

Shaw #1

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

UNION,

-and

EMPLOYER

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(X) having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated July 1, 1984 and having been duly sworn and having duly heard the proofs and allegations of the Parties.

AWARDS as follows:

For the reasons set forth in the accompanying opinion, This Grievance is upheld.

December 18, 1985

OPINION AND AWARD

Samuel S. Shaw, Arbitrator

October 11, 1985

Date: January 31, 1985

Nature of Grievance:

"Violation of Article XXXII Supplemental Agreements (Inter-Departmental Letter, dated May 28, 1982) - Article XI Seniority Sec. 5, Article XIV Work Assignment Sec. 1 paragraph d. (see attachment)"

Date of Occurrence:

"January 11, 1985 (extended filing date agreed)"

Statement of Facts:

"The Memorandum dated 1-21-85 from Deputy Chief Person 1's Office is in Direct Conflict with negotiated supplemental agreement dated May 28, 1982 where as the Union and Management agreed upon the seniority Procedure for Daily Manpower Adjustments. This is also an infringement upon the employee's Seniority Rights related to Work Assignments."

Suggested Adjustment:

"To rescind the Memorandum of Jan 21, 1985 by Deputy Chief Person 1, and if Management feels there is a problem with the past negotiated policy, then they (Management) should renegotiate this policy."

/s/ Person 2.

Vice President, Union

Employer's Reply - Step 2.

"The grievance alleges violations of Article XXXII Supplemental Agreements (Letter 5/28/82), Article. XI, Seniority Section 5, Article XIV, Work Assignments, Section 1.d. "This grievance is based upon a Fire Department Memorandum dated 1/11/85 which reminded supervisory personnel of department policy concerning daily transfers. The issue seems to center on whether or not retention of an employee for at least on duty day in the three day cycle at their primary station on their assigned apparatus: is a legitimate training function as it related to "seniority exception" #6. (Letter 5/28/82) In the opinion of the undersigned, such consideration does not appear to be unreasonable nor incompatible with the provisions of the Agreement. It is noted that disputes arising out of Article XIV, Section 1.d., are to be referred to the Labor Relations Office for final resolution. Since this grievance does not involve a specific individual employee and set of facts or circumstances, this answer should be interpreted as limited to the issue raised in the grievance. The grievance is denied."

March 1, 1985 /s/ Person 3

Director, Labor Relations

As the Parties were unable to resolve their differences through the Steps of the Grievance Procedure, the matter was referred to arbitration.

The hearing in arbitration was held in the City Hall, City A, Michigan on October 11,

1985 before Arbitrator Samuel S. Shaw, selected under the procedures of the American Arbitration Association. Both Parties were properly represented, and given full and ample opportunity to present pertinent documentary evidence and introduce witnesses in support of their respective positions. All witnesses were duly sworn, and the proceedings tape recorded by the Arbitrator.

At the opening of the Hearing, the Employer raised an issue of arbitrability, contending that any disputes arising out of the application of Article XIV, Section 1.d. were to be referred to the Labor Relations Office for final resolution; therefore, any question involving this Article was not within the jurisdiction of the Arbitrator. After a brief discussion relative to the question of arbitrability, including a joint expression of the issue, the matter of the merits was presented. At the close of the oral Hearing, both Parties elected to file post-hearing briefs, and agreed to mail them to the City B Office of the American Arbitration Association, postmarked no later than November 18, 1985, These Briefs were received by the Arbitrator on November 19, 1985, and the Hearing closed as of that date;

Relevant Contract Provisions

The following provisions appear in the Parties' Collective Bargaining Agreements effective from July 1, 1980'- June 30, 1982, and from July 1, 1984 to June 30, 1986, and were either cited by the Parties or deemed pertinent by the Arbitrator.

ARTLCLE XI SENIORITY

"Section 5. Application of Seniority. Seniority shall apply to work assignments, vacation, layoff and recall and to promotion as otherwise provided in• this Agreement."

ARTICLE XIV - WORK ASSIGNMENT

"Section 1.d. Seniority shall be considered when making daily transfers for purpose of balancing manpower. Any deviation from such seniority shall be made known to the effected employee. Needs of the service consideration in making such transfers shall not include personal convenience or preference of a Common Officer. Any dispute regarding this paragraph shall be referred to the Labor Relations Office for final resolution."

ARTICLE XXXII - SUPPLEMENTAL AGREEMENTS

"Section 1. All supplemental agreements modifying this Agreement are subject to approval by duly authorized representatives of Union and the Employer. All supplemental agreements shall be in writing."

Background

In 1980, for the first time, the Parties negotiated their 1980-82 Agreement sub-section (d) of Article. XIV, -Section 1. Subsequent application of the provision, however, revealed inconsistencies. As a result, the Union and the Employer entered into a memorandum of agreement setting forth a procedure to be followed in the daily transfer of personnel as needed to balance manpower. This Memorandum was as follows:

"Date: May 28, 1982

The following is a new procedure to be used when it is necessary to transfer fire fighters for manpower, purposes.

The officer reporting the daily manpower will report as usual and also any men over 3 per company. These are men that may travel to another station. He will also give the seniority number following the man's name. This may be obtained from-the master seniority list.

The dispatcher will record the name and seniority number and then when making the assignments will call the senior man and give him his choice of stations and the same procedure will be followed for the 2nd, 3rd, 4th, etc. until all positions are filled. This order will apply at all times except for the following seniority exceptions:

1. In station transfers
2. Incorrect manpower reports
3. Transfers where an acting E.O. or officer is needed
4. Transfers that arise after 0700
5. Multiple alarms between 0630 and 0700
6. Retain a person for training purposes
7. The manpower chief may suspend seniority transfers for the day if an emergency arises.

Note: Seniority transfers for manpower purposes will apply to those persons scheduled to work 24 hours on the day of the transfers.

This will be for a trial period from June 1 to September 1 when it will be analyzed and either continued or discontinued."

/s/ Person 4, Fire Chief /s/ Person 5, President Union

According to the testimony, the above procedure was consistently followed from May, 1982, forward.

In January, 1985 the following memorandum was issued:

Date: January 11, 1985

To: All Battalion Chief's and Company Officer's

From: Deputy Chief James Person 1

[Memorandum of January 11, 1985 (Cont.)]

Subject: Travel

"All officers are reminded of the department policy that no one Firefighter travels all the time. All personnel are expected to spend at least one duty day in each three day cycle on their assigned apparatus in their own station. This comes under the heading of Training."

The Union registered an objection to this "new" procedural interpretation of the transfer policy, and filed the subject Grievance.

Positions of the Parties

In brief, it was the position of the Union that the January 11, 1985 Memorandum "has initiated a new policy which violates the agreement between the parties, which agreement is as binding as the Collective Bargaining Agreement between the parties."

The Union argued that the; May 28, 1982 memorandum of agreement set forth all the exceptions that are necessary to satisfy all apparent needs of the service, including the retention of personnel for training purposes. Furthermore, at the time of the agreed to Memorandum there was no such policy as "no one fire fighter travels all the time", nor was there a requirement that

all personnel spend at least one day in each three-day cycle on their assigned apparatus in their own station. Inasmuch as the January, 1985 memorandum could, if implemented, require a senior employee to travel one duty day in each three-day cycle without consideration for seniority, the memorandum is clearly "a divergence" from the prior agreement of the parties. Therefore, it should be rescinded, and until such time as the matter may be renegotiated, the parties should be required to operate under the 1982 agreement.

It was the Employer's primary position that inherent in its right to manage the affairs of the Employer and direct the work force, was the right to determine the appropriate levels and type of training for the work force. In this case, the January 11, 1985 memorandum was simply a reminder to department supervisors of the policy to "retain personnel at least one duty day in each three day cycle * * * for training purposes", and was consistent with management's reserved rights, and the terms of the May 28, 1982 letter.

Moreover, the policy does not require senior employees to travel one day out of three. "Travel from one station to another occurs only if a single engine/truck company has a complement of four persons on duty and another company has less than three" a practice that is controlled by the absentee situation-on a given day.

Therefore, as the policy in question "represents a reasonable exercise of managements rights", and as there is no evidence the action was capricious, arbitrary, or discriminatory, the Grievance should be denied.

The Issue

The Parties stipulated the only issue to be decided is:

Does the January 11, 1985, memorandum violate the provisions of the May 28, 1982, Inter-Departmental Letter?

Discussion

The Employer's basic contention with respect to the matter of substantive arbitrability was that any dispute relative to Article XIV, Section 1 (d) is to be resolved by the Labor Relations Office, and therefore, not within the province of the Arbitrator.

I might agree with this contention if this dispute involved the interpretation or application of Article XIV, Section 1 (d). However, according to the Parties stipulation of the issue, the problem is whether or not the January 11, 1985 memorandum adds to, subtracts from, or otherwise changes the agreement entered into by the Parties on May 28, 1982. I acknowledge there is a relationship between the May 28th Inter-Departmental Letter and Article XIV, Section 1(d) in that they both relate to transfers. However, the issue here is not a question of the interpretation or application of Section 1(d), but simply whether or not the January 11th Memorandum changes the agreement detailed in the aforesaid Inter-Departmental Letter of May 28th. Consequently, that portion of Section 1(d) establishing the Labor Relations Office as the resolving authority in Section 1(d) disputes is not applicable to this case inasmuch as Section 1(d) is not at issue. It has to be ruled, therefore, that the issue that is before the Arbitrator is within his jurisdiction, and arbitrable.

As to the merits in this case, a review of the Inter-Departmental Letter versus the July 11th Memorandum substantiates the claim there is a difference between the two. The major difference is that the Memorandum does not include any recognition of the seniority conditions that the Parties had made a part of the agreement in the Inter-Departmental Letter. It is entirely possible the author of the Memorandum did not intend to reduce or otherwise change the agreement; nevertheless, on their face, a comparison of the two documents as they now stand does indicate they could be subject to different interpretation and/or applications.

In summary, in May, 1982 the Parties, voluntarily entered into a formal agreement to resolve a problem that had arisen in the application of a contractual provision covering the procedure for making daily manpower adjustments. According to the record, this agreement has been consistently followed since its inception in May, 1982, and, therefore, has to be recognized as a bona fide supplemental agreement.

Finally, the 1985 Memorandum sets forth a Departmental policy relative to "travel", or transfer, with no mention as to whether or not seniority was to be a consideration; therefore with the implication that in the policy's application, seniority was to be disregarded. Whether this omission was or was not intentional, it was contrary to the agreed upon seniority considerations agreed to in the 1982 Letter, and to that extent, in violation of that agreement.

I appreciate that Department operations may have changed materially since 1982, as a result Management may find that some of the previously agreed upon conditions are too restrictive, or inhibitive for the efficient operation of the Department. If such is the case, the problem areas should be subject to renegotiation. But in the meantime, the Inter-Departmental Letter of May 28, 1982 must prevail as written.

AWARD

For the reasons discussed herein, this Grievance is upheld.

Samuel S. Shaw,

Arbitrator

December 18, 1985