Sickles #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

STATEMENT OF THE CASE

On January 18, 1993, representatives from the Union and the Employer met to discuss the implementation of Article 9: Filling Vacancies, of the parties "new" collective bargaining agreement. At that meeting, Person 1, Manager of Maintenance Administration, described how the Employer projected that the job vacancy system would work, but Person 2, the Assistant General Chairman of the Union objected to the Employer's plan.

The parties were unable to resolve the dispute and the matter was submitted to this Board.

The undersigned was designated as Arbitrator by the parties and a hearing was held at Employer's Headquarters on April 5, and April 20, 1993, at which time all parties were represented and were afforded full opportunity to present evidence, testimony and argument.

A 336 page verbatim transcript of proceedings was compiled; a copy of the April 5, 1993, transcript was received by the undersigned Neutral Member of the Board on April 12, 1993, and a copy of the April 20, 1993, transcript was received on April 29, 1993.

Both parties submitted briefs. The deadline for briefs was extended by agreement of the parties and the briefs were received by the Undersigned Neutral Member of the Board on June 14, 1993.

The Board met briefly in Executive Session at the conclusion of the taking of testimony on April 20, 1993.

All matters of record have been fully considered by the Board.

QUESTION AT ISSUE

Must the Employer provide a five-day notice to the Union prior to filling a permanent position which results from the filling of a vacancy under the preference system?

STATEMENT OF FACTS

In the prior collective bargaining agreement (effective date March 1, 1987), new jobs and vacancies were individually bulletined and bid.[1] Among other provisions, Article 9: Filling Vacancies, of that agreement set forth language regarding the procedures, rights and obligations for such bidding:

* New jobs and vacancies were bulletined at all points on the system on Tuesdays;
* Bids were submitted by mail for such bulletined jobs and the final dates for mailing bids could "not be less than five (5) calendar days after bulletin [was] posted" (that is, Saturday);
* Employees were required to submit one copy of each bid to the Employer and one to the Local Chairman;

[1] In referring to the procedures by which new jobs or vacancies are filled, this Opinion expressly excludes reference to those positions which are covered under separate sections of the contract, such as, shift changes (including redeployment and realignment) at stations under Section 9(A), temporary upgrades in Section 9 (Q), and supervisory and on-the-job instructor positions in Section 9 (U). Moreover, in relating the bargaining history, no specific discussion will be made of changes in redeployment procedures and upgrade request. Nevertheless, it must be noted that, in addition the changes discussed herein, the parties also agreed to changes in other parts of Article 9, as well as other articles in the contract.

* Bids were awarded on the bases of classification seniority;
* Job awards and employee moves were posted on a bi-monthly basis on bulletin boards at stations;
* With certain exceptions, employees were limited to two (2) moves in a calendar year and employees who bid to a premium classification were required to remain there six (6) months or the remainder of the calendar year, whichever was longer;
* Employees could decline bids if "postmarked no later than midnight Saturday of the week bids (were) awarded" but an employee who declined a bid award lost bidding rights for six months;
* The Employer was required to move employees who successfully bid within 15, 20 or 25 days, depending on whether the move was shift to shift, bid area to bid area or city to city. If not moved within that time, the employee received the higher rate of pay of the awarded job and applicable overtime until moved to the awarded bid, awarded a second bid or the original bid was canceled.

The Employer testified that this procedure was cumbersome and unworkable as the work force grew through the acquisition of other airlines. Among other things, bids which were postmarked on the West Coast on Friday or Saturday of a week did not always arrive before the following Tuesday. Therefore, if the Employer awarded a bid, and bulletined the vacancy created by the successful bidder, a late entry from the West Coast could require the recall not only of the first successful award but of the subsequently bulletined vacancy (TR. 155). Moreover, during this period of enormous growth, the Employer was not always able to move employees within the 15, 20 or 25 day period set forth in the contract. As a result, when the deadline passed before the

move was executed, the Employer paid successful bidders the higher rates (and higher overtime) of the job awarded while the employees remained in their preceding jobs. Finally, under this system, an initial vacancy, which resulted in four backfills, or "holes", required five weeks to fill (TR. 145).

Through negotiation some mid-term adjustments were made to certain aspects of the vacancy procedures. Nevertheless, on January 22, 1990, the Employer notified the Union, pursuant to the provisions of Section 6, Title I, of the Railway Labor Act (and the then exiting collective bargaining agreement) that it intended to reopen the agreement between the parties.

At the time of the issuance of the Section 6 notice, the Employer indicated that it sought to renegotiate the provisions of Article 9. Filling Vacancies, to "amend to provide for a more efficient, cost effective bidding system including a procedure for a "standing" request for transfer to be maintained in place of the current job bulletin procedures. . ."[2] Within the next two months, the Employer outlined its position and submitted a proposal which established a "standing bid system."

According to the outline provided to the Union, employees would have had the right to submit standing bids for specific jobs (i.e., classification, bid area, station and shift). When vacancies arose in the system, bids would be considered for award by classification seniority of the bidder. No employee would be permitted to decline the award of a bid, and no notice to the Union would have been contractually required. By April 1990, The Employer's proposal regarding the filling of vacancies was more detailed:

[2] The Section 6 notice also identified two other concerns with respect to filling vacancies in a new agreement between the parties: a requirement that an employee remain at a location for a specified period of time once a transfer has been granted; and updated minimum qualifications required for positions covered by the agreement.

* Employees desiring consideration for vacancies, including promotional, would be required to submit a permanent preference bid card listing between one and five choices for vacancies;
* When vacancies occurred, "preference bids" submitted at least ten days earlier would be considered and the jobs would be awarded, based on classification seniority, on Wednesday of each week; vacancies were defined as additional jobs, replacement jobs or new jobs;
* Employees would be required to submit copies of preference bids to the Union, but the Employer offered no notice to the Union of the vacancies;
* The Local Chairman would receive a copy of all preference awards (whether at the same time the awards were posted on bulletin boards or before was not indicated);
* Employees moving into premium jobs would be expected to remain there 12 months;
* Employees awarded jobs would be moved to their new position within thirty days of the date of the award.

Thus, this initial proposal would have changed the then existing contract in at least certain important respects: 1) all vacancies would be filled by standing preferences, rather than individually bid; 2) the Union would have had no advance notice of the vacancies to be filled (either the initial vacancies or the "holes" created by the subsequent movement of employees into the resulting vacancies); 3) the stability period for those holding premium jobs would have been extended to a full twelve months; and 4) the amount of time the Employer would have to move employees would have been increased from 15, 20 or 25 days to 30 days in all cases.

It appears from the record that an impasse in contract negotiations was reached shortly after this proposal was placed on the table and the impasse resulted in the initiation of mediation.

During the summer of 1991, the issue of filling vacancies was again addressed by the parties. According to the testimony of Union witnesses, the Union did not wish to convert to a preference system for all vacancies. In notes of the July 10, 1991, negotiation session, Person 1, Manager of Maintenance Administration, set forth his concept of how the preference system would work (Co. Ex. 3).[3]

Approximately one month later, the parties again returned to the topic. On August 13, 1991, the Employer submitted its second full proposal on Article 9. It was discussed extensively on August 14 and 15, 1991, during negotiations. Under this proposal, the Employer still maintained a master list of potential vacancies to which employees could place a maximum of 24 bids. Moreover, the Employer would close the window on standing bids for a job to those bids submitted at least 10 days prior to the award. In this version the Employer agreed to give the Union notice of "all vacancies prior to filling."[4] At this point, the Employer offered to guarantee moves within 25 days of the award of a preference job.

In sum, up to this point in the negotiations, the Employer continued in its endeavor to transform the "bulletined" bid system into a "standing preference" bid system. Moreover, the Employer maintained its position that a longer period of time in which to move employees was needed, although the earlier proposal of 30 days had been adjusted downward to 25 days. Finally, the Employer had agreed at this point to give notice to the Union of "all vacancies prior to filling."[5]

[3] The notes illustrate that 011iffee described at the bargaining table the procedure under the prior agreement, where one vacancy which resulted in five (5) subsequent openings, would take six (6) cycles, or weeks, to complete. Under the newly proposed system, it would only take one cycle.

[4] It appears that the proposal was silent with respect to whether or not an employee would be notified of successful bids.

[5] It is important to note here that under this proposal the Employer could have fulfilled in desire to fill all backfill simultaneously and still give the Union notice prior each backfill vacancy; it is only the addition of a "waiting period" after notice to the Union which makes the two approaches incompatible.

Employer representatives who attended the negotiation sessions testified regarding the discussion which immediately followed the submission of this proposal. In its brief, Counsel for the Employer summarized the record as follows:

On August 14, following a proposal by Person 2 for a "conceptual" meeting, Person 3 [Director of Labor Relations, Ground], Person 4 (Vice President of Labor Relations), Person 5 and Person 2 met with Mediator Person 6. Tr. 170, 256. During that meeting, as Person 3 described it, Person 4 stated that:

> "what we're looking for is we have a vacancy, X. We want to be able to run through the preference system and fill from the street in as short a period of time as possible-instantaneously, same day, two days, whatever." (Tr. 257).

Person 3 had repeatedly described that as the Employer's goal in other negotiation session with the Union. As he put it:

> "Five to ten times I have said across the table that what the Employer was looking for was to find a vacancy here, to go through the preference system and almost instantaneously, if possible, fill from the street -- run down the list. And that would take care of the vacancy. (Tr. 255)."

On August 15, a meeting was held between Person 2, Person 3, Person 1 and the mediator. Person 1 testified that at that meeting, in response to the question of whether the "originated bid only" would be filled by the preference system, Person 2 responded that the backfill, "holes", would also be filled by the preference system simultaneously, or as close as possible, without further notification to the Union (TR. 173, 174, 214, 217). Person 3 also testified for the Employer to the effect that at the August 15 meeting, Person 2 had taken the position that there was no notice required for backfills (TR. 259).

Union witnesses also testified regarding these session in August 1991. The most definitive testimony in this regard was that of Person 2 who testified that he had not agreed during negotiation sessions that under the preference system notification would only be required on the first vacancy and that backfills would not require further notice (TR 331).

On August 20, 1991, the Employer submitted a further proposal on the filling of vacancies.[6] It appears that in this proposal the Employer, for the first time, indicated a willingness to maintain two systems for filling vacancies: the preference system for vacancies in basic classifications and a version of the existing bid system for vacancies in premium classifications.[7] The proposal also contained other significant offers as well: it returned to employees the right to decline bids within a five day period after an award (with the existing 6 month loss of bidding rights); it closed the window on preference bids concurrent with notice to the Union of "any vacancy"; it required the Employer to, "within five (5) work days after the award of [a preference] job . . .post a notice on the bulletin board at each location where employees covered by this Agreement are located, showing the name of the employee selected to fill the job and his seniority number." This posting notice procedure was also applied to bulletined awards although it varied from the existing contract.

This proposal was discussed on August 22, 1991. According to the Employer, both negotiating teams, the mediator and the Chairman of the National Mediation Board were present that day to

[6] Union Exhibit 10 indicates, in a handwritten note, that this proposal was submitted on August 16. To the extent that the specific date is relevant, the weight of testimony supports the conclusion that the Employer submitted the proposal, not on August 16, but on August 20.

[7] The Director of Labor Relations, Ground testified that vacancies in basic classification account for approximately seventy percent of vacancies in the bargaining unit (TR 313).

discuss Article 9. In the brief for the Employer, Counsel summarized the testimony on that discussion:

> Person 1 testified that the diagram which appears at the last page of his negotiation notes of August 22, 1991, is exactly the example which he walked the union through during the negotiation on the same date (TR. 182, Co. Ex. 5). The example shows that an initial vacancy was posted on August 19 filled through the preference system, and that the mechanic who filled that initial vacancy was leaving a position as a mechanic. That backfill position was thereafter immediately filled through the preference system. Person 1 testified that the initial vacancy filling would be preceded by "notification to the Union on August 19th." No other notice was contained in his example for the backfilling.

It appears that on August 29, 1991, negotiations were adjourned until January 1992. During the intervening months, Person 1 assumed a new assignment for the Employer. Although he continued to advise members of the Employer's negotiating team, he no longer had any face-to-face negotiations with the Union's negotiating team and was not directly involved in the negotiation of the any changes in the language in Article 9.

On March 11, 1992, the Union submitted its proposal regarding the filling of vacancies. With respect to the issue of the notice to the Union, this proposal included the following language:

(C) The Local Chairman will be notified of any vacancy to be filled thru the preference system five (5) days prior to filling of same. Such notification will serve to close the preference file for consideration for said vacancy.

Other than this, the Union proposal sought at least two other changes to the proposal made by the Employer seven months earlier: 1) a change in the procedure by which employees were to be notified of a preference award and given the opportunity to decline such award, and 2) the elimination of the "stability period" provision, which circumscribed the number of moves an employee could make in a year. The Union's proposal set 25 days as the time in which the

Employer must make the move, thereby agreeing to change the existing contract to better meet the needs of the Employer.

The Employer responded on March 31, 1992, with a proposal which curtailed notice to the Union to one (1) day, and suspended bidding rights of an employee who declined an award for one (1) year.

On April 23, 1992, the chief negotiators for the Employer and the Union signed off on Article 9: Filling Vacancies. In its final form, the contract provided for:

* A preference bid system for basic classifications and a bulletined bid system for new jobs and premium classifications (operating in much the same manner as that which existed under the previous contract);
* the continuation of the right of employees to decline awards, although those who have been offered a job through the preference system must notified of the award in person and must decline immediately;
* the continuation of a six (6) month suspension of certain bidding rights after declining the award of a bid/preference;
* a notice system which posts successful bidders within five days of the award;
* the right to two (2) bid moves and (2) preference moves in a year, with the continuation of the stability period for premium classifications of six (6) months or the remainder of the calendar year, whichever is longer.

Finally, the new contract contained the following clause with respect to the Union's right to notice and the window for the submission of preference bids:

> (C) The Local Chairman will be notified of any vacancy to be filled through the preference system five (5) days prior to filling it. Such notification will close the preference system for that vacancy.

DISCUSSION

The Union asserts that the language of 9 (C) is clear and unambiguous: that the Union is to be notified of any vacancy which is to be filled through the preference system. According to the Union, language which is clear and unambiguous must be given its common, ordinary meaning.[8] Under this view, this Board would be required to hold that all vacancies - including those resulting from backfill - would require a five (5) day notification to the Union.

Given language which is clear on its face, the Union argues that parole evidence should not be used to alter the parties' contract. In support of this proposition, the Union has introduced the holding of Archibald Cox in an early arbitration award, United Drill & Tool Corporation, 28 LA 677, 679 (1957):

> "When the parties to contractual negotiation adopt a writing as the final and complete expression of their agreement, the parole evidence rule prevents adding to the agreement or varying it by proof of prior or contemporaneous promises relating to the same subject matter regardless of whether the promises are oral or written."[9]

The Employer, however, makes a number of arguments to the effect that the language of 9(C) should not be read as it appears on its face.

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[8] "in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern", citing Elkouri and Elkouri.

[9] See also Elkouri and Elkouri, How Arbitration Works, 3rd Ed.

"Under the parol evidence rule a written agreement may not be changed or modified by any oral statement or arguments made by the parties in connection with the negotiation of the agreement. A written contract consummating previous oral and written negotiations is deemed, under the rule, to embrace the entire agreement, and, if the writing is clear and unambiguous, parol evidence will not be allowed to vary the contract." p. 362

First, the Employer argues that the fundamental rule of contract interpretation is to give effect to the mutual intent of the parties and argues that parole evidence is not only admissible, but necessary here to determine that intent.[10] Thus, for the sake of argument, assuming that parole evidence can alter the plain meaning of language, the initial threshold is a finding that the parties agreed to something contrary to that which appears in the contract.

According to the Employer, the intent of the parties was to streamline the system of filling vacancies by eliminating the burdensome time delays associated with the bulletin system for the basic classification vacancies.

The Employer claims that it has produced:

> detailed and specific testimony and even the notes taken at critical times in negotiation which prove beyond peradventure that the Union agreed to backfilling under the preference system without additional notice (Employer Brief 13)

The Employer urges the Board to review the negotiation history regarding the purpose and intent of Article 9 (Employer Brief 14).

According to the Employer, the Union bears the burden of proving that its proposal regarding the five-day notice changed the nature of the "already agreed upon preference system for backfills" (Employer Brief 16).

If parole evidence is to be considered here, however, the Employer must first show that the precise system for backfills actually had been agreed upon at the discussions in August 1991.

A careful review of the bargaining history shows that there were many ways in which the Employer sought to "streamline" the filling of vacancies: by the elimination of the bulletined bids system, by limiting the number of preferences an employee could bid on, by eliminating the

[10] 10 Elkouri and Elkouri, How Arbitration Works, 4th Ed.,p. 348.

right to decline an award and restricting the number of moves an employee could make during one year. The testimony of all the witnesses, the contract proposals themselves and the notes introduced as Employer exhibits, all indicate that these issues were placed on the table by the Employer and that as of August 15, 1991, none of them had been resolved. On August 20th, the Employer offered a proposal which contained both a preference bid and bulletined bid system. However, subsequent Union and Employer proposals in March showed that differences remained in the areas of notice of vacancies, notice of awards, rights to decline and number of moves allowed. Given this distance between the parties on so many aspects of the procedures for filling vacancies (both through the preference system and the bid system), it is not possible to conclude that the parties had specifically agreed to the manner of notice for backfills under the preference system.

There is no doubt that the Employer was forthcoming in how it wanted the preference procedure to work: although the Employer witnesses did not testify on this matter, the Board assumes that the Employer was equally forthcoming on a number of other matters relating to the filling of vacancies.

In attempting to show a meeting of the minds, however, more is necessary that a demonstration that one party made its preferences well-known.

The fact that the Union's negotiator nodded in assent, or may have said "O.K.", does not rise to the level of "a meeting of the minds" as the Employer suggests (Employer Brief, p. 15). In this regard, it is possible to credit Person 1's testimony regarding the discussions that took place in August 1991 and still find that the parties did not reach agreement on the precise procedure to the used. The Union may have seemed agreeable to certain aspects of Person 1's explanation but when the Union returned with its proposal in March 1992, approximately seven months later, the

Union included language which entitled it to five days notice of "any vacancy to be filled thru [sic] the preference system." Union Ex. 11. The Employer has argued, however

> Person 2 admitted that Person 3 had made clear that it was the Employer's desire to go from the initial vacancy all the way down to the street to fill if necessary almost instantaneously. TR 141.

This being admittedly true, it was incumbent upon Person 2, or some other union spokesman, to explain that the five-day notice would eliminate the possibility of going through the backfills almost instantaneously, since each one would take five days. But no such statement was made. (Employer Brief, Page 17.)

The testimony of the Employer's witnesses did not provide much insight into the actual negotiations which took place in March. But in its March 11, 1992, proposal the Union included a provision in Section (M) which required that "Employees must accept or decline preference awards at the time they are notified by the Employer that they are the senior qualified preference bidders." In inserting a provision that required notification of employees, the Union essentially precluded the "instantaneous" backfill system that had been envisioned by the Maintenance Administration. Thus, to the extent that the Employer claims that the Union never objected to an instantaneous backfill system, the inclusion of Section M in the March 11, 1992 proposal defeats that argument.

Finally, the Employer claims that it is a fundamental rule of contract interpretation that illogical or harsh results should be avoided.[11] In this regard, the Employer brief states:

> Whereas it would have been illogical and, in fact, harmful, for the Employer to have negotiated a system as bad, or worse, than what it had, it is perfectly reasonable to assume that the Union would have agreed to a system which did not require notice for backfill. . . The five-day notice for backfills, therefore, serves no beneficial purpose for

[11] Elkouri and Elkouri, How Arbitration Works, 4th Ed. p. 354.

> the employees and in fact only delays the time it will take them to get to the openings they desire. (Employer Brief at pp 21-22.)

At another point the Employer claims that if the Board finds that the Union is correct in applying the five-day notice to backfills, the "the severe problems experienced by the Employer in filling vacancies will continue or worsen" (Employer Brief at 12). At still another point, the Employer argues that the five-day notice requirement for each backfill is not as timely or effective and is more expensive to the Employer than the current cost prohibitive vacancy bidding system (Employer Brief at 17).

To set aside clear and unambiguous language on the grounds of harshness or irrationality, however, would require a demonstration of extreme conditions. Yet, the Employer's own assessment as to the implementation of the two versions of the preference system relies somewhat on overstatements. Using the Employer's own example, assume that a vacancy is created by a retirement. On the day Maintenance Administration is notified of the retirement, the manager opens the position by notifying the Local Chairman, establishing the day before such notice as the latest acceptable postmark date (TR. 187-88). According to the Manager of Maintenance Administration, five days later "we check the preference file, identify the senior employee who has bid the position" (TR. 189), and get contact and approval of the individual employee. Once that vacancy is filled, Maintenance Administration would then know where the backfill was needed, and could "immediately fill all resultant openings based on the preferences on file in the preference system. As an observation, there are at least three flaws in this interpretation. First, since the window for submission of bids closes with notification to the Union, Maintenance Administration would not have to wait until five days later to use the standing preference file to determine who should get the vacancy; that information would be

available to both the Employer and the Union within hours of the notice. In fact, the Employer and the Union should be able to determine not only the most senior bid, but the next senior in case the first declines, the third senior, in case the second also declines, and so forth. Depending on the sophistication of the computer hardware and software, all possible permutations on resulting backfills could be ascertained and planned for.[12] Moreover, since the contract requires that employees be notified of the award of a preference bid, it is entirely possible that Maintenance Administration won't reach the initial replacement for four, five or six days: the belief that Maintenance Administration could fill six jobs "instantaneously" when the contract requires personal notification is optimistic, at best. Finally, this possible lag in contacting employees raises a more troubling problem with the Employer's interpretation: the five-day notice to the Union does more than merely let the Union know what jobs are open;[13] such notice closes the preference system for that vacancy. If, as the Employer claims, the first notice operates to close the window until the preference system has run its course, if there are delays in filling a position or positions higher up the chain, it is quite possible that more senior bidders will be kept out of competition for backfill positions. Using the same example that was used during the hearing, if the Union is notified of a vacancy due to retirement on April 28, 1993, the latest acceptable postmark date is April 27. The first vacancy may be filled on May 3, but what if the senior bidder for the backfill cannot be reached until May 8, and the senior bidder for that

[12] Under the Union's interpretation of the contract, when the initial vacancy was filled, and the subsequent five-day notice on the resultant vacancy issued , the only question for Maintenance Administration would be whether any bids with greater seniority had been submitted for the vacancy since the earlier computer run.

[13] 13 In testimony, Union witnesses did acknowledge that they had an interest in knowing what jobs were open before they were opened and filled.

backfill, until May 13. Under the Employer's interpretation, no preference bid postmarked after April 27 would be considered to fill a position that comes open more than two weeks later. These observations lead this Board to conclude that the Union's interpretation is neither so harsh nor so illogical as to require the abrogation of clear and unambiguous language.

AWARD

The Question at issue is answered in the affirmative. Grievance Granted.