

In the Matter of the Arbitration	)	DATE OF HEARING: March 27, 2007
Between	)	BRIEFS RECEIVED: May 12, 2007
ALLEGHENY ENERGY	)	RECORD CLOSED: May 12, 2007
GREENSBURG, PENNSYLVANIA	)	DATE OF AWARD: May 31, 2007
And	)	GRIEVANCE NO: 96-34
LOCAL NO. 102 UTILITY	)	
WORKERS UNION OF AMERICA	)	

**BEFORE**  
**PHILIP W. PARKINSON, ESQ.**  
**ARBITRATOR**

Representing the Company: John S. Ferrer, Esquire  
Representing the Union: James E. Lewis, National Representative

**I. THE GRIEVANCE**

This grievance was filed on May 3, 1996 by Local No. 102 of the Utility Workers Union of America (hereafter referred to as the "Union") on behalf of Local 102-M in the Coal and Ash Department of the Hatfield Power Station of Allegheny Energy (hereafter referred to as the "Company" or "Management"). The Union contends that the Company has violated the parties Collective Bargaining Agreement.<sup>1</sup> The grievance states: "We protest the unfair action of the company for not filling a permanent Barge Handlers vacancy." They ask that the grievants be made whole.

The grievance was denied and the Union appealed the matter to Step 2. Management responded denying the appeal. In its response, Management stated:

This grievance was discussed in detail at a Second Level Meeting at Hatfield Power Station on September 10, 1996. As there is no violation of the current labor agreement, this grievance is denied.

The case was appealed to arbitration and, the undersigned arbitrator was appointed to hear and decide the matter. Accordingly, a hearing was held on March 27, 2007 in Greensburg, Pennsylvania at which time the parties were afforded full opportunity to present evidence, both oral and written, to cross-examine witnesses, who were sworn, and to argue their respective positions. The record was closed upon the submission of post hearing briefs on May 12, 2007.

**II. BACKGROUND**

Mr. David Corob testified that he has worked for Allegheny Energy since October, 1978 currently in the Maintenance Department. He also serves as Union President. At the time the grievance was filed, he was the Health and Safety Officer. He

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<sup>1</sup> AGREEMENT between West Penn Power Company and Local Union No. 102 Utility Workers of America, AFL-CIO, May 1, 1992 to April 30, 1996 (hereafter referred to as the "Agreement").

stated that the grievance was filed because of the way the Company filled a vacancy in the Coal and Ash Department upon the retirement of Mr. George Riess. According to Mr. Corob, Mr. Riess's position should have been filled using job seniority consistent with Section 10.4 of the Agreement for "Jobs In A Series."<sup>2</sup> Mr. Riess held the position of Barge Unloader Operator. The remaining jobs by sequence are Towboat Operator, Heavy Equipment Operator and Barge Handler. When Mr. Riess retired, Mr. Newmeyer, who had the most job seniority in the next position of the job series (Towboat Operator) should have moved to the open position of Barge Unloader Operator. Rather the Company moved Mr. Goodwin with less job seniority into the position. Mr. Scott who had more job seniority in the next position of the job series (Heavy Equipment Operator) should have then moved to Towboat Operator rather than Mr. Pawlak with less job seniority who was moved into the position, and Mr. Chury who had more job seniority in the next position of the job series (Barge Handler) to Heavy Equipment Operator rather than either Mr. Matthews or Mr. Rygle, whoever was senior, both of whom had less job seniority. The Barge Handler should have then been filled from the Labor Gang. Mr. Corob stated the improper filling of the open job may have affected the employee's overtime, base salary and pension. According to Mr. Corob the employee's job seniority should have been followed, not the unit seniority, although, if done properly, both will be the same. He pointed out there has never been a grievance on this issue.

Mr. Corob said that the Company knows of a permanent vacancy well in advance because the Union administers the hospitalization plan for retirees and is usually notified one quarter before an employee retires. When they learn of a planned retirement, they

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<sup>2</sup> There are four crews entitled "A", "B", "C" and "D", all of which have in their job series sequence Barge Unloader Operator, Towboat Operator, Heavy Equipment Operator and Barge Handler.

inform the Company. Mr. Corob reviewed the schedule dated May 1, 1996. He pointed out that Mr. Reiss was not on it, and therefore, he had retired. Reviewing the July 7, 1996 schedule, he stated that everyone was in the correct position. As a result, he felt that Mr. Newmeyer suffered an economical loss for more than two months. He also felt that Mr. Scott, Mr. Chury and those eligible for Barge Handler suffered an economic loss because they were denied the opportunity to move up to increase their base pay, overtime and other benefits. Mr. Newmeyer was properly trained to go to the Barge Unloader Operator as was everyone else down the line.

Mr. Joseph M. Zimmerlink testified that he has worked for Allegheny Energy for 27 years, currently in Maintenance. He has been a Union officer for 27 seven years and currently serves as Shop Steward. At the time of the grievance, he was President of the Union. Mr. Zimmerlink stated that the first level grievance meeting was held on May 3, 1996 with Mr. Tom Stoner. They discussed the Barge Handler. Mr. Stoner said that he was not going to move people in the Coal and Ash Unit because of negotiations. He thought the Towboat Operator might be the highest paid job after negotiations and that was his reason for not making the proper moves when Mr. Reiss retired. Mr. Zimmerlink stated there is no language in the Agreement to support this position. He filed the grievance because the people were not moved properly. It was to cover everyone affected. At the first and second level meetings, Mr. Newmeyer, Mr. Scott and Mr. Chury's names were mentioned.

Mr. Zimmerlink stated that Section 10.4 of the Agreement required that the senior person move up continuing with each position in the job series until the bottom job that is filled by bid. He pointed out that in 1984, he moved from the senior qualified "C" person

on "C" crew to the junior qualified "B" person on "A" crew to fill a permanent vacancy. When Mr. Riess retired, Mr. Newmeyer should have moved from "A" Crew to "D" Crew as Barge Unloader Operator. Mr. Scott should have moved to Mr. Newmeyer's spot, Mr. Chury should have moved to Mr. Scott's spot and the Barge Handler should have been filled by bid.

According to Mr. Zimmerlink, Mr. Goodwin had a unit seniority date of November 14, 1982 versus Mr. Newmeyer's unit seniority date of July 15, 1979. The grievance was filed for not filling a permanent vacancy that created a chain reaction. Mr. Zimmerlink wrote GLA on the grievance referring to a General Labor Agreement violation because the grievance encompassed the whole Agreement and the chain reaction.

On cross examination, Mr. Zimmerlink acknowledged that the grievance did not allege failure to move employees up and he confirmed that he puts GLA on every grievance that he files.

Mr. William J. Sterner testified that he is the full-time President of UWUA Local 102 and is on temporary leave from the Company as a Lead Lineman in the Charlevoi Service Center. He has been with the Company for 34 years and has held positions with the Union for most of his career. He has been a part of negotiations for five of the Agreements. Mr. Sterner stated that the Agreement in effect at the time of the grievance expired on April 30, 1996. The parties had agreed to a one year extension until a successor Agreement could be obtained. A Memorandum of Agreement was reached on July 15, 1996. Ratification took about one month. At some point in July, 1996 the Company properly filled the position of Mr. Riess.

Mr. Sterner stated that since the Union administers the health care plan for retirees, employees are requested to provide notice so the Company can make the appropriate payment each quarter. Mr. Riess did this and the Union notified the Company of his planned retirement. As a result, there was plenty of time to fill the vacancy when he retired. Mr. Sterner pointed out that Section 10.4 did not change during negotiations, and the Company has never filled a vacancy in the manner they did to replace Mr. Riess.

On cross-examination, Mr. Sterner acknowledged that the date of the tentative Agreement was May 28, 1996 and that Mr. Riess's position was filled on July 7, 1996. He also stated that when an employee requests retirement, there have been times when the effective date has changed.

Mr. Thomas Z. Seighman testified that he retired from the Company on February 1, 2003 as Regional Director of the Hatfield/Lake Lynn/Mitchell Regions with responsibility for operations, maintenance, labor relations and overall general management. He held this position at the time the grievance was filed.

Mr. Seighman stated that he was familiar with Mr. Riess who retired in May, 1996. He stated that the Company used Section 13.17 of the Agreement to fill the vacancy on a temporary basis. He pointed out that the Company does not always fill a vacancy. For example, if there was a Barge Unloader vacancy, it would not be filled if the plant was not unloading coal. The Shift Fuel Attendant was phased out. In the case of Mr. Riess's position, the Company was in negotiations. There were several proposals which could have affected the vacancy such as pay, staffing and alternate work schedules.

Mr. Seighman stated that the Company began restructuring in February, 1995. A team was organized in August, 1995 to implement recommendations that were approved in January, 1996. Negotiations began in March of 1996 and were in progress when Mr. Riess retired. Mr. Seighman became involved in mid April, 1996 as a consultant between the redesign team and the negotiating team. The parties reached tentative agreement on May 28, 1996 and the Memorandum of Agreement was reached in the middle of July.

Mr. Seighman stated that the Position Staffing Approval was submitted on June 7, 1996. Mr. Newmeyer was awarded the position on July 7, 1996. The Company decided to fill the vacancy on a regular basis because there were no changes in the Agreement. He stated it was always the Company's intent to fill Mr. Riess's position on a regular basis unless affected by changes in the Agreement. The posting for a Barge Handler went up on July 5, 1996 and was filled by Mr. George Dugan on July 22, 1996.

Mr. Seighman stated that the Company relied on Management Rights to fill Mr. Riess's job on a temporary basis because no language required the Company to fill it as a regular vacancy. As an example, he cited illness, injury and military leave where positions are filled on a temporary basis. In 1986, Mr. Gus Impasini's position as garage mechanic was temporarily filled for a minimum of two years as a result of illness. Mr. Seighman discussed a situation at the Mitchell Plant where a Heavy Equipment Operator was filled on a temporary basis because the position was not required permanently. When Mr. Walter Gruzniak and Mr. Nicholas Young retired as a Shift Fuels Attendants their positions were not filled. During negotiations he stated the Company redirected maintenance outages and delayed hiring summer laborers until the Memorandum of Agreement was reached.

Mr. Thomas H. Stoner testified that he has been employed by Allegheny Energy since 1978, currently as a Consulting Engineer to provide technical support to operating power stations. At the time of the grievance, he was Operations Manager at Hatfield's Ferry Power Station. He was involved in filling Mr. Riess's position. Using the Management Rights Clause, as well as Section 13.17, the crew was moved up and the Barge Handler was filled at the best economic rate. The Company decided not to fill the position on a regular basis because they had never gone through negotiations and had a retirement at the same time. Mr. Stoner stated that Mr. Seighman informed him that the Towboat Operators rate of pay and alternate work schedules could affect the position. Consideration was also being given to a 12 hour rotating schedule that could require adding a 5<sup>th</sup> crew. If the Company filled Mr. Riess's position and changed to the 12 hour rotating schedule, Mr. Stoner stated that the Agreement would require the payment of differentials for a change of schedule, short swings and days off. He stated that 20 people could have been affected. Mr. Stoner recalled temporary vacancies that were filled for medical and military reasons. He also recalled the Heavy Equipment Operator being filled on a temporary basis, at the Mitchell Plant.

### III. POSITION OF THE PARTIES

#### A. COMPANY

The Company contends the Agreement does not mandate when a vacancy must be filled due to retirement. They point out that Management Rights reserves the right to determine size of the workforce and to promote employees unless otherwise specifically limited by the Agreement. They state the Agreement does not define permanent vacancy, and there is no support for the presumption that retirement creates a permanent vacancy.

The Company asserts there is no past practice that mandates the Company to fill a vacancy due to retirement. They argue that undisputed testimony demonstrates that the Company never faced the issue of filling a vacancy due to retirement during negotiations. Hence there is no past practice addressing the circumstances of this case. They argue that arbitral precedent states past practice cannot override the fundamental management right of determining when vacancies should be filled. The Company has a past practice of exercising sole discretion in determining when to fill a vacancy.

The Company contends that it had a legitimate business reason for filling the vacancy created by Mr. Riess's retirement on a temporary basis. They assert that reshuffling crews could result in change of schedule costs for 20 employees. They point out that the Company always intended to fill the vacancy on a regular basis, but made a prudent business decision to wait until proposals that could affect the Coal Handling Group were off the negotiating table. One week after a tentative agreement was reached, they filled the Barge Unloader on a regular basis. Finally, they contend that no bargaining unit employees were harmed because the Company's actions were proper. They request that the grievance be denied. The Company's brief included a number of arbitration awards in support of their position, all of which were carefully reviewed

**B. UNION**

The Union contends that the grievants should have moved up, and the remaining job of Barge Unloader filled through the normal process. They argue that the jobs should not be filled temporarily simply because the previous Agreement had been extended. They point out that military leave, illness and injury are instances where jobs are filled temporarily because employees return as opposed to a vacancy resulting from retirement.

They state that the Company is notified in advance when an employee retires, so there is adequate time to fill a permanent vacancy.

The Union argues that the grievance applies to all affected employees because it was identified as General Labor Agreement. They contend that unit seniority is the basis for progression as provided in Section 10.4 because of the past practice of moving employees immediately. The Union asserts that the Management Rights Clause does not give the Company the right to change language.

The Union requests that the grievance be sustained and all affected members made whole, including, but not limited to 401(k), pension, hourly wage, move-ups and shift change for Mr. Newmeyer, Mr. Scott, Mr. Chury and the person who came into the bottom position. The Union points out that the senior Towboat Operator who would have progressed passed away and requests that his beneficiaries get his share of the remedy.

**IV. RELEVANT CONTRACT PROVISIONS**

**Section IX - SENIORITY**

**9.9 UNIT SENIORITY**

An employee's unit seniority date shall be the date on which he first filled a regular vacancy in the specific recognized unit ...

**Section X - JOB VACANCIES**

**10.4 JOBS IN A SERIES**

In conformance with past practice, vacancies shall not be advertised for those jobs where employees progress through job classifications in a job series.

**Section XIII - WORKING HOURS AND OVERTIME**

**13.17 TEMPORARY VACANCIES FOR SHIFT EMPLOYEES**

A temporary shift vacancy shall be filled by advancing a qualified operator below the vacancy in the same crew, filling the resultant vacancies in the lower positions in that crew in the same manner, with the vacancy in the lowest position or in a single position crew being filled by a nonshift employee, if this can be done at straight time. ...

13.19 PERMANENT VACANCIES

Permanent vacancies shall be filled in accordance with Section IX, Seniority.

Section XXVI - MANAGEMENT RIGHTS

26.1 Except as otherwise specifically limited in this Agreement, it is mutually understood and agreed that the Company has the right to exercise the regular and customary functions of Management, among which functions are the ... the rights to hire, assign work, suspend, discharge, discipline, promote, demote, or transfer, and to release employees because of lack of work or for other proper reasons, subject however, to the employee's or Union representative's privilege of submitting a grievance as provided for in this Agreement. ...

V. OPINION

The issue to be determined is whether the Company violated the Agreement when it failed to immediately fill the vacancy created upon the retirement of Mr. Riess. The Union contends that the grievants should have moved up, leaving the remaining job of Barge Unloader to be filled. They point out that military leave, illness and injury are instances where jobs are filled temporarily because the employees return to the jobs. The Company counters that the Management Rights Clause gives it sole discretion to determine when to fill a vacancy.

While the Management Rights Section provides "the right to exercise the regular and customary functions of Management ... including the rights to ... assign work ... promote, demote, or transfer ..." it must be applied "as otherwise specifically limited in this Agreement."

Elkouri and Elkouri in their treatise entitled How Arbitration works discuss vacancies. They state:

It is generally recognized that in the absence of a contract provision limiting management's rights in regard to filling vacancies, as for example, a clear requirement to maintain a certain number of employees on a particular job, it is management's right to determine whether a vacancy exists and whether and when it shall be filled. But where duties associated with the vacancy are reassigned and continue to be performed by employees in other jobs, arbitrators will examine whether the employer has intentionally avoided contractually required procedures for filling jobs.<sup>3</sup>

To determine whether the Company has intentionally avoided contractually required procedures for filling Mr. Riess's vacancy, a significant factor in making such a determination is what happened to the duties that had been performed by Mr. Riess prior to his retirement. In reviewing the testimony of Mr. Seighman, it is clear that Mr. Riess's duties continued to be performed by other employees under the provisions of Section 13.17 of the Agreement. Specifically, Mr. Seighman testified that when Mr. Riess retired, "we chose to fill it as a --- temporary vacancy, following 13.17 of the contract." In response to Mr. Ferrer's question "And according to that provision, what happened?" he testified "Well, you would --- you'd move the crew up, fill in the bottom, if necessary." He pointed out that the decision was made to fill the job in this way until it could be determined how the negotiations would turn out. In response to Mr. Ferrer's question "And so, was it always the Company's intention to --- to fill Mr. Riess's position on a regular basis?" he testified: "It was, yes." From this testimony, it is apparent that the duties performed by Mr. Riess were permanent. As a result, the language in Section 13.17 of the Agreement "Temporary Vacancies for Shift Employees" does not apply. Rather, for a permanent vacancy, Section 13.19 applies. That section

<sup>3</sup> Elkouri and Elkouri, How Arbitration Works, 5<sup>th</sup> edition (1996) The Bureau of National Affairs, Washington, D.C., page 723.

requires that: "Permanent vacancies shall be filled in accordance with Section IX, Seniority." Section IX requires the application of unit seniority.

The Company submitted a number of arbitration awards in support of its position. Each of them, in one way or another, stands for the proposition that Management has the discretion to fill a vacant job when the work no longer exists. In this case, however, it is clear that the work of the Barge Unloader Operator previously performed by Mr. Riess continued to exist. The position was filled by Mr. Goodwin on a temporary basis. This fact distinguishes the present grievance from the arbitration awards that the Company submitted in its brief where it was determined by Management that the work no longer existed.

Since it has previously been concluded that there was a permanent vacancy resulting from the retirement of Mr. Riess, Section 10.4 concerning job vacancies must also be considered. It states: "In conformance with past practice, vacancies shall not be advertised for those jobs where employees progress through job classifications in a job series."

The Company contends that it had a legitimate business reason for initially filling the vacancy created by Mr. Riess's retirement on a temporary basis due to negotiations. They assert that reshuffling crews would have resulted in paying change of schedule costs for 20 employees. While this may be true, both parties are obligated to abide by the provisions of the Agreement. As previously determined, the vacancy created by Mr. Riess's retirement was a permanent vacancy and Section 13.19 was the appropriate section to apply.

Finally, the Company contends that no bargaining unit employecs were harmed. Clearly this is not the case. The grievants were denied the opportunity to increase wages and benefits by moving to new jobs that were created by the retirement of Mr. Riess.

For all of these reasons, the grievance is granted. The grievants, including the senior Towboat Operator who would have progressed had he not passed away are to be made whole for the time period in which the positions were filled on a temporary basis until such time as they were filled on a permanent basis. The senior Towboat Operator's share of the remedy is to be paid to his estate.

AWARD

The grievance is granted. The grievants, including the senior Towboat Operator who would have progressed had he not passed away are to be made whole for the time period in which the positions were filled on a temporary basis until such time as they were filled on a permanent basis. The senior Towboat Operator's share of the remedy is to be paid to his estate.

  
PHILIP W. PARKINSON

MAY 31, 2007  
Washington, PA