

IN THE MATTER OF THE ARBITRATION BETWEEN

CLEVELAND CLIFFS, INC.
INDIANA HARBOR EAST

And

Grievance No. 2202-24-015
Alford Gordon Grievance

UNITED STEELWORKERS USW
LOCAL 1010-60

Case 148

OPINION AND AWARD

Background

This case from Indiana Harbor East concerns the Union's claim that the Company failed to establish Grievant Alford Gordon in his new bid job on the date he was notified that he was a prevailing bidder, thus having an adverse effect on his seniority. The case was tried virtually on June 7, 2024. Stephon Smith represented the Company, and Jacob Cole presented the Union's case. The parties agreed that there were no procedural arbitrability issues and that the case was properly in arbitration. The issue on the merits will be discussed below. The parties submitted the case for decision on final arguments.

Most of the facts are not in dispute. Grievant's service date is March 11, 1976, and on September 22, 2021, he was working as a Craneman in the Production and Maintenance (P&M) bargaining unit at the 80" hot strip mill. On that date, the Company posted five job openings for the Inventory Verifier position in the 80" hot strip, a job that was part of the Office and Technical (O&T) bargaining unit. The two bargaining units are covered by separate collective

bargaining agreements and represented by different local unions; the parties agree that only the O&T agreement is at issue in this case. Although there are separate agreements, Appendix A of the O&T agreement allows P&M employees to bid on O&T vacancies. Appendix A is headed "BIDDING ORDER FOR PERMANENT VACANCIES," and includes P&M employees next-to-last in a list of 29 eligible bidders (mostly occupations or job titles), right ahead of "New Hire." The Company published the Award Notice listing the successful bidders on October 28, 2021. Among other things, the bidding notice included the following language:

If a Cleveland Cliffs employee from another local union accepts a transfer to an Office & Technical position, the transfer pending date will become his/her new seniority date with the Office & Technical Union (Local 1010-06) for purposes of seniority, vacation selection and Employment Security. Additionally, there will be no "right to reversion" to the employee's previous unit. The new Employment Security date will be used for applying the employment security language provided in the Collective Bargaining Agreement. All other benefits, including, but not limited to vacation entitlement, pension, and health care benefits will be based on his/her date of first employment....

There were six successful bidders for the Inventory Verifier position, three from the O&T unit and three from the P&M unit.¹ Grievant was senior to the other two successful bidders from the P&M unit.

After the successful bidders were announced on October 28, 2021, Grievant remained in his Craneman position in the P&M unit for 46 days, until December 12, 2021. This was apparently the time it took for the Company to find and train a replacement Craneman. The Union's response to the second step grievance minutes asserts that the Company never showed "a compelling reason" to keep Grievant in his Craneman position for 46 days. However, there

¹ Despite the bid notice announcing five vacancies, Union witness Charles Switzer, Grievance Chairman, said there were six vacancies, three of which went to P&M employees and three going to O&T employees, including Grievant. The record does not say why the bid form listed only five vacancies; however, nothing turns on that discrepancy in this case.

was no evidence at the hearing about the reason for the delay and the Union did not argue in arbitration that the Company had improperly delayed the transfer. On December 13, 2021, Grievant signed a document titled O&T Vacancy Information Checklist, which the parties apparently call a transfer-pending form. There are three sections to the form, one for “all bidders,” one for “O&T bidders,” and one for “Unit to Unit Bidders [bidding into a different unit].” The portion of the form for Unit to Unit Bidders reads, in relevant part, as follows:

Transferring to a different unit

- Transfer and the loss of employment security occurs immediately upon their 1st day in the new sequence and unit.

...

- They have no reversion right to their previous unit....
- Their new sequence and union membership date will be the transfer date.
- Vacation selection will be based on the transfer date.

...

Grievant checked the Unit to Unit Bidders block and signed the form on December 13, 2021.

The Company says when Grievant signed the form he was released from his P&M job (and the P&M bargaining unit) and was transferred to the O&T unit. When he accepted the transfer, he was given a new seniority date of December 12, 2021, which was also his transfer-complete date.²

² The record does not indicate why the transfer-pending form was signed on December 13, 2021 (it is not otherwise dated). Grievant’s transfer-complete date was one day earlier, December 12, 2021. The second step minutes say Grievant was held on his P&M job until December 13 and that he was a member of the P&M unit until that date. The minutes also say that after he was released from his P&M job and accepted transfer, he became a member of the O&T unit. However, the Company’s witness, Tracy Wozniak, Senior Human Resources Representative, said employees will receive the transfer-pending form either before or on their expected transfer date. It appears, then, that Grievant received the form on December 12 but did not sign it until December 13. Either that, or he confused the date he signed the form. In any event, there was no argument from either party that the disparity between the transfer-complete date and the date Grievant signed the transfer-pending form was significant to the arguments or issues in this case.

The event that gave rise to this case was the earlier transfer to the Inventory Verifier position in the O&T unit by the two other successful bidders from the P&M bargaining unit. Both of those bidders had less seniority in the P&M unit than Grievant. However, because their transfer to the O&T unit preceded Grievant's, and because the Company says a transferring employee's new seniority date in their new sequence and in Union seniority will be the transfer date, those two employees are now senior to Grievant for some purposes. Tying an employee's seniority date to the transfer date for across bargaining unit transfers, the Company says, has been the practice since at least 2004. Moreover, it says Grievant knew that because it was noted in the bid and in the transfer-pending check list, which Grievant signed.

Union witness Switzer addressed how the Union believes the bid form, quoted above on page 2, should have affected the result in this case. The form notes that employees transferring from another bargaining unit have no reversion rights to their previous job, which P&M employees have when they bid on another job in the P&M unit. The bid form also says that the "transfer pending date" will be the employee's new seniority date in the O&T unit for several purposes. Although the testimony was unclear, I understood Switzer to say that the reference to a "transfer pending date" was from a time when P&M employees apparently retained reversion rights to the P&M unit when they transferred to an O&T job, and the transfer pending date was the date the reversion rights expired. In any event, there is no dispute that employees who transfer from the P&M unit to the O&T unit now have no right to revert once they accept the transfer.

Switzer also testified that employees accept the transfer as soon as the Award Notice is published. He said at one time, the Company called employees to see if they wanted the job once the Award Notice came out. However, the Company later changed to an "auto accept" process

on issuance of the bid sheet. According to Switzer, this means Grievant accepted his new position as Inventory Verifier on October 28, 2021, which is when the award notice was published. For purposes of Section 13.5.3, Switzer contended, Grievant was established in his new job on that date and he could then be temporarily assigned to his former job, which is what happened when Grievant was retained to work as a Craneman. This also would have avoided any seniority problems, Switzer said, because the other two P&M bidders to the same job would also have been established in their new jobs on October 28, 2021. And, according to Switzer, this case is almost unique because to his knowledge, the Company usually only posts one vacancy in an O&T job on a bid sheet. Switzer says the Union understands Section 13.5.3 to mean that employees are immediately established in the new job when the bid award sheet comes out and employees are awarded the bid.

Senior HR Rep Wozniak testified that there have been 54 transfers from the P&M unit to the O&T unit since 2010 and that in each case, the seniority date was the transfer-complete date. These cases spanned the periods in which the plant was owned by Ispat Inland and Arcelor-Mittal. She said the Company has never used the award date to establish seniority when employees transfer from one bargaining unit to another. She also identified four instances in which she said an employee with less Company seniority transferred into their O&T job before a senior employee, but still ended up with the more seniority in O&T. There were no grievances in any of those cases, Wozniak said. Wozniak said the Company understands Section 13.5.3 to apply only to transfers of O&T employees within the O&T unit, noting that Article 13 begins, in Section 13.1 by saying “*Employees within the bargaining unit shall be given consideration in respect to promotional opportunity for positions not excluded from said unit....*” (italics added). The term “bargaining unit” refers only to the O&T unit, Wozniak said.

Positions of the Parties

The Union argues that the award date (the date Grievant was notified he was a successful bidder) and not the transfer-complete date should have been the date when Grievant's seniority commenced in the O&T bargaining unit. And, while it cites various provisions of the O&T Agreement, the Union places principal reliance on Section 13.5.3:

Permanent vacancies may be filled by temporary assignments until such time as the prevailing bidder is selected and assigned. Should management deem it necessary to retain an employee on his/her former job in order to continue efficient operation, it may do so on the basis of establishing such employee on the new job and temporarily assigning him to his/her former job until a suitable replacement can be trained for the job or its performance is no longer required. In no event shall an employee be held for more than four (4) full pay periods following the week they accept the vacancy.

The Union says this provision allows the Company to fill vacancies by temporary assignment, which it did when it temporarily retained Grievant in his crane operator position following his successful bid. But, the Union argues, in order to keep an employee in the job he bid away from, it first has to establish him on his new job and then temporarily assign him to his former job until the Company secures a replacement for that job. This means, the Union contends, that Grievant should have been established in his new Inventory Verifier job on the date he was notified of his successful bid. Had the Company done so, it would then have been free to retain Grievant in his Craneman position until a replacement could be trained and assigned permanently.

Had the Company established Grievant in the O&T job as of the award date, the Union says, the dispute in this case would have been avoided. The two junior successful bidders would also have been established as Inventory Verifiers on the award date, so it would not have mattered that they actually left the P&M unit and started work in the O&T unit before Grievant.

All three of them would have had the same sequence and Union membership date in their new unit and, the Union says, Grievant would have been senior to them for sequence, job security, and vacation selection because of his greater plant service.

The Company says there is nothing in the language the Union cites that says transferring employees are established in their new jobs on the date the bid is awarded. But even if there were, the Company argues that Section 13.5.3 is from the O&T Agreement and applies only to transfers within that bargaining unit. There is nothing in Article 13 that suggests it applies to across bargaining unit transfers. What is key in this case, the Company argues, is that there is a past practice going back at least as far as 2004 that shows an employee transferring across bargaining units is established in the new job on the transfer date. Grievant should have been aware of this, the Company says, because the bid notice posted in September 2021 said that for across bargaining unit transferees, the transfer pending date would be the successful bidder's seniority date in the O&T unit. Moreover, the check list Grievant signed on December 13, 2021 also said that the new sequence and union membership date would be on the transfer date. If Grievant disagreed with that language, the Company points out, he could have refused the bid by refusing to sign the form. Until Grievant signed that form, the Company insists, he remained in the P&M unit and had no seniority status at all in the O&T unit.

Findings and Discussion

The issue in this case is when an across-bargaining unit transferee is established in his or her new job. Is it, as the Union contends, when the employee is awarded the bid or is it, as the Company insists, when the employee's transfer to the new job is complete and the employee begins working on the job? As will be explained below, the answer depends on the Company's

consistent practice of using the transfer date to establish the seniority date for across bargaining unit transfers. Past practice can be used to help interpret collective bargaining agreements, or it can create rights that are consistent with, but are not explicitly spelled out in, the agreement. In this case, past practice controls the outcome in either alternative.

Appendix A of the O&T Agreement recognizes the possibility of across unit transfers, but neither Appendix A nor Section 13.5.3 addresses how seniority is established for such bidders.

The principal language at issue in Section 13.5.3 is the following:

Should management deem it necessary to retain an employee on his/her former job in order to continue efficient operation, it may do so on the basis of establishing such employee on the new job and temporarily assigning him to his/her former job until a suitable replacement can be trained for the job or its performance is no longer required.

There is no dispute that Grievant was retained in his former job in the P&M bargaining unit. But even if the language applies to an employee bidding across units (which the Company denies), the key to the case is deciding when the transferring employee is established in the new job. The O&T Agreement does not expressly say how employees transferring across bargaining units become established. The Union claims it occurs when the P&M employee is awarded the bid to an O&T job. This is not an unreasonable interpretation. But the contract language does not expressly equate award with establishment, meaning that there is ambiguity about when across-unit transfers are complete.

When contract language is ambiguous, arbitrators often look to how the process has been accomplished in the past. In some cases, employers have not followed a consistent practice, thus creating doubt about how the language should be interpreted. Here, however, the Company says that it has consistently followed a practice of establishing employees in their new job when the transfer is complete, meaning when the employee begins work in the new job. The Company's

evidence revealed at least 54 such events starting as early as 2004. Moreover, it introduced exhibits beginning in 2004 showing that employees were advised in the bid notices that seniority in the new unit would be established on the transfer date. That language appeared in the bid notice of the jobs at issue in this case. In addition, Switzer acknowledged on cross examination that when bid notices are posted, employees attend an information session and are told that seniority will be established on the transfer date. And finally, in this case, Grievant signed a checklist on September 13 acknowledging that his new sequence and union membership date would be the transfer date. At the time he signed that notice, effectively accepting transfer to the O&T job, Grievant was aware that two of his junior P&M colleagues had already transferred to the O&T unit, and the notice itself informed him that the earlier transferees had more seniority in the new sequence. In contrast to this, the Union did not introduce any instances in which employees in across bargaining unit transfers were established in their new jobs on the award date.

The Union argues, in part, that Grievant must have been established in his new job on the award date because he was retained in his former job beginning on that date. This is consistent with the Section 13.5.3 language, quoted above, that says once established in their new job, employees can be retained temporarily in their old job until a replacement is found or until they are no longer needed, although not to exceed four pay periods. But the consistent practice has been to tell employees that their transfer to the new job will not be complete until they actually begin work in the new O&T sequence. Thus, the retained employees remain in the P&M bargaining unit while awaiting transfer to O&T. They are not immediately established in the new bargaining unit and then transferred back across bargaining unit lines to work temporarily in their old job.

The Union cites *USS-48,784; 785* and *USS-46,382*, which construed language similar to the disputed provision in this case. The Union says there is language in both cases that supports its claim in this case. In *USS-48,784; 785*, the Company canceled a posting after awarding the posted jobs to employees. And in *USS-46,382*, the Board considered whether a successful bidder who had been retained in his old job could bid on another job even though he had not worked in his new job. In *USS-46,382*, the Board said that once an employee was established on his new job, he was an incumbent on that job for seniority purposes. In *USS-48,784;785*, the Board considered, among other things, how employees become established in their new jobs. Citing *USS-46,382*, the Board noted that “established” was not defined in the contract, but said that the Board had “seemingly treated it as having been awarded the bid.” That, obviously, is the position the Union urges in the instant case.

Neither of the USS-USW Board of Arbitration cases the Union cites dealt with across bargaining unit transfers and the issue of whether the language of one collective bargaining agreement permitted an assignment of transferring employees to work in the other unit covered by a different contract. Nor was there any evidence cited in either case of a well-defined practice of establishing seniority on the transfer date for across bargaining unit transfers. In the instant case, the parties historically have understood that when employees transfer from the P&M unit to the O&T unit, their new seniority date in O&T will be effective on the date of transfer. This is an acceptable – and consistent – interpretation of how employees are established in their new jobs in the event of across bargaining unit transfers. Moreover, even if Section 13.5.3 does not apply to across bargaining unit transfers, as the Company contends, the Company’s practice satisfies the criteria required of an established past practice of dealing with such transfers. The practice has been known to both sides, it has been consistently applied, and it is of long standing.

Finally, the Union argues that the delay in establishment in a new job until the transfer date allows the Company to manipulate seniority among employees. If that were the case, the Union might contest the Company's action as discrimination in violation of the contract. But there is no evidence in this case that that Company deliberately delayed Grievant's transfer or otherwise treated him improperly.

I understand why the Union is unhappy with the result of this case. But I cannot grant the relief it seeks in arbitration. If the practice is to be changed, the parties will have to address the issue in negotiations.

AWARD

The grievance is denied.

Terry A. Bethel

Terry A. Bethel
July 2, 2024