

IN THE MATTER OF THE ARBITRATION BETWEEN

MINNESOTA NEWSPAPER GUILD)	FEDERAL MEDIATION AND
TYPOGRAPHICAL UNION, LOCAL)	CONCILIATION SERVICE
37002 OF THE COMMUNICATIONS)	CASE NO. 11-51551
WORKERS OF AMERICA,)	
)	
)	
Union,)	
)	
and)	
)	
STAR TRIBUNE COMPANY,)	
Operating As)	
STAR TRIBUNE NEWSPAPER)	
OF THE TWIN CITIES,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

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On May 5, 2011, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union

against the Employer. The grievance alleges that the Employer violated the parties' labor agreement when it transferred the grievant, James L. Foster, to a lower-paying classification. Post-hearing written arguments were received by the arbitrator on June 12, 2011.

FACTS

Background. The Employer publishes a newspaper of general circulation (the "Star Tribune") and distributes it in the metropolitan area that includes Minneapolis and St. Paul, Minnesota. The Union (usually referred to as the "Guild") is the collective bargaining representative of the non-supervisory employees of the Employer who work in the newspaper's News and Editorial Departments and of some employees who work in the Sales/Promotion and Circulation Departments. The Guild and its predecessors have represented those so employed for many years.

The Guild and the Employer were parties to a labor agreement that had a duration beginning August 1, 2003, and ending July 31, 2008 (sometimes, the "2003-08 labor agreement" or the "previous agreement"). In the spring of 2008, the parties began negotiations for a new labor agreement, which, by its terms, was to be effective from August 1, 2008, through July 31, 2011 (the "2008-11 labor agreement" or, for reasons given below, the "original 2008-11 labor agreement"). The parties executed this agreement on September 15, 2008.

In recent years, many advertisers have substituted internet advertising for newspaper display and classified advertising, thus causing a substantial reduction in the revenue realized by

newspapers of general circulation. In 2008, as representatives of the parties bargained about the 2008-11 labor agreement, their representatives were aware that the recent decline in advertising for the sale of homes had exacerbated the Star Tribune's loss of advertising revenue. The Employer was able to obtain the Guild's agreement to many cost-saving provisions in that agreement in what the Guild characterizes as "concessionary bargaining."

Despite reduction in the cost of labor realized by operating under the new labor agreement, the Employer decided that it must undertake a financial reorganization using Chapter XI of the United States Bankruptcy Code, and, in January of 2009, the Employer filed a petition in the United States Bankruptcy Court seeking such a reorganization. During the Chapter XI proceeding, with the approval of the bankruptcy court, the parties negotiated a "Letter of Agreement," which they executed on April 24, 2009. The Letter of Agreement revised some of the provisions of the 2008-11 labor agreement, as originally executed on September 15, 2008. The bankruptcy court approved the revisions made by the Letter of Agreement, and, in the fall of 2009, when the Employer emerged from Chapter XI bankruptcy, the terms and conditions of employment of Guild members were established by the original 2008-11 labor agreement, as revised by the Letter of Agreement of April 24, 2009. (Hereafter, for ease of reference, I refer to this revised agreement simply as the "current labor agreement," and, when necessary to refer to the unrevised 2008-11 labor agreement, I refer to it as the "original 2008-11 labor agreement.")

The Grievance. The grievant was hired by the Star Tribune in 1985 and began working as a copy editor in the Sports Department. During his early employment, he was classified as a News Assistant. In 1995, the grievant began working in the classification, Graphics Composition Technician. He continued to work in that classification until March 30, 1997, when he was promoted to the classification, Reporter. The promotion from Graphics Composition Technician to Reporter increased his pay level from the "T-Scale" to the "A-Scale." Under the parties' labor agreement in force in 1997, the T-Scale was a mid-level pay scale, and the A-Scale was one of the higher pay scales -- a pay relationship that continues under the current labor agreement.

On February 18, 2010, Cory Powell, Managing Editor for New Products, sent the grievant the following letter:

This letter serves as official notification of your reassignment to the News Support team and classification as a T-Scale Graphics Composition Technician for reasons of economy, in accordance with Article 4, Section* 4(c) of the Guild contract. In this new role, you will continue to support the Business department with some data collection duties, but also serve the whole newsroom in a support role.

The accompanying reduction in pay to T-5 Scale will occur in two steps. You will remain at your current salary until March 1, 2011, when 50 percent of the reduction

* I note that the divisions within articles of the parties' labor agreement are not designated either as "sections" or as "paragraphs," but that both terms have been used to refer to those divisions in documents and in the testimony of witnesses. For consistency, in my writing about divisions within articles, I use the term, "section," though, when I set out writings presented in evidence -- usually contract provisions or correspondence -- I do not alter the term used in those writings.

will take effect. The rest will take effect on Aug. 1, 2011. . . The job transfer will take effect March 1, 2010, with some training during the week of Feb. 22. You will report to News Research Manager Sandy Dale.

On March 18, 2010, Michael Bucsko, Executive Officer of the Guild, initiated the present grievance by the following letter sent to Robert W. Schafer, the Employer's Assistant Managing Editor for Administration:

Please consider this as formal notification the Guild is filing a grievance over the reclassification of Jim Foster from A-scale to T-scale, as memorialized in a letter to Mr. Foster from Cory Powell, dated February 18, 2010. The company's representative cites Article IV, Para. 4(c) as the reason for the demotion.

The union contends the reclassification violates the following provisions of the Collective Bargaining Agreement:

Article IV, Para. 2, in which Mr. Foster's work since 1994 has been tied to the A-scale classification. The Guild contends Mr. Foster will continue to use the skills and to perform the work that has been recognized as rightly being part of the A-scale compensation, along with new duties that were previously the responsibility of a former employee.

Article IV, Para. 4(c), "Transfer from a higher-paying classification to a lower-paying classification (i) for reasons of economy" per Cory Powell's Feb. 18 letter to Mr. Foster. The Guild contends if the company exercises its right under this clause to reclassify an employee "for reasons of economy," that the reclassification must be done by inverse order of seniority, as in a layoff. . . .

The Issue. The parties have stipulated that the following issue is to be decided in this proceeding:

Did the Employer violate Article IV, Section 4(c), of the Collective Bargaining Agreement when it transferred the grievant from A-Scale to T-Scale rather than transferring the least senior A-Scale reporter?

Because the stipulation does not seek resolution of any issue related to the first allegation made by the grievance -- that

the grievant continued to do the work of a Reporter after the transfer -- no issue concerning that allegation is before me.

The Labor Agreement. The stipulated issue is one of contract interpretation. To understand the parties' arguments, some of which allude to bargaining history, it is necessary to know relevant contract provisions from the 2003-08 labor agreement. The parties did not present in evidence the full text of that agreement, but it is clear by their references to it that its Article IV included a section that established the wage structure of bargaining unit employees. The evidence does not include the text of that section of Article IV of the previous agreement. I infer from other evidence, however, that its Section 3 established pay rates for bargaining unit employees and was substantially the same in its structure as Section 2 of the original 2008-11 labor agreement, which is in evidence, though the section is renumbered. The latter provision sets out in table form, eleven "minimum wage scales," designated A, B, C, D, F, H, I, J, K, N and T. I set out below, relevant parts of the text of Section 2 of the original 2008-11 labor agreement:

[Section] 2. Minimum Wage Scales. in the application of this Agreement, employees shall be divided into the classifications set forth below. Employees shall be paid at bi-weekly intervals. Effective on the dates below, the minimum weekly wage for full-time employees in each classification, based on their years of experience therein, shall not be less than set forth in the following minimum wage scale [I omit dates and amounts]:

- A. Writers, Reporters, Copy Editors, Photographers, and Graphic Artists: [Amounts omitted]
 . . .
- F. Receptionists, Typists, Clerks:
 . . .
- T. Graphics Composition Technician:

I have set out this text of Article IV, Section 2, of the original 2008-11 labor agreement to show that some of the eleven wage scales establish the wage rates for work in several job functions. Thus, an A-Scale wage rate is established not only for Reporters, but for those who work as Writers, as Copy Editors, as Photographers and as Graphic Artists. As is more clearly shown in the parties' later bargaining, discussed below, the text that precedes the wage scales also refers to the wage scales as "classifications." In the Letter of Agreement of April 24, 2009 (and thus in the current labor agreement), the several functions performed by employees paid at the same wage scale (classification) are referred to as "job titles."

The parties did present in evidence the following text from Article IV, Section 6, of the 2003-08 labor agreement -- from which they derived in bargaining Article IV, Section 5, of the original 2008-11 labor agreement and, eventually, Article IV, Section 4, of the current labor agreement:

Article IV. [Section] 6. There will be no reduction in pay for the life of this Agreement, subject to the following exceptions:

- a. Transfer from night work to day work.
- b. Transfer made at the request of the employee.
- c. A new pay basis for an employee may be negotiated with the Guild in the event the employee is transferred to a different classification or position or in the event a reduction in pay is warranted for just and sufficient cause.
- d. All wage rates set forth in this Agreement are minimum wage rates [but the Employer may recognize individual merit by paying wages in excess of the minimum].

In bargaining for the original 2008-11 labor agreement, which began in the spring of 2008, the parties adopted the following language (which they renumbered as Article IV,

Section 5), derived from Article IV, Section 6, of the 2003-08 labor agreement:

Article IV. [Section] 5. There will be no reduction in pay for the life of this Agreement, subject to the following exceptions:

- a. Transfer from night work to day work.
- b. Transfer made at the request of the employee.
- c. Transfer from a higher-paying classification to a lower-paying classification (i) for reasons of economy, or (ii) in the event of a transfer for just and sufficient cause.
- d. A new pay basis for an employee may be negotiated with the Guild in the event the employee is transferred to a different position with lesser responsibilities within the same classification or in the event a reduction in pay is warranted for just and sufficient cause.

The parties also preserved the Employer's authorization to give merit pay by moving that authorization from Article IV, Section 6(d), in the previous agreement, so that it appeared in the original 2008-11 agreement as the only sentence in a revised Article IV, Section 6.

Article XIII of the 2003-08 labor agreement is entitled, "Dismissals, Promotions and Transfers." Below, I reproduce the full text of the sections relevant here:

[Section] 1. There shall be no dismissals except for just and sufficient cause or for reduction of the force for reasons of economy except that the first three (3) months of employment shall be a probationary period during which a new employee may be dismissed at the option of the Publisher.

[Section] 3. Dismissals for reduction of the force for reasons of economy shall be made within job classification as set forth in Article IV of this Agreement in inverse order of seniority, with "seniority" being defined as length of service with the Publisher and all employees within each job classification being as one group for purposes of this paragraph.

[Section] 5. Any employee dismissed because of reduction of the force for reasons of economy, suspension or

reorganization of a department or abolition of a job, shall for one (1) year thereafter, upon his request, have his name included in a rehiring pool and during such year be given first consideration whenever the Publisher is filling a position for which he is qualified. Individuals in the rehiring pool shall receive first consideration on the basis of seniority, as defined in Section 3 above. A former employee need not be considered for reemployment if he once refuses an offer for reemployment or if he cannot be available for work within thirty (30) days after he has been offered reemployment.

[Section] 6. In the event of consolidation, sale or suspension of the newspaper, the Publisher agrees that, when filling vacancies or adding to its staffs in departments within the jurisdiction of this Agreement, it will, so far as possible, draw from a list of those left unemployed thereby who are, in the Publisher's judgment, qualified for the new positions.

When the parties bargained for the original 2008-11 labor agreement, they made several changes in Article XIII. The article retained its title, "Dismissals, Promotions and Transfers." The parties made no change in Section 1. They amended Section 3 to read as follows:

During the life of this Agreement, dismissals for reduction of the force for reasons of economy shall be accomplished by the Publisher first offering voluntary separation packages to employees within the job titles where, in the Publisher's sole judgment, reductions are required. The terms of such a separation package shall at a minimum be the equivalent of dismissal pay as specified in Article VIII, Section 1. Employees shall have, at a minimum, a 14-day window in which they may elect to request a separation package. If more employees elect to request a separation package than the number of packages available, then employees will be selected to receive the package on the basis of seniority. If an insufficient number of employees in one or more job titles accepts the voluntary separation packages, the Publisher may then dismiss employees within those specific job titles in inverse order of seniority, with "seniority" being defined as length of service with the Publisher. For the purpose of dismissals under this provision, "job titles" are defined as the pay classifications listed in Article IV, Section 2, except that the "A" classification shall be divided into three subgroups: (a) reporters, columnists and editorial writers; (b) copy editors, and (c) photographers and

videographers. Graphics artists in the "A" classification shall be grouped with the designers in the "K" classification for purposes of this paragraph only.

The parties made no substantive change in Article XIII, Sections 5 and 6. They added an entirely new section, as Article XIII, Section 7, which I set out below:

The Publisher reserves the right to offer voluntary separation packages for the termination of employment [of] employees covered by this agreement. The frequency, timing and amount of any such packages shall be at the sole discretion of the Publisher. In addition, the Publisher shall have the sole discretion to decide to whom any particular voluntary separation package will be offered.

On September 15, 2008, the parties executed the original 2008-11 labor agreement.

As noted above, the Letter of Agreement of April 24, 2009, made changes in the original 2008-11 labor agreement, many of which reduced the pay of bargaining unit employees. Changes in two articles are relevant here. What had been Article IV, Section 5, in the original 2008-11 agreement was changed to the following, now renumbered as Article IV, Section 4 (new text is double underlined):

Article IV. [Section] 4. There will be no reduction in pay for the life of this Agreement, other than as set forth in the Letter of Agreement dated April 24, 2009, between the Guild and the Publisher, subject to the following exceptions:

- a. Transfer from night work to day work.
- b. Transfer made at the request of the employee.
- c. Transfer from a higher-paying classification to a lower-paying classification (i) for reasons of economy, or (ii) in the event of a transfer for just and sufficient cause.
- d. A new pay basis for an employee may be negotiated with the Guild in the event the employee is transferred to a different position with lesser responsibilities within the same classification or in the event a reduction in pay is warranted for just and sufficient cause.

The Letter of Agreement of April 24, 2009, changed Article XIII, Section 3, of the original 2008-11 agreement by substituting new text for its last two sentences. Below, I set out all of Article XIII, Section 3, as thus amended:

During the life of this Agreement, dismissals for reduction of the force for reasons of economy shall be accomplished by the Publisher first offering voluntary separation packages to employees within the job titles where, in the Publisher's sole judgment, reductions are required. The terms of such a separation package shall at a minimum be the equivalent of dismissal pay as specified in Article VIII, Section 1. Employees shall have, at a minimum, a 14-day window in which they may elect to request a separation package. If more employees elect to request a separation package than the number of packages available, then employees will be selected to receive the package on the basis of seniority. If an insufficient number of employees in one or more job titles accepts the voluntary separation packages, the Publisher may then dismiss employees within those specific job titles in inverse order of seniority, with "seniority" being defined as length of service with the Publisher. For the purpose of dismissals under this provision, "job titles" are defined as:

- a. Copy Editors
- b. Reporters, Columnists, Editorial Writers
- c. Photographers and Videographers
- d. Graphic Artists and Designers
- e. Reference Librarians
- f. Library Classifiers and Researchers
- g. Photo Lab Assistants
- h. Receptionists, Typists, Clerks
- i. Team Leaders, Department Heads and Assistants
- j. Copy Desk Clerks
- k. Wire and Web Editors
- l. Photo Editors
- m. Design Director, Deputy Design Directors, Assistant Design Directors, StarTribune.com Design Director
- n. Specialty Editors, (CAR Editor, Artists Team Leader, Senior Producer, etc.
- o. Promotion Copy Writers and Promotion Graphic Designers
- p. Metro Circulation District Managers
- q. News Assistants
- r. Graphics Composition Technicians

The Publisher shall not be required to reduce the force (whether by buyout or layoff) within a job title on the

basis of seniority if the Publisher deems that an employee must be retained. The Publisher may exercise its rights pursuant to this paragraph by exempting no more than twenty (20) percent of any reduction in force or one exemption for every five positions or fraction thereof reduced within a job title. However, there shall be no more than 12 exemptions during a calendar year.

[Footnote;] The number of exemptions for calendar year 2009 shall be prorated on the date when the U.S. Bankruptcy Court approves the Letter of Agreement dated April 24, 2009,

The grievant testified that, when the pay reduction caused by his transfer from A-Scale to T-Scale becomes fully effective, his annual pay will be reduced by about \$10,500. He also testified that, before the transfer, his A-Scale seniority rank was thirty-fourth among 115 in his job title, Reporter-Columnist-Editorial Writer, and that, after the transfer, his T-Scale seniority rank became first among two in the T-Scale's sole job title, Graphics Composition Technician. He testified that his vulnerability to layoff has increased substantially because the Employer could exempt the other employee in the job title, who performs a function the Employer may decide it should retain -- thus making the grievant subject to immediate layoff as the only non-exempt employee in that job title.

DECISION

As noted above, the parties have stipulated that the primary issue presented is whether the Employer violated Article IV, Section 4(c), of the current labor agreement by transferring the grievant "from A-Scale to T-Scale rather than transferring the least senior A-Scale reporter." Thus, I must interpret Article IV, Section 4(c), of the current labor agreement, which I repeat below:

There will be no reduction in pay for the life of this Agreement, other than as set forth in the Letter of Agreement dated April 24, 2009, between the Guild and the Publisher, subject to the following exceptions:

- c. Transfer from a higher-paying classification to a lower-paying classification (i) for reasons of economy, or (ii) in the event of a transfer for just and sufficient cause.

The parties agree that the Employer grounded the grievant's transfer on the first stated basis, "for reasons of economy," and not on the second stated basis, for "just and sufficient cause," which would require at least a showing of poor performance, something the Employer does not allege.

Bargaining History. The parties presented evidence about the bargaining history that led to the adoption of Article IV, Section 5(c), of the original 2008-11 labor agreement, which is now Article IV, Section 4(c), of the current labor agreement. I summarize that evidence as follows.

Bucsko testified that he was the chief negotiator for the Guild and was assisted by Darren Carroll, a representative from the International Newspaper Guild. Schafer testified that he was a chief negotiator for the Employer. As bargaining began in the spring of 2008, both parties were aware that the Employer was having financial difficulties because of the loss of advertising revenue and the need to service debt.

Schafer testified as follows. Under the 2003-08 labor agreement, the Employer had the right to transfer employees to a nominally lower-paying classification, but not to reduce the actual pay of an employee so transferred to the pay scale of that lower-paying classification without negotiating such a reduction with the Guild. In bargaining for the original

2008-11 labor agreement, the Employer recognized that it must reduce the number of its employees substantially, but that in doing so it must have flexibility to fit retained employees into positions suited to their skills, with pay appropriate to the position. Accordingly, the Employer bargained for and obtained, several contract provisions that increased its ability to reduce the work force to an efficient level -- by offering separation by buyouts and by exempting some employees from seniority-ranked layoff. The Employer also sought to eliminate the requirement that an employee transferred to a position in a lower-paying classification could not have pay reduced to the lower pay scale without negotiating such a reduction with the Guild. In late May or early June of 2008, the Employer proposed the following amendment to Article IV, Section 5, (numbered in the current agreement as Article IV, Section 4):

There will be no reduction in pay for the life of this Agreement, subject to the following exceptions:

- a. Transfer from night work to day work.
- b. Transfer made at the request of the employee.
- c. Transfer from a higher-paying classification to a lower-paying classification.
- d. A new pay basis for an employee may be negotiated with the Guild in the event the employee is transferred to a different position within the same pay classification or in the event a reduction in pay is warranted for just and sufficient cause.

Schafer testified that he explained to the Guild negotiators that the Employer needed the flexibility this provision would give, after buyouts of some personnel and layoffs of others, to assign remaining personnel to positions fitting their skills with appropriate pay. Bucsko testified that the Guild

rejected this proposal, which would have given the Employer unlimited authority to transfer employees to a lower-paying classification and reduce their pay accordingly.

The parties continued their bargaining throughout June, but did not return to bargaining about the transfer language in Article IV, Section 5(c), until about July 10 or 11, 2008. On July 10 (or possibly July 11), the Employer proposed the following new language for Article IV, Section 5(c):

There will be no reduction in pay for the life of this Agreement, subject to the following exceptions:

- . . .
- c. Transfer from a higher-paying classification to a lower-paying classification (i) for business reasons, or (ii) in the event of a transfer for just and sufficient cause.

. . . .

The parties agree that the second basis for transfer -- "(ii) in the event of a transfer for just and sufficient cause" -- was added because the Guild objected that a transfer to a lower-paying classification for poor performance should be based upon a showing of such poor performance.

The accounts of Schafer and Bucsko differ substantially about what occurred during bargaining over the first basis for transfer -- "(i) for business reasons." (Hereafter, I may refer to this first basis for transfer as "clause (i)" or "the provision at issue.") I summarize their testimony on this subject as follows.

Bucsko testified that, when the Guild representatives received the Employer's clause (i) proposal to permit transfers to a lower-paying classification "for business reasons," they

thought that this language was still too broad. In further bargaining on July 11, the parties agreed to change the phrase used in clause (i) to the current language, "for reasons of economy." Bucsko testified as follows about the discussion that led to that change (questions asked on direct examination by the Guild's attorney, Ronald L. Rollins):

- Q. . . . tell us about the discussion you had with the company at the table surrounding this, we'll call it single i reason, whether it's "business reasons," "reasons of economy," . . . Who said what?
- A. "Business reasons" to us, to the Guild negotiating team, seemed, again, very open-ended and a bit ambiguous, and we discussed with the company about, you know, what "business reasons" meant and if it was the same as "reasons of economy." Because the "reasons of economy" language is used in Article XIII in the reduction in force language, and during the discussion that we had about the term "reasons of economy," we said, well if there is going to be any kind of reduction in classification or transfer of a classification, that we believed that it should be done the same that it's done with the reduction in force in the layoff language in Article XIII, that it should be done by seniority in class, and that was, I know we had that, we had that discussion with the company, and subsequently the language was changed to "reasons of economy." And our view is that the reason that it was changed to "reasons of economy" was a result of that discussion and the implicit understanding is that the "reasons of economy" language, because it's not random language, it's language that's specifically used in Article XIII, is linked to Article XIII, because any reduction or transfer in classification from a higher to a lower-paying classification must be done by seniority. . . .
- Q. And the discussion that you said the Guild, I think you testified the Guild expressly talked about doing it like it was done in layoff by seniority, like in a layoff, reasons of economy by seniority, like in a layoff, is that correct?
- A. That's correct.
- Q. And that was stated expressly at the table?
- A. It was.
- Q. And did the company answer that piece of it? Did they answer that piece? Did they ever talk or respond to you about that?

- A. They did. We had a discussion about that, and I don't remember who exactly said what, and I'm not, to be honest with you, even sure who was all there, because the company also had an attorney, Bob Ford, who was present during the negotiations, along with, you know, Randy Lebedoff and Bob Schafer, but we had an exchange about it in a room actually similar to this in terms of the way we were all sitting. So I know that Darren Carroll went into great detail about "reasons of economy" and what it meant and that it would be seniority-based.

As noted above, Schafer's testimony about these negotiations was in substantial conflict with that of Bucsko. Schafer testified as follows about the Employer's purpose in proposing the first version of the amendment of Article IV, Section 5(c), in late May or early June of 2008 (questions asked on direct examination by the Employer's attorney, Noah G. Lipschultz):

- Q. And what was the intent of this proposal?
- A. This proposal would achieve several things for us. It would address the situation that I mentioned just previously regarding the transfer of a person from one classification to another and a decrease in responsibilities and be able to reduce his pay accordingly. It also would address the situation in which we were left with an imbalance of jobs after departures of employees, either through voluntary buyouts or involuntary terminations, in which we had an imbalance in how the remaining employees were spread across the newsroom. We still had specific tasks that needed to be fulfilled on a regular basis and needed to transfer somebody to a lower-paying scale in order to fulfill those tasks.

Schafer testified that there was no significant discussion of the Employer's first proposal to amend Article IV, Section 5, until July 10 or 11, 2008. About those discussions he testified as follows;

- Q. And so what was the first substantive response that you had from the Guild in July when this section was discussed?
- A. Darren Carroll, who was mentioned earlier this morning, objected to the language that we had

presented, saying that it would take away a due process right that the Guild had regarding its ability to contest transfers and reductions in pay for just and sufficient cause.

- Q. And other than the due process concern, did Mr. Carroll or any other member of the union's negotiating team raise any other concerns with this specific proposal?
- A. They were concerned with the broadness of it.
- Q. In terms of the reasons for transfers?
- A. Not for the reasons for transfer. Well, they were concerned with the broadness of the language, saying that it could encompass anything, and I think one of the things that was mentioned was that with this language the company could transfer and reclassify a person simply because there was a personality conflict between the supervisor and the employee.
- Q. At that juncture did the union mention anything, any type of objection to this language on the basis that the transfer needed to be done by seniority or inverse seniority?
- A. Not on the first day of the July 10th and 11th discussions. Seniority was not mentioned at all on that first day, according to the notes that I have of that.
- Q. And how did the company respond to the union's concerns by way of any subsequent proposals?
- A. Oh, we certainly were not planning to use this to transfer employees because of personality conflicts, and we also recognized that the Guild had a valid concern about the due process rights. So the next day we came back with a revised proposal that we felt was not as broad and still addressed some of the concerns that we were hearing from the Guild.
- Q. And was that the language that said that you could transfer employees from a higher-paying classification to a lower-paying classification for business reasons?
- A. And also for performance and just and sufficient cause related to performance. Both of those aspects were in the revised proposal that we gave to the Guild on July 11.
- Q. And what was the Guild's response to that suggestion?
- A. Darren Carroll again was the person making the response for the Guild, and he said that the company had the right now to lay off the least senior person in a job classification, and I interpreted that as his recognizing that this would give us an ability to do something beyond just laying off the least senior person and would give the company greater flexibility, and so that was the -- the counter from the Guild at that point was that, well, we could already lay off the least senior person in the classification.
- Q. So your interpretation of it was why do you need this right since you already have a different right?

- A. Yes. And we explained again at that point that we needed it to address imbalances in the newsroom related to cutbacks that had happened or that could happen in the future.
- Q. And did Mr. Carroll propose any, any responsive language to the company's proposal?
- A. There was a caucus after that, and following the resumption of negotiations after that caucus, the Guild returned and Darren proposed replacing the words "for business purposes" with the words "for reasons of economy."
- Q. And did he offer any explanation for his proposal?
- A. He did not. And my own reaction to that was throughout these entire negotiations we had been talking about reasons of economy, and that having the "reasons of economy" language in this particular clause certainly addressed the need that we had been talking about across the table, so we accepted his proposal using the words "for reasons of economy."
- Q. Did Mr. Carroll explain or state to you that "for reasons of economy" meant that you had to follow inverse seniority order in doing transfers?
- A. He did not say anything regarding that.
- Q. And had he said that, what would your reaction have been?
- A. Our reaction would have been not to accept that language because it would have made the entire clause totally unworkable from the company's standpoint.
- Q. And why was that?
- A. Because it would cause us to have to transfer someone who might be totally unqualified to do the duties that we were transferring that person to do.
- Q. Did the company -- I just asked you whether Mr. Carroll specifically explained any seniority restrictions with respect to the language "for reasons of economy." At any time in the negotiations over this particular provision did Mr. Carroll ever explain or suggest any seniority-based restrictions with respect to transfers from a higher-paying classification?
- A. My memory says that he never raised that, and nothing that suggests his raising seniority as an issue is reflected in the notes that I took of those negotiations, so no.

As noted above, the current labor agreement -- the original 2008-11 agreement as amended by the Letter of Agreement of April 24, 2009 -- retains the language that was thus adopted in the parties' bargaining on July 11, 2008.

The Parties' Arguments. The Guild argues that during the bargaining that led to the adoption of what is now Article IV,

Section 4(c)(i), on July 11, 2008, Bucsko made it clear to the Employer's representatives that the Guild's proposal to change the words, "for business reasons," to the words, "for reasons of economy," was intended to require the use of inverse seniority when making an involuntary transfer to a lower-paying classification. The Guild argues that, even though the language of the provision does not expressly state that such a transfer must be made by inverse seniority, the words, "for reasons of economy," should be read as importing that requirement from Article XIII, Section 3, to Article IV, Section 4(c)(i) -- because the same wording, "for reasons of economy," is used when expressing the related requirement that inverse seniority must be used when making "reductions in the force for reasons of economy." The Guild urges that Bucsko's testimony clearly shows that the Employer's representatives were informed of this intention and that, therefore, acceptance of the Guild's revision in the language was an acceptance of the meaning intended by the Guild and expressly stated across the bargaining table.

The Employer argues that Article IV, Section 4(c)(i), is not ambiguous -- that it contains no express language requiring transfers to a lower-paying classification to be made by inverse seniority. The Employer urges that, because the language is clear, extrinsic evidence should not be used as an aid to its interpretation. The Employer also argues that, even if extrinsic evidence were to be used as an aid to interpretation, Schafer's testimony should be credited -- 1) that the Employer had proposed the transfer provision so that it could fit the needs

of the newsroom to the skills of employees at appropriate pay scales, 2) that the Employer accepted the Guild's proposal to use the words, "for reasons of economy," because those words reflected the obvious underlying condition that the Employer's financial condition was strained, and 3) that Guild representatives did not inform the Employer's representatives that these new words were proposed with the intention to carry an implied requirement that transfers to a lower-paying classification must be made by inverse seniority.

I make the following rulings. I find nothing in the evidence that indicates either that the testimony of Bucsko or that of Schafer is false -- either intentionally so or made so by mistake. Without such evidence, their mutual contradictions of the testimony of the other are not resolvable. If I could find that the testimony of either of them should be accepted rather than that of the other, I would use such a finding as an aid to interpretation of the provision at issue, using such a finding either to negate or to affirm that the words, "for reasons of economy," were used to carry a special meaning defined in the parties' bargaining.

Without such a finding, however, I do not interpret the appearance in Article XIII of the same phrase, "for reasons of economy," as implying an agreement understood by both parties that inverse seniority must be used for transfers made under Article IV, Section 4(c)(i). I rule that, in the absence of express language requiring the use of inverse seniority for such a transfer, the Employer did not violate Article IV, Section

4(c)(i). when it transferred the grievant to the Graphics Composition Technician's classification.

Administration of The Provision at Issue. Since the parties adopted the provision at issue in Article IV, Section 5(c), in the original 2008-11 labor agreement and readopted it in Article IV, Section 4(c) of the current labor agreement, three occasions for its possible application have arisen (in addition to the one that is the subject of the present grievance). The parties have agreed that the employees transferred to lower-paying classification in those three instances should be referred to as "Employee A," "Employee B" and "Employee C."

During the Chapter XI proceeding, Employee A was transferred from H-Scale to A-Scale, a lower-paying classification, though Employee A was not the most junior in the H-Scale classification, and the Guild initiated a grievance. The grievance was settled during administration of the Chapter XI proceeding, but, because all outstanding grievances were settled as part of the disposition made in that proceeding, it is not clear that the settlement implies a particular interpretation of the provision at issue.

After the Employer emerged from the Chapter XI proceeding, Employee B and Employee C each was transferred from a higher-paying to a lower-paying classification when each was not the most junior employee in the higher-paying classification. The evidence shows that neither employee wanted to grieve the transfer -- one because of the possibility that the transfer was

based upon performance. Because the two potential grievants were unwilling to grieve, the Guild should not be charged with an implied acceptance of the Employer's interpretation of the provision at issue. I conclude that the parties' administration of the provision at issue does not indicate an agreement, evidenced in their conduct, about its proper interpretation.

AWARD

The grievance is denied.

August 8, 2011


Thomas P. Gallagher, Arbitrator