ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 643

OCB GRIEVANCE NUMBER: G87-1313

GRIEVANT NAME: CARPENTER

UNION: OCSEA/AFSCME

DEPARTMENT: TRANSPORTATION

ARBITRATOR: DWORKIN, JONATHAN

MANAGEMENT ADVOCATE: TORNES, JOHN

2ND CHAIR: LIVENGOOD, RACHEL

UNION ADVOCATE: ROWLAND, BOB

ARBITRATION DATE: JUNE 5, 1991

DECISION DATE: AUGUST 1, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: DID THE EMPLOYER VIOLATE ART. 17 OF THE CONTRACT WHEN A JUNIOR EMPLOYEE WAS AWARDED A POSTED VACANCY AS EQUIPMENT OPERATOR 2 VIA A JOB AUDIT IN COMPLIANCE WITH ART. 19? UNION ALLEGES PREPOSITIONING.

HOLDING: "WHEN GRIEVANT FINISHED TESTIFYING, THE UNION'S CASE ON PREPOSITIONING CONSISTED OF CONJECTURES AND ARGUMENTS - NEITHER OF WHICH JUSTIFY A FAVORABLE AWARD. THE 1986-1989 AGREEMENT MADE JOB BIDDING UNDER ART. 17 AND POSITION AUDITS UNDER ART. 19 PARALLEL AND COEQUAL MECHANISMS FOR FILLING VACANCIES. BOTH WERE CONTRACTUALLY AUTHORIZED. THE FACT THAT GRIEVANT'S JOB BIDDING RIGHTS WERE BYPASSED BY A JUNIOR EMPLOYEE'S SUCCESSFUL POSITION AUDIT DID NOT VIOLATE ANY CONTRACTUAL PROVISION.

COST: $1,109.46

OCB-OCSEA VOLUNTARY GRIEVANCE PROCEEDING
SUMMARY ARBITRATION OPINION AND AWARD

#643

In The Matter of Arbitration Between:

THE STATE OF OHIO
Ohio Department of Transportation
District 1, Putnam County Garage

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, OSCEA/AFSCME
Local Union 11, State Unit 6

Carpenter

Case No G87-1313

Decision Issued:
August 1, 1991

APPEARANCES

FOR THE STATE

John Tornes	Labor Relations Officer
Rachel Livengood	OCB Representative
John Audet	ODOT Personnel Officer
Leo Roof	Highway Superintendent

FOR THE UNION

Bob Rowland	OCSEA Staff Representative
Brian J. Eastman	Associate General Counsel
Greg Starcher	OCSEA Legal Assistant
Tony DeGirolamo	Arbitration Clerk
N. Eugene Brundige	Witness

ISSUE: 1986-1989 Agreement, Articles 17 and 19: Claim that Agency violated Grievant's seniority-bidding rights by filling opening with junior employee who was elevated to the classification of the vacancy through position audit.

Jonathan Dworkin, Arbitrator
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

This is an unusual seniority-bidding controversy. It relates not only to the Promotions and Transfers language in Article 17 of the Agreement, but to Article 19, Job Audits and Reclassifications, as well. The Union's reference to Article 19 raises a substantive arbitrability issue which will be discussed later in the Opinion.

The case arose four years ago, in April 1987. Although it did not reach arbitration until June, 1991 -- during the term of the current 1989-1991 Agreement -- it is governed by the 1986-1989 Contract. As will be observed, provisions material to the dispute were eliminated in the 1989 negotiations.

On April 17, 1987, the Ohio Department of Transportation (ODOT), District 1, posted a vacancy for an Equipment Operator 2 in the Putnam County Garage. There were five applicants from the lower Classification of Highway Worker 2. The contractually prescribed selection process was largely seniority-driven and Grievant had the second highest seniority among the candidates. Article 17, §17.05 provided in part:

> **A.** The Agency shall first review the bids of the applicants from within the office, county or "institution." Interviews may be scheduled at the discretion of the Agency. The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee.

As stated in §17.05 A, qualifications for the job also constituted a decisional factor in the bidding-promotional scheme. The qualifications in the Equipment Operator 2 job description emphasized an applicant's ability to handle heavy machinery. Eighty percent of the position functions were:

> Operates bulldozers, backhoes, small grader, trenchers, ditchers, vactor jet and similar pieces of equipment to complete a variety of maintenance and construction projects; occasionally operates smaller equipment such as loader, dump trucks with or without snowplows, rollers, tractors, etc.

The remainder of the job description assessed ten percent to minor maintenance, repairs, and adjustments of heavy motorized equipment; ten percent to general labor and record keeping.

Two who bid for the job also had initiated position-audit applications which were pending before Department of Administrative Services. Their applications alleged that they were already performing work of the higher classification and deserved automatic promotions. Both requests were given desk audits by Administrative Services Technicians. After the posting but before the vacancy was filled, one of them was granted; a bidder junior to Grievant by nearly three years was promoted to Equipment Operator 2. The promotion filled the Garage quota, and ODOT withdrew the vacancy.

This grievance followed. It protested the withdrawal and demanded that Grievant be awarded the promotion together with the wage

differential he would have earned if the bidding process had continued to completion.

In advancing its position, the Union conceded that the State had discretion to fill or not fill vacancies -- that under normal circumstances, would not have created a grievable matter. In this case, however, the Union claimed that the vacancy **was** filled. It was given to the reclassified junior employee. It was this act which the Union viewed as extra-contractual. The vacancy existed, bids were received, but then it was filled by Management without regard to the requirements of Article 17. Seniority was ignored. A similar situation would exist, according to the Union, if a job opening were filled by transferring an employee already in the higher classification from another county or district. It is clearly established that such action would be contractually impermissible.[1]

---

[1] See the Decision of Arbitrator Harry Graham in Case No. 11-06-(88-12-27)-0043-01-09, involving the Ohio Bureau of Employment Services. (Decision Issued, May 25, 1991.) Reviewing a lateral transfer from one county to another, Arbitrator Graham noted that Article 17 establishes well defined priorities for filling vacancies, and transfers are far down the list. He then held:

> "A vacancy must first be posted. In this case, Ms. Deissle moved into a position which the Employer decided to fill. Middletown was understaffed. To improve the situation a position was added to the complement at Middletown. It was a permanent full-time position. When filling such positions the Agreement clearly, unmistakably, and unreservedly requires that they be posted. That did not occur in this case. Upon posting, employees are permitted to bid. That did not occur in this case either. Employees did not bid because they did not know of the vacancy. It was not posted. Employees could not exercise their bidding rights under Section 17.04 of the Agreement. Similarly, the 'qualified

A second Union allegation is that "prepositioning" was responsible for elevating the junior employee at the expense of Grievant's seniority rights. "Prepositioning" is a term of art. It occurs when Supervision intentionally grants out-of-classification work assignments to an employee, thereby influencing his/her position audit. The practice is forbidden by both law and contract. Ohio Revised Code, §124.14(E) states:

> The personnel board of review shall disallow any reclassification or reassignment classification of any employee when it finds that changes have been made in the duties and responsibilities of any particular employee for political, religious, or other unjust reasons.

The contractual prohibition is more encompassing and direct. Article 19, §19.12 states:

> The Employer shall not abuse the job audit and reclassification process by prepositioning employees.

* * *

The Agency denied the grievance. It maintained that the vacancy was canceled by the position audit, not filled. In the Employer's

---

> employee with the most State seniority' was deprived of the opportunity for being awarded the position under Section 17.05 of the Agreement. **Employees must be provided the opportunity to exercise their rights to bid on a vacancy before a transfer may be effected.** [Emphasis added.]

judgment, audits and job bids are commensurate promotional tracks. Neither takes precedence over the other. The Agency's position throughout the grievance procedure was that the vacancy was eliminated because of the timing of Administrative Service's decision on the junior employee's reclassification request. Had it come earlier, the vacancy would not have been posted; if it had been later, the vacancy would have been filled pursuant to Article 17.[2]

The Employer vigorously contested the Union's prepositioning charge on two grounds. First, it asserted the facts did not confirm that Supervision had engaged in the prohibited activity; second, it argued that the Arbitrator lacked jurisdiction to decide the issue. Prepositioning, according to the Employer, is an Article 19 issue to be decided by the special Board of Hearing Officers established by that Article. It is not open for review or opinions by grievance arbitrators.

* * *

The grievance was presented to arbitration in Columbus, Ohio on June 5, 1991. The jurisdictional question was argued first, then the Advocates proceeded to the merits. It was clearly understood that the State did not waive its arbitrability protest by addressing the merits and that the Arbitrator would not examine the prepositioning

[2] The Employer notes that the job would not have gone to Grievant in either case. He was not the senior qualified applicant.

issue unless and until he determined that he had contractual authority to decide it.

Article 25, §25.03 of the 1986-1989 Agreement set forth the scope and limitations of arbitral authority. It provided in part:

> Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

POSITION AUDITS AND PREPOSITIONING; THE JURISDICTIONAL CHALLENGE

Position audits existed in Ohio long before collective bargaining and the resulting separation of State employees into represented and exempt classifications. Its mechanism and goals may be summarized as follows: When an employee feels s/he is performing duties of a higher-rated job than s/he currently holds, s/he can file a request for reclassification with the Department of Administrative Services. The process is outlined in Ohio Revised Code, §124.14(E):

> Upon the request of any classified employee, the director of administrative services shall perform a job audit to review the classification of the employee's position to determine whether the position is properly classified. The director shall give to the employee affected and to his appointing authority a written notice of the director's determination whether or not to reclassify the position

> or to reassign the employee to another classification. An employee or appointing authority desiring a hearing shall file a written request therefor with the state personnel board of review within thirty days after receiving notice. The personnel board of review shall set the matter for a hearing and notify the employee and appointing authority of the time and place of the hearing. The employee, appointing authority, or any authorized representative of the employee who wishes to submit facts for the consideration of the personnel board of review shall be afforded reasonable opportunity to do so. After the hearing, the personnel board of review shall consider anew the reclassification and may order the reclassification of the employee and require the director of administrative services to assign him to such appropriate classification as the facts and evidence warrant.

A more precise definition of "position audit" is found in Ohio Administrative Code, §123:1-47(59):

> "Position audit" - Means the evaluation of the current duties and responsibilities assigned to an encumbered position to determine proper classification.

As can be seen, a position audit was an avenue for promotion, separate from and independent of contractual job bidding. The negotiators of the 1986-1989 Agreement saw fit to grant both to members of the Bargaining Unit. Article 17 addressed job bidding while Article 19 incorporated position audits. The language of Article 19 modified and streamlined the statutory system, but retained most of the basics. The definition of the benefit in Article 19, §19.01 was practicably identical to that in the Administrative Code, and the Director of Administrative Services continued to have initial authority to grant

or deny applications for classification changes. A notable difference between law and contract, germane to this dispute, is that the Agreement eliminated appellate functions of the State Personnel Board of Review, substituting a mutually selected panel of neutral Hearing Officers to decide audit appeals. Six Sections of Article 19 were devoted to selection of Hearing Officers for position-audit appeals, procedures to be followed, and how hearings were to be conducted. The Employer's contention is that this special Board, rather than the regular arbitration panel, had jurisdiction over audit-appeal grievances. That position finds support in Article 19, §19.07 which stated what was to happen if either the Employer or the affected employee disagreed with the decision of the Director of Administrative Services:

> **§19.07 - Appeal**
>
> If the employee or the Agency disagrees with the decision of the Department of Administrative Services, the employee or Agency may appeal to the Director of the Office of Collective Bargaining in writing within ten (10) days of receipt of the decision. The employee may withdraw the audit request at this time. If withdrawn, no further action will be taken. The Director of the Office of Collective Bargaining shall schedule a hearing officer to review the case, and a hearing shall be scheduled to commence no later than thirty (30) days of the Office of Collective Bargaining's receipt of the request for appeal. The hearing date may be extended by mutual consent of the parties.

The award of a hearing officer was final, binding, and ordinarily non-appealable. Section 19.10 stated in part:

> The decision of the hearing officer is final and binding and not subject to the grievance procedure. The hearing officer shall be treated as an arbitrator, thus his/her decision may be appealed pursuant to ORC [Ohio Revised Code] Chapter 2711.

Section 19.12 -- the concluding provision of Article 19 -- spoke to the prohibition against prepositioning. Because the prepositioning language was placed at the end of Article 19 as part of the contractual position-audit process, the State contends that all prepositioning complaints, including this one, were within the exclusive jurisdiction of the hearing officers selected expressly for position-audit appeals. This means, according to the Employer, that the Arbitrator is absolutely without authority to rule on the Union's allegation that Grievant was the victim of prepositioning. The Employer argues:

> Article 19 has a self-contained resolution mechanism which includes arbitration. This is a distinct and separate forum. As such this case is in the wrong forum and outside the jurisdiction of the Arbitrator.

THRESHOLD DECISION ON ARBITRABILITY

To determine whether or not Grievant's prepositioning claim is properly before this Arbitrator, three questions must be asked and answered: 1) Is the proscription against prepositioning a contractual

condition of employment? 2) Does the claim that one has been harmed by the prepositioning of another constitute a complaint over application, meaning or interpretation of the governing Collective Bargaining Agreement? 3) If the answer to the second question is affirmative, is Grievant entitled to an arbitral resolution of his complaint?

The reason these questions are pivotal can be found in Article 25 of the Agreement. It describes grievances and comprehensively explains how they are processed. Section 25.01, Subsection A defines a "grievance" as, "any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement." Subsection B begins, "Grievances may be processed. . . ."

Article 25 is plainly designed to comport with Ohio Revised Code, §§4117.08(A) and 4117.09(B)(1). Section 4117.08(A) states that wages, hours, or terms and other conditions of employment are mandatory subjects of bargaining. Section 4117(B)(1) requires public-sector collective bargaining agreements to contain grievance procedures through which employees and/or their representatives can enforce negotiated wages, hours, and terms of employment. It provides:

> (B) The [public-sector collective bargaining] agreement shall contain a provision that :
>
> (1) Provides for a grievance procedure which may culminate with final and binding arbitration of unresolved grievances

> and disputed interpretations of agreements, and which is valid and enforceable under its terms . . .

It does not require great leaps of creative reasoning to find that the language on prepositioning sets forth a negotiated condition of employment. Article 19, §19.12 is concise and its meaning is unmistakable. It circumscribes Management Rights, stating, "The Employer shall not abuse the job audit and reclassification process by prepositioning employees." The Section goes beyond the statutory mandate to the State Personnel Board of Review (to "disallow" reclassifications upon finding there has been prepositioning), imposing the duty not to preposition directly on the Employer. The design could not be clearer. It was the manifest intent of the negotiators to ensure that job audits would be impartial and as fair as possible.

Once §19.12 became part of the Agreement, it established a condition of employment for all members of the Bargaining Unit -- those seeking job audits and those affected by them. It follows that Grievant's claim that he was bypassed for promotion because of the extra-contractual prepositioning of a junior employee constitutes a "grievance" as delineated by §25.01 of the Agreement.

The State does not argue with these conclusions. It does not deny that the Employee was entitled to a hearing on his grievance. Its position is that the entitlement was contractually restricted to a different forum -- before arbitrators appointed under Article 19 rather than Article 25.

The Arbitrator is prepared to agree with the State if Grievant would have had standing in an Article 19 arbitration. Upon examining that provision, however, it is clear that he would not have standing. To explain the point, it is helpful to walk through the provisions of Article 19. Section 19.01 stated what a position audit was, and §19.03 specified how the procedure was activated. It began: "An employee or the Appointing Authority may request in writing that the Department of Administrative Services, Division of Personnel, conduct an audit." The next relevant provision is §19.07 which stated how to initiate an appeal. It provided in part: "If the employee or the Agency disagrees with the decision of the Department of Administrative Services, **the employee or Agency** may appeal to the Director of the Office of Collective Bargaining in writing within ten (10) days of receipt of the decision."

It is apparent that Article 19 recognized only two parties to a position-audit dispute -- the employee directly involved and his/her agency. No other entity (except representatives of those parties) were authorized to invoke an appeal. No others received notices or had standing before the Article 19 tribunal. If Grievant had filed an Article 19 appeal protesting someone else's audit decision, it probably would have been summarily dismissed without a hearing. Therefore, the Employer's argument that "this case is in the wrong forum and outside the jurisdiction of the Arbitrator" is misleading. It implies there was a "right" forum for Grievant when in fact, if

regular arbitration under Article 25 was not available to him, he had no forum whatsoever.

The Arbitrator cannot ignore the Agency's cogent argument that the prepositioning language in §19.12 was part of Article 19, physically connected to the other position-audit provisions and, therefore, meant to be subject only to the exclusive arbitration procedure created by Article 19. But adoption of the position would abolish grievances and arbitrations for claims of consequential harm arising out of position audits. Of course, the parties were entitled to negotiate such exclusion. They could have adopted something like the statutory clause, stating that a hearing officer shall not grant reclassification if s/he "finds that changes have been made in the duties and responsibilities of any particular employee for political, religious, or other unjust reasons." They could have stated simply that only the individual subject to a reclassification dispute shall have grievance-arbitration rights. The negotiators did neither. They settled on language directed at the Employer, barring it from prepositioning. When they did that, they created a protection for all Unit employees.

* * *

Contractually created rights and employment protections are presumed to be enforceable. Every employee who alleges he or she was injured by a violation of the Agreement should have access to grievance-arbitration machinery. The only exception is when access

is precisely and unambiguously denied by contract. As demonstrated, Grievant could not have pursued his claim through Article 19 arbitration; he had no standing in that forum. His only recourse, therefore, was to seek resolution through Article 25 -- regular arbitration. Accordingly, it is ruled that his case is substantively arbitrable. The Employer's objection is disallowed.

ADDITIONAL FACTS AND CONTENTIONS; OPINION OF THE ARBITRATOR

The Employer refers to the job-audit mechanism as a "wild card," with "dramatic effect on the agency's ability to manage the workforce." The description is apt; this dispute demonstrates the potential interference with Management responsibilities that can come from an employee-initiated job audit. It can upset the Employer's planning and its ability to keep needed jobs attended.

ODOT did have a vacancy to fill. The Putnam County Garage had lost an Equipment Operator 2. The incumbent was on extended leave due to a long-term illness; then he retired creating a permanent vacancy. From the Employer's perspective, it is important to observe that the Agency did not have unbridled authority to offer promotional opportunities. Central Office Personnel, a division of the Department of Administrative Services, maintains strictly controlled quotas of classifications and their ratios to one another. In the Putnam Garage,

there was a limited number of Equipment Operator 2 positions, and ODOT was absolutely without power to increase it.

When the ill employee retired, his position -- and only that position -- became a bona fide vacancy. Local Management did not have an option to grant two or three Equipment Operator 2 promotions; it had but the single opening to fill. While undoubtedly aware that job-audit applications were pending, the Agency did not postpone its posting responsibility. It did not continue to fill the job with temporary cross-classification assignments as it had when the former Equipment Operator 2 was on leave. It acted in better faith than that, accepting bids without delay. There was no reason not to; job audits ordinarily took a long time to complete and there was little likelihood that a favorable decision on either of the pending requests was imminent.

An unexpected happening affected the Article 17 promotional process then underway. With uncommon speed, the Department of Administrative Services finished the junior employee's audit and granted him the promotion. It was unexpected for two reasons. First, the short time between the application and response was practically unheard of. The employee senior to both Grievant and the one promoted by Administrative Services filed his request at the same time, and it was months before he received an answer. Second, of all the individuals in contention for the Equipment Operator 2 position, the one who obtained it was the least likely candidate in terms of both

qualifications and seniority. The Highway Worker Superintendent testified there was "no way" he would have recommended the junior employee for the job; he did not feel he was even marginally qualified. Both Grievant and the senior applicant, in his opinion, were "head and shoulders" above the individual selected. The Superintendent vigorously asserted that he did absolutely nothing to preposition or otherwise effect a favorable outcome of the audit.

If prepositioning did occur, the opportunity for it came about through the illness of the former Equipment Operator. His leave entailed an extended period, and lower-rated employees (including Grievant) were assigned to his work day to day. According to the Union, the junior employee received more of those cross-classification assignments than anyone else. The Union contended that Grievant, aware of what was going on, often complained to Supervision. The responses were most unsatisfactory; the repeated answer to the Employee's protests was that Management could use people as it saw fit pursuant to Article 5 (the Management Rights Clause) of the Agreement.

The Union contends that the Equipment Operator assignments to the junior employee constituted prepositioning; and the experience gained through those improprieties was pivotal to that individual's reclassification and his ability to seize the vacancy from more senior applicants.

The Employer challenges the contention on two bases:

1) While the junior employee may have received more Equipment Operator work than Grievant, he received less than the most senior member of the crew -- the highest-rated bidder for the job. The senior individual also applied for reclassification through a position audit. He was significantly better qualified and more experienced than the junior employee, and Supervision was certain that his would be granted as well. Many months later, it was denied. This patent inconsistency spotlighted the problems inherent in position audits. They were dependent on human judgment and human error. In 1987, according to the ODOT Human Resources Manager, there were wide variations in Administrative Services audit responses. A lot depended on the Technician performing an audit, his/her practices, philosophies, and workload. Audit results lacked consistency; as often as not, disparate decisions were issued in similar cases. Such differences were so common that they were generally expected.

The Employer argues that the Administrative Services decisions granting the least qualified employee's application and denying that of the most qualified employee illustrate the speculative nature of position audits.[3]

---

[3] The unequal treatment and lack of predictability were probably two of the reasons the parties dropped the language of Article 19 in their 1989 negotiations. In its place, they agreed upon a procedure which pays employees for working in higher classifications and states in part that if an employee is found to be working in a classification other than his/her own, "the Director of the Office of Collective Bargaining shall direct the Agency to immediately discontinue such assigned duties."

The Employer concludes that Administrative Services' lack of steadiness, not supervisory prepositioning, generated the admittedly unwarranted promotion for the junior employee. ODOT supervisors had no interest in or preference for his elevation and did nothing to improve his chances.

2) The assertion that ODOT supervisors did nothing to aid the junior employee's job audit does not necessarily mean that aid was not given. Supervisors did not make the day-to-day individual work assignments. Grievant's crew was run by a Highway Worker 4 -- a lead person and a member of the Bargaining Unit who told each individual what to do. If unjustified heavy-equipment opportunities were allotted to the junior employee, it was the Highway Worker 4 who did it, not any supervisor or manager. The Employer points out that Article 19, §19.12 prohibited "The Employer" from abusing audits by prepositioning employees. Assuming prepositioning occurred (an assumption the State denies), it was not intended, initiated, directed, or approved by the Agency. It was the deed of a Bargaining Unit member -- a Highway Worker 4 -- not of "the Employer."

* * *

The Arbitrator finds that prepositioning was a strictly forbidden act of favoritism under the 1986 Agreement, and a violation was grievable by any Unit member who suffered consequential harm. As the Employer argues, prepositioning is an intentional act, and it was the Union's evidentiary obligation to establish that Grievant was

denied his right to effectively bid for a vacancy by the intentional prepositioning of another. This finding stems from the fact that the negotiators simply used the word "prepositioning" in Article 19, §19.12 without redefining it. In other words, they adopted the preexisting statutory definition. Ohio Revised Code §124.14(E) implicitly made intent a determinant part of prepositioning by stating that the State Personnel Board of Review was not to grant reclassifications if it determined "that changes have been made in the duties and responsibilities of any particular employee **for political, religious, or other unjust reasons.**" The word, "reasons" in this context is synonymous with "purposes," and purposes define intent. That does not necessarily mean that the Employer must have acted in pursuance of a conscious, deliberate goal. The kind of intent contemplated by the statute and the Agreement was "legal intent." Legal intent existed if the Employer unjustly gave the junior employee opportunities to operate heavy equipment when it knew or reasonably should have known it would create an illicit advantage for him and concomitant disadvantage for others in position audits.

If prepositioning influenced the junior employee's promotion, the Employer cannot avoid having to answer for it by stating that the violation was committed by a Highway Worker 4. While lead employees on highway crews are not technically members of supervision, they are invested with marginal supervisory powers. They direct their crews -- tell individuals what work to perform, what equipment to

operate. They do not exercise real Management powers; rather, they act as conduits for Supervision. They receive orders which they communicate to the workers in their crews. They perform as agents; and the acts they carry out within the scope of their apparent authority are attributable to their supervisors. Thus if a Highway Worker 4 committed prepositioning, his/her wrongful act was chargeable against the Supervisor(s) who permitted it to occur.

Summarizing to this point, a member of the Bargaining Unit who was not a party to a job audit but suffered damage or loss through someone else's prepositioning was entitled to process an Article 25 grievance. To succeed on the merits, the employee would have to prove prepositioning occurred and that Supervision was aware or reasonably should have been aware of it. In evaluating intent, acts of lead persons or other agents of the Employer are attributable to Supervision.

These findings provided fertile ground for the Union's case. Moreover, the record contained elements strongly suggesting that prepositioning might have occurred. The unexplained haste with which the junior, least qualified employee was advanced to Equipment Operator 2 through the audit procedure; the much longer time it took to deal with the senior, best qualified employee's audit and the fact that his application for promotion was denied seemed consistent with the prepositioning charge. The Union Advocate was quick to seize upon these factors. In his opening statement, he linked them together

with a forceful allegation of supervisory intent to preposition. He stated that Grievant complained to Supervision numerous times that the junior employee was getting a lion's share of Equipment Operator work and was being given an unfair advantage. The Advocate alleged that each time he made the complaint, Grievant was rebuffed.

The Advocate's introductory remarks were concise, yet strikingly well tailored to what the Union needed to prove. When this kind of argument is advanced at the start of a hearing, an arbitrator characteristically waits in anticipation for supporting evidence. The Union looked to Grievant to produce the evidence, but the Employee's testimony was anything but supportive. He literally annihilated his own case on prepositioning. When asked if the junior employee was given more heavy equipment assignments than anyone else, he answered that the work distribution was fairly even: "Maybe he [the junior employee] got to run machinery a little more, but we did about the same work." He also demolished his Advocate's intent argument even though he was asked painstakingly leading questions to evoke the response that he had complained often about the assignments. Instead, he answered, "I may have mentioned it a couple of times, but I really don't recall."

It is apparent that Grievant had no thoughts of esoteric bans on prepositioning when he launched this grievance. He was concerned only with equity. As he testified, "What made me mad was that [the junior employee] jumped two steps and grabbed the vacancy." The Union's arguments were provocative but amounted to nothing without

a convincing evidentiary foundation. When Grievant finished testifying, the Union's case on prepositioning consisted of conjectures and arguments -- neither of which justify a favorable award.

The Arbitrator is obliged to dismiss the prepositioning allegations. The Union's position must stand or fall on the question of whether or not Management was required to fill the Equipment Operator 2 vacancy in accordance with the bidding mechanisms in Article 17 of the Agreement. Before examining the issue, it is appropriate to make a threshold finding on a highly technical and arcane disagreement between the parties. The Union contends that the vacancy was not withdrawn; it continued from when it was posted until it was filled. This leads to the argument that all vacancies under the 1986-1989 Agreement had to be filled by the procedures in Article 17. The Agency counters that the vacancy was not filled; that it somehow disappeared when the Department of Administrative Services granted the job audit.

Without burdening this Opinion with detailed explanation, the Arbitrator finds the Union's theory of what happened more persuasive than the State's. When the former Equipment Operator retired, he left an opening which Management had to fill. It could not continue to cross-classify lower-rated employees, and selecting someone for the vacancy was not inconsistent with Central Office Personnel regulations or quotas. So the County Superintendent followed both the Agreement and established procedures by posting the open position for bids. Bidding-selection was not interrupted because the need

for an Equipment Operator 2 disappeared or because Management exercised its prerogative to cancel the position. The vacancy was filled, but by the Department of Administrative Service rather than ODOT.[4] The determinant issue, therefore, is whether or not the Employer violated Article 17 by filling a bona fide vacancy through Article 19 job-audit procedures.

A number of prior arbitral decisions in disputes between these parties tend to buttress the Union's argument that the vacancy had to be filled pursuant to Article 17. The ruling of Arbitrator Harry Graham has been mentioned. The case arose when an Interviewer from the Bellefontaine office of the Ohio Bureau of Employment Services[5] moved to Kettering. She asked Supervision for a new work location to accommodate her move, and an open slot was found for her in the Middletown, Ohio facility. She was absorbed into that office without change in her classification; no vacancy was posted and no competitive bidding occurred. The position would have been a promotional opportunity for other Middletown employees had it been posted, and the resulting grievance claimed that the transfer effectively filled

---

[4] Neither ODOT or Administrative Services constitutes a separate Employer. Both are Agencies of Grievant's Employer, the State of Ohio. More to the point, both had promotional roles under the governing Collective Bargaining Agreement -- ODOT under Article 17 and Administrative Services under Article 25.

[5] Employment Services employees are represented by the same Local Union under the same Agreement as ODOT employees; binding contract interpretations are applicable to both Agencies.

a vacancy in a manner which violated Article 17. Arbitrator Graham agreed. He directed the Agency to vacate and post the job.[6]

The thrust of the Graham award was that Bargaining Unit openings (other than entry-level) were to be filled strictly in accordance with Article 17. That ruling corresponded to others that had gone before. One was a stipulated award, signed by Arbitrator Rhonda Rivera, in which the Employer implicitly conceded that the demotion of a Project Engineer 3 to the newly created position of Design Engineer 2 violated Article 17 bidding rights.[7] In a similar case decided by this Arbitrator, ODOT had demoted an exempt supervisor into its highest-ranked Bargaining Unit classification. The Union grieved, maintaining that the supervisor was barred by Article 17 from walking into the job; that the position had to be posted for bids. In arguing for denial of the grievance, the Agency did not disagree with the Union's stance. It contended only that there was no vacancy:

> The demoted supervisor was not a senior member of the Unit. He was slotted into a job which would have been a desirable promotional opportunity had it been posted as a vacancy. There were eligible individuals . . . who could have filled it. **The Employer concedes that a vacancy encompassing the job undoubtedly would have gone to a member of the Bargaining Unit**, but urges that there was no vacancy. In the Agency's view, the position held by the supervisor

---

[6] Case No. 11-060(88-12-27)-0043-01-09. See quoted excerpt from decision at footnote 1.

[7] Case No. G87-1239.

> after the demotion was the same as before; only the functions and pay were changed.[8]

The Employer's concession significantly narrowed the issue to whether or not the demotion was to a "vacancy." There was basic agreement on the principle that, if a vacancy did exist, the Employer had no power to fill it through any mechanisms other than those specified in Article 17.

A common factor can be found in all these decisions. None of the openings became available through promotion, relocation, dismissal, quit, retirement or death of an incumbent. Each was created to be occupied for the first time. Nevertheless, all were determined to be "vacancies" to be filled by bidding. That fact makes this dispute different from the others; the difference seems to add strength to the Union's arguments.

Another difference detracts from the Union's position. Unlike the cited cases, the vacancy here at issue was filled by contractual means. The position-audit language was removed from the Agreement in 1989, but was a binding condition of employment when this dispute came into being. In fact, it was something the Union proposed at the 1986 bargaining table. Nothing in the 1986-1989 Agreement made Article 19 subordinate to Article 17. Accordingly, the job-audit provisions are as pertinent to this controversy as the job-bidding

---

[8] Case No. G89-0643, pp 2-3; emphasis added.

language. This is an obvious fact, and it unequivocally requires that the grievance be denied.

It is the rationale of the former arbitral decisions that makes an award denying the grievance unavoidable. Assuming, as has been held in the past, that anytime an employee moves from one position to another s/he automatically fills a "vacancy," it follows that each promotion through a position audit created and instantaneously filled a vacancy. The junior employee who prevailed in his position audit automatically filled a vacancy through a contractually legitimate method -- in a manner corresponding to Article 19 of the Agreement. It makes no difference if the opening pre-existed the position audit or came about as the result of the audit; in either case, it was a "vacancy." This grievance can be sustained only if the Arbitrator were to find that Management was obligated to create a brand new opening for every successful position audit. Such a ruling would improve the Union's benefits beyond anything specified in the Agreement. It would also violate the unqualified limitation on arbitral authority in Article 25, §25.03:

> The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

In sum, the Arbitrator finds that Articles 17 and 19 of the 1986-1989 Agreement carved out parallel and coequal paths for promotion.

The fact that an employee was able to use Article 19 to override Grievant's seniority and capture a vacancy did not violate any express terms or conditions of employment. Accordingly, the grievance will be denied.

AWARD

The grievance is denied. The 1986-1989 Agreement made job bidding under Article 17 and position audits under Article 19 parallel and coequal mechanisms for filling vacancies. Both were contractually authorized. Therefore, the fact that Grievant's job bidding rights were bypassed by a junior employee's successful position audit did not violate any contractual provision.

Decision Issued at Lorain County, Ohio, August 1, 1991.

Jonathan Dworkin, Arbitrator