ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

August 3, 2024

Gorton's Inc.
Employer

and

United Food and Commercial Workers International Union
District Local 1445, AFL-CIO

FMCS Case No. 240201-03183

Grievance: [redacted] - denied classified position

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Employer: [redacted]

The Union: Alfred Gordon O'Connell, Union Counsel

Statement of the Award: The grievance is sustained. The Grievant will be made whole for all losses and will be placed in the 3rd shift classified palletizer position.

BACKGROUND

Gorton's Inc. (Employer) and the United Food and Commercial Workers International Union, District Local 1445, AFL-CIO (Union) are parties to a collective bargaining agreement (CBA) effective May 7, 2023 through May 3, 2026. Pursuant to that agreement the Union filed a grievance on behalf of the Grievant.

The grievance, filed in Step 2 on December 14, 2023, states:

> **NATURE OF GRIEVANCE** On or around 12/6/23 [redacted] filed a grievance for the member who was denied a classified position due to the member stepping down from the same position on a different shift. The employer is [citing] past practice that the member forfeits the right to bid on this classified position for one calendar year.
>
> **ADJUSTMENT DESIRED** that a meeting take place with the employer and union representatives to discuss this matter. That [the Grievant] be given the desired position can be made whole in every way. [JX 2.]

The Employer responded to the grievance on December 13, 2023, as follows, in relevant part:

> Nature of Grievance -
>
> [The Grievant] has been passed over for 3rd Shift Palletizer (a classified position) for someone with lower bargaining unit seniority ...
>
> **Company Response** -
>
> The company holds its position and therefore rejects the grievance filed on behalf of [the Grievant.]
>
> On September 5, 2023, [the Grievant] voluntarily gave up his classified Palletizer position on 1st Shift. Per past practice, an employee who gives up a classified position, regardless of shift designation, must wait one (1) calendar year before they are eligible for consideration for this same position.
>
> Effective September 5, 2024, [the Grievant] would be considered for the Palletizer position, on any shift, if there is an opening. [JX 3.]

Following a joint meeting on December 18, 2023, to discuss this grievance, on January 2, 2024, the Company issued the following:

> **Company's Updated Response -**
>
> The company holds its position and therefore rejects the grievance filed on behalf of [the Grievant].
>
> In the meeting on 12/18/23, the union cited another union member's ([redacted]) Job transfer to a different position and then back to his original position within a year as an example of the company not requiring employees to have to wait a full year considered for the same position.
>
> The example provided by the union does not represent the same scenario as with [the Grievant]. [The Grievant] went from a Production 2 position to a lower paying Production 3 position. In the example with [P.C.] he was in a Production 2 Hauler position and transferred to another Production position (Line Material Handler) on 2/13/23 on 11/6/23, [P.C.] transferred back to his original Production 2 Hauler position. These transfers were all within the same Production 2 category.
>
> Per past practice, an employee who gives up a classified position, regardless of shift designation, must wait one (1) calendar year before they are eligible for consideration for the same position. [JX 4.]

After the parties were unable to reach a resolution, the Union submitted the grievance to arbitration pursuant to Article XVI of the CBA. The undersigned Arbitrator was selected through the auspices of the Federal Mediation and Conciliation Service and a hearing was held on June 27, 2024, at which both parties were represented and were afforded the opportunity to introduce exhibits, to present witnesses and cross examine opposing witnesses. No transcript was taken. The parties did not submit post-hearing briefs but made closing arguments orally.

The Union offered the Grievant as it sole witness. The Grievant has worked for the company for 27 years on various jobs. He testified about his decision to give up the classified palletizer job on the first shift and his decision, three months later, to sign the posting for the third shift palletizer job.

The Employer also offered one witness: [redacted], who started working for the employer in 1992 and recently moved to the nonbargaining unit position of 1st shift process manager. She testified about a conversation she had with the Grievant, while she was still a Union employee, about him having to wait a year to reapply if he surrendered his job and how most people knew that.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE XII - SENIORITY

Section 1:

a) Bargaining unit seniority is a principle that governs the Company and the employees as provided in this contract. Company seniority is defined as an employee's length of service with the Company from the employee's last date of hire. Bargaining unit seniority will govern for the purposes of: layoffs, recall, and transfer of employees whose work is suspended in any job category, classified or non-classified job, all other transfers and temporary job assignments, and shift transfers. Bargaining unit seniority shall prevail for all permanent job assignments to vacancies and/or newly created positions, provided the most senior employee is qualified for the job. The Company agrees to furnish the Union with a copy of the current seniority list.

* * *

Section 4:

* * *

b) ***Vacancies*** - The Company shall post all vacancies, job openings or newly created positions for not less than five (5) working days. Employees may bid for such openings by signing a bid. The employee will be chosen by bargaining unit seniority and will be subject to a thirty (30) day trial period. If either the Company or the employee should determine that the change is not satisfactory, the employee shall be returned to his or her former position with no loss of wages or seniority.

CONTENTIONS OF THE PARTIES

The Union's Contentions

The Union contends that the contract language is clear and contrary to the past practice asserted by the Company. When employees have been demoted, the Company has enforced a waiting period. But that does not apply when, as here, an employee voluntarily takes a reduction. Article XII, Section 4-b does not provide for a one-year wait.

The Union contends that Article XII, Section 1-a gives the Grievant the right to exercise his seniority to bid on any posted vacancy. That clear language, coupled with the language of Section 4-b, must prevail even in the face of a past practice. Further, no past practice was established.

The Union requests that the grievance be sustained, that the Grievant be placed in the third palletizer position and that he be made whole for all holiday and vacation pay differences.

The Employer's Contentions

The Company contends that past practice is often brought up by stewards and business agents. Even though the practices are not written in the contract they are honored as part of the CBA. This matter falls in the same category. Although this past practice was not discussed in meetings is well known throughout the plant and prevents people from job jumping, especially in the high paid classified positions.

The Company requests that the grievance be denied.

ISSUE

Whether the Company violated the CBA when on or about October 30, 2023, the Company denied the Grievant's request to bid into the palletizer position. If so, what shall be the remedy?

FINDINGS

Both parties acknowledge that there is no specific language in the CBA mandating that when an employee opts to take a demotion, as a matter of choice, the employee is barred from bidding on a posted vacancy for such a position for one year. The language cited by the Union, the "employee will be chosen by bargaining unit seniority," is clear and straight forward. Although the Union contends that no practice can overcome such language, arbitrators have sometimes found to the contrary.

III. PAST PRACTICE

2.20. Past Practice as an Interpretive Aid

> **(1) *Definition*. A "past practice" is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action.**
>
> **(2) *Uses of past practice.* Past practice may be used (a) to clarify ambiguous contract language; (b) to implement general contract language; or (c) to create a separate, enforceable condition of employment. Some arbitrators use past practice to modify or amend clear and unambiguous contract language.**
>
> **(3) *Altering a past practice*. A past practice may be altered or eliminated in appropriate circumstances.**

> [Common Law of the Workplace, Second Edition at 89. Emphasis original.]

In the Comment to that section the factors generally applied by arbitrators in determining whether a workplace activity qualifies as a "past practice" are set forth as follows:

> (1) Clarity and consistency of the pattern of conduct,
> (2) Longevity and repetition of the activity,
> (3) Acceptability of the pattern, and
> (4) Mutual acknowledgment of the pattern by the parties.

As to the Company's argument here, the Comment further states:

> When parties' conduct during the life of an agreement consistently conflicts with the written terms of the contract, some arbitrators conclude that, in fact, the parties meant to alter their agreement by substituting what they actually do for what they said in writing they intended to do. [Common Law of the Workplace, Second Edition at 90.]

On this record, however, the Company cannot prevail. It's sole evidence as to the existence of the practice was testimony that everyone knew and understood that an employee who voluntarily took a reduction would be barred from that classified position for one year. The Company's witness, with extensive service in the bargaining unit, was not aware of a single instance where that had occurred. Thus, there is no clear and consistent pattern of conduct and no longevity and repetition of that activity. A past practice is not created to apply in the event an activity occurs. Rather, it results from an activity occurring repeatedly, over a period of time, that is mutually acknowledged by the parties.

For the above reasons, the grievance will be sustained. As requested the Grievant will be made whole for all losses and will be placed in the 3rd shift classified palletizer position.

AWARD

The grievance is sustained. The Grievant will be made whole for all losses and will be placed in the 3rd shift classified palletizer position.

Elizabeth Neumeier

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Elizabeth Neumeier, Arbitrator

August 3, 2024