

**Boyer Jr. #1**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

and

Union

Hearing Date: September 8, 1993

**STATEMENT OF JURISDICTION**

The Issue as determined by the Neutral Chairman and stated below was submitted to Arbitration.

Each of the Parties presented testimony under Oath was afforded full opportunity for examination and cross-examination of witnesses, submitted exhibits in support of their respective positions, and the Hearing was declared closed.

The Opinion and Award was prepared by the Neutral Chairman. Accordingly, concurrence by either of the other System Board members shall not be interpreted to indicate or imply agreement with any or all aspects of the Opinion.

**THE ISSUE**

Did the Employer violate Article XI, Paragraph I of the Agreement and/or its intent when it failed to bulletin and award a permanent Lead Mechanic vacancy, because such would cause a surplus of personnel in that classification? If so, what shall be the appropriate remedy?

**BACKGROUND**

The Issue involves interpretation of the meaning and/or intent of the Agreement, given the facts are essentially not in dispute. The genesis of the dispute is the operational distinction between a

"temporary" and "permanent" vacancy, and the appropriate remedy for alleged Employer violations of Article XI, Vacancies, Paragraph I of the Agreement.

The Employee is employed as a Mechanic in the Building and Maintenance group at the Employer's City 1 facility, with a seniority date of 1986, and normally assigned to the day shift. During the sixty-three (63) day period of March 15 to May 16, 1992 a Lead Mechanic (Person 1) was the regularly assigned Lead on the day shift, and the Employer assigned other employees to the Lead position to cover his scheduled days off for a maximum of sixteen (16) hours alleged to be consistent with the criteria of the disputed Article. However, at times Person 1 was also upgraded to the Foreman position, and this required that other employees be upgraded to temporarily fill his vacated Lead position. Accordingly, over that period five (5) different Mechanics were temporarily upgraded for more than twenty (20) hours per week, and a permanent vacancy was not bulletined or awarded. The basis for the Employer's action being another Mechanic (Person 2) was being removed from the shift, making another Lead unnecessary. However, Person 2 continued on the shift until July 9, 1992, and the Union contends such should have no effect upon the matter.

The instant matter was complicated by a prior grievance seeking clarification of the permanent vacancy clause. The settlement apparently involved the Employer agreeing to cease permitting a Foreman to function as Lead, to bulletin and award a permanent vacancy, and to pay that employee (Person 3) for all lost wages.

The complex chronology of events leading to the instant matter were rekindled on May 29, 1992 when the Plant Maintenance Manager (Person 4) advised the successful bidder for the Lead vacancy (Person 5) the Lead position awarded would create a surplus in the department, and require he be surplused and displace a less senior Lead in another department. Subsequently,

Person 5 was notified of a requirement he be tested for qualification(s) for another Lead position, a dispute resulted and was resolved without testing, and he ultimately reported for duty on June 29, where typically such a reassignment is allegedly accomplished within ten (10) days. Consequently, on that date he was notified of his surplus status cited above.

The Employer contends that concurrent with the events above, it was assessing the staffing requirements in the Plant Maintenance Department to achieve improved efficiency and productivity. Further, another Mechanic (Person 6) was advised on June 25, 1992 that he was being reassigned to the Tour 1 (midnight shift), but the Parties stipulate such had no specific impact upon the instant matter.

Finally, a related incident occurred in November, 1992 when the regularly scheduled Lead on the midnight shift was absent due to injury that required surgery. The Employer allegedly anticipated an absence of approximately six (6) weeks, and temporarily upgraded Mechanics for a period that exceeded sixty (60) days. A grievance resulted; the Employer discontinued the practice and reassigned a Lead from the day shift for the remaining period. The Employer contended such was possible because of a surplus of Leads on the day shift, and it could not declare a permanent Lead vacancy, because another Lead was still on furlough in a manner allegedly identical to the instant matter.

Accordingly, the instant grievance was submitted, and the genesis of the dispute before the System Board was not whether the Employer had violated the Agreement with the series of temporary upgrades cited over the sixty-three (63) day period, but failed to provide the required remedy; that is, when it refused to implement the complete requirement of Article XI, Paragraph I to bulletin, and award a permanent Lead vacancy. The basis for the Employer's refusal being a permanent Lead vacancy cannot be declared until all Leads on furlough status are recalled, and

contending its Hearing Officer was not aware a Lead was on layoff at the time he directed a vacancy be declared.

Therefore, the Employer consistently denied the Union's request, and given the Parties were unable to resolve the matter and stipulate to an absence of procedural deficiency, it was reduced to writing in accordance with Article XVIII - Bargaining and Grievance Procedure and appealed to the System Board for adjudication.

## **PERTINENT PROVISIONS OF THE AGREEMENT (Excerpts Only)**

### **ARTICLE X - SENIORITY Paragraphs**

H. When it becomes necessary to lay off employees at any location on the Employer's system, any temporary or part-time employees at the point will be terminated first and then system seniority in the basic classification plus ability to perform the available work will govern. In any such layoff, the ratio of Apprentices as provided for in this Agreement will be maintained.

I. 1. When it becomes necessary to layoff employees due to a reduction in force, at least ten (10) calendar days' notice of such layoff or normal pay in lieu of such notice will be given all employees to be laid off except temporary employees.

- a. When notice of lay off is...
- b. When notice is given an employee...
- c. If the notice is served by

2. The above shall apply to all employees covered by the Agreement at all times excepting employees on vacation. If an employee scheduled for vacation is given notice . . .

J. 1. The Employer will furnish to employees to be laid off a list of available permanent vacancies, probationary employees, or junior employees on the system, whichever is applicable, at the time the employees are notified of layoff.

2. An employees being laid off in a basic seniority classification because of a reduction in force may:

- a. Accept layoff with right of recall at his point, or...
- b. Exercise his seniority to transfer to any other point on the system . . .
- c. If unable to fill a vacancy under b above, he may submit an order of preference among stations where probationary employees are located . . .
- d. If unplaced through the operation of subparagraphs b or c he may exercise system seniority in his basic seniority classification to displace the junior employee on the system whose work he is qualified to perform...

- e. An employee may limit his willingness to displace to only a given location or locations from among several locations listed by the Employer...
- 3. When an employee is offered recall to his old point...
- 4. The temporary assignment of an employee filling a temporary vacancy shall be terminated before the layoff...
- 5. Transfers under this Paragraph and under Paragraph P of Article X shall be made without expense to the Employer...
- 6. The Employer will notify the System General Chairman...

K. Employees, except temporary employees, laid off by the Employer who desire to seek employment elsewhere will...

L. Employees who have given long and faithful service in the employ of the Employer and who have become unable to handle their normal assignments will be given preference...

M. 1. An employee whose transfer request to a different classification represented by the Union is accepted by the Employer shall retain and continue to accrue seniority...

#### ARTICLE XI - VACANCIES Paragraph

I. In the case of vacancies not expected to exceed sixty (60) days, the Employer may select an employee to fill such vacancy on a temporary basis without bulletining the job. In case of vacancies in higher classifications, the selection will be based on seniority insofar as practical and wage claim will be paid where deviation from normal selection practice for temporary assignments is due to Employer convenience. At the end of sixty (60) days the vacancy will be filled as otherwise provided in this Agreement. Exclusive of vacation requirements, when a Lead job in a work group for a full shift is regularly filled each work week by temporarily upgrading an employee more than half time (more than 20 hours per week) for sixty (60) days, a permanent Lead vacancy will be bulletined and awarded.

#### ARTICLE XXI - GENERAL AND MISCELLANEOUS

K. The right to hire, promote, discharge or discipline for cause, and to maintain discipline and efficiency of employees is the sole responsibility of the Employer except that employees will not be discriminated against because of Union membership or activities. In addition, it is understood and agreed that the routes to be flown, the equipment to be used, the location of plants, hangars, facilities, stations and offices, the scheduling of airplanes, the scheduling of overhaul, repair and servicing of equipment, the methods to be followed in the overhaul, repair and servicing of airplanes are the sole and exclusive function and responsibility of the Employer.

#### **ARTICLE XVIII - BARGAINING AND GRIEVANCE PROCEDURE**

##### **H. Step Four - System Board**

3. The Board shall have the power to make sole, final and binding decisions on the Employer, the Union, and the employee(s) insofar as a grievance related to the meaning

and application of this Agreement. The Board shall have no power to modify, add to, or otherwise change the terms of this Agreement, establish or change wages, rules or working conditions covered by this Agreement.

## **POSITION OF THE PARTIES**

The position and requests of the Parties were outlined by their representatives and supported by a variety of documents and testimony as follows:

## **THE UNION**

- 1) The Employer violated Article XI, Paragraph I of the Agreement when it temporarily upgraded Mechanics to a Lead Mechanic position for more than twenty (20) hours per week and/or a period of more than sixty (60) days duration.
- 2) The Article cited requires the Employer to bulletin and award a permanent Lead vacancy. The only exception to the requirement being for "vacation requirements" not present in this dispute.
- 3) That during the disputed sixty-three (63) day period, the Employer incorrectly gave temporary upgrades to five (5) different mechanics over forty-one (41) scheduled shifts.
- 4) The Employee has a Employer and classification seniority date of November 24, 1986 and normally works the day shift in the terminal area.
- 5) The Employee's Building and Maintenance group is relatively small and established practice is to bulletin and award such a permanent vacancy regardless of whether other provisions of the Agreement require that action.
- 6) The Employer's proposed resolution of the matter violates the layoff clause of the Agreement as affected by an EEOC/Court decree relative to seniority, bidding and filling of vacancies, and is not consistent with transfer procedures in the area.

- 7) That an identical prior grievance arose in the same department, was sustained, and a Lead vacancy was bulletined and awarded. However, the Employer then placed the displaced Lead on layoff which constitutes a violation of the specifics and intent of the "permanent" vacancy concept in Article XI.
- 8) That a 1976 System Board of Adjustment decision sustained the obligation of the Employer to upgrade to the Lead position.
- 9) Requested the System Board sustain the grievance and direct the Employer bulletin and award a permanent position of Lead Mechanic when the vacancy exists beyond the time requirements specified in the Agreement.

## **THE EMPLOYER**

- 1) The Employer concedes it violated Article XI, Paragraph I when it temporarily upgraded the mechanics to the Lead position and was directed by a Third Step decision to bulletin and award a permanent vacancy.
- 2) That at the time of that decision a mechanic was on layoff status from the Lead classification, there was no need to assign an additional Lead, and did not recall the Lead from layoff.
- 3) That during the March 15 to May 16, 1992 period when the temporary upgrading occurred, no more than thirteen (13) mechanics actually worked on a given day although seventeen (17) and a Lead were assigned to the shift.
- 4) The Agreement fails to prohibit the Employer from placing an employee on layoff status when it determines his services are no longer required.
- 5) That during the disputed period, the assigned Lead was temporarily upgraded to Foreman, which caused the need to upgrade to "back fill" the Lead slot. When the violation was

discovered, the upgrading to Foreman was discontinued, the scheduled shift was realigned and such caused the successful bidder for the bulletined Lead vacancy to be surplus.

- 6) The Union is attempting to redefine the definition of "permanent" vacancy to reference a life-time appointment never subject to any change that was not intended by the Agreement.
- 7) The Employer did not intentionally act to circumvent the Agreement.
- 8) Requested the System Board deny the grievance of the Union in its entirety.

## **OPINION AND AWARD**

On the basis of the considered evaluation of all documents, testimony, and arguments presented by the Parties, the decision of the System Board is to sustain the grievance of the Union to the limit cited in the Award. The basic reasons for the Award are the following:

1) Initially, the Chairman can readily empathize with the mutual concerns and apparent frustration inherent in the disparate positions of both Parties when confronted with the emotion-laden dilemma of the conflicting pressures of a complex Agreement, and Employer desire for efficiency and cost control in the granting of premium pay Lead Mechanic positions in a relatively small department, that necessitated adjudication in these proceedings.

Therefore, the Award shall not be interpreted as reflecting upon the integrity of the principals, given the behavior of each exhibited at the Hearing could be characterized as an open, reserved, and sincere attempt to provide convincing argumentation supportive of their positions.

Nevertheless, the Award was predicated upon well documented standards of contract interpretation recognized by both the principals in a dispute and neutrals alike.

2) A primary basis for the Award was the Chairman's cognizance of a well-documented principle of dispute resolution accepted by both Neutrals and advocates alike that an Agreement be

interpreted in its entirety or "as a whole", but that a situation-specific provision be accorded precedence over any other less-specific or generalized clause(s). In the instant matter, the Chairman was compelled to characterize the grievance-specific requirements of Article XI, Paragraph I as controlling, and to render the generalized provisions of Article XXI - General and Miscellaneous (commonly referenced as the "Management Rights" clause), and cited in detail above, as clearly subordinate. Further, such conclusion is buttressed by both the Parties stipulated bargaining history relative to the provisions and the express clarity of the controlling clause.

First, the Record clearly documents the Parties bargaining history and indicates the disputed Article XI, Paragraph I evolved over several iterations of the Agreement to its current form, in a manner totally consistent with the process of collective bargaining. Specifically, as early as 1969 the Parties apparently sought to address an Employer concern when the Union proposed a thirty (30) day maximum duration, the Employer counter proposed ninety (90) days, and the Parties compromised on the existing sixty (60) day period limitation upon utilization of temporary upgrades. Accordingly, there is no doubt the practice was mutually considered to be a serious matter of conflicting Union negotiated rights/opportunities associated with earned seniority, etc. and the Employer's avowed concern for flexibility and/or productivity considerations that continue today within the instant Employer and the industry as well-documented by the popular press and media. Nevertheless, the Parties achieved accord on the principle that "In the case of vacancies not expected to exceed sixty (60) days, the Employer may select an employee to fill such a vacancy on a temporary basis without bulletining the job . . ." Such proviso must be characterized as both incontrovertibly clear and totally unambiguous.

However, the Parties interaction relative to the matter continued to the 1975 negotiations where they acted to add the latter sentence of the disputed clause that provides in relevant part:

"Exclusive of vacation requirements, when a Lead job for a full shift is filled each week by temporarily upgrading an employee . . . (more than 20 hours per week) for sixty (60) days, a permanent Lead vacancy will be bulletined and awarded. (Emphasis Added) Simply stated, regardless of the Employer's articulately detailed concerns for achieving operational efficiency and/or cost control, or for the real and/or potential sequential effects of that action, the Agreement mandates a permanent Lead vacancy be bulletined and awarded, with the singular exception of addressing non-specified "vacation requirements" stipulated to not be a factor in the instant dispute.

3) The Chairman can certainly empathize with the Parties situation given the dispute is centered in a relatively small department, where the personalities of advocates for both can impact upon the perceived significance of any alleged violation. However, the scenario and complex chronology of events that occurred either prior to and/or concurrent with the instant dispute clearly indicate the Employer representative was not attempting to covertly circumvent the requirements of the Agreement as explicitly and implicitly contended by the Union. Rather, it appears the Agreement could be characterized as not totally anticipatory of any/all circumstances that could cause such temporary upgrading and/or the potential for the resulting domino effect. Such was undoubtedly complicated by the "system" that mandates that the Union monitor and "detect" such alleged violations.

Accordingly, the Agreement contains a highly detailed Article X - Seniority, briefly highlighted above, that provides for the application of such in virtually every layoff type situation in the traditional format of the industry. The cogent point being the controlling Article XI, Paragraph I

vests an affected Mechanic with a right to a Lead position after the Employer has exhausted its sixty (60) day period of flexibility achieved through the utilization of temporary upgrades, but fails to vest the Employer with any other discretionary authority to restrict that right on the basis of factors such as causing a "surplus" within the classification, etc. Rather, if such unanticipated results do occur, the affected employee(s) are subject to numerous other provisions of the Agreement that can be appropriately characterized as either advantageous or disadvantageous depending upon individual perception(s).

Simply stated, Employer operational considerations in such matters are rendered subordinate to the specific requirements of the Agreement, which vests employees with both earned rights and/or other obligations characteristic of the totality of that Agreement.

4) The Chairman was also cognizant of the Union request for a "definition" of a "permanent" as compared to a "temporary" Lead, and of the Parties well articulated and disparate alternative definitions. However, the Parties have expressly and appropriately limited the authority of the System Board in Article XVIII, Paragraph H (3), and such clearly precludes such a definition. Rather, the Record indicates that in some situations mandated to require an additional Lead, a permanent Lead vacancy pragmatically characterized as of "unknown duration" may in fact be required to be bulletined and awarded; or if a Lead is already on layoff, he/she may be reassigned to limit the Employer's necessity for utilization of temporary upgrades, etc. Such shall not be characterized as an absurd result, but is the clear effect of applicability of the Agreement as negotiated and accepted by the Parties.

Accordingly, should the Employer continue to perceive inequity in such interpretation of the provision at Issue, the appropriate and readily available forum is the process of compromise and

concession characteristic of collective bargaining. However, the extent to which such may be instructive to the Parties, the Chairman prefers remain for conjecture.

Finally, the Chairman was less than compelled by the applicability and/or relevance of the 1976 System Board decision given it simply involved the Employer's obligation to appoint a Lead Mechanic given the number of Mechanics employed at the two (2) sites.

Therefore, on the basis of the analysis and conclusions above, the System Board is compelled to render the Award.

## **AWARD**

The decision of the System Board is to sustain the grievance of the Union to the extent that follows:

- 1) A notice of a permanent Lead Mechanic vacancy in the instant matter shall be properly and promptly bulletined and the position awarded.
- 2) The Employee or successful bidder should be made whole for any losses retroactive to the appropriate posting date in 1992.
- 3) The Chairman assumes and appreciates the Parties desire and intent to cooperate in implementation of the Award. Therefore, should the Parties mutually agree to any alternative remedy in the matter, such shall not be characterized as inconsistent with the Award. However, the System Board shall retain jurisdiction to resolve any matters associated with administration of the Award.