BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MENASHA UTILITIES EMPLOYEES UNION, LOCAL 1269, AFSCME, AFL-CIO and WATER AND LIGHT COMMISSION OF THE CITY OF MENASHA	Case 85 No. 51861 MA-8762

Appearances:

Mr. Michael J. Wilson, Representative at Large, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for the Menasha Utilities Employees Union, Local 1269, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Edward J. Williams, Godfrey & Kahn, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, for the Water and Light Commission of the City of Menasha, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Ruth Wood, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 15, 1995, in Menasha, Wisconsin. The hearing was transcribed, and the parties filed briefs and reply briefs by August 21, 1995.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the Employer violate Article XIX and/or Article III of the labor agreement by refusing the job bid of the Grievant to fill the June, 1994 posted vacancy of Stationary Fireman?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III - MANAGEMENT

The Commission possesses the sole right to operate and manage the Utilities, and all management rights repose in it, subject only to the provisions of this contract. These rights which are normally exercised by the Manager of the Water and Electric Utilities include, but are not limited to, the following:

A. To plan, control and direct all operations of the Utilities . . .

C. Determine and direct the work force . . .

D. To hire, promote, assign and retain employees in positions with the employer . . .

G. To schedule and assign work to the employees and to determine the work to be performed . . .

K. To maintain the efficiency of employees.

Nothing contained in this clause shall be applicable, if inconsistent with any other terms of the Agreement. The commission shall not exercise any of its management prerogatives for the purpose of discriminating against any employee. Disputes under this clause shall be subject to the grievance procedure as set forth herein.

. . .

ARTICLE VIII - GRIEVANCE PROCEDURE

. . .

ARTICLE IX - ARBITRATION

. . .

E. Decision of the Arbitrator:

The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of specific provisions of this Agreement and to determine arbitrable issues as defined in this Article. The decision of the Arbitrator shall be final and binding on both parties. The Arbitrator shall have no power to add or subtract from or to modify or extend any of the terms of this Agreement.

. . .

ARTICLE XIX - JOB POSTING

When a vacancy occurs in any department for any reasons, the employer agrees to post said position . . .

A. Job Award:

The employer shall select from those employees who signed the posting in the department in which the vacancy occurred based on their seniority and qualifications. The employee shall also give to the General Manager, at his office, in writing, his qualifications and period of service. The employer shall determine whether the employee applying for the position meets the qualifications to perform the job. Vacancies not filled within thirty (30) days from the date of posting shall be re-posted before filling said vacancies. This does not include the thirty (30) days trial period.

B. Trial Period:

An employee awarded a job opportunity shall serve a trial period of up to thirty days if deemed desirable

by the employer or the employee. If the employer determines the employee is not qualified for the job, or if the employee himself wishes, the employee may return to his former position at his former rate of pay and without loss of seniority. In such case, the next employee who signed the posting shall be considered for the job. The Union shall be informed of all posting (sic) and the names of the successful applicants.

C. In the event that no employee from within that department qualifies or wants the job, the employer shall select from those employees who originally signed the posting from outside the department based upon qualifications and seniority under the same conditions as currently outlined above. When all other factors are relatively equal, seniority shall be the determining factor . . .

BACKGROUND

The grievance, dated July 21, 1994, alleges a violation of Article XIX due to the Employer's refusal to award the Grievant the Stationary Fireman position posted on June 13, 1994. The grievance states the requested remedy thus: "I should have the chance to try this job."

The June 13, 1994 posting reads thus:

. . .

GENERAL RESPONSIBILITIES

This is skilled work in the operation of high pressure steam boilers in an Electric Power Generation Plant.

Work involves responsibility for the operation of high pressure steam boilers to assure an even and properly regulated flow of steam to turbine generators. Work includes performing Power Plant Operator's duties on a relief basis.

Work includes maintaining proper water levels and coal distribution for efficient boiler operation. Work is performed within established

policies, procedures, and technical guidelines,

and will be under the supervision of the Power Plant Operator whenever a Management person is not present. Work is reviewed by superiors through conferences and results obtained.

This is a skilled position wherein the employee is expected to learn the additional skills of Power Plant Operator for the purpose of assignment to such position both on a relief basis as well as the eventual progression to Power Plant Operator.

EXAMPLES OF WORK

Operates high pressure steam boilers in an Electric Power Generation Plant on an assigned shift.

Maintains proper water levels and coal distribution in the boilers; starts up and shuts down boilers, as required.

Makes regular inspection tours to assure proper lubrication, cooling, and operation of machinery; records voltage readings on the precipitator.

Changes recording charts; takes and tests samples of boiler water; greases machinery, and performs other routine maintenance on a regularly scheduled basis.

Performs Power Plant Operator duties on a relief basis.

Prepares and maintains necessary records and reports.

Performs related work as required.

QUALIFICATIONS

Considerable knowledge of the methods and techniques of high pressure steam boiler operation.

Considerable knowledge of the safe and most efficient steam pressures and temperatures in boiler operation.

Considerable knowledge of the hazards and safety precautions of the trade.

Ability to operate high pressure, steam boilers in a safe and efficient manner.

Ability to react quickly and properly in emergency situations.

Ability to establish and maintain effective working relationships with superiors and other employees.

DESIRABLE EDUCATION AND EXPERIENCE
Graduation from high school, and considerable experience in the operation of high pressure steam boilers, or any equivalent combination of education and experience providing the knowledge, abilities, and skills listed above.

SUPERVISION: This position reports to the Power Plant Superintendent.

WAGES: $14.52 to $17.64, depending upon qualifications.

HOURS: 40 Hours Per Week - Rotating Shift Job

Indicate intention to apply for the STATIONARY FIREMAN position by signing below, and by separate application in writing to the Power Plant Superintendent, stating your qualifications for this position.

. . .

NOTE: PENDING APPLICATION BY QUALIFIED PERSON, THE LEAST SENIOR MAINTENANCE WORKER/RELIEF FIREMAN WILL BE ASSIGNED TO FILL THIS OPEN POSITION.

The Grievant was the only unit employe who signed the posting. The Employer placed the least senior Maintenance Worker/Relief Fireman, Donald Bojarski, in the Stationary Fireman position.

The Employer provides water and electricity to its customers. The Employer's coal-powered electric power plant is under contract to Wisconsin Public Power (WPPI), which is a joint action utility owned by thirty Wisconsin municipal utilities. The plant once provided electricity to its customers on a twenty-four hour per day, seven days per week basis. In 1992, the Employer became a peaking facility. As a peaking facility, the Menasha plant is dispatched to provide power to a grid maintained by WPPI on an as-needed, low cost provider, basis. When

needed, the Employer is under contract to provide power to the grid on twelve hours notice. Since 1992, WPPI has run the Menasha plant roughly eight to twelve days per year for capacity testing in addition to whatever peak service WPPI members require. The Menasha plant is staffed to be called into operation at any time.

The Employer's electric power plant consists of four boilers, four turbines and four generators. Two of those units are no longer operational. One of the operational boilers is designed to provide a flow of steam at 150,000 pounds per hour. It operates at 650 pounds per square inch of steam pressure at a temperature of 835 degrees. The other operational boiler is designed to provide a flow of steam at 202,000 pounds per hour. It operates at 905 pounds per square inch of steam pressure at a temperature of 905 degrees. Each unit is roughly five stories tall.

The bargaining unit represented by the Union includes six classifications which are directly involved in the mechanical operation of the electric power plant: Power Plant Operator; Power Plant Technician; Stationary Fireman; Power Plant Maintenance Mechanic; Maintenance Worker/Relief Fireman; and Coal & Ash Worker. Of these positions, Power Plant Operator and Power Plant Technician are the highest paid. The 1994 pay range for those positions extends from $15.24 to $18.49 per hour. The 1994 pay range for Power Plant Maintenance Mechanic is the same as that for Stationary Fireman. The 1994 pay range for Maintenance Worker/Relief Fireman extends from $13.17 to $16.00. The 1994 pay range for Coal & Ash Worker extends from $12.51 to $15.24. The position description for Coal & Ash Worker identifies the work of that position as "manual work." The position description for Maintenance Worker/Relief Fireman identifies the work of that position as "unskilled and limited skilled work."

The Grievant, at the time she signed the posting, was classified as a Water Plant Clerk. The 1994 pay range for that position extends from $10.85 to $13.17 per hour. She has worked for the Employer since 1975. Before her employment with the Employer, she was employed as a Head Cook, in various clerical positions and as a finisher of metal machine parts. Her sole experience with boilers was with pressure cookers.

In a letter to James Koehler, the Employer's Power Plant Superintendent, dated June 17, 1994, the Grievant stated her interest in the posted position thus:

> I am still interested in the job of Stationary Fireman.
>
> I have been employed by Menasha Utilities for the past 19 years and worked at various occupations. I would now like to be considered for the position of Stationary Fireman.

In response to the Grievant's stated interest, the Employer's General Manager, Dennis Rydzewski, called a meeting to consider her qualifications. Rydzewski, Koehler, the Grievant and Sandy Brink, the Employer's Accounting Department Manager, attended the meeting. At a minimum, the meeting covered the qualifications required of a Stationary Fireman and those possessed by the Grievant. None of the Employer representatives considered the Grievant qualified for the position. All of those representatives considered Bojarski, as the employe who

would be assigned the position, qualified for the position. On or about July 11, 1994, another meeting was conducted with the same personnel, and the Grievant was informed she would not be awarded the position of Stationary Fireman.

Much of the evidence adduced at hearing concerns the Employer's past conduct in filling positions in the electric power plant. A brief overview of that evidence is a necessary preface to the parties' positions.

The "NOTE" at the end of the June 13, 1994 job posting was stated on job postings dated October 16, November 19 and November 30 of 1990. The "NOTE" also appeared on a job posting dated June 25, 1991. Each posted position was that of Auxiliary Operator, which has come to be known as Stationary Fireman. It appears, however, that Bojarski is the first employe moved into a posted position under the terms of the "NOTE." Tim Gosz was recalled from layoff status into the position of Stationary Fireman. His recall was noted in a letter from the Employer's then incumbent General Manager to the Union, dated March 9, 1983, which reads thus:

> The posting on February 24, 1983, for the position of Stationary Fireman was not signed by any employee, therefore we called Timothy Gosz from layoff status . . .

It is not clear if the February 24, 1983 posting included the "NOTE."

Several employment histories were entered into evidence. Gosz, at the time of his recall, had no prior experience or training in boiler operation. In April of 1984, the Employer hired Peter Biese as a Stationary Fireman. He had previous experience in boiler operation. Stephen Ellisen was hired as a Stationary Fireman in May of 1987. He had prior experience at another utility. In September of 1989, Ellisen, after a thirty day trial period, declined the position of Power Plant Operator. Two other unit applicants, Gerard Watras and Gregg Peterson had applied for the opening. In a letter dated September 26, 1989, Koehler informed Watras he would not be placed in the position thus:

> Due to your inexperience and short time with Menasha Utilities, at this time, I do not feel you are qualified for training in this position. Therefore, the position will be reposted.

Both Watras and Peterson had prior experience or training in boiler operation. Both started work as Stationary Fireman in January of 1989. In a letter dated October 5, 1989, Koehler informed each employe they would not be placed in the posted position of Power Plant Operator. Each

letter reads thus:

> Thank you for your interest in becoming a power plant operator, however, I do not feel, at this time, that you have had enough experience in your current position as stationary fireman. Once #4 is back on line and time and manpower permit, you will be trained as a relief operator which is part of your current position.

Watras left employment with the Employer in June of 1991. In April of 1990, Peterson became a Power Plant Operator.

Gary Pagel was hired as a Stationary Fireman in March of 1990. He had prior experience in boiler operation. James Spencer was hired as a Stationary Fireman in June of 1990. He had an Associate Degree in Electrical Power Technology and prior experience at another municipal utility. In April of 1991, the Employer hired Scott Maurer as a Stationary Fireman. In August of 1991, the Employer hired Ricky Socha as a Stationary Fireman. Each had prior training or experience in boiler operation.

In July of 1990, the Employer rejected the job application of Ted Siebers. In January of 1991, however, the Employer hired Siebers as a Stationary Fireman. He had no prior training or experience in the operation of boilers. In a letter dated July 1, 1991, to Jerry Hiler, the Union's President, Koehler noted that the Employer wished to extend Siebers' probation period:

> Ted Siebers six month anniversay (sic) is July 07, 1991. Ted is to be an Auxiliary Operator. Under the direction of WPPI, we have not operated either machine, with the exception of testing the week of May 09, since April. As a result, Ted has not been exposed to his ultimate position with Menasha Utilities.
>
> We are scheduled to come on line July 08, 1991 and at that time I intend to have Ted out on operations training. In all fairness to Ted and to Menasha Utilities, it is my intent to extend his probationary period an additional three months; to October 07, 1991.
>
> . . . The reason for extending the probationary period is solely to ensure that he is able to learn his position on operations . . .

In a letter to Hiler dated August 16, 1991, Koehler stated Siebers' progress thus:

> Since my July 01, 1991 memo regarding the extension of Ted's probationary period, he has been exposed to and begun training for the position of Auxiliary Operator.
>
> Ted has done well in his training, and on August 15, 1991 took and passed his test on firing. The reason for the extension was to ensure his ability to learn the position. It appears as though Ted will make a fine fireman, and effective Sunday, August 18, 1991, he will be reassigned to Fireman, Step II . . .

On five occasions prior to his assignment to the position of Stationary Fireman, Bojarski had served on a temporary basis as a Fireman. He was first employed as a Maintenance Worker/Relief Fireman in February of 1979.

Any employe assuming the position of Stationary Fireman requires training. That training is provided in house. Over time, employes have developed a manual covering the different aspects of the electric power plant's operation. The manual is a series of questions which, to be answered correctly, immerse an employe in the operation of the electric power plant. When an employe feels he is familiar with the material covered in the manual, he is tested by the Employer. That test must be passed, but on at least one occasion, an employe who failed the test was permitted to take it over again. Even when the electric power plant was in 365 days per year operation, the training of a Stationary Fireman required more than thirty days.

It is undisputed that the position of Stationary Fireman is a skilled position vital to the safe operation of the electric power plant. It is also undisputed that errors made by a Stationary Fireman can have potentially disastrous implications. Todd Kerschbaum, the Director of Engineering for WPPI, testified that the Grievant could not be trained to be a Stationary Fireman at the Menasha facility in less than three to five years. The length of his estimate is based on her prior lack of experience but more significantly on the Menasha facility's limited on-line time. Two unit members testified and supported Kerschbaum's opinion. Richard Sturm, who serves as a Power Plant Operator and also instructs fourth class power engineering classes at the Northeast Wisconsin Technical College, does not share the opinion that lower operating hours have rendered in-house training infeasible.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After an extensive review of the evidence, the Union contends that the "qualifications of (the Grievant) and Donald Bojarski should never have been compared." That Bojarski is the better qualified candidate can be granted, according to the Union. The fact remains that Bojarski did not apply for the position and this mandates that the Stationary Fireman position "should have been awarded to employee applicants from other departments based upon qualifications and seniority."

Since no other employes applied, the Union concludes that the Grievant should have been afforded the opportunity to train for the position. Under the labor agreement and relevant arbitral precedent, the opportunity to be trained for the position cannot, the Union argues, be unilaterally withheld from the Grievant.

Noting that no employe was qualified for the position and that no employe could be trained for the position within thirty days, the Union concludes that the Employer had no factual basis to prefer Bojarski over the Grievant. That the Employer has trained minimally qualified applicants for the position in the past underscores this conclusion. Contending that the Grievant "is trainable for the position" and that "the Employer has not seriously contested her ability to learn the position," the Union concludes that the Employer lacks any basis in the contract or in fact to deny her the right to a trial period.

The Union concludes by making the following remedial request:

> (T)he Union respectfully requests the Arbitrator sustain the grievance and order the Grievant's "assignment" as Stationary Fireman with full back-pay (the difference between what she was paid and what she otherwise would have been paid as a Stationary Fireman had she been so assigned following completion of the job posting procedure).

The Employer's Initial Brief

The Employer states the issues for decision thus:

> Did the Employer violate Article XIX of the labor agreement when it did not select the Grievant for the position of Stationary Fireman?
>
> If so, what is the appropriate remedy?

The Employer's first major line of argument is that the Employer, unlike the Grievant, fully

complied "with the express terms of Article XIX."

Section A of Article XIX unambiguously "vests exclusively in management the right to determine an employee's qualifications for a position," and Section E of Article IX precludes arbitral modification of the labor agreement. With this as background, the Employer concludes that "unless the Employer's decision" that the Grievant did not have the minimum qualifications for the position "is arbitrary or capricious, it must stand."

Section A of Article XIX required the Grievant to submit a written statement of her qualifications for the position of Stationary Fireman. That the Grievant failed to do so is, the Employer argues, sufficient reason, standing alone, to deny the grievance. In spite of the Grievant's failure to supply that writing, the Employer met with her in "a good faith effort to determine" her qualifications. That effort, the Employer asserts, revealed the Grievant's lack of qualifications for the position.

The Employer argues that the Stationary Fireman position is part of a progression, and is not "an entry-level position." The rate of pay and position description establish, the Employer asserts, that the position is highly skilled. The evidence is "overwhelming," the Employer contends, that the Grievant lacks "the minimum qualifications for the position." Testimony from management employes, unit employes and an expert witness all indicate, the Employer argues, that the Stationary Fireman position is highly skilled and vital to the efficient and safe operation of the utility. Those witnesses with significant experience agree, the Employer concludes, that the Grievant lacks the "initial qualifications to perform the job."

The Employer's second major line of argument is that arbitral precedent distinguishes between a trial period and a training period, and that Section XIX, B provides for a trial period. Relevant practice establishes, according to the Employer, that it has denied employes a trial period where the employe failed to possess the minimum qualifications for the position.

The Employer's next major line of argument is that its training manual, in-house training programs and the labor agreement all presume that Article XIX provides a 30 day trial period, not a 30 day training period. The Employer argues that even if this evidence is ignored, the Grievant could not be given the minimum qualifications for the position within 30 days.

Viewing the record as a whole, the Employer asks that the grievance be denied.

The Union's Reply Brief

The Union argues that much of the Employer's argument "is misplaced" since Section XIX, C governs the grievance, not Section XIX, A. That the Grievant failed to submit a written list of qualifications is, the Union asserts, a diversion. This issue was not raised at any

point in the processing of the grievance and it is not clear why it should be given any weight at this point in the process. The Union asserts that the more fundamental difficulty with this line of argument is that no such writing is required by Section C. Even if Section C stated such a

requirement, the Union argues that the Grievant complied with it "at least twice." That the Employer seeks to create "artificial and meaningless hurdles to the Grievant's application" is, the Union concludes, "evidence of prejudice."

That Section XIX, C governs the grievance distinguishes the grievance from the arbitral precedent relied on by the Employer. The Union argues that no view of Section XIX, C can make a weighing of the relative qualifications of Bojarski and the Grievant relevant to an award of the position of Stationary Fireman. What is relevant, according to the Union, is that "Bojarski was not qualified to perform all the duties of the position and could not successfully complete a trial period for same within thirty (30) days."

The Union then contends that because the Employer has failed to present any timely objection to the Grievant's alleged lack of qualifications, it has waived any such objections under the terms of a prior arbitration award.

Asserting that no other employe has been required to demonstrate job qualifications within the thirty day trial period, the Union concludes that this "case is about disparate treatment." That the plant is no longer on-line on a full-time basis complicates the training process, but the process is no less complicated for Bojarski than for the Grievant. Beyond this, the Union denies the persuasive force of past practice: "not only were there possibly more senior applicants for the position in question but . . . Peterson was assigned as power plant operator in April of 1990."

Safety issues can, the Union contends, play no role in the determination of this grievance. The grievance presumes that the Grievant will be properly trained in the safe operation of plant boilers since that "is the Employer's responsibility." If the Employer is concerned about safety issues, that concern, according to the Union, could more fruitfully be translated "into an agreement wherein the Union can appeal safety issues to grievance arbitration."

Viewing the record as a whole, the Union "requests the arbitrator sustain the grievance and order appropriate remedy."

The Employer's Reply Brief

The Employer contends that the Union's contention that Bojarski's and the Grievant's qualifications cannot be compared ignores the express requirements of Section XIX, A. Nor can focusing on Section XIX, C change this, since the agreement must be read as a whole, and Section C does not obviate the requirement that a job applicant be minimally qualified for a position. Beyond this, the Employer argues that past postings expressly stated that pending application by a qualified applicant, the least senior departmental employe would be assigned to fill the open position. This is, the Employer contends, precisely what happened in this case.

The Employer then disputes the relevance of the arbitration award cited by the Union. Even if that award was not distinguishable, the Employer argues that an arbitrator cannot legally be compelled to follow precedent. That the Employer has trained other employes and has reimbursed other employes for undertaking training is, the Employer argues, irrelevant here. Such training and reimbursement uniformly, according to the Employer, presumed that the employe met the minimum qualifications of the position. Acknowledging that it has hired one employe without boiler experience, the Employer argues that this single exception is distinguishable from the facts of the grievance and is, in any event, insufficient to establish a binding practice. More specifically, the Employer asserts that the utility was, at that time, in full-time operation and on-site training was feasible. At the present, the Employer does not control when the plant will operate. Beyond this, the Employer argues that recent history suggests training opportunities will be few and far between.

The Employer concludes that the grievance must be denied.

DISCUSSION

I have adopted the Union's statement of the issues. The difference between the Union's and the Employer's is not significant. The Union's underscores that Article III must be considered, since the "NOTE" which states how Bojarski was assigned as Stationary Fireman is rooted less in Article XIX than in the Employer's right to assign under Article III. The Employer has cited Article IX in its brief, but the admonition of Article IX, Section E turns on the interpretation of Articles III and XIX.

The interpretive difficulty posed by the grievance is based less in contract language than in determining how the language applies to the facts. The prefatory paragraph of Article XIX sets out the posting procedure. Section A mandates that intra-departmental applicants "shall" be considered first for selection. Section C applies when no intra-departmental applicant "qualifies or wants the job." These sections are, on their face, bound together. Section C repeats that "qualifications and seniority" govern the choice between competing applicants. More significantly, this statement is to be applied "under the same conditions as currently outlined above." This statement, on its face, draws Sections A and C together.

Read together, Sections A and C mandate that the Employer review an intra or an inter-departmental applicant's qualifications before the "seniority and qualifications" criterion is applied. The third sentence of Section A mandates that "(t)he Employer shall determine whether the employee applying for the position meets the qualifications to perform the job." Section C underscores that this determination must precede weighing "seniority and qualifications." If this was not a threshold determination, a significant part of the first sentence of Section C is rendered meaningless. That sentence provides that inter-departmental applicants are considered only if "no employee from within that department qualifies or wants the job." If seniority alone granted a

right to a position, there is no need for the reference to an employee who "qualifies."

The fundamental issue posed by the grievance is whether the Employer's determination that the Grievant was not qualified to be a Stationary Fireman violated Article XIX. The Employer asserts this determination can be questioned only if it was arbitrary or capricious. It is not, however, necessary to speculate on the appropriate standard of arbitral review to address this point. The Employer's determination cannot be dismissed as unreasonable, and this is the broadest standard of arbitral review.

The Employer concluded that the Stationary Fireman position requires a level of skill and training which the Grievant neither possessed nor could be expected to receive in a reasonable period of time. That the Grievant lacked any qualifications for the position is undisputed, as is the fact that the position of Stationary Fireman cannot be considered entry level. None of this reflects any personal failing on the Grievant's part. Rather, it reflects that her work as Water Plant Clerk afforded her no relevant experience in the operation of the boilers of the electric power plant. Beyond this, her prior work experience provided her with no relevant training. The Employer's conclusion that her past experience with a pressure cooker has no significant bearing on the operation of five story boilers operating at 800-900 degrees is difficult to characterize as less than reasonable. The record reflects that the Employer afforded the Grievant the opportunity to present her qualifications and evaluated those qualifications without any bias. In sum, the record affords no basis to conclude the Employer's determination that the Grievant was unqualified for the position was unreasonable.

Nor does the record afford a basis to question the reasonableness of the Employer's assignment of Bojarski as Stationary Fireman. That assignment, as noted above, rests not on Article XIX but on Article III. The statement of the "NOTE" on the job posting cannot be considered to have granted the Employer any right to assign beyond that granted in Article III. However, I can see no reason to conclude the assignment violates Article III. That the "NOTE" may account for Grosz's placement as a Stationary Fireman is speculative. There is no evidence the "NOTE" reflects a mutually understood practice. There is, however, no basis to conclude the "NOTE" violates Article XIX or the broad language of Article III, Sections D, G and K.

This sketches out the broad contractual parameters governing the grievance, but does so at the cost of not addressing the strength of the Union's arguments. It is necessary to address those arguments to clarify the application of the contract to the facts.

The strength of the Union's argument is that no employe assigned to be a Stationary Fireman has ever been "qualified" for the position at the point of application or within any time less than six weeks of that application if "qualified" is read to mean "presently possessing the skills" of a Stationary Fireman. From this, the Union argues that the "qualifications" determination turns on the trainability of the Grievant, not on the skills she may possess prior to training. The Employer counters that neither Section A nor Section B obligates the Employer to

afford anything more than a "trial" period to a "qualified" applicant.

The Union's contention raises a significant interpretive difficulty. If no employe possesses the skills of a Stationary Fireman even after the Article XIX, Section B trial period, then any applicant can be considered unqualified. This turns the third sentence of Article XIX, Section A into a provision of unlimited discretion. Such a reading would unpersuasively render the detailed posting provisions of Article XIX superfluous. However, the Union's interpretation also poses difficulty. Its reading of Article XIX denies any discretion to the Employer to determine qualifications, thus rendering the third sentence of Section XIX, A meaningless.

This interpretive dilemma can be resolved only on a case-by-case basis, by examining the reasonableness of the Employer's determination of an applicant's qualifications. As the parties' positions demonstrate, this determination must assess not only an applicant's immediate qualifications, but the feasibility of in-house training supplementing those qualifications. In this case, the reasonableness of the Employer's assessment cannot persuasively be challenged. As noted above, the Grievant's lack of qualifications is undisputed. More significantly, in-house training cannot feasibly address this. The electric power plant is operational so seldom and so sporadically that the necessary training would take years. The Union has asserted the Employer has an obligation to train any Stationary Fireman. As argued by the Union, however, this duty to train is unlimited. Even if the Employer trained the Grievant off-site, such training can be given meaning only when the plant is operational. It can be granted that the Employer must, to some degree, train a Stationary Fireman. The essential point here is that the labor agreement states no unlimited duty on the Employer's part to train applicants for a posted position. This broad a duty to train must rest on contract language, not arbitral implication.

The Union underscores its contentions by pointing to past practice and to a prior arbitration award. The evidence will not, however, establish a past practice. At most, the Employer's treatment of Gosz and Siebers indicates a willingness to train otherwise unqualified applicants as Stationary Firemen. Neither example, however, demonstrates anything more than that the Employer will train an unqualified applicant when the plant is operational. Siebers became a Stationary Fireman only because his probation period was extended long enough to permit his exposure to operating boilers. This demonstrates both that the Employer considers the feasibility of training relevant to the determination of qualifications and that the Employer considers exposure to the boilers' operation essential to the position of Stationary Fireman. That the Grievant has no such luxury reflects no failing on her part, but a reflection of the current operational status of the electric power plant. In any event, the essence of past practice is the mutual agreement manifested by the conduct of the bargaining parties. In this case, the evidence affords no support for the conclusion that Gosz's or Siebers' treatment represents a willingness by the Employer to assume an open-ended obligation to train a job applicant.

The Accounting Clerk arbitration cited by the Union has no bearing on this case. In that case, Arbitrator Moberly reviewed the following language:

> If no regular employee makes application for this job by signing said posting, it shall be given to the temporary employee applying (signing) who has the most seniority, subject to the right of the Employer to determine whether the employee applying for said position has the proper qualifications to perform the job.

Moberly interpreted that language thus: "However this clause would appear to apply only to temporary employees who sign a posting." This has no bearing on the interpretation of the third sentence of Section XIX, A which grants the Employer the right to assess the qualifications of "the employee applying for the position." Moberly's observation that the determination to try the job resided with the employe thus has no applicability here. Even if it did, it is difficult to reconcile the factual gap between training an employe in ongoing accounting functions to training an employe in the sporadic operation of potentially hazardous machinery.

The Union's contention that the contract does not envision a comparison of Bojarski's and the Grievant's qualifications is persuasive. The evidence indicates the Employer did assess Bojarski's qualifications. This evidence cannot, however, obscure that the contract mandates a preliminary determination by the Employer of an applicant's qualifications which is independent of an assessment of the qualifications of a competing applicant. In this case there were no competing applicants, and the Employer determined the Grievant was not qualified. Bojarski's assignment reflects the absence of qualified applicants, not a comparison of his and the Grievant's qualifications. He was not awarded the position under Article XIX. He was assigned the position under Article III.

The Employer's and the Union's dispute on whether the trial period of Article XIX, Section B can be considered a "training period" is only marginally relevant to a determination of the grievance. Whether a training period or not, the 30 day trial period follows the award of a position to an applicant determined to be qualified. The discussion above slurs this distinction by noting the determination of minimum qualifications must involve some assessment of the feasibility of training. This reflects that the distinction between a trial and a training period is easier for an arbitrator to state in the abstract than for bargaining parties to maintain in fact. Any trial period inevitably involves some training, intended or not. More to the point, the distinction between the determination of minimum qualifications and the trial/training period cannot be kept crystal clear on this record. No employe who has become a Stationary Fireman passed the requisite test within the 30 day trial period.

That the Grievant failed to submit a statement of her qualifications to the Employer until requested to do so well after signing the posting offers no assistance in resolving the issues. The Employer asserts the Grievant's belated submission of the writing is a basis to deny the grievance. Article XIX, however, states neither a time limit for submitting the writing nor a sanction for a failure to do so. There is no persuasive basis to conclude either that the Grievant failed to comply

with this requirement or that the Employer was prejudiced by the brevity of the statement she submitted.

The parties have disputed the content of the two meetings in June and July of 1994 at which the Employer determined the Grievant's qualifications and then informed her she would not be awarded the position. None of the statements alleged by either party has any bearing on the grievance. Even assuming the intent of either the Employer in posting the position or of the Grievant in signing for it could be determined, their intent offers no assistance in interpreting the authority of Article III or the rights afforded under Article XIX.

In sum, the third sentence of Section XIX, A authorizes the Employer to determine whether an applicant meets the minimum qualifications for a posted position. This sentence does not grant the Employer unfettered discretion to reject any applicant for the position of Stationary Fireman who does not possess the qualifications to pass the test for that position within 30 days, since no applicant for the position has had such qualifications. However, the Employer can weigh the current qualifications of such applicants as well as the feasibility of training otherwise unqualified applicants. Where the Employer's assessment of these factors is reasonable, its determination of qualifications cannot be set aside. In this case, the Employer's determination was reasonable. Because the Employer's assignment of Bojarski has not been shown to violate Article III, no contract violation has been proven.

AWARD

The Employer did not violate Article XIX and/or Article III of the labor agreement by refusing the job bid of the Grievant to fill the June, 1994 posted vacancy of Stationary Fireman.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 19th day of December, 1995.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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