Wolkinson #2

IN THE MATTER OF ARBITRATION BETWEEN

UNION

AND

EMPLOYER

Arbitrator: Dr. Benjamin Wolkinson, selected mutually by the parties under the auspices of the American Arbitration Association.

The grievance was appealed to arbitration in accordance with the parties' collective bargaining agreement. A Hearing was held on September 4, 1985 in City, Michigan at which the parties were afforded the opportunity to submit evidence, to call and examine witnesses and to present arguments in support of their respective positions. The parties submitted post-hearing briefs which were timely filed.

FACTS

The Grievant, Person 1, has been employed as a firefighter for the Employer for nineteen (19) years. His duties as a firefighter include driving pump and ladder trucks, and commanding a company in the absence of a superior officer.

Between 1979 and 1985 the Grievant worked at the Street A Station No. 14 on the "C" Shift. On his particular shift were individual firefighters who were junior to him in seniority with the department. On December 27, 1984 he was involuntarily transferred to the Street B Station No. 4. The result of his transfer was to create a vacancy in the position he formerly

occupied at Station No. 14. On January 1, 1985 the Grievant communicated a request to transfer back to Station No. 14 and fill his former position. Following the denial of this request, Mr. Person 1 filed a grievance alleging that the department in involuntarily transferring him to Station No. 4 and failing to reinstate him back to his original job at Station No. 14 violated his seniority rights under Article XI of the collective bargaining agreement.

ISSUE

On the basis of the record the issue to be decided is whether or not the Employer violated the Grievant's rights by involuntarily assigning him to Station No. 4 and by failing to honor his request for reassignment back to Station No. 14 (Street A).

UNION POSITION

Article XIII, Section 5, clearly indicates that seniority shall apply to work assignments. Article XIV, Section 1, clearly indicates that "seniority shall be recognized as the basis of work assignment" with the limiting language "where the needs of the service permit." The foundational language of the contract, therefore, recognizes seniority as a right afforded an employee when it comes to work assignments including transfers. The burden must therefore be upon the Employer to demonstrate a situation in which seniority shall not be applied with respect to transfers of employees. The Employer, according to the contract, must demonstrate an actual need of the service, in order to ignore the seniority provisions of the contract.

If it is the position of the Employer that the Grievant was transferred to a truck company because of his experience in operating a truck, it must be noted that the Grievant had not participated in the operation of a truck for over five (5) years before the date of his transfer. The

seniority list indicates that there are several employees junior to Grievant whom Grievant has testified have equal or greater experience in truck driving than he. If it is the position of the Employer that Grievant was transferred because of his experience as an acting officer in the absence of the regular shift lieutenant, this position is without merit for the reason that Grievant was offered the option of becoming either a truck operator or an acting officer. Additionally, the junior firefighter who eventually filled the vacant position created by the Grievant's transfer is junior to Grievant and is the acting officer on Grievant's former shift. The replacement of Grievant's position at E-14 was made after his request for transfer back to E-14 in January of 1985. According to testimony of Employer witnesses, both E-14 and T-4 are considered low response companies. Therefore, the duties of the Grievant's junior replacement at E-14 are in substance, the same as would be required of Person 2 had he been transferred to T-4.

The Employer has failed in its burden to establish a clear need of the service which would permit them to ignore the seniority provisions of the contract. This failure is particularly evident in the testimony of Deputy Chief Person 3 who indicated that although he is aware of the seniority provision in the contract, he did not take it into account in effecting the transfer of the Grievant. His testimony loses credibility when he claims that he was looking for an acting officer and not a truck operator when one considers that Chief Williams and the Grievant have both testified that the Grievant was offered the option of acting in either capacity. The Grievant did not have to become acting officer at T-4 if he elected not to. The Grievant elected to become the acting officer only after he had relocated to T-4.

The Employer has chosen to hide behind the vagaries of the "needs of the service" language of the contract while completely ignoring seniority. There was no evidence on behalf of the Employer that firefighters junior to Grievant were incapable or less able to perform the

job to which the Grievant was transferred.

The Employer has emasculated if not consciously disregarded the seniority provisions of the contract as it relates to work assignments and transfers.

EMPLOYER POSITION

Article IV, Management Rights, Section 1, reserves the right to manage the affairs of the Employer and to direct the work force, including the right to determine the methods, processes and manner of performing work. Inherent in such clause is the right to determine the needs of the service, including the distribution and utilization of personnel to best advantage. However, such rights are subject to certain restrictions, i.e., except where specifically provided otherwise in the Agreement and further that, in the exercise of such rights, management may not discriminate against any employee because of membership in the Union.

Article XIV, Work Assignments, specifically authorizes the transfer of personnel and establishes the terms and conditions of such transfers. However, such Article does not impinge upon Management's right to determine the needs of the service. In the instant case, the grievant claims his seniority rights were abrogated first when he was transferred from Engine No. 14 to Truck No.4 and again when his request to be transferred back to Engine No. 14 was not granted. However, the application of seniority in instances of transfers is subject and subordinate to the needs of the service. Consequently, any grievance which asserts an absolute right to a transfer based solely on seniority is without merit and must be denied.

Determinations regarding the needs of the service are an absolute prerogative of management under Article XIV. Any employee who is dissatisfied with a duty assignment or transfer may discuss the matter with the Fire Chief and ultimately may request a hearing before

the Employer Manager or the dispute is to be referred to the Labor Relations Office in cases involving daily transfers. In any event, in all cases except those involving daily transfers, the express language of the Agreement requires that the Employer Manager shall make a final determination. (Jt. 3, pp. 12-13, Par. a.b.c.d.)

The record testimony in this case indicates that the Grievant elected not to discuss the matter with the Fire Chief, nor did he request a hearing before the Employer Manager. On cross-examination, the Grievant stated that, "I was grieving primarily the denial of seniority." Such testimony, when viewed together with the grievance at Step 2 clearly supports a conclusion that the grievant was indeed claiming an absolute right to a transfer based solely upon seniority. As noted earlier, such claim is without merit and must be denied.

If such conclusion is erroneous and the grievance is questioning the needs of the service determination of Management, then the grievant has failed to exhaust the administrative remedies available under Article XIV. Under such circumstances, this Arbitrator is without authority to issue a ruling on a needs of the service determination since such disputes are subject to a final determination by the Employer Manager.

Article VIII, Grievance Procedure, Section 3., Step 3.b., provides that:

> . . . . The power of the arbitrator shall be limited to the interpretation and application of the terms of this Agreement and the arbitrator shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written . . . .

In the event that the Arbitrator concludes that the grievance represents an asserted absolute right to a transfer based solely upon seniority, the grievance should be denied since nothing in Article XI or Article XIV conveys such right. Alternatively, if the Arbitrator concludes that the grievance represents a challenge to the needs of the service determination of Management, the grievance should be denied for lack of jurisdiction and remanded back for

purposes of compliance with the remedy provided in Article XIV. Finally, if the Arbitrator should conclude that he does have jurisdiction to decide a dispute concerning a needs of the service determination of Management, the Employer suggests that the grievance be denied for the following reasons:

1. Deputy Fire Chief, Person 3, testified that he was principally responsible for preparing the annual transfer list in 1984. He testified, in reviewing the situation of Truck No. 4, that the Company Officer, Captain Barnes, was on extended sick leave. The department was short nineteen (19) employees and in the process of hiring recruit replacements. It was necessary under the circumstances to assign experienced truck personnel to Truck No. 4 and, in addition, someone who could assume the duties of acting officer. Firefighter Person 1 had approximately 11 years experience in a truck company and had functioned both as an acting driver and officer. In the judgment of Chief Person 3, Mr. Person 1 was best suited for the assignment. Consequently, Chief Person 3 submitted his recommendation to Fire Chief Williams who adopted same.

Absent evidence that Management acted in an arbitrary, capricious or discriminatory fashion in exercising their management rights, their decision to transfer Mr. Person 1 should be left intact. The record evidence in this case certainly does not support any conclusion sufficient to justify this Arbitrator to substitute his judgment for that of a senior Chief Officer intimately familiar with the relative skills and abilities of the personnel of the Grand Rapids Fire Department and the allocations of personnel resources and equipment necessary to meet the needs of the service.

There was absolutely no rebuttal evidence offered by the Union to contradict the validity

of the circumstances and considerations described by Chief Williams and Deputy Chief Person 3. Mr. Person 1 testified that, in his opinion, there were other qualified personnel available with less seniority sufficient to meet the needs of the service. However, Mr. Person 1's opinions do not constitute evidence nor does the Employer pay Mr. Person 1 to be responsible for such decisions.

In a case of this nature, the Union carries the burden of establishing a contract violation. In the instant case, the Union has failed to meet that burden. Consequently, the Employer respectfully requests that the grievance be denied.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE IV. MANAGEMENT RIGHTS

Section 1. Except as otherwise specifically provided herein, the Management of the Employer and the direction of the work force, including but not limited to the right to hire, the right to discipline or discharge for proper cause, the right to decide job qualifications for hiring, the right to lay off for lack of work or funds, the right to abolish positions, the right to make rules and regulations governing conduct and safety, the right to determine schedules of work, the right to subcontract work (when it is not feasible or economical for the Employer employees to perform such work), together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management. Management, in exercising these functions, will not discriminate against any employee because of membership in the Union.

ARTICLE 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. Where the needs of the service permit, seniority shall be recognized as the basis of work assignment, and transfers to fill vacancies.

a. During the month of January each year, employees may submit their requests for duty assignment in writing to the Fire Chief. The Fire Chief shall review such requests and subject to the needs of the service, may grant or deny same. In the event such request is denied by virtue of needs of the service, the effected employee may discuss the matter with the Fire Chief concerning the details of the needs of the

service. If the matter is not resolved to the satisfaction of the employee, the employee may request a hearing before the Employer Manager, who shall make a final determination.

b. Employees interested in securing a transfer to fill a vacant position may submit their request in writing to the Fire Chief. Subject to the needs of the service, such requests shall be based upon seniority. If such requests are denied by virtue of needs of the service, the effected employee may discuss the matter with the Fire Chief concerning the details of the needs of the service. If the matter is not resolved to the satisfaction of the employee, the employee may request a hearing before the Employer Manager, who shall make a final determination.

c. Involuntary transfers may be made by the Fire Chief. If the employee objects to such transfer and the matter is not resolved to the satisfaction of the employee, the employee may request a hearing before the Employer Manager, who shall make a final determination. Daily transfer for purpose of balancing manpower shall be exempt from this provision.

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 Command officer. Any dispute regarding this paragraph shall be referred to the Labor Relations Office for final resolution.

DISCUSSION

At the outset it is appropriate to consider the Union contention that Article XIV c does not come into play because the Employer has waived its right to address that subsection. Presumably the Union's contention is based upon the fact that the Employer did not reference Article XIV c in either its Step 1 or Step 2 response. Nonetheless the arbitrator must find this contention unpersuasive. The arbitrator notes that there is nothing in the agreement which requires the Employer to present all of its proofs prior to the arbitration proceeding. Consequently the fact that the Employer did not at an earlier stage present Article XIV c as a defense to the grievance did not bar it from doing so in arbitration.

In resolving this grievance, the arbitrator must address three questions:

1. Must an employee to protest an involuntary transfer first address his complaint to the

Employer Manager?

2. Does Article XIV c vest the Employer with final decision making authority over involuntary transfers?

3. If not, was the Employer justified in involuntarily transferring a senior employee because of the needs of the service?

In resolving these questions the arbitrator must rely exclusively on contract language as the parties have failed to introduce any probative evidence as to past practice or history of negotiations to clarify specific contractual provisions.

Turning to the first question, it is evident that under Article XIV c employees have the opportunity to object to a transfer and obtain a hearing before the Employer Manager. At the same time the arbitrator must reject the Employer contention that the employee who does protest an involuntary transfer is obliged to resort to the dispute procedure administered by the Employer Manager. Thus, the language in Article XIV c specifies that the employee "may" request a hearing, and not that he shall or must do so. By resorting to the use of the permissive term "may", the implication is that employees can resort to the procedures outlined in Article XIV c but alternatively have a full right to bypass that mechanism and challenge managerial action by filing a grievance.

Significantly, the arbitrator's interpretation that Article XIV c permits but does not require the employee to seek a hearing before the Employer Manager is supported by examination of related contractual provisions. It is important to note that under Article XIV d the contract uses terminology that makes it clear that disputes over "daily transfers" must be referred to the Labor Relations Office for final resolution. This result is the outcome of that section's use of the term "shall" instead of the term "may" with regard to the resolution of

disputes over daily transfers. Generally, all words in a contract are to be given effect. As the Elkouris have noted, "the fact that a word is used indicates that a party intended it to have meaning, and it will not be declared to be surplusage if a reasonable meaning can be given to it consistent with the rest of the agreement." (How Arbitration Works, pp. 308-309, 1973)

Consequently, it is reasonable to presume that in using the mandatory terminology of "shall" in Article XIV d and the permissive terminology of "may" in Article XIV c, the parties sought to establish a clear distinction between the relative rights of the parties in resolving the two different types of transfer issues. For disputes over daily transfers the parties agreed that disputes must first be referred to the Labor Relations Office for final resolution. However, for disputes over involuntary transfers not involving a daily transfer situation the parties agreed that employees would have the option of either going to the final hearing route under the control of the Employer Manager, or alternatively filing a grievance wherein the employee would have the unrestricted right to have his dispute subject to the binding and final determination of a third party neutral.

Furthermore, even if an employee took advantage of his rights under Article XIV c and requested and obtained a hearing before the Employer Manager, there is no compelling reason to conclude the Employer Manager's decision on involuntary transfers is final and binding on the arbitrator, as claimed by Management. While the phrase make "a final determination" is used, it is very possible that what the parties intended by that language is to identify the Employer authority who will be making the Employer's final determination and thereby limit the number and stages of employee appeals for redress from Management. Thus, for purposes of involuntary transfers, it is the Employer Manager who makes the final decision for the Employer, while for daily transfers, final decision making authority for the Employer is vested with the Labor

Relations Office. In the latter circumstance, the employee would be barred from appealing the decision of the Labor Relations office to the Employer Manager outside the context of the ' Grievance Procedure. While the constituent subsections of Article XIV identify the specific Employer representatives who present the Employer's final position, that position still is subject to review and appeal within the Grievance Arbitration Procedure.

Significantly, this interpretation is supported by contract language. It is noteworthy that Article XIV c says that the Employer Manager shall make "a" and not "the" final determination. While the definite article "the" does connote a singular term and references one specific option, the term "a" can mean any one of a great number (Black's Law Dictionary, page 1, 1979). As a result the use of the indefinite article "a" carries with it the interpretation that there may be in fact more than one final determination. This is the case here. Article XIV c identifies the specific Employer representative who makes the Employer's final determination with regard to involuntary transfers', it does not rule out the authority of the arbitrator once a grievance has been filed to review the Employer's determination for its consistency with the parties' contractual rights.

Having determined that the Grievant was not obliged: (1) to exhaust his intra-Employer appeals procedure under XIV c , and that (2) the filing of a grievance affords the arbitrator the full authority to determine an involuntary transfer dispute, the arbitrator must now address whether or not the Grievant's rights were violated in this case. In resolving the relative rights of Management and Union under Article XIV Section 1 this arbitrator is confronted with an issue concerning the burden of proof that has been the subject of wide differences traditionally between Employers end Unions. From the Employer's perspective the needs of the service determination should be upheld unless the evidence indicates that Management's choice was

arbitrary, discriminatory or capricious. On the other hand, the Union has contended that the Employer is obliged to justify its forced transfer of the more senior employee.

In this case the controlling contractual provision is Article XIV Section 1 which provides "where the needs of the service permit seniority shall be recognized as the basis of work assignments, and transfers to fill vacancies." Significantly, this provision recognizes that seniority is the basis for making work assignments and transfers except when needs of the service would not permit. Given the general requirement that seniority be the basis for job assignments and transfers, the burden of proof logically rests with the employer to demonstrate that service needs dictate that seniority not be the basis of an employer's selection or transfer decision. Placing the burden of proof on the Employer is also reasonable because the Employer has the capacity to identify the reasons for its actions in bypassing a more senior employee or involuntarily transferring him. The Employer itself has attempted to assume this burden by supplying evidence that the Grievant's selection was justified. This evidence primarily consisted of testimony from the Deputy Fire Chief Person 3 that the company officer, Captain Barns, was on extended sick leave from Station House No. 4 and that it was necessary to assign an experienced fireman to that Station House to assume the duties of an acting officer. The Grievant was selected as he was viewed as the best one who could satisfy those job duties.

In reviewing the reasonableness of these contentions it is important to note that both the Fire Chief and the Deputy Chief have acknowledged that there were other firefighters with less seniority than the Grievant who could have exercised the same duties as the Grievant including the assumption of the duties of an acting officer. Nevertheless, from the testimony of both the Fire Chief and the Deputy Fire Chief, it is apparent that from the Employer's perspective, the needs of the service justify the selection of the individual deemed by the Employer to be the

most qualified person. Thus both the Fire Chief and the Deputy Fire Chief have testified that seniority only comes into play when the ability of the two competing candidates are equal. Since the Grievant was viewed as the most qualified employee, his selection was justified on the basis of service needs.

The arbitrator has carefully considered this contention and finds that it is unacceptable under the language of Article XIV. Assuming that the Grievant was the most qualified candidate, there has nonetheless been no showing that other firefighters could not have performed the same duties in a satisfactory manner. To interpret "needs of a service" as permitting Management to select the top candidate regardless of seniority would require the arbitrator to read into Article XIV Section 1 provisions that are simply not there. Thus, nowhere in Section 1 is Management afforded the right to give preference to junior employees because that employee is superior in ability to the senior employee who still has the capacity to perform all essential job duties. What the employer has done is to convert the seniority provision into a relative ability clause whereby seniority only governs if qualifications are relatively equal. It is reasonable to presume that had employees intended this outcome, they would have negotiated standard contract language that would have affected that type of selection process.

Instead, the arbitrator finds that the contractual requirement that seniority be the basis of job assignments, unless needs of a service do not permit selections to be made on that basis, imposes on the employer in this case the evidentiary burden of proof that some service needs could not be satisfied through the selection of the more junior employee for the involuntary transfer. This burden has not been met. Indeed the record indicates that according to the Deputy Fire Chief and Chief there were other firefighters with less seniority who had the capacity both to drive ladder and aerial trucks and also had experience serving as acting officer.

While this arbitrator should not substitute his judgment for that of the Employer in determining the circumstances under which needs of the service would be undermined, this arbitrator is of the opinion that the evidence fails to show sufficient effort on the part of the Employer to make any objective evaluation of the capacity of other employees to fill the duties in Station No. 4. When this employer as here involuntarily transfers a more senior employee it has the obligation to factually document and support its reason that the service needs would not be satisfied if a junior employee were not transferred. To uphold such involuntary transfers without such evidence would be to negate in an arbitrary and capricious manner employee seniority rights. On the basis of these considerations the arbitrator must sustain the grievance.

AWARD

The grievance is sustained. The Employer shall reinstate the Grievant to the Street A Station and to the position and shift he held prior to his involuntary transfer on December 27, 1984.

Benjamin W. Wolkinson

December 3, 1985