

Zigman #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Introduction

This matter was heard before Louis M. Ziqman, Esq., neutral arbitrator, on February 10, 1993.

Both parties were afforded an opportunity to present evidence and to examine witnesses. At the conclusion of the hearing both parties made oral closing argument.

Based upon the evidence and contentions of the parties I issue the following decision and award.

Issue

Did the Employer violate the collective bargaining agreement when it adjusted the seniority of the Employee? If so, what is the appropriate remedy?

Material Facts

This dispute concerns the classification seniority for the Employee.

The Employee was employed as a customer service agent when he bid on a posted position for the Sr. Customer Service Agent position. That position was posted on April 9, 1990 and the posting closed one week later. That position was a temporary position which was opened as a result of the incumbent employee going on occupational leave.

The Employee was successful in his bid and he was then placed into that position on May 6, 1990 and he worked as a Sr. Customer Service Agent until June 2, 1990. At that time he returned to his former Customer Service Agent position.

Thereafter, on September 30, 1990, as result of another temporary opening in a Sr. Customer Service Agent position, the Employee was recalled on that date. He served in that temporary position until November 10, 1990, whereupon he returned back to his former position,

On January 16, 1991 the Employee was recalled to again to another Sr. Customer Service Agent position, and after he served 22 days, he had accrued 90 days in the Sr. Customer Service Agent position within the qualifying 12 month period and he attained seniority in that position.

The Employer then gave him seniority status in that new position as of October 26, 1990.

He disagreed with the seniority date and he filed a grievance in which he asserted that his classification seniority should have been as of April 17, 1990 rather than October 26, 1990.

According to the Employee and the union, his seniority should have begun on the "date following the closing of the bulletin period", which was April 17, 1990.

The Employer, on the other hand, maintained that the date of October 26, 1990 was the proper date and the Employer explained its formula by which it selected that particular date.

The union did not agree with that formula and the parties then referred this dispute to the undersigned for resolution.

Pertinent Contractual Provisions

ARTICLE 10 - VACANCIES

G.1. An Employee, whose application for a bulletined job is accepted, shall work in the bulletined job for a reasonable period but not to exceed ninety (90) days on a trial basis, in order to demonstrate his ability to perform his ability to do the work required by the

job and to establish seniority in said classification. Seniority of a successful bidder shall begin on the date following the closing of the date of the bulletin period provided the employee successfully passes the trial period stipulated above. The trial period will commence the day he actively fulfills the position...

Positions of the Parties

Union's Position

The union asserted that the Employer violated Article 10 (G)(1) when it assigned the Employee classification seniority in the Sr. Customer Service Agent position as of October 26, 1990.

According to the union, the contractual provision provides that the successful bidder, i.e. the Employee, was entitled to classification seniority "on the date following the closing of the bulletin period" (April 17, 1990), because he successfully completed his trial period.

While noting that it took the Employee ten months to complete 90 days of service in the Sr. Customer Service Agent position, nonetheless, the union noted that an employee has up to 12 months in which to gain the 90 days necessary to fulfill these requirements.

Inasmuch as the Employee did successfully complete the trial period, he was entitled to classification seniority retroactive to April 17, 1990, the day following the closing of the bulletin period for that particular job.

In noting that the Employer agreed that in terms of filing permanent positions, employees who successfully complete 90 consecutive days in the higher position are given classification seniority as of the date following the closing of the bulletin period, the union asserted that there is no contractual provision for distinguishing between employees who attain their seniority during a 90 day consecutive day period as opposed to another employee who achieves seniority after gaining 90 days on an intermittent period of less than 12 months. Here again, according to the union, both employees, who have attained classification seniority in this new classification,

are entitled to the same formula for achieving seniority, i.e. by having their classification seniority retroactive to the day following the closing of the particular bulletin job.

Again, according to the union, there is no contractual basis to distinguish the seniority period as between individuals who have completed their trial period within 90 consecutive days or having achieved 90 days over a 12 month period.

In recognizing the Employer's argument that it is unfair to grant greater seniority to an employee who may have taken many months to have attained the 90 days over another employee who completed his/her period in 90 consecutive days, the union denied that there was any unfairness in such a result. According to the union, this is precisely the bargain which it achieved in the contractual language. Moreover, the union pointed out that its members know exactly how this procedure works and that this procedure of filling temporary vacancies is available, partially to allow employees an opportunity to build up time to eventually achieve seniority status at the higher rated position. Here again, according to the union, its members are perfectly well aware that employees filling temporary bid positions may eventually leap frog over others who have secured permanent positions so long as the employee filling temporary bid position successfully fulfills 90 days within a 12 month period.

Inasmuch as this procedure was bargained for, the union maintained that the Employer's "belief" that this is somewhat unfair to other bargaining unit employees, is irrelevant.

In view of the following, and in noting the language in Article 10(G)(1), the union maintained that the language is clear and unambiguous and therefore, because the Employee successfully fulfilled his trial period in the Senior Customer Service Agent position within a 12 month period, his classification seniority should have been made retroactive to April 17, 1990.

Employer's Position

The Employer maintained that the language in Article 10(G)(1) is somewhat ambiguous when read in conjunction with other articles in the collective bargaining agreement. In this respect the Employer pointed to Article 10(B)(2),(3) and (5).

While acknowledging that employees who fill permanent positions are given seniority retroactively back to the date following the bulletin postings once they successfully complete their 90 consecutive days, the Employer maintained that those employees are in a different situation from the employees who may not complete their trial period for many months. As such, the employee who has completed his/her trial period in 90 consecutive days gains their seniority effective the day following the bulletin inasmuch as the employee has continuously filled that position from the day following the bulletin period. On the other hand, the employee who works in temporary positions and takes a greater amount of time to gain seniority, has not actually worked in the higher level position on a continuous basis. Therefore his/her seniority should not be retroactive to the day following the bulletin period inasmuch as that employee has not worked in that position retroactive to that day.

As noted above, the Employer maintained that it would be unfair to an employee who filled a permanent position in the Senior Customer Service classification from February 1 through May 1 as compared to another employee who filled a temporary position for 30 days, effective January 9, and then had an interval of some 8 months before serving in another temporary Senior Customer Service agent position to then leap frog over the person who had actually been working in the position on a regular basis for many months.. According to the formula advocated by the union, that employee filling temporary positions over the year period would, on completion of their 90th day, many months later, be given classification seniority in the Senior

Customer Service Agent position retroactive to January, while the other employee who has actually served in the Sr. Customer Service Agent classification from February 1, would have less classification seniority than the other one.

As noted above, the Employer maintained that this result would be patently unfair.

The Employer also maintained that contrary to the union's assertion that the bargaining unit employees understood the contractual provision as the union suggests, that this is in fact is not so. In this respect the Employer noted that it has applied this formula in the same manner to many other employees for at least 15 years. Therefore, according to the Employer, the parties, particularly the union, has assented to the interpretation and practice as enunciated by the Employer.

Again, according to the Employer, this long standing practice has demonstrated that the parties have construed the language in the collective bargaining agreement as adjusting the successful bidder's seniority in the matter as provided in this case.

In view of the foregoing, the employer maintained that it did not violate the collective bargaining agreement when it assigned the Employee classification seniority in the Senior Customer Service Agent position as of October 26, 1990. As such, the Employer maintained that the grievance should be denied.

Analysis and Conclusion

In considering contractual grievances one must look to the language in the collective bargaining agreement. In having considered the language in the collective bargaining agreement, more particularly in Article 10(G)(1) I found the union's arguments as persuasive to the effect that this

language does provide the formula for determining the seniority of a successful bidder in a classification.

In this respect I note that the parties agreed that the 90 day trial period can be achieved over a 12 month period of time and does not have to be on a consecutive basis. As such, the language is clear and unambiguous on this point and therefore I found the union's position as persuasive to demonstrate that when the Employee successfully completed his 90 day trial period, albeit on or about February 8, 1991, he was entitled to the Sr. Customer Service position at that time and his seniority, according to Article X(G)(1), would be determined as of the date following the closing of the bulletin period, i.e. April 17, 1990.

While I recognize the Employer's argument based on past practice is a very cogent argument and while in some instances an arbitrator may be persuaded by a long standing past practice, nevertheless, the strong principle in contract interpretation lies in favor of carrying out language which is otherwise clear and unambiguous. Thus, while there may be some instances when a past practice would be persuasive to demonstrate "intent", nevertheless, there are no such compelling reasons in terms of this particular case and I also note that there is really no adverse impact on the Employer's operations as a result of the assignment of the classification as the union asserts.

Because there has been no detrimental reliance by the Employer, in terms of adverse impact, and because the remedy is limited to giving this Employee classification seniority retroactive to April 17, 1990 and no further retroactive remedies, and most importantly, because the language is clear, I found the union's arguments and position as persuasive in this case.

In making this determination and in granting the remedy in this case I also note that the remedy in this case is to be applied prospectively to situations occurring after the issuance of this award, with the exception of this particular grievance. As such, classification seniority which has

already been given to bargaining unit members prior to this date shall be considered as valid and no longer subject to grievances. Of course by applying this decision on a prospective basis, it shall apply to any employees currently serving in a trial period and for situations arising hereafter.

In view of the foregoing, I find and conclude that the evidence did substantiate the union's claim that the Employer violated the collective bargaining agreement when it assigned classification seniority to the Employee as of October 26, 1990 and as a remedy the Employee's classification seniority as a Sr. Customer Service Agent shall henceforth be as of April 17, 1990. No further remedy shall be granted to the Employee as a result of this award.