FEDERAL MEDIATION AND CONCILIATION SERVICE
AD HOC LABOR ARBITRATION

EMPLOYER

AND

UNION

ARBITRATOR'S OPINION AND AWARD

Arbitrator Anne T. Patton
June 11, 2008

Chronology

Date of Grievance: September 14, 2007
Date of Hearing: February 27, 2008
Dale of Record Closing: April 9, 2008

Statement of Issues

1 .Whether the grievance was timely filed?
2. Whether the Employer violated Sections 21 (a), 40, of 48 or the Agreement by applying the wage chart in the current Agreement to the Grievant, instead of his red-circled final assembly rate, when he bumped into the lower classification of machine op tech?
3. If so, what remedy is appropriate?

For the Employer: For the Union:

Appearances

Employer Attorney — Union Attorney

Witnesses

Employer Attorney
HR Director — Local President

Also Present

Chief Steward

Brief Statement of the Award

The grievance is denied.

INTRODUCTION

This dispute involves the application and interpretation of a newly negotiated contractual provision covering what rate should be paid to red-circled employees who bump into a lower job classification.

On September 14, 2007, this grievance was filed by the Grievant protesting his wage reduction from $16.64 to $15.50 on the grounds that it violated Section 21 (a), Section 40, and Section 48 of the Union Contract. The remedy requested is backpay reimbursement in the amount of $16.64 per hour. Joint Exhibit 2.

On September 14, 2007, HR Director denied the grievance. Joint Exhibit 2 at page 3.

On October 4, 2007, the parties met at the 2nd Step Meeting.

On October 11, 2007, HR Director denied the grievance, stating:

> Section 40 of the contract expressly states that employees who bump into a lower classification will receive the rate of pay assigned to the level of experience they achieved in their previous classification. Because the Grievant had more than 36 months experience in his previous classification, he received the top pay ($15 .50) in the Machine Op Tech classification when he bumped into it. There is nothing in the contract that gives an employee the right 10 keep his/her "red-circled" rate when bumping into a lower classification. Further, the Grievant has waived his right to grieve this issue by not grieving it the first time he bumped into a lower classification in May of 2007.
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> Joint Exhibit 2 at page 4.

On October 15, 2007, the parties met to discuss the grievance. The Union suggested that, if any of the red-circled employees bump into a different classification, they should revert back to the last wage schedule in the expired contract and the employee would get paid the top rate in that classification plus any of the annual rate increases that have occurred up to this point. Union Exhibit 14.

By letter dated October 16, 2007, HR Director responded to the Union's suggestion as follows:

> Section 40 of the contract expressly states, "That employees who bump into a lower classification will receive the rate of pay assigned to the level of experience they achieved in their previous classification." There is nothing in the contract that gives an employee the right to keep his/her "red-circled" rate when bumping into a lower classification and there is no language that refers to the old wage schedule. Your suggestion is just that, in both cases. For this reason, the suggestion of the committee is not acceptable to management.
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> Union Exhibit 14.

By letter dated October 29, 2007, the Grievance Committee of Union advised the Employer that it had voted to take this grievance to arbitration.

On February 27, 2008, the arbitration was conducted at the Employer's offices. Each party was afforded ample opportunity to present evidence and argument. Each party filed a post hearing brief. On April 9, 2008, upon receipt of the briefs, I declared the record closed.

STATEMENT OF FACTS

Background

The Employer is engaged in the manufacture of all terrain fork lifts. The Union is the collective bargaining representative of a unit consisting of production, maintenance, and transportation employees, excluding office, clerical, engineering, janitors, plant guards, custodial and sale employees and supervisors. There are approximately 36 unit employees.

The parties arc signatories to an Agreement, dated March 19, 2007 to March 4, 2011.

The 2007 Contract Negotiations

The previous Agreement expired on March 19, 2007. In February 2007, the parties began negotiations for a new contract. Employer Attorney and HR Director represented the Employer. The Union spokesperson was International Representative. Also present for the Union was the Local President. There were about seven or eight sessions. Employer Attorney took handwritten minutes of each session, which were subsequently typed and shared with the Union. The parties agreed that these minutes would be the "official" record.

Local President described negotiations as being "tough" and "concessionary." Of paramount concern was the wage rate schedule.

During the first session, the Employer submitted a proposal regarding Section 40, Layoff and Recall. The proposal stated, in relevant part:

> Any employee who voluntarily transfers to a lower classification shall receive the rate of pay assigned to that classification.
>
> Company Exhibit 7.

Later, the Employer decided that employees who bump should be credited with the experience gained in their previous classification, rather than being moved to the starting rate for the classification they were bumping into. Joint Exhibit t 3 indicates that during the February 12, 2007 session, the Employer changed its initial proposal to state:

> On Section 48 the Employer stated that an employee who is laid off can bump into an "equal" or lower classification. Also, an employee who bumps into one of these classifications will receive the rate of pay for that classification

> commensurate with the amount of experience the employee had in his or her previous classification.
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> Joint Exhibit 3 at page 2.

This language was subsequently approved by the Union. On about February 26 or 27, 2008, the parties reached a tentative agreement, which states in relevant part:

> Any employee who voluntarily transfers to an equal or lower classification shall receive the rate of pay assigned to the level of experience he had achieved in his previous classification.
>
> Employer Exhibit 8.

During the session on March 12, 2008, the Employer explained that the current wage schedule was out of line with the market and new hires needed to go through a different progression. However, the Employer also assured that it did not intend to "punish" current employees because both parties "had let the wage schedule get out of hand." Union Exhibit 4.

The minutes from the March 13, 2008 bargaining session address "wages," as follows:

> On Wages, the Employer agreed to red-circle all employees in the 36 month wage chart whose current wage is above the proposed wage schedule. The employer went on to explain that by "red-circling," it meant that the employees will stay at their current wage and receive no increases until the wage schedule passes them or they complete the 36 month wage schedule. For those employees outside the 36 month wage schedule, the employer agreed to eliminate the maximum wages, and further agreed to increase its proposal for annual increases to the following year 1 - $. 10; year 2 - $.10; year 3 - $.15; year 4 - $.15.
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> Union Exhibit 5.

Section 21 - Wage Rates of the current Agreement expresses the intent of protecting current employees by "red-circling" their current wage rates. Subsection (a) provides, in relevant part:

> Furthermore, nothing in this schedule [Appendix "A"] shall serve to reduce any current wage rates of individual employees.

The parties ultimately agreed to a new wage chart, which contains wage rates lower than many of the current employees' wages. Joint Exhibit 1, Appendix "A" compared with Union Exhibit 6.

The newly negotiated Agreement became effective on March 19, 2007.

The Employer's Application of Section 40 of the 2007-2011 Agreement

The first application of Section 40 involved Employee 1, a welder whose rate was red-circled because he had more than 36 months seniority. On April 6, 2007, Employee 1 was laid off from his home classification of welder and bumped into a machine op tech position. Pursuant to Section 40 of the new Agreement, the Employer paid him the rate of pay in the current wage chart for the machine op tech position based on the level of experience he achieved in his home classification of welder. Employee 1, with his more than 36 months seniority as a welder, received $15.50, the top rate of pay in the machine op tech position. When he returned to his home classification, he received his previous red-circled rate of $17.31 per hour. Company Exhibit 10. Neither Employee 1, nor the Union, grieved Employee 1's pay rate in the machine op tech position.

The second application involved Employee 2, another red-circled employee. He was laid off from his home classification of painter and bumped into a utility position. As a painter, Employee 2 received $16.63 per hour. In the utility position, he received $11.50, based on the level of experience he achieved in the painter classification. As with Employee 1, he was paid based on "Appendix A" of the new Agreement. When Employee 2 retuned to the painter classification, his rate of pay went back up to the red-circled rate of $16.63 per hour. Company Exhibit 11. Neither Employee 2, nor the Union, grieved Employee 2's pay rate in the utility position.

The third application involved the Grievant, whose red-circled rate in his home classification of final assembly was $16.64. On May 7, 2007, after being laid off from final assembly, the Grievant bumped into a machine op tech position. Like the two employees before him, the Grievant was paid $15.50 per hour, the rate of pay in the current wage chart for the machine op tech position based on the level of experience he had achieved in final assembly. Upon returning to final assembly, the Grievant resumed receiving $16.64 an hour. Company Exhibit 12. Neither the Grievant, nor the Union, grieved the Grievant's pay rate in the machine op tech position.

The Incident Leading to This Grievance

In September 2007, the Grievant was again laid off from final assembly and again bumped into the machine op tech position. Instead of receiving the reduced rate of pay ($15.50) for machine op tech, as he had in May 2007, he continued to receive his red-circled rate of $16.64 for final assembly. When the Employer became aware of its mistake, it questioned the Grievant who admitted knowing he was being paid too much but decided not to report it because he needed the money.

On September 14, 2007, the Grievant executed an Authorization of Deduction, effective September 21, 2007, which allowed him to pay back the overpayment over a period of 34 weeks. Employer Exhibit 13.

On the same date, the Grievant filed this grievance.

THE THRESHOLD ISSUE - TIMELINESS OF THE GRIEVANCE

The threshold issue is whether this grievance was timely filed. The Employer bears the burden of proving by a preponderance of the evidence that the grievance is not timely, therefore, not arbitrable.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE VI – GRIEVANCE AND ARBITRATION PROCEDURE

> Section 7. Grievance Procedure
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> Step 2. If the grievance is not resolved in the first Step, the employee shall put the grievance in writing and submit it to Human Resources within three (3) working days from the time the employee knew or reasonably should have known of the incident giving rise to the grievance . . . .
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> Section 8. Arbitrator's Authority. The arbitrator's authority shall be limited to the application and interpretation of this Agreement as written. The arbitrator shall at all times be governed completely by the terms of this Agreement and may pass judgment only on the dispute before him. The arbitrator shall have no power or authority to amend, alter or modify this Agreement in any respect. No award of the arbitrator shall be retroactive prior to thirty (30) calendar days before the filing of the grievance.
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> Section 9. Time Limits. The time limits established in this grievance procedure shall be followed by the Employer and the Union. If the Union misses a time limit, the grievance shall be considered settled in accordance with the Employer's last response. If the Employer misses a time limit, the grievance shall automatically advance to the next Step. The time limits established in this Agreement may be extended by mutual agreement.

POSITIONS OF THE PARTIES

The Employer

The Employer takes the position that the grievance should be dismissed because it was untimely filed. It points out it raised the timeliness challenge at step two. The Employer notes that Article VI, Section 7, Step 2 requires the employee "to put the grievance in writing and submit it to Human Resources within three working days from the time the employee knew or reasonably should have known of the incident giving rise to the grievance." Further, Section 9 provides that failure to follow the time limits means the grievance "shall be considered settled in accordance with the Employer's last response."

According to the Employer, the Union was put on notice of the Employer's position as early as April 6, 2007 when it applied the current wage chart in Appendix A to Employee 1's transfer. The Employer applied the same procedure to Employee 2 on April 16, 2007 and to the Grievant on May 7, 2007. Despite having notice in April and May, the Union did not file a grievance until September 14, 2007, more than five months after the Employer's first application of its position.

The Employer contends that the Union's only defense lacks merit. The Union defended its untimeliness on the basis that Local President was not aware of the April and May applications. The Employer notes that the Union failed to prove that any other committee member also lacked knowledge. It cites arbitral precedent that "where the employee had knowledge of the adverse action but did not speak up, the Union will not be heard to say that the time limit should be extended because the Union did not know." The Employer submits that this is especially true in this case where the Grievant himself had knowledge of the application in May 2007, when it first happened to him.

The Union

The Union recognizes that promptness is an important aspect of the grievance-arbitration procedure. However, it believes "that prompt settlement of grievances depends not upon the presence of contractual time limits, but upon a sincere desire of the parties to settle differences." The Union submits that both parties desire resolution of this issue, which was not discussed during negotiations. The "deliberate move" of this grievance to arbitration shows that both parties believe the issue is properly before the arbitrator.

ANALYSIS

I find that the Employer has failed to meet its burden of proving the grievance was not timely filed.

This grievance only concerns the bumping in September 2007. To determine the timeliness of filing, it is necessary to pinpoint the exact date of the occurrence, or the date when the Grievant should have known of the occurrence. This would be the date he bumped, or the date of his first paycheck post bumping, or the date the Employer rectified its error and lowered his red-circled rate to the lesser rate of $15.50 per hour. However, the exact dates of these incidents do not appear on this record. For this reason, it is not possible to count the number of days that passed between the occurrence, or when he should have known of it, and the filing of this grievance. The closest approximation or any date is the authorization of deduction, which the Grievant signed on September 14, the same date he filed this grievance. The simultaneity or both acts suggests that the Grievant did not delay his protest beyond the contractual time limits.

The second step answer asserts that the Grievent forfeited his right to grieve the $15.50 pay rate by failing to grieve when he first received this rate after bumping in May 2007. The Grievant did not, and is not, and can no longer grieve what happened in May 2007. As to the May occurrence, a grievance would be untimely because it was filed well beyond the three working day limit under Article VI, Section 7, Step 2. The Grievant certainly forfeited his right to grieve the May occurrence by failing to timely grieve. However, he did not forfeit the right to grieve a future

occurrence. The rectified rate he received after bumping in September constitutes an entirely new and separate occurrence, which is grievable, as long as the grievance is timely filed.

CONCLUSION

I conclude that the evidence is not sufficient to prove that the grievance was untimely filed under Article VI, Section 7 of the Agreement. Thus, the grievance is arbitrable.

THE ISSUE ON THE MERITS

The issue on the merits is whether the Employer violated Sections 21 (a), 40, or 48 of the Agreement by applying the wage chart in the current Agreement to the Grievant, instead of his red-circled rate, when he bumped into the lower classification of machine op tech. The Union bears the burden of proving by a preponderance of the evidence that the Employer violated the contract.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE X

Section 21. Wage Rates

(a) The following wage rates shall be effective as of Monday, March 19, 2007, and continue in effect until changed in accordance with the terms of this Agreement. These are base minimum hourly rates and nothing contained here prohibits the Employer from paying higher wage rates than those shown. Furthermore, nothing in this schedule shall serve to reduce any current wage rates of individual employees. The wage rates referred to above are outlined in Appendix "A" Wages, attached.

ARTICLE XII

Section 40. Layoff and Recall. For the purpose of layoffs and recalls, seniority shall be applied by job classification. Employees may exercise their seniority in all areas of the plant, provided they have the necessary skill and ability to satisfactorily perform the remaining work as determined solely by the Employer. In the event of a layoff, employees wishing to exercise their plantwide seniority and work in an equal or lower classification shall notify Human Resources as soon as possible in writing, but no later than the commencement of the layoff. Employees not exercising the option within the slated period shall not be allowed to exercise the option at a later date during the period of layoff. The Employer will give a minimum 48-hour notice in the event of a layoff. Any employee who voluntarily transfers to an equal or lower classification shall receive the rate of pay assigned to the level of experience he had achieved in this previous classification.

Section 48. Rate on Job Advancement. An employee bidding to a higher classification shall retain his current regular rate as a red circle provided it is higher than the minimum rate for the higher classification, until such time as the rate in the new classification is higher than his red-circle rate.

POSITIONS OF THE PARTIES

The Union

The Union takes the position that whenever red-circled employees bump into a different classification, they should be subject to the wage schedule of the expired contract and be paid the top rate in that classification plus any annual rate increases. It stresses that the intent of the parties during the March negotiations was the creation of a bona fide two tier wage system. The Union notes that there is no dispute the parties discussed and agreed to a "red-circle" wage concept. The March 12, 2007 bargaining session minutes show that the Employer needed to create a wage schedule more in line with the market and new hires needed to go through a different progression. However, the Employer also stated that it did not want to punish current employees. Thus, the parties agreed that current employees would be compensated according to "Appendix A" of the prior contract. In contrast, the parties intended that the wage schedule in the current Agreement apply only to new hires. The Union asserts that no language in the current Agreement "allows the Employer to unilaterally deviate from the legal wage rate schedule of May 15, 2006 on a bump maneuver for the pre-March 19, 2007 incumbent employees."

The Employer

The Employer takes the position that the grievance should be dismissed because the Union is asking the arbitrator to exceed her contractual and legal authority. It notes that the Union's position at arbitration was that an employee who bumps into an equal or lower classification should receive the rate of pay for that classification based on the wage chart in the expired contract. In short, the Union is asking the arbitrator to amend the Agreement and incorporate an outside document. No language in the Agreement supports the inclusion of the expired wage chart and there was no discussion during negotiations of continuing to use the expired wage chart.

Next, the Employer argues that the grievance should be denied because the Union has not sustained its burden of proving that the contract language evidences any intent to incorporate the expired wage chart. It concedes that arbitral authority is mixed as to whether employees retain their red-circled rates when they move to another classification. However, the Employer emphasizes that the Union is not requesting this. Rather, the Union maintains that, "employees should bump into the expired contract's wage chart." The Employer points out that Section 40 of the Agreement requires something else - employees who bump receive the rate of pay assigned to the level of experience achieved in the previous classification. There is no mention of a red-circled rate and no mention of the expired contract's wage scale. In contrast, the Employer points out that Section 48 states that an employee who bids to a higher classification shall retain his current regular rate as a red circle. The Employer argues that if the parties had intended a bumping employee to retain his red-circled rate, Section 40 would say so, as Section 48 does.

In response to the Union's arguments, the Employer asserts that no language in the Agreement provides that the wage chart applies only to new hires. Second, Section 21 guarantees that nothing in the wage schedule shall serve to reduce any current wage rates, but the language implicitly allows that the schedule may result in the reduction of future wage rates, including those received through bumping. Finally, the Employer maintains that the expired wage chart was not incorporated by the process of red-circling rates. The rates of the old wage chart did not even apply to red-circled employees because Employee 1, Employee 2, and the Grievant had been red-circled at a different rate than their work experience would have provided for in the old wage chart.

ANALYSIS

I find that the evidence is not sufficient to prove that the Employer violated any provision of the Agreement. Section 21 (a) establishes the wage rates effective as of March 19,2007, as outlined in Appendix "A" of the 2007 to 2011 Agreement. The only exception to those rates, detailed by the parties, is for the "current wage rates of individual employees." There is no dispute that the effect of this language was to "red-circle" incumbent employees' wage rates to be the same as they were on or about March 18, 2007. By red-circling the rates of incumbent employees, the parties, in effect, created a two-tier wage schedule.

However, no language in Section 21 (a) guarantees that the red-circled rates apply to future situations where incumbents bump into a lower classification. Furthermore, no language in Section 21 (a) incorporates by reference the wage schedule of the expired contract. Finally, there is no evidence that during negotiations the parties discussed incorporating the expired contract's wage scale. I have no authority under Article VI, Section 8 to amend, alter or modify the current Agreement by incorporating the wage schedule set forth in the expired contract.

In contrast to the wage schedule of the expired contract, the parties did discuss what rates would apply in a bumping situation. After discussion, they agreed in Section 40 that, "Any employee who voluntarily transfers to an equal or lower classification shall receive the rate of pay assigned to the level of experience he had achieved in this previous classification." This language means that the controlling factor for determining an incumbent's wage after bumping into a lower classification is his "level of experience" in his home classification, not his red-circled rate. Thus, the incumbent's level of experience is applied to the Appendix "A" wage schedule, in the current Agreement, for the lower classification. Had the parties' intended to guarantee the red circled rate even after bumping into a lower classification, they could have so specified. However, I cannot do what the parties chose not to do and guarantee an incumbent employee his red-circled rate after bumping into a lower classification. To do this would exceed my power under Article VI, Section 8. Moreover, it would violate the express terms of Section 40.

In contrast to Section 40, Section 48 of the current Agreement makes clear the parties intended to protect an incumbent's red-circled rate when bidding into a higher classification. It provides, "An employee bidding to a higher classification shall retain his current regular rate as a red circle." This language could have been used in Section 40 had the parties intended to protect red-circled rates when bumping into a lower classification. The absence of such language in Section 40

further proves that the parties did not intend to continue a red-circled rate after an employee bumped into a lower classification.

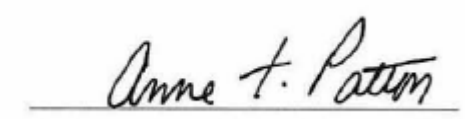
In short, the Employer adhered to Section 40 when it compensated the Grievant $15.50 per hour, the rate for the machine op tech position with the Grievant's level of experience, instead of his red-circled rate of $16.64.

CONCLUSION

I conclude that the Employer did not violate Sections 21 (a), 40 or 48 of the Agreement by applying the wage chart in the current Agreement to the Grievant, instead of his red-circled final assembly rate. Section 21 (a) red-circled the rates received by incumbent employee. Section 40 provides that employee who bump into a lower classification will be paid the rates for that classification according to the level of experience gained in his home classification. However, it does not guarantee that incumbent employees will receive their red-circled rates after bumping into a lower classification. In contrast to Section 40, Section 48 clearly protects the red-circled rates when employees bid into a higher classification. The absence of such language in Section 40 shows the parties did not intend incumbent employees to carry over their red-circled rates when bumping into a lower classification.

AWARD

The grievance is denied.



Anne T. Patton, Arbitrator

Dated: June 11 ,2008