ceased feed mill operations and these were taken over by a Joint Venture. As a result, the grievant, based on his seniority, bumped into the Hardware Department. The Hardware Department consisted of one full-time bargaining unit employe, Bert Luther, and a regular part-time employe, a Mr. Horn. The grievant bumped Luther who in turn bumped Horn. The grievant was given a 30 work day trial period at the end of which the grievant was laid off on the basis that he was not qualified for the job. The grievant turned down the Employer's offer of the regular part-time position. On August 9, 1994, the grievant filed a grievance over his layoff from the Hardware Department, and this grievance was amended on September 2, 1994, and appealed to the instant arbitration.

ISSUES:

The parties stipulated to the following:

Did the Employer violate the collective bargaining agreement by laying off Rex Stewart? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 8

SENIORITY

Section 1. Seniority rights and job qualifications for employees shall prevail in all matters of employment in this Agreement except or unless it is specifically noted in any Article or Section. For determination of seniority rights, the rule shall be that the oldest employee in respect to his employment with the Employer in the bargaining unit, as defined in Section 2, is the senior employee and has seniority over anyone his junior who is hired after he was, as defined in Section 2. This shall continue down the list with the above interpretation. Therefore, any place in this Agreement that seniority is mentioned, unless qualified, it shall mean the oldest employee of the Employer in respect to length of employment with the Employer in the bargaining unit. Where no specific mention is made of seniority or any qualification, seniority shall prevail with the above ruling. It is also understood that should any employee leave the bargaining unit for any reason other than that which is

granted in Article 9 entitled "leave of Absence", he shall lose all seniority accumulated to date. Feed Mill and Hardware employee's seniority shall date back to original date of hire (rather than purchase date) for all other purposes except layoff.

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Section 5. In filling vacancies, making promotions or new jobs created within the unit, those employees with the most seniority shall be given preference if qualified.

Section 6. When layoffs are necessary, those employees with the least seniority shall be laid off first provided those employees retained are capable of carrying on the operations. When employees are called back to work, those employees having the greatest seniority shall be recalled first provided they, together with those on the job, are capable of carrying on the plant's usual operations.

Section 7. All job openings shall be posted at least five (5) days. It is agreed that when employees bid on a job, it shall be for at least one (1) years (sic) duration unless otherwise agreed to between the Union and the Employer. The senior employee who bids on the job opening shall be given a thirty (30) day qualifying period. During this period the employee shall retain his regular rate of pay. If proven unsatisfactory at the end of his qualifying period, he shall be returned to his last job. Employees retained on the new or posted jobs shall receive the rate of the job after the above qualifying period. No more than two (2) changes need be posted as a result of one job opening. Thereafter the Employer may fill the job. Employees may be temporarily transferred to other departments in case of fluctuation in work load.

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ARTICLE 16

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Section 5. Regular part time employees will accrue seniority and seniority rights only in relation to other regular part time employees. Regular part time employees will be laid off prior to

full time employees. Regular part time employees will be given first opportunity to become full time employees as openings occur. Seniority, skill, and ability shall prevail in filling all openings. If such employee proves to be unsatisfactory in the required probation period, he or she shall be returned to his or her former part time position. The Employer may employ one (1) part time employee per department. Regular part time employees will not be eligible for pension, wage, or health and welfare benefits, or other contract guarantees. They are not recognized as members of the Union for the purpose of this contract.

UNION'S POSITION:

The Union contends that seniority is the backbone of any contract and the parties' agreement contains a detailed seniority provision. It points out that the contract provides that when layoffs become necessary, the least senior employees are laid off first provided the employees retained are capable of carrying on the operations. It notes that this provision does not require present knowledge and ability, rather "capable" implies the ability to perform. The Union, referring to the job posting for the position the grievant bumped into, asserts that the job does not require experience and simply states that prior experience in retail sales and service of the above items "are desirable."

The Union takes exception to the Employer's basis for laying off the grievant which was that he was not qualified to perform the hardware job. It notes that the Employer pointed to the specific deficiencies in paint mixing, cutting keys and pipes, hydraulic repairs, as well as familiarity with plumbing, electrical, farm products and power equipment. It submits that the Employer showed the grievant how to mix paint on only one occasion and he subsequently was never asked to mix paint on his own, no one ever showed the grievant how to cut keys or pipe. It further alleges that the grievant was not shown nor asked to do hydraulic repairs. It claims that the grievant was familiar with plumbing, electrical and farm products, and as to the power equipment, the only allegation is that the grievant asked on occasion his supervisor or another employee to obtain equipment from the downstairs storeroom. It argues that as the grievant was never disciplined, layoff is an extreme reaction.

The Union states that a close review of the Employer's review of the grievant makes clear that he is not an undesirable employee, that he worked well with customers and co-workers and showed a willingness to learn the "ins and outs" of retail hardware. It further notes that the review statement that the grievant was reticent to try things not familiar to him was based on one thing, the grievant's not feeling quite comfortable enough to mix paint on his own. The review states that the grievant was careless in stocking and there were mistakes in sales tickets, but the grievant was never disciplined for this. It submits that the review indicates inexperience was the grievant's

main weakness but the grievant was definitely trainable in hardware, and the supervisor could not determine how long training would take. The review indicated a lack of interest in power equipment, but according to the Union, this conclusion was based on the

grievant's asking others to pick up a piece of equipment from downstairs, and perhaps a verbal warning might be appropriate, but layoff is not warranted. The Union contends that a review of the Employer's complaints reveals they are without basis.

It submits that the grievant's layoff is in contradiction of the agreement and basic seniority principles. It also argues that the Employer treated the grievant as bidding for the job and applied Article 8, Section 7, when in fact Article 8, Section 6 applies. The Union claims that the Employer has trained others in the Hardware Department but never provided the grievant with training and he was not shown how to perform many tasks nor was he asked to perform these. It insists that the grievant's layoff without warning and without training was unwarranted.

The Union does not deny the grievant did not accept the offered part-time position in the Hardware Department. It states that this position is not represented by the Union, no seniority is gained and there is no eligibility for pension, wage, health and welfare benefits or other contractual guarantees. It claims that with less pay and less hours and no benefits, the grievant was fully justified in not accepting the position. The Union alleges that the Employer has violated Article 16, Section 5 which states that part-time employees will be laid off prior to full-time employees. It requests the grievance be upheld and the grievant be reinstated and made whole.

EMPLOYER'S POSITION:

The Employer contends that the grievant knew that he would have to try out for the position he bumped into and that management would have the right to determine whether he was successful. It submits that the grievant did not grieve the requirement that he try out for the job nor the Employer's decision that his try out was unsuccessful and he was unqualified for the job. It claims that the issue is very narrow and that is whether the layoff itself violated the contract and not about the try out or the Employer's decision as to the grievant's qualifications.

It notes that the grievant has not attempted to bump anyone else and his only complaint is that a part-time employe is working and he is laid off, but the reason for this is the grievant's refusal to take that job.

The Employer insists the grievant does not have the full-time hardware position because he is not qualified for it and, under the contract, the Employer has the right to retain only employees who can perform the work. The Employer states that it is not required to retain employees that it has no work for. It maintains that there is no contract violation and this conclusion is buttressed by the fact that there is no rational remedy for the alleged violation. According to the Employer, the grievant cannot be given the full-time hardware position because he is not qualified and he turned down the part-time job which resulted in his layoff. It submits that the grievance must fail and requests the grievance be decided in the Employer's favor.

UNION'S REPLY:

The Union takes exception to the Employer's assertion that the grievant was laid off because he refused the part-time hardware position as he only refused the part-time position after he had been laid off from the full-time position.

The Union contends that the grievance is that the grievant would not have been laid off but for the trial period and the Employer's insupportable reasons why he failed it. It further asserts that his layoff might not be objectionable if less senior employees or part-time employees were not working. It rejects the Employer's assertion that the grievant conceded the Employer could require a trial period because the contract is between the Employer and the Union and employee interpretations of the contract are not binding, rather the express language of the contract applies and it states that trial periods apply only to bidding situations and not to bumping situations.

It notes that the Employer never gave the grievant the opportunity for training it offers to others. It claims that the grievant did not cause his layoff, the Employer's breach of the contract did. It refers to Article 16, Section 5 which states that regular part-time employees will be laid off prior to full-time employees and there are no exceptions to this clear language. It maintains that the Employer is simply and unfairly trying to "pass the buck." It requests the grievance be sustained and the grievant be made whole for the losses he suffered as a result of his unjust layoff.

EMPLOYER'S REPLY:

The Employer reiterates that the grievant testified that he was not grieving his try out for the hardware position nor the Employer's decision that he was not qualified for it. It submits that the grievant knew on July 1, 1994, he would have to try out for the position and that the Employer has the right to determine if his try out was successful. No grievance was filed over these requirements and the only grievance was filed on August 9, 1994, and it would be untimely on the above issues. It claims that the only issue was whether the layoff was proper. The Employer asserts that it is not required to keep employees off layoff if there is not enough work for them. The Employer points out that the grievant was offered the part-time hardware position but refused it, so it did not violate the contract when it laid him off for lack of work. It requests a decision in its favor.

DISCUSSION:

The parties have taken divergent views over the issue in this case. The Union advocates a strict reading of Article 16, Section 5 asserting that a regular part-time employee remained employed while the grievant was laid off. The evidence establishes that the grievant was offered

the regular part-time position but turned it down. Under these circumstances, the Employer was free to fill the position the grievant had turned down. The Employer would limit the grievance to this issue and its denial would follow.

The Union also argues that Article 8, Section 6 should be read very expansively. It notes that Section 6 does not call for a trial period as does Section 7, so no trial period was required and the grievant met the requirements of Section 6. The Employer, in effect, argues a waiver of any claim of violation by its trial period and determination of the grievant's qualifications.

Section 6 provides that senior employees will be retained provided they are capable of carrying on the operations. Capable means having the ability or necessary qualities to perform the job. It is not equated to experience. In order to determine whether an employee has the ability to perform the job, it is not unreasonable for the Employer to place someone in the job and observe his performance for a period of time to determine, after orientation, familiarization and instructions, whether the employee has the ability and qualities to perform the job. Thus, it is not a contractual violation for the Employer to require a trial period for the employee to demonstrate that he is capable of carrying on the operations. Although the agreement does not set a specific trial period time, it can be inferred that the Employer is the sole judge of whether or not an employee is "capable" and can set a period of time for the employee to demonstrate his abilities. The period of time must be reasonable and in this case, a 30 work day period is not deemed so unreasonable such that a violation of the contract has been established. Thirty work days is reasonable and thus the requirement of a trial period did not violate the terms of the contract.

As noted above, the Employer is the sole judge of whether an employee is capable and its decision will stand so long as its action is reasonable and not capricious, arbitrary or discriminatory. The grievance is not whether the Employer can make such a decision, but the issue here is whether the Employer's decision was reasonable.

It is necessary to review the Employer's evaluation of the grievant during the trial period to determine whether the Employer acted reasonably. A review of the Retail Supervisor, Richard Swan's evaluation and testimony establishes that, in most respects, the grievant's performance was positive. Essentially, Mr. Swan found the grievant's appearance acceptable, the grievant showed a willingness to learn the "ins and outs" of retail hardware, showed a willingness to help customers and when he was given corrective instructions, he accepted them in good humor. 1/ Mr. Swan felt inexperience was the grievant's main weakness but that he was trainable in most phases of hardware. 2/ Swan perceived a lack of interest in power

1/ Ex. 6.

2/ Id.

equipment by the grievant and felt that factor as well as the training required for hardware knowledge established a basis for the grievant's layoff. 3/

Mr. Swan listed things the grievant could not do or was reluctant to do. For example, mixing paint, cutting keys, pipe cutting, hydraulic hose repairs and lack of knowledge and reluctance to get power equipment parts. The grievant was shown how to mix paint but it is unclear if he was asked to mix paint on his own. Additionally, the grievant was shown how to cut and thread pipe but again there was no evidence he was required to do this later. Swan admitted that he did not do hydraulic hose repairs because of liability concerns and there is no evidence the grievant was shown how to do such repairs or asked to do them. The grievant's lack of interest in power equipment appears to result from his asking others to go down to the Mezzanine to pick up parts requested by customers. Swan testified that he did not discipline the grievant for job performance. Initially, the grievant was careless in stocking shelves, made mistakes in sales tickets and after a faltering start on the cash register, an improvement in efficiency was noted. 4/ These deficiencies appear minor and due to a lack of experience and the grievant was not reprimanded or disciplined for these and the evidence is unclear whether these were still concerns at the end of the 30 day period.

The grievant testified that he asked Swan how he was doing in the job and Swan told him he was doing a good job, and apparently Swan never expressed to him his concern that the grievant showed a lack of interest in power equipment.

It is the undersigned's opinion that if the Employer has a trial period that it will orient and instruct the employe as to any deficiencies so the employe can demonstrate that he has the ability to perform properly. Here, it appears that the reasons for the layoff were never clearly expressed to the grievant. If the Employer had done so, the result might have been different. There is unfairness in finding an employe's performance unacceptable without telling the employe what is expected and at least giving the employe the opportunity to demonstrate acceptable performance. It appears that the Employer had concerns, especially about the lack of interest in power equipment, but gave the grievant no feedback to correct this and it merely recommended his layoff. Under these circumstances, it is concluded that the Employer's evaluation and decision was flawed and unreasonable as to the grievant's capabilities. It is concluded that the Employer violated Article 8, Section 6 because it failed to make a fair and reasonable evaluation of whether the grievant was capable of carrying out the operations in the Hardware Department.

3/ Id.

4/ Id.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Employer violated the collective bargaining agreement by laying off the grievant. The Employer shall immediately reinstate the grievant and make him whole by paying him back pay and benefits, less any interim earnings or unemployment compensation received.

The undersigned will retain jurisdiction for a period of thirty (30) days solely for the purpose of resolving any disputes with respect to the remedy herein.

Dated at Madison, Wisconsin, this 2nd day of March, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley
Chairman of Arbitration Board

UNION

EMPLOYER

I CONCUR:

I CONCUR:

Michael Thoms /s/
Michael Thoms

Larry Dokkestul

3-10-95
Date

Date

I DISSENT:

I DISSENT:

Michael Thoms

Larry Dokkestul /s/
Larry Dokkestul

3-7-95

Date

Date