Eischen #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Subject: Lead A&P Mechanic Bid Bypass

PROCEEDINGS

The Parties selected me to hear and decide this grievance filed by A&P Mechanic the Employee when his bid for a posted vacancy in the Lead A&P Mechanic position was denied, and an employee with less seniority was awarded that position. A hearing was convened on August 22, 1997, at which both Parties and the Employee were represented, and afforded full opportunity to present documentary evidence, testimony subject to cross examination and oral argument. The Employee was present throughout the proceedings and testified in support of his grievance. The record was closed with the exchange and submission of post hearing briefs dated October 20, 1997.

ISSUE

1) Did the Employer violate the Collective Bargaining Agreement by establishing six (6) months' HSI experience as the minimum qualifications for a lead mechanic position in the engine shop in November 1993?

2) If so, what shall be the remedy?

PERTINENT AGREEMENT PROVISIQNS

ARTICLE 2- MANAGEMENT RIGHTS

Subject to the provisions of this Agreement, the Employer retains discretion and authority to manage its operations and direct its work force. Such rights include, but are not limited to, the right to hire, promote, demote, transfer, furlough and recall; to assign and reassign duties, schedules and hours of work; to schedule and utilize management employees; to maintain good order and efficiency; to discipline and discharge employees for just cause; to establish and, from time to time, amend rules, regulations and procedures; to establish and, from time to time, amend the Policies and Procedures Manual; to determine qualifications for initial employment; to determine uniform qualifications for continued employment or other promotions; to determine the quality of service; to determine the means of providing services to its passengers, including the size, type and number of aircraft to be utilized in providing the service; to determine the methods of administering and selling its services; to determine the size and composition of the work force; to establish new routes, to discontinue all or part of its operations; to transfer equipment from one base of operation to another base of operation; to determine where to perform all or any part of its operations; to contract out its operations, consistent with other provisions of this agreement; and to determine whether to purchase additional aircraft or to lease, sell or otherwise dispose of all or any part of its equipment.

Any of the rights the Employer had prior to the signing of this Agreement are retained by the Employer except those specifically modified by this Agreement.

ARTICLE 3-CLASSIFICATION OF WORK

Throughout this Agreement, the word Classification shall mean the job titles: Maintenance Controller, Lead A&P Mechanic, Lead Avionics Technician, Inspector, A&P Mechanic/Avionics Technician, Lead Ground Equipment Mechanic, Ground Equipment Mechanic, Lead Building and Grounds Mechanic, Building and Grounds Mechanic, Lead Fueler/Utilityperson, Fueler/Utilityperson, Mechanics Helper, and Custodian...

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II. In general terms, classification content includes, but is not limited to, the following:

A. Premium Mechanic

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2. Lead A&P Mechanic: The work of a Lead Mechanic shall be the same as that of a Mechanic and, as a working member of a crew to lead, direct an assign Mechanics and lower classifications in their assigned work. He may also be required, as needed, to inspect the work being performed in connection with repairs, overhaul, installation, major and intermediate inspections and checks, and accomplish and maintain applicable records relating to the overhaul, inspection, repair, modification, and installation of aircraft equipment, aircraft accessories and parts. A Lead Mechanic must hold required license(s) and will be required to monitor aircraft paperwork during the course of maintenance

being performed and sign for the completed package after audited for proper signs-offs and signatures of his crew members. Such signing shall not relieve any other members of his group from responsibility for the work that such members performed or relieve those members from being required to sign appropriate Employer work records.

4. Lead Mechanic will also give on-the-job instructions and training to mechanics when requested to do so by the Employer. When requested, a Lead Mechanic will check, review or verify work sheets and forms related to mechanic's work.

B. A&P Mechanic. The work of a Mechanic shall consist of any and all work generally recognized as, but not limited to, a Mechanic's work on or about an aircraft and its components parts performed at line stations, major stations and shops. Mechanics may be required to inspect and test aircraft systems or component parts used in their work and sign for the work performed. They must be capable of performing their work satisfactorily to Employer standards and hold valid licenses as required by the Employer and government regulations, and they may be required to instruct less experienced employees.

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ARTICLE 10- SENIORTIY

A. 2 ... The work classifications to be recognized for seniority purposes shall be as defined in Article 3.

B. Classification seniority shall govern all employees covered by this agreement in preference of shifts, furloughs, re-employment after furloughs, demotions, transfers, in bidding for vacancies of new jobs, and promotions, provided that in each case the employee meets the qualifications for the job...

ARTICLE 11- FILLING OF VACANCIES

A. When a vacancy occurs, notice of such vacancy will be posted on the bulletin boards at all locations for a period of five (5) calendar days. The notice will specify the classification, shift and base.

B. In the filling of posted jobs, the bid awards shall be made in the following priorities:

1. Most senior employee in the job classification at the location of the vacancy meeting the minimum qualifications for the position.

2. Most senior employee in the job classification on the system meeting the minimum qualifications for the position. .
3. Most senior employee on the system meeting the minimum qualifications for the position.

ARTICLE 16- GRIEVANCE AND ARBITRATION PROCEDURE

C. Grievance Procedure. A grievance is defined as a dispute between the parties arising under the express terms of this Agreement. The following procedure shall be used by the Employer and any employee who has completed his new-hire probationary period:

3. If the decision in- Step 2 is not satisfactory to the Union, the General Chairman or his designee may appeal the decision to the Vice President-Maintenance of the Employer or his designee within fifteen (15) days after receipt of the written decision rendered in Step 2 above. This appeal will be by submission of the written grievance. The Vice President-Maintenance or his designee will render his decision in writing within fifteen (15) days after final discussion with the General Chairman or his designee.

4. If the decision of the Vice President-Maintenance or his designee is not satisfactory to the Union, the grievance and decision thereon may be referred to arbitration within thirty (30) days after the receipt of the written decision of- the Vice President Maintenance or his designee.

BACKGROUND

The facts giving rise to this dispute are not in material conflict. Company 1, is a City 1, State 1-based commercial air carrier, wholly-owned by the Employer, and doing business as the Employer. Company 1 supports the Employer’s hubs in Baltimore, Pittsburgh, Philadelphia and Charlotte, and also provides point-to-point service within State 4 and to the Bahamas, with its fleet of 47 de Havilland Dash 8's. Employees of Carrier in the classifications described in Article 3, supra, are represented for purposes of collective bargaining by the Union. The March 21, 1995-February 28, 1998 collective bargaining agreement (hereinafter "Agreement"), is the second contract between these parties, the first having a term June 1, 1991-May 31, 1994.

With maintenance bases in City 1, City 2, State 2 and City 3, State 3, Company 1 employs some 250 Union-represented mechanics. This dispute arose at the City 1 maintenance base Engine Shop in 1993, under the terms of the 1991-94 Agreement.

Under the day-to-day supervision of Shop Manager Person 1, the Engine Shop at City 1 performs complete restoration of the Pratt & Whitney 120 engine (hereinafter "120"), including "hot section inspection" work, (hereinafter "HSI"). It is not disputed that hot section work is most labor intensive, requiring the most amount of work within the 120 engine. There is no requirement that an A&P Mechanic be previously experienced in HSI work to bid into the Engine Shop. However, every mechanic who bids and is awarded a position in the Engine Shop thereafter attends training classes at the Pratt & Whitney site and is further trained on the job by a Lead A&P Mechanic.

The instant grievance concerns the bidding and awarding of a Lead A&P Mechanic position in the Engine Shop in November 1993. At that time, the Employer posted vacancy announcement reading in pertinent part as follows:

> RESPONSIBILITIES: Reports to the supervisor of Accessories and Overhaul. Is responsible for the repair, refurbishment, recalibration and overhaul of P&W 100 Series engine hot sections. Must be available for any assigned shift.
>
> QUALIFICATIONS: A&P license, good written and verbal communication skills, 6 months experience performing 120 HSI.

As of November 1993, the Employee and

Person 2 were both employed as A&P Mechanics in the Engine Shop, each licensed as airframe and power plant mechanics with airframe licenses. Both of these mechanics routinely performed 120 HSI work under the direction of a Lead A&P Mechanic. Both the Employee and Person 2 bid on the posted vacancy. It is stipulated for the record that the Employee was the more senior of the two employees; but their respective accumulated hours of 120 HSI training were as follows:

> Person 2 c. 11.5 months (1787.5 hours), Employee c. 3.7 months (577) hours.

After reviewing the bids, Shop Manager Person 1 concluded that, despite his seniority, Employee failed to "meet the minimum qualifications for the job". The promotion was awarded to Person 2, the most senior bidder who possessed the requisite 6 months of HSI training, whereupon the Employee filed the instant grievance asserting the following violations of his Agreement rights: "I was not awarded the Lead A&P Mechanic position in the Engine Shop per Articles 10 (B) and 11 (B) because the qualifications set were not in accordance with Article 3.11.(2)". The grievance was denied on grounds that "a check of your training record and time keeping records did not indicate that you met the minimum qualifications for this position". The matter remained stalemated through all subsequent grievance handling until appeal to me for final and binding determination in arbitration under Article 16 of the Agreement.

POSITIONS OF THE PARTIES

The following statements of position are extrapolated and edited from the respective post hearing briefs submitted by the Parties:

The Union

The question before the arbitrator is whether the Employer violated the contract by establishing six months Hot Section Inspection experience as the minimum qualifications for a lead mechanic position in the engine shop on November 1993, if so what should the remedy be? The Union feels it has proven its case, based on the fact the award of the engine shop lead position was not based on uniform qualifications as stated in the contract.

Person 3, chief steward testified the Employer has the right to establish minimum qualifications for leads, "as long as they're uniform", Person 4 former chief steward, and negotiating committee

member, agreed that the Union's primary concern in negotiations was that the qualifications be uniformly applied.

After the Employee's bid was denied, Person 5 was awarded an engine shop lead position, even though he did not meet the minimum qualifications of six months (1040 hours) 120 Hot Section Inspection experience. Person 1, under cross-examination, stated the job was awarded (to Person 5) "based on fairness" and "because he was the senior most qualified person that bid for the job". Article 11 (B) of the contract states the most senior employee in the job classification meeting the minimum qualifications for the position will be awarded the job. This clearly shows the Employer violated Article 2A of the contract, by not uniformly applying qualifications to the engine shop lead bid.

Going to the qualifications of the Employee, he had been in the engine shop for over a year when the grievance was filed. He had attended formal classroom training on 120 hot section inspections and (had several hundred total hours of HSI training.) The Employee was a temporary lead in the engine shop on several occasions. If the Employer had a concern with the Employee being qualified per the FARS they would have denied the Employee the temporary lead positions in the engine shop.

In closing the union has shown that the Employer violated the contract by not making uniform qualifications for the engine shop lead positions. How can the qualifications be uniform when one employee, Person 5, who did not meet the qualifications of six months experience on 120 hot section inspection, be awarded a lead in the engine shop. The agreement requires that the most senior employee meeting the minimum qualifications would be awarded the job. The Union requests that Employee be made whole for his losses.

The Employer

Because this grievance raises a contractual issue, the union bears the burden of proving, by a preponderance of the evidence, that the Employer violated the applicable labor agreement when it established qualifications for the position of lead mechanic in the Engine Shop. Because there is no evidence to support the union's claim, this grievance must be denied and no remedy imposed. The qualifications set for the lead position were uniform. Both parties agreed that formal training was not sufficient to qualify a mechanic to function as a lead. Thus, the union did not question the Employer's right to establish qualifications for lead mechanic positions--a right expressly reserved to the Employer by the Management Rights provision of the 1991 Agreement--and the union's position must yield to the plain language of the Agreement. Company 1's shop is the only one in the country that performs a complete restoration of this kind of engine, and one of only a few that performs the hot section work. Since the Engine Shop opened at Company 1, the parties had always treated it somewhat differently than other work areas, because of the unique nature of the work performed there. Recognizing this, even the Employee admitted that a mechanic seeking to function as a lead in the Engine Shop "should have some experience". Perhaps, the union's real disagreement with the bid in this case concerns the AMOUNT of experience required, rather than whether any experience is required. But once it is established that the Employer has the right to establish minimum qualifications, the union cannot prove a violation on the theory that the Employer set the bar too high or too low. Nothing in the contract gives the union a right to challenge the level of qualifications, but that appears to be precisely what it is doing. An admission that the Employer should establish some level of experience as a minimum undermines the union's entire theory of the case.

All other evidence and arguments aside, the disparities aspect of this case involves the testimony about the 1995 Agreement. The union openly conceded that, had this case arisen under the current agreement, there would have been no violation. Therefore, in order for the union to prevail, it must prove that Article 3.111 of the 1995 Agreement conferred rights on the Employer that the 1991 Agreement did not. This the union cannot do, because it did not happen. The paragraph added to the 1995 Agreement placed additional obligations on the Employer that had not existed under the 1991 Agreement. That paragraph required the Employer for the first time to publish a list of qualifications in advance and to meet and confer with the union over changes to the qualifications. There is no logical way to twist that language imposing new obligations on the Employer into language that for the first time enabled the Employer to establish qualifications. By its plain meaning, and by admission of union negotiator Person 4, the language was intended to limit the Employer's flexibility, not to endow it with new freedoms in the area of flexibility. The language giving the Employer the right to establish qualifications is found in the Management Rights section, and it remained unchanged from the 1991 to the 1995 Agreement.

The Employee here would be entitled to no monetary remedy, for several reasons. First, under the prior arbitration award, the sole remedy was recession of the bid and a re-bid using the proper qualifications. If the prior ruling is deemed to control, the same remedy should be imposed here. Second, because no evidence of monetary loss was presented, damages would be speculative at best. Third, the passage of so much time since the vacancy was filled is a clear indication that the union sat on its rights, and should not be allowed to profit by collecting a larger damage award. Fourth, the Employee has failed to take any steps to mitigate his damages, such as by bidding

any subsequent lead positions. Therefore, even if the arbitrator rules in favor of the union, no monetary remedy may be imposed.

OPINION OF THEARBITRATOR

The managerial rights and authority reserved in Article 2 of the Agreement are conditioned or limited by other express and specific terms of the Agreement. It is well recognized in labor management arbitration that absent such contractual limitations management retains reasonable discretion [subject also to federal and state employment discrimination legislation) to select the individual it considers "most able" from among applicants for transfers or promotions, irrespective of seniority. See New Britain Machine Co., 45 LA 993, 995-996 (W. McCoy, 1965); Sun Oil Co., 52 LA 463, 468-469 (B. Abernethy, 1969).

Typically, however, the tension between fitness/ability and seniority is revolved unions and employers in collective bargaining agreements by balanced compromise on clauses like Article 10.B and Article 11.B. The express language of those cited provisions establish a "sufficient ability" standard for filling vacancies and promotions by post and bid.

Unlike "relative ability" clauses, sufficient ability clauses are close in concept to a straight seniority standard. Thus, under such language, when the senior bidder meets the established minimum qualifications for the position, it is a violation for the Employer to select a junior applicant, even one who is "head and shoulders" more qualified. See Hughes Aircraft CQ., 43 LA 1248 (H. Block, 1965); South. Minn. Sugar Cooperative, 90 LA 243 (Flagler, 1987); Warner Cable of Akron 91 LA 49 (Bittel, 1988); Dynair Fueling of Nevada 102 LA 230 (Mikrut, 1993); Clermont Cnty. Human Services Dept., 102 LA 1024 (Donnelly, 1994).

Because of the presumptive priority of seniority under such "sufficient ability" clauses (unless the senior bidder is patently disqualified), a grievance challenging Management bypass of a senior bidder places the burden of persuasion on the Employer to demonstrate the fact that the senior bidder failed to meet Management's "minimum qualifications". See Pittsburgh Plate Glass Co. 8 LA 317 (Blair, 1947); Pacific Gas & Electric Co. 23 LA 556, 557 (A. Ross, 1954); American Sawmill Machinery Co. 79 LA 106 (Harrison, 1982); Sweetheart Cup Corp. 8 LA 289 (Kelliher, 1982).

In the absence of express contract limitations, Management has considerable latitude in establishing such job qualifications. However, when challenged in arbitration Management must be able to meet and overcome Union evidence that its bypass of the senior bidder was procedurally unsound and/or that its established "minimum qualifications" were unfair, established in bad faith, unreasonable, subjective, not uniformly applied or not job-.related. See Alabama Power Co., 18 LA 24 (McCoy, 1952); AT&T 25 LA 256 (Horvitz, 1955); American Cyanajnid Co.,52 LA 247 (S. Cahn, 1969); Screw Conveyor Corp. 72 LA 434 (D. L. Howell, 1979); Public Service Co. Of Colorado 77 LA 313 (Watkins, 1981); City of Redwing 105 LA 1105 (Imes, 1995).

"Job-relatedness" is the most frequently used objective measurement for assessing the fairness and reasonableness of minimum qualifications established by Management. Yuba Heat Transfer Co. 38 LA 471; (Autrey, 1962) Realist Co. 45 LA 444 (Keeler, 1965); Penn. Power & Light 57 LA 146 (Howard, 1971); Illinois Dept. Of Correction 72 LA 941 (Rezler, 1979); Marshalltown Area Community Hospital 76 LA 978, 983 (C. Smith, 1981).

The central issue presented by the grievance filed on November 29, 1993 by the Employee is whether the Employer-established minimum qualification of six (6) months training in HSI for

the position of Engine Shop Lead A&P Mechanic was fair, reasonable and job-related. If so, the ancillary question is whether Management applied that standard fairly and impartially in the case of the Employee's bid for the Engine Shop Lead vacancy in November 1993. Application of the foregoing principles to the undisputed facts of records leads to an affirmative answer to both of those questions. Therefore, I must find that the Carrier did not violate Article 10.B, Article 11.2 or Article 3.II.A.2, as alleged in Employee' grievance.

It cannot reasonably be disputed that a significant amount of HSI training is a job-related qualification for the position of Lead A&P Mechanic in the Engine Shop at City 1. HSI work is the most time-consuming and labor-intensive portion of the 120 engine refurbishment performed by Mechanics and Lead Mechanics in the Engine Shop. The job description for Lead A&P Mechanic specifies at Article 3.A.II.B, that the Lead "shall...as a working member of the crew lead, direct and assign Mechanics and ...give on-the-job instructions and training to Mechanics when requested to do so by the Employer". Not do I understand the Union to be arguing that such HSI training is not job-related or is, per se, an unreasonable requirement for the Lead in the Engine Shop. Rather, the points of contention appear to be whether it was unreasonable to require six (6) months' of such training, rather than accept the lesser amount of 3.7 months HSI training which Employee possessed at the time of his bid in November 1993.

Since the Employer has demonstrated persuasively that the HIS training requirement is job-related, the burden passes over to the Union to show that the quantum of such training required by the Employer was arbitrarily or unreasonably excessive. The Union was unable to carry that burden of persuasion, nor did it provide any evidence that the six-month requirement was tailored in bad faith to discriminate against the senior bidder and rig the bid to favor a "fair-haired boy" or "favorite son" junior bidder.

Even though he had less seniority than the Employee, Person 2 was the senior bidder who met the minimum qualifications for the Lead vacancy in the Engine Shop in November 1993. Thus, the Employer's award of the bid to Person 2 was in strict compliance with the express language of the "sufficient ability" provisions and no violation of Employee' rights under those provisions. The fact that the Employer waived strict application of the six-month HSI requirement under significantly different circumstances in a subsequent bid for Lead A&P Mechanic two (2) years later in September 1995 has does not establish discriminatory treatment of Employee in 1993. Employee elected not to place a bid on the 1995 vacancy and none of the employees who did bid fully met the six-month HSI training requirement. Rather than close the bid with no award, the Employer awarded the bid to Person 5, the most senior bidder most nearly meeting the minimum training requirements by possessing some 842.6 hours of HSI training.

Finally, Article 3.111 is of no comfort to Employee in the instant case. That language was added to the Agreement at Union insistence in 1995, at least in part as a response to the subject of this arbitration proceeding--the facts and circumstances surrounding the disputed Engine Shop Lead bid of November 1993. However, there was no such express contractual condition or limitation on the Employer's reserved managerial discretion in 1993; and, for reasons explained fully, supra, I find no abuse of that discretion and no other violation of the seniority rights of Employee in the bypass of his November 1993 bid for the position of Lead A&P Mechanic in the Engine Shop at City 1. Based upon all of the foregoing reasons, the grievance filed by Employee must be denied.

AWARD OF THE ARBITRATOR

1) The Employer did not violate the Collective Bargaining Agreement by establishing six (6) months' HSI experience as the minimum qualifications for a lead mechanic position in the engine shop in November 1993.

2) The grievance filed by the. Employee is denied.