LABOR & EMPLOYMENT

Arbitration Decisions ☆ Favorite

Labor Arbitration Decision, Silgan White Cap Corporation, 2020 BL 454171, 2020 BNA LA 1268

Pagination

* BNA LA
1268 p

Decision of Arbitrator

In the Matter of: UNITED STEELWORKERS, AFL-CIO-CLC, LOCAL UNION 5163, and SILGAN WHITE CAP CORPORATION, Employer.

October 5, 2020

Hide Summary

Case Summary

LABOR ARBITRATION

SUMMARY

[1] Wages - Promotion - Wage rate - Management rights ►119.124 ►114.308 ►2.01 [Show Topic Path]

Silgan White Corporation, a packaging company, did not violate its collective-bargaining agreement with the Steelworkers union when it promoted 16 non-probationary lug line and fab maintenance technicians—who had at least 60 working days in—to the highest pay level within their classifications, without requiring these employees to complete certain hours of training referred to in their job descriptions, Arbitrator Lee Hornberger ruled. He found that "training" occurs for the first few weeks, after which the employee performs the job on their own with only the opportunity to ask questions, and the pay progression on the last page of the job descriptions neither mandates nor explains what the training consists of. The company took action because they had lost employees to a new company that paid better, it had a management right to "promote" employees to a higher paying wage level, and there was no evidence that employees who received the pay increases were unable to safely do their jobs or were somehow not fully qualified.

Markeya McDaniel, International Staff Representative, United Steelworkers, 9402 Uptown Drive, Suite 600, Indianapolis, IN 46256, mmcdaniel@usw.org, for the Union.

Bernard J. Bobber, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Pabst Boiler House, 1243 North 10th Street, Suite 200, Milwaukee, WI 53205-2559, 414-239-6411,

Bernard.bobber@ogletree.com, for the Employer.

LEE HORNBERGER, Arbitrator.

VOLUNTARY LABOR ARBITRATION TRIBUNAL
DECISION AND AWARD
INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between the United Steelworkers, AFL-CIO-CLC, Local Union 5163 (Union) and Silgan White Cap Corporation (Employer). The Union contends that the Employer violated the CBA when the Employer failed to require completion of training hours for incoming employees and accelerating their rate of pay. The Employer maintains that it did not violate the CBA when it paid the employees then in the pay progression process at the full rate for their job.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on September 8, 2020, in Wayne County, Indiana, via Zoom. The Zoom platform worked quite well. At the hearing, the parties were afforded the opportunity for examination and cross-examination of witnesses and for introduction of relevant exhibits. The dispute was deemed submitted on September 28, 2020, the date the last post-hearing submission was received by me.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

ISSUE

The Union frames the issue as:

Whether or not the Employer may decline to require completion of required hours of training for certain positions and, if the Employer disregards completion of required hours of training, may the Employer accelerate pay for those employees who failed to complete the hours of training requirement?

The Employer frames the issue as:

Whether the Employer violated the CBA by accelerating the employees through the pay progression to the full pay rate for their jobs? If so, should the cease and desist remedy sought by the Union include reducing their pay?

The parties agreed that in light of the submissions I could frame the issue. I frame the issues as:

Did the Employer violate the CBA when it placed 16 Lug Line Technicians and Fab Maintenance Technicians in the highest pay level within their Classifications? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE I. BARGAINING UNIT

Section 1. Coverage

It is the intent and purpose of the parties to set forth certain agreements pertaining to wages, hours and working conditions to be observed between the parties, and to provide procedures for the prompt and equitable adjustment of grievances.

Section 2. Recognition

The Company hereby recognizes the Union as the sole and exclusive collective bargaining representative for all hourly production and maintenance employees, employed by the Company at its location currently located in Richmond, Indiana; but excluding the Plant Manager, Assistant Plant Managers, Managers, Supervisors, all office clerical**[*2]** employees, salesperson, technical professional employees, guards, and supervisors as defined in the "Act".

...

Section 4. Management Rights

The Company has, retains, and shall continue to possess and exercise all management rights, functions powers, privileges and authority inherent in the right to manage except only those rights relinquished or restricted by the provisions of this Agreement. Such right to manage includes, but is by no means limited to, the right to select, hire, transfer and promote, and to suspend, lay off, discipline or discharge for just cause; assign and supervise employees; to determine and change schedules, starting times, quitting times, and shifts, and the number of hours to be worked and the nature of work to be performed by employees and methods, procedures and equipment to be utilized by employees to achieve the highest level of employee performance, productivity, and customer service consistent with safety and good health, to determine staffing patterns; to determine standards, policies and procedures with respect to production and customer service; to determine or change the methods and means by which its operations ought to be carried on, including the right to make and carry out contracts with primary or independent contractors or subcontractors; to determine, modify, and enforce reasonable work standards, rules of conduct and regulations (including rules regarding attendance and drug and alcohol testing); to determine the size and location of the Company's facilities; to extend or curtail, and to terminate or relocate the operations of the Company or any part thereof permanently or temporarily; to introduce new and improved methods or facilities; to change existing methods or facilities; to utilize employees whenever necessary in cases of need or in the interest of productivity, customer service and to maintain safety, efficiency, discipline, and order.

It is further understood and agreed that all rights heretofore exercised by or inherent in the Company not modified or restricted by the terms of this Agreement are retained solely by the Company and the exercise of such right shall not be contrary to or inconsistent with the terms of this Agreement.

...

Section 5. Negotiation of Excluded Matters

This agreement fully and completely incorporates the understanding hereto and constitutes the Agreement between the Parties on any and all matters subject to collective bargaining.

Neither party shall, during the term of this agreement, be required to accede to any demand for change herein.

Section 6. Other Agreements

Only those Letters of Agreement and Memorandums of Understanding that have been mutually agreed to between the Company and the Union as of the effective date of this Agreement shall be in effect. All other letters, memorandums and understandings are null and void.

ARTICLE III. STANDARD HOURLY RATES

The tables of Standard Hourly Rates to be effective during the term of this Agreement are attached**[*3]** hereto as Appendix I and I-A. Furthermore, effective within thirty (30) days of December 1, 2017 employees will receive a lump sum payment less applicable deductions of $*1,350.00*.

...

ARTICLE IV. NEW OR CHANGED JOB CLASSIFICATIONS

Section 7. New Job Classifications

In the event the Company establishes a new job classification or alters an existing job classification during the term of this Agreement, the Company will give the Union reasonable notice of the new or changed duties and the new or changed rate of pay. If the Union has any objection concerning the new or changed rate, the Company and the Union will meet and negotiate over such question. If agreement on such rate is not reached the Union may, within 30 additional days, submit the question to arbitration. The Arbitrator shall be limited to determining whether or not the rate placed into effect by the Company is in line with the existing rate structure of the plant, giving due consideration to the work content and skill or ability involved, but he may not change the job description.

Notwithstanding the above, for any job combination that results in two or more previous rates of pay, the new job shall not be rated at a rate lower than the highest rate of the job(s) combined.

It is further understood that the Company shall not assign a new rate to any existing job classification, which has not had a substantial change in the classification.

Section 8. Exclusions

Production standards are not subject to modifications, termination, or establishment by arbitration although the Arbitrator may consider evidence relative to production standards. However, failure to meet production standards will not be cited as the sole determining reason for discipline.

ARTICLE VIII. SENIORITY

A. Company Seniority - Definition

Company seniority of an employee is measured by years, months, and days from the employee's last date of hire.

Presently Qualified - Definition

"Presently qualified," where used in this Agreement, is understood by the parties to mean that the employee can perform the duties of the job classification without additional training or experience. Training or experience as used above does not include orientation or break-in and the fact that an employee has not previously performed the job classification for the Company is not conclusive evidence that the employee is not presently qualified.

Criteria to be considered in determining if an employee is "presently qualified" shall be:

1. The employee has worked in the job classification for the Company and can demonstrate that he has maintained the

required job skills to effectively perform the job, or

2. The employee has gained sufficient knowledge and experience with the Company or elsewhere that, in the Company's judgment, he can perform the required functions of the job.

Section 32. Local Rules

Other rules dealing with seniority, reduction of forces, restoration of forces, and the other matters expressly set forth in Article**[*4]** VIII may be added to, modified or renegotiated by the Company and the Union and when accepted by both parties such modifications or additions shall be in full force and effect, provided all such modifications and additions must be consistent with the terms of this Agreement.

Grievances growing out of such rules shall be subject to the grievance and arbitration provisions of this Agreement.

ARTICLE IX. JOB POSTINGS AND WORK ASSIGNMENTS

Section 33. New Job Classification and Vacancy in Classification

A. When, as covered by this Agreement, a new job classification is created, or a vacancy occurs in an existing classification in any department, it shall be posted in *the plant* so that employees may apply for it.

If more than one employee bids for the vacancy, preference will be given to the employee with the greatest seniority, provided that, for vacancies in job classifications 16 and above, the employee is "presently qualified." An employee is not eligible to bid if he is at the Five-Day (administrative) Suspension step of the Attendance Program on the date the bid is posted. Due to the Company's needs, if new, necessary reassignment or necessary realignment of the work force within the classification occurs with no change in the number of work force, preference will be by Company seniority to fill these assignments. If no senior employee requests these assignments, then the least senior employee within the classification shall be required to fill the position.

B. An applicant who qualifies shall, if he so requests, be given a one-day trial for a "little or no" and "little or more" vacancy, or a two-day trial for a "craft" vacancy, unless it is obvious that such applicant does not have sufficient ability to fill such new classification or vacancy.

C. No such new classification or vacancy shall be permanently filled until any employee with greater company seniority than the employee to whom the trial is given (or his Union representative) has had an opportunity to have his case fully considered, provided such case has been properly presented within five days, (excluding Saturdays, Sundays, and holidays) of the time when such new classification or vacancy is temporarily filled.

D. An employee's failure within a 10-day period for "little or no," within 30 Days for "little or more," and 600 Hours for "craft" to fill the new classification or vacancy satisfactorily shall not penalize him with any loss of seniority, and he/she shall be placed back on his/her former job and shift. For clarification "little or no" is defined as "Grades" #1 through #8; "little or more" is defined as "Grades" #9 through #15; "craft" jobs are defined as #16 and above.

E. It is recognized that a Journeyman or equivalent level of qualification is required to fill vacancies in the classifications Machinist, Electrician, Tool and Die Maker and Millwright. It is further recognized that specific skills, aptitudes, and abilities**[*5]** are required to meet

the qualifications required to fill the job of Litho Specialist, Coater II, Pressman, Assistant Pressman, Fab Technician and Lug Technician Employees who possess the required qualifications and who bid for the vacancies will be considered on the basis of qualifications which shall include education and/or experience in the appropriate trade and successful completion of practical tests related to trade knowledge. Attainment of minimum scores for aptitude, mechanical comprehension and other job related tests which may be deemed appropriate to aid in the determination of qualification shall be required for employees bidding on such vacancies.

Section 34. Rates on Promotions or Displacements

A. When an employee is promoted to a higher-rated job classification, such employee will receive not less than the base rate of such higher-rated classification.

B. In a posted reduction of forces employees who are displaced shall receive the rate of the job to which they are displaced. Should an employee be permanently demoted from a classification, such employee will receive the rate of the job to which he/she is demoted.

C. Payment of the rate of the classification immediately upon promotion shall not be evidence of qualification for the job.

...

ARTICLE XVIII. TRAINING PROGRAM

...

Section 76. Training Program Lengths and Rates

The Union and the Company maintain documents regarding the length and rates of pay of various programs to train employees. These documents are on file at the plant.

Any proposed changes to these documents by either party during the term of this Agreement will be subject to negotiations and not barred by the provisions of Article I, Section 5 or Article XXX. However, any new or changed rate of pay for a new job classification, an existing job classification or a job combination will be subject to the provisions of Article IV, Section 7.

...

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM of Understanding is entered into this 1st day of November, 2005 between Silgan Closures, LLC (hereinafter referred to as the "Company") and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC on behalf of Local No. 5163-05 (hereinafter referred to as the "Union").

The Company and Union shall meet to mutually determine which job classification(s) and which specific employees within such identified job classifications require additional training in order to be considered fully qualified to perform the job.

The parties shall mutually agree as to the number of such identified employees within the identified classifications that shall be given rotational assignments during each calendar quarter to further such training. The Company shall determine all aspects of such assignments, including the work to be performed and the duration of each assignment.

With regard**[*6]** to training and overtime assignment, the Company may identify an employee to serve as a trainer and to work with an employee in need of training during the latter's overtime assignments. The identity and use of such trainer shall not be subject to the grievance and arbitration procedure and shall not be considered a violation of the Overtime Assignment appendix, Appendix II.

The parties will meet quarterly to review the program.

This Memorandum of Understanding shall be in force until October 31, 2017.

IN WITNESS WHEREOF, the Company and Union have caused this Letter of Agreement to be executed on the day and year first above written.

UNION COMPANY
By: _____ By: _____
James Tipton James Stajkowski
Business Representative Plant Manager

REVIEW OF THE FACTUAL PRESENTATIONS

Two witnesses testified at the arbitration hearing. These were Union President Jason Nicholson and Plant Manager Mike Lewis. These witnesses testified as follows.

Union President Jason Nicholson

Mr. Nicholson is the Union President. He has been employed by the Employer for 21 years. He works in the Maintenance Department.

On August 15, 2019, Mr. Nicholson was notified by a Union member about the increase in pay situation when a Union member showed him a pay stub. The employees in question had worked in the job for a period of time.

On August 15, 2019, Mr. Nicholson had a conversation with Plant Manager Michael Lewis. Mr. Nicholson asked Mr. Lewis about the raising of those employees pay. Mr. Lewis said it was done to stay competitive.

According to Mr. Nicholson, this type of pay increase had not happened before.

There are skilled positions and multiple classifications. There is the Lug Line position. Exh. 1. There is the Fab Maintenance Technician position. Exh. 2.

Prior employees had to complete the training.

The Employer did not discuss the acceleration of pay situation with the Union.

Mr. Nicholson wrote a Grievance. The August 5, 2019, Grievance said:

> The Union contends the Company has violated the labor agreement by not following the proper procedure for training hours.
>
> Follow training hours procedure. Cease and desist.
>
> Past practice. Job descriptions are inherent part of contract. Disparate treatment. Exh. 3.

One would refer to the Grievance Report to see what remedy the Union wants. The Grievance Report indicates, "Follow training hours procedure. Cease and desist."

The Grievance alleged "agreement violation" and "past practice."

The Employer's December 9, 2018, Step 4 letter said in part:

> A 4th step grievance meeting was held on December 8, 2019 to discuss grievance 06-19. ...

> The Union is alleging the Company has violated the [CBA] by not following the proper procedure for training hours. The Union contends the recent promotion of all non-probationary employees in skilled position to evaluated status is a violation.
>
> The Company had a critical business**[*7]** need to retain the skilled labor workforce in a local labor market that is extremely competitive. The decision was made to promote and elevate the incumbents sooner than the identified training hours in order to ensure the business would not lose employees and become a detriment to the business. The Company maintains the action taken to promote these individuals is a management right, per Section 4, Management Rights of the [CBA]. ... .

There is a Memorandum of Understanding (MOU) attached to the CBA that concerns training hours. CBA, p. 121. Training hours are in this MOU. It is the Union's position that the Employer violated this MOU. According to Mr. Nicolson, this is the only part of the CBA that the Employer violated.

Mr. Nicolson was asked, "could the Employer hire a qualified person off the street and go to mid-level?" He answered employees could "come in qualified or non-qualified." It is the Employer that makes that decision. The Employer could do a new hire but the Union could grieve.

CBA, p. 18, states "Company determines ... presently qualified ... enough skill and knowledge to perform job function."

In 2017, Mr. Nicholson was on the Union negotiating team.

When bid on top job received a higher rate. The job was posted that way.

Even the higher rate is not close to the competitive rates at other facilities.

The pay progression existed before Mr. Nicholson's time.

The Employer had not approached Mr. Nicholson to reduce training hours. There is no training program.

Plant Manager Michael Lewis

Mr. Lewis has been the Plant Manager for 11 years. He has worked at the Richmond plant for 15 years. The Employer is a packaging company with 58 manufacturing facilities across the United States at which the Employer makes metal cans and lids for human and pet food packaging. A union represents the employees at over one-half of those plants. The Employer operates a manufacturing facility in Richmond, Indiana, at which it employs 17 individuals in salaried positions and approximately 122 hourly production and maintenance employees represented by the Union. The Employer acquired the Richmond, Indiana, plant in 1998. At the Richmond plant, the Employer manufacturers steel closures for glass jars used in food packing, such as for salsa, pickles, and other products.

Until 2012 to 2014, the Employer had one of the top two or three wage levels in town. The wage level was "above other places." During the last couple of years, other companies have come into town. They pay higher wages than the Employer. Then other plants in town raised their wages. The Employer is struggling to recruit new employees. The Employer has lost five employees to the new company in town. It has been a struggle competitively.

During the summer of 2019, some employees came to Mr. Lewis about the pay situation. Mr. Lewis talked with the Supervisors. They were asking whether employees could go to the top pay level.

The employees were advanced during the**[*8]** summer of 2019. Exh. 3. The accelerations occurred after employees had 60 working days in. The Employer did not accelerate any probationary employees.

There is an Electrician on the list. The Employer took all skilled jobs in plant, and if employee not in probationary period, upgraded them. Because of Mr. Lewis' decision, 16

employees were advanced more quickly to the full wage rate for their job than they otherwise would have if the Employer insisted on holding them at each pay level in the progression until they worked the designated number of hours. The Employer paid them all full rate. The Employer implemented its acceleration of the pay progression to all employees then in the progression process for skilled positions.

Mr. Lewis testified that there had been prior situations in which the Employer unilaterally raised an employee to a higher wage level before the employee completing the designated number of work hours in the pay progression. These situations included Katie Jessup, Brandon Maidon, Sam Ochoa, Steve Riggle, and Hayden Webb. There were no grievances concerning those situations.

Mr. Lewis did not realize it was an issue to bargain with the Union. The Employer had done it before. One of these was at the request of the Union.

CONTENTIONS OF THE PARTIES

a. For the Union

The Union contends that on or about August 15, 2019, it became aware that the Employer was no longer requiring employees to complete hours of training in order to reach the top rate of pay for specific jobs. Several jobs require additional hours of training before an employee reaches top rate. However, the jobs that are the Union's primary concern are those of Lug Line Technician and Fab Line Technician. Each of these positions requires thousands of hours of training in order to be deemed fully qualified. Employees were accelerated to top rate for those positions without having completed the requisite hours to be considered fully trained.

The Union contends the Employer must follow the CBA with respect to requiring employees to complete hours of training in order to reach top rate of pay for applicable jobs. The Union believes that the Employer cannot unilaterally decide to not enforce the hours of training requirement provisions for certain positions. The Employer must abide by the CBA when it comes to appropriate rates of pay for positions which require additional training per the CBA. Absent agreement from the Union, the Employer cannot accelerate rates of pay for employees in a manner that is not consistent with the language of the CBA for the life of the CBA.

The Employer has failed to follow the CBA in not requiring employees to complete hours of training in order to progress through the wage progression to reach the top rate. The Union is requesting that the Employer be directed to follow the CBA and no longer allow employees to reach top pay in certain classifications without completing required hours of training.**[*9]** The Union is not requesting to retract the pay promotions of those who are currently employed and were not required to complete hours of training. The Union believes that those employees were promoted without having completed the training through no fault of their own. For the above reasons and because the Union believes that it is the just and proper thing to do, the Union asks that I grant the Grievance.

b. For the Employer

The Employer contends that to mitigate the harm to the business from new, competitive wage pressures, the Employer waived its right to require employees in skilled positions to work a certain number hours before being entitled to a next higher wage, and instead paid the skilled employees then in the pay progression process at the full rate for their job. The Employer paid no one more than the full rate agreed to with the Union in the CBA, but the Employer did advance 16 skilled employees more quickly through a pay progression that the Employer could have enforced to hold the employees' pay down for a while. The Union contends that the Employer violated the CBA by waiving its right to hold employees' pay back and instead paying them the full, agreed-upon rate quicker than it had to. Although no one has been harmed, and 16 employees have had inevitable pay increases to their jobs' full rate accelerated, the Union seeks a "cease and desist" remedy in which the Arbitrator would force the Employer to knock back the 16 employees' pay rates.

The Union failed to carry its burden to prove that the Employer violated some provision of the CBA. The CBA confirms the Employer's management right to promote employees. CBA,

Sec. 4. The case seems strange in that the Union seeks to prevent the Employer from accelerating employees more quickly to the full wage rate for their job when doing so benefitted these affected employees, the Employer (in its employee retention needs), and indirectly everyone else. No one lost as much as a penny. Because the Union failed to prove a CBA violation, and because the entire Grievance and remedy it seeks would only hurt the business and hurt the affected employees, the Grievance should be denied.

DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from**[*10]** the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

The issue before me is whether the Employer violated the CBA when it placed 16 Lug Line Technicians and Fab Maintenance Technicians in the highest pay level within their Classification. If so, what is the remedy?

The Union contends that the Employer violated the CBA when the Employer failed to require completion of training hours for incoming employees and accelerating their rate of pay.

The Employer maintains that it did not violate the CBA when it paid the employees then in the pay progression process at the full rate for their job.

The arguably relevant CBA provisions include the following.

Sec. 4. Management Rights

> The Company has, retains, and shall continue to possess and exercise all management rights, functions powers, privileges and authority inherent in the right to manage *except only those rights relinquished or restricted by the provisions of this Agreement.* Such right to manage includes, but is by no means limited to, the right to select, hire, transfer and promote, ...; to determine standards, policies and procedures with respect to production and customer service; to determine or change the methods and means by which its operations ought to be carried on, ...; to introduce new and improved methods or facilities; to change existing methods or facilities; to utilize employees whenever necessary in cases of need or in the interest of productivity, customer service and to maintain safety, efficiency, discipline, and order.
>
> It is further understood and agreed that all rights heretofore exercised by or inherent in the Company not modified or restricted by the terms of this Agreement are retained solely by the Company and the exercise of such right shall not be contrary to or inconsistent with the terms of this Agreement. ... Emphasis added.

ARTICLE IX. JOB POSTINGS AND WORK ASSIGNMENTS

> E. ... It is further recognized that specific skills, aptitudes, and abilities are required to meet the qualifications required to fill the job of ... Fab Technician and Lug Technician Employees who possess the required qualifications and who bid for the vacancies will be considered on the basis of qualifications which shall include education and/or experience in the appropriate trade and successful completion of practical tests related to trade knowledge. Attainment**[*11]** of minimum scores for aptitude, mechanical comprehension and other job related tests which may be deemed appropriate to aid in the determination of qualification shall be required for employees bidding on such vacancies.

When an employee is promoted, "such employee will receive not less than the base rate of such higher-rated classification." CBA, Sec 34.A, p. 33.

Memorandum of Understanding. CBA, p. 121. The MOU states, "This Memorandum of Understanding shall be in force until October 31, 2017." *Id.* The term of the CBA is November 1, 2017, to October 31, 2020.

"Presently Qualified" in Seniority Art. VIII, p. 18. The definition lists criteria to be considered in determining if an employee is "presently qualified." *Id.* The criteria include consideration of whether the employee "has worked in the job classification for the Company," and consideration that "the employee has gained sufficient knowledge and experience with the Company or elsewhere that, in the Company's judgment, he can perform the required functions of the job."

The Job Descriptions for Lug Line Technician and Fab Maintenance Technician state, in part,

JOB GRADE	***CLASSIFICATION - TRAINING PERIODS***
7	Lug Line Technicians - Train 1 - 1000 hours
8	Lug Line Technicians - Train 2 - 1000 hours
10	Lug Line Technicians - Train 3 - 1000 hours
12	Lug Line Technicians - Train 4 - 1000 hours
20	Lug Line Technicians - Evaluated
JOB GRADE	***CLASSIFICATION - TRAINING PERIODS***
13	Fabrication Maintenance Technician - Train 1 - 1000 hours
14	Fabrication Maintenance Technician - Train 2 - 1000 hours
16	Fabrication Maintenance Technician - Train 3 - 1000 hours
18	Fabrication Maintenance Technician - Train 4 - 1000 hours
20	Fabrication Maintenance Technician - Train 5 - 1000 hours

JOB GRADE	*CLASSIFICATION - TRAINING PERIODS*
27	Fabrication Maintenance Technician - Evaluated
22	Fabrication Maintenance Technician - Probationary (1)

Lug Tech Job Description, Exh. 1, and Fab Tech Job Description, Exh. 2, show the pay levels that the Employer has to provide once an employee reaches a certain number of work hours. The Job Descriptions refer to these hours as Training. Mr. Nicholson testified that training occurs for the first few weeks, but after that the employee performs the job on their own, with no trainer or assistance other than the opportunity to ask a question now and again. After the initial weeks, the employee performs the job, but the Employer may hold back the full wage until the employee completes a certain number of hours. Mr. Nicholson testified that this was a right that the Employer wanted, not the Union, although in bargaining the Union agreed to give the Employer the right to incrementally step the employee through the pay progression.

For the reasons that follow, I conclude that the Union did not prove by a preponderance of the evidence that the Employer violated the CBA when the Employer placed 16 Lug Line Technicians and Fab Maintenance Technicians in the highest pay level within their Classification.

I have carefully read my notes of the**[*12]** hearing several times.

Burden of proof

The Union bears the burden of proof in this CBA interpretation case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 8-104 to 8-107. The burden lies with the Union to identify a CBA provision which prohibited the Employer from acting as it did. Reynolds Metal Co., **62 LA 695** (Volz, 1974). As stated by Arbitrator Sears:

> ... in contract interpretation cases ... the grieving party has the burden of persuading the Arbitrator that its position is the correct one. Int'l Minerals & Chem. Corp., 62-1 ARB ¶ 8284 at p. 4074 (Sears, 1962).

Negotiations

There is no relevant negotiating history concerning the acceleration issue. The acceleration issue has to be resolved from the words within the Job Descriptions, the CBA, and the totality of the circumstances. Elkouri & Elkouri, pp. 9-26 to 9-31.

CBA interpretation principles

Usually, all words used in the CBA should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning. *Id.,* at pp. 9-34 to 9-36. The CBA terms should be interpreted consistent with the parties' intent as reflected by clear and explicit terms. My construction should not make a provision a nullity.

The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Riley Stoker Corp., **7 LA 764** , 767 (Platt, 1947).

If CBA wording is clear and definite, clear language should be enforced. In cases where the language is clear and unambiguous, arbitrators are generally unlikely to consider extrinsic forms of evidence such as the intent of the parties, bargaining notes or history, or

practices. Champion Int'l Corp., **85 LA 877** , 880 (Allen, 1985). Words should be given their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special or technical meaning.

It has been indicated that:

> Although [I] may use [my] expertise in interpreting and applying the contractual provisions, [I] cannot substitute [my] own sense of equity and justice but the award must be grounded in the terms of the agreement. To do otherwise would, in effect, be to change or alter the agreement through indirection. This [I] cannot, and should not do in the interest of all parties and the collective bargaining process. In other words, it is the [my] duty ... to interpret the contract as precisely as [I] can, and not to rewrite it. Johnston-Tombigbee Mfg Co., **113 LA 1015** , 1020 (Howell, 2000).

The CBA should be interpreted as a whole. When general provisions and special provisions concern the same thing, the special provisions will generally prevail. Elkouri & Elkouri, pp. 9-41 to 9-42. Written provisions imply the exclusion of everything not mentioned.

"Ordinarily, all words used in an agreement**[*13]** should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning. ..." Elkouri & Elkouri, p. 9-35.

All of the witnesses testified honestly and to the best of their recollections.

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Riley Stoker Corp., **7 LA 764** , 767 (Platt, 1947).

The Union argues that it was agreed during bargaining that the Fab and Lug positions require training; the Union agreed during bargaining that training is an important aspect of these positions; the Employer and the Union worked together to identify these positions; this collaboration generated an additional set of requirements that involves completion of training in order to be fully qualified; Exhs 1 and 2, Job Descriptions generated by the Employer, reflect the agreed upon hours of training requirement and established them as part of the job description; it was upon completion of each level of training that the employee would receive the appropriate rate of pay. This argument does not control. At the hearing, Mr. Nicholson testified that, in his opinion, MOU, CBA, p. 121, is the only language in the CBA violated by the Employer. The Employer contends that this MOU does apply to the wage level decisions made by the Employer in August 2019. The MOU states, "This Memorandum of Understanding shall be in force until October 31, 2017." *Id.* The term of the incumbent CBA is November 1, 2017, to October 31, 2020. The term of the MOU, p. 121, does not overlap the term of the incumbent CBA.

CBA, Sec. 6, states:

Section 6. Other Agreements

> Only those Letters of Agreement and Memorandums of Understanding that have been mutually agreed to between the Company and the Union as of the effective date of this Agreement shall be in effect. All other letters, memorandums and understandings are null and void.

It has been stated that,

> With respect to the issue about whether or not an agreement is ambiguous, the typical standard is that words will be given their ordinary meaning unless the evidence shows the parties mutually

agreed to some other meaning. American Arbitration Association, *References for Labor Arbitrators* (2005), p. 36.

The Union argues that it had been the general practice, until this Grievance, that only upon completion of the training hours that employees were accelerated to top pay because they completed hours of training to be qualified and fully trained; the Union did not go to the Employer and demand that employees who had not met the hours of training requirement be paid the highest wage in the progression as they would not be fully trained; paying these employees in an**[*14]** accelerated fashion goes against the intent and spirit of the CBA and the provisions concerning the development of qualified and trained individuals; allowing the Employer to disregard the hours of training for individuals because of a perceived staffing shortfall flies in the face of the CBA; employees are required to complete hours (be they training or working hours) in order to receive the pay; time paid for time worked is a basic principle of labor law; the Employer should not be allowed to circumvent the requirement of having employees to be fully trained so that they may offer an accelerated rate of pay to those who are otherwise not qualified to fill a vacancy; and the Employer should not be allowed to not comply with provisions of the CBA that it finds inconvenient. This argument does not control. Mr. Nicholson testified that, after the first few weeks on the job, the employee has no trainer and no training program. The employee basically does the job. For almost all of what is designated as "training" in the pay progression, the employee is performing the full scope of the job. Mr. Nicholson testified that the Union did not ask for the pay progression system. It is a system that Employer wanted and bargained for. There is no evidence in the Record of what the training components were during the incumbent CBA after the probationary/orientation period.

The Union argues that the competitive hiring situation may necessitate discussion between the Union and the Employer concerning wages; it will not be at the expense of sacrificing training; the Employer declined to have the discussion and acted unilaterally and accelerated the rates of pay for those who had not completed the wage progression; when the Employer acts unilaterally in this fashion, it creates a strain on the relationship between the Employer and the Union; employees who have completed 4,000 or 5,000 hours of training are being required to not just perform the jobs they qualified to perform, but to train persons who have been promoted in pay yet remain unable to perform their respective job at the level at which they are receiving pay; this puts a strain not only among employees who have completed the hours of training, but it also disadvantages employees who have not completed the training, as the expectation is that their level of skill is commensurate with their level of pay because it is for those who completed the hours of training. This argument does not control. Mr. Nicholson testified that "training" occurs for the first few weeks.**[*15]** After that the employee performs the job on their own, with no "trainer" or assistance other than the opportunity to ask questions. After the initial weeks, the employee performs the job, but the Employer may hold back the full wage until the employee completes a certain number of hours. There is no evidence in the Record that the placing of the 16 employees in question has either resulted in non-qualified employees being put at a higher pay level or a burden being put on the employees who were already there. There is no evidence in the Record that those employees who were increased in pay were unable to safely and appropriately perform their respective jobs at the level at which they were being paid. I am deciding this case based upon the Record in front of me. Elkouri & Elkouri, p. 7-36.

The Union argues that the CBA provides a wage progression framework to which the Employer must adhere; and wage progression is associated with the completion of hours of training and work and remain inseparable in the CBA. This argument does not control. The pay progression in the last page of the Job Descriptions neither mandates nor explains what the training consists of. On occasion, employees have entered the Classification at a mid-pay level. There is no evidence that the employees who received the pay level increases are unable to safely and appropriately do their jobs or were not fully qualified for their new pay level. There is no training program under the incumbent CBA.

The Union argues that the CBA has been in place for many years; the Employer deemed its need to retain personnel so great that it bypassed the Union, and unilaterally disregarded the fact that the CBA and its Job Descriptions define the criteria for when wage progression occurs; the reason the criteria are in the CBA and the Job Descriptions is because they were deemed critical; it is incredulous to believe that the Employer and the Union developed the criteria and qualifications for the two positions with the intent of

their being set aside out of convenience by either party; the qualifications and criteria have been followed until the instant Grievance; and they should continue to be followed. This argument does not control. The Employer has management rights "and authority inherent in the right to manage" except only "those rights relinquished or restricted by the provisions of this Agreement." CBA, Sec. 4, p. 2. One management right listed in the CBA is the Employer's right to "promote ... employees." *Id.* It can be argued that a promotion may involve moving an employee to a higher paying wage level. In the case before me, the Employer moved the employees in the pay progression to the higher wage level. The Employer has the management right to do this, unless there is a "provision[ ] of this Agreement" showing the Employer**[*16]** relinquished or restricted that right. There is no evidence in the Record that the training language in the Job Description was deemed to be critical under the incumbent CBA. There is no evidence, other than possibly during the orientation/probationary period, of what the training consisted under the incumbent CBA.

Conclusion

The crucial points in this case include:

1. the Union has the burden of proof,

2. after the first six months in the Classification hardly any training is done under the incumbent CBA,

3. previously some other employees were accelerated with no grievance,

4. there is no evidence in the Record of a training program for the Classifications in question beyond the first six months under the incumbent CBA,

5. the MOU was not in force after October 31, 2017,

6. there is no evidence in the Record of the accelerated employees being a hazard to themselves or others,

7. the totality of the circumstances, and

8. the wording of the CBA.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

The Union did not prove by a preponderance of the evidence that the Employer violated the CBA when the Employer placed 16 Lug Line Technicians and Fab Maintenance Technicians in the highest pay level within their Classification.

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I deny the grievance.

Dated: October 5, 2020.