

Oct. 15, 1985

J. 7

IN THE MATTER OF ARBITRATION

Article 1 Sec 1.1
1.12

BETWEEN

Article 4 Sec 4.4

Job Bidding
Sustained

KANSAS CITY AREA TRANSPORTATION
AUTHORITY,

Employer,

and

DIVISION 1287, AMALGAMATED
TRANSIT UNION, AFL-CIO

Union.

Gwen Rich, Edwina Christian,
Patricia Hamilton-Shaw, and
Sharon Bradford,

Grievants

Arbitrator's File No. 230

BEFORE

MELVIN L. NEWMARK

ARBITRATOR

Appearances:

For the Employer

Mark S. Bryant
1125 Grand Avenue
Suite 1610
Kansas City, MO 64106

For the Union

Janae L. Schaeffer
JOLLEY, MORAN, WALSH, HAGER & GORDON
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INTRODUCTION

Kansas City Area Transportation Authority, hereinafter called "Employer" and Local 1287, Amalgamated Transit Union (affiliated with the AFL-CIO), hereinafter called "Union", are parties to a collective bargaining agreement, hereinafter called "Agreement", effective from the 15th day of November 1983 through the 14th day of November 1985. The parties have agreed that the Agreement was in full force and effect when the events giving rise to this Grievance occurred and that the Grievance is now properly before this Arbitration Board composed of Gayle Holliday, Employer-appointed Arbitrator; Otis Rusher, Union-appointed Arbitrator; and Melvin L. Newmark, an Impartial Arbitrator jointly selected by them.

The Union filed this Grievance on behalf of Gwen Rich, Edwina Christian, Sharon Bradford and Patricia Shaw, employees of the Company, hereinafter referred to as "Grievants" alleging that the Employer violated the collective Agreement by refusing any of them a four workweek trial period on a job opening for which they were the sole applicants. A hearing was held at the Employer's facility, 1350 East 17th Street, Kansas City, Missouri, on July 2, and 3, 1985.

In addition to Mark S. Bryant, Attorney at Law, the following persons were present on behalf of the Employer: Gayle Holliday, Deputy General Manager of the Transit Authority;

Marybeth Van Sice, Management Analyst of the Transit Authority;
Fern Cole, Director of Finance of the Transit Authority and Sue
Whitten, Payrole Supervisor of the Transit Authority.

In addition to Janae L. Schaeffer, Attorney at Law, the
following persons were present on behalf of the Union: Otis
Rusher, President of ATU Local 1287; Nancy Santilla; Patricia
Burgess; Linda Coleman and the four (4) Grievants; Edwina
Christian, Gwen Rich, Patricia Shaw and Sharon Bradford.

At the hearing the Parties were afforded full
opportunity to present evidence and to examine and cross-examine
the witnesses who were sworn and sequestered. They stipulated
that all of the provisions of the Agreement concerning the filing
and processing of the Grievance had been properly complied with
and they waived any requirement that Arbitrator file his opinion
within any specific number of days following the close of the
hearing. Post-hearing briefs were timely filed with the
Arbitrator on September 9, 1985.

CONTRACT PROVISIONS INVOKED

The parties believe that the following provisions of
their Agreement are both relevant and pertinent to the dispute:

ARTICLE I

GENERAL PROVISIONS

Section 1.1 Purposes of Agreement

It is recognized by the contracting parties
that the welfare of the employees depends upon the
welfare of the Authority, which in turn is

dependent upon the good will and patronage of the public in the communities served; and, since these mutual advantages can only be gained by giving the highest type of service, the Union agrees to exert every reasonable effort to raise the standard of ability and efficiency of the employees in order that they may become increasingly proficient in their duties and make the service more desirable and attractive to the public; and the Authority agrees to cooperate in these efforts.

. . .

Section 1.12. Management-Discipline.

(a) The Union recognizes that the management of the business, including the right to direct the working forces, to prescribe, effectuate and change service and work schedules consistent with and not contrary to any specific provisions contained in this Agreement, to plan and control corporate operations, to introduce new or improved facilities or operating methods, to relieve employees from duty because of lack of available work or for other legitimate reasons, to transfer them, to determine the minimum qualifications of experience, health and physical and mental fitness for any job covered hereby and to appraise the qualifications of any individual therefor, is vested exclusively in the Authority; subject, however, to the seniority rules and grievance procedure hereinafter set forth as concerns any employee to whom this Agreement is applicable and who may be relieved from duty or transferred or whose qualifications may be questioned.

. . .

(e) Warning slips will be removed from an employee's file after twelve (12) months.

. . .

(h) Employees shall be called in and notified in writing of any disciplinary actions placed in the employee's record. Customer complaints that have not been investigated and verified shall not be used as a basis for disciplinary action.

Section 4.4 Bidding--Abandoning Jobs.

. . .

When a job vacancy is to be filled (except temporarily as noted above), or an opening is created by a new job, notice of such vacancy or opening, with the job description and rate applicable thereto, will, within three (3) workdays after such vacancy or opening occurs, be posted on the bulletin board of the Seniority Unit affected for a period of not less than three (3) workdays (Saturdays, Sundays and Holidays excepted). If a job vacancy is not to be filled, a notice will, within three (3) workdays after such vacancy occurs, be posted on the bulletin board within the Seniority Unit affected, to the effect that the job is being abandoned and the reason for such abandonment. Any employee desiring to bid on a posted job, as above-provided, must have completed the sixty (60) day probationary period and shall submit his bid in writing within said three (3) workdays. The bidder with the greater seniority in his Seniority Unit, who is qualified, will be assigned to the job as soon as possible. If no qualified bidder bids, bidders qualified for a four (4) workweek trial period will be assigned at their existing wage rate, unless the employee is bidding for a lower-rated job in which case he will be immediately assigned at the rate of the lower job. Ability and merit being sufficient, seniority shall prevail in determining those eligible for the four (4) workweek trial period. The Authority will attempt in good faith to qualify the employee for the job at the earliest possible date. If at the end of the four (4) workweek trial period the employee is unable to qualify, he shall return to his former job, provided it has not been filled by an employee of greater seniority. If the former job has been so filled, the disqualified employee shall not be permitted to exercise his unit seniority to bump any job of a rate classification higher than that of his original job in his own Seniority Unit. . . .

In the event a posted job is not bid by a qualified employee or is not bid by an employee qualified for a trial period for four (4) workweeks, the authority . . . may fill the job with a new employee. . . .

ISSUE

Did the KCATA violate Section 4.4 of the collective

bargaining agreement when it failed to give any one of the Grievants a four work week trial period for the job of Accounts Payable Clerk?

FACTS

The Kansas City Area Transportation Authority, commonly referred to as the KCATA, provides public bus transportation in the Kansas City area which is partly in the State of Kansas and partly in the State of Missouri. The employees are divided into three seniority units; maintenance, transportation and office/clerical. There are about seven to eight hundred employees in the office/clerical seniority unit. The Agreement requires the KCATA to fill any job vacancy by promotion from within on a seniority basis within the Seniority Unit in which the vacancy occurs. Section 4.4 of the Agreement describes the steps to be followed by the KCATA in filling the vacancy.

By and large that section provides that when a job vacancy is to be filled a notice of such vacancy must be posted on the bulletin board of the Seniority Unit affected and any employee desiring to fill that vacancy must submit his bid within three (3) workdays. The bidder with the greater seniority in the Seniority Unit affected, who is qualified, will be assigned to the job as soon as possible. If no qualified bidder bids, then bidders qualified for a four (4) workweek trial period become eligible for the four (4) workweek trial period. That section further provides that ability and merit being sufficient,

seniority shall prevail in determining those eligible for the four (4) workweek trial period.

In the event a posted job is not bid by a qualified employee or is not bid by an employee qualified for a four (4) workweek trial period then the KCATA may fill the job with a new employee.

The qualifications which an employee must possess in order to qualify for a promotion are not set out in Section 4.4. Section 1.12 of the Agreement however gives management the exclusive right to determine the qualifications for any position. When the KCATA posted the job opening on November 29, 1984, the general qualifications as well as the special qualifications which a candidate would be required to have were listed, together with the summary of the duties of the "Accounts Payable Clerk".

Since 1979 the KCATA has given a series of tests which it deemed to be job related for many vacancies, (1) Accounts Payable test, (2) Accounting test, (3) a math test, (4) calculator test, and (5) copying and checking test. The applicant for the accounts payable vacancy was required to achieve a test score of 75% on each of those test and in addition to other qualifications have a good attendance record. Because the KCATA did not believe any of the persons already employed by Company were qualified either for immediate promotion or for a four workweek trial period a person who had not previously been employed by KCATA was hired to fill that job vacancy.

As a result Union, on behalf of the four (4) employees; Gwen Rich, Edwina Christian, Sharon Bradford and Patricia Shaw all of whom believed they were qualified for a four (4) workweek

trial period, filed this grievance.

Fern Cole, employed by Company as Director of Finance, during the first day of the hearing, testified in detail as to why she did not believe any of the four (4) Grievants were entitled to a four (4) workweek trial period. As head of the finance department she said she was responsible for concluding that none of the four Grievants qualified for a four workweek trial period because none of them received a 75% or better score on each of the five different tests.

She said the accounts payable clerk was responsible for all of KCATA's cash disbursements except payroll; for cash flow planning; for bank reconciliations; for handling cash discounts on invoices and credit memos; for monthly mileage reports and fuel reports; for reconciling accounts payable to the general ledger; for adjusting journal entries in the bank reconciliation and more.

In order to do all this, Cole thought, the applicant had to be a high school graduate; have a consistently good attendance record inasmuch as there was only one (1) accounts payable position; have the ability to make accurate calculations at a reasonable rate of speed; have a working knowledge of basic accounting and an understanding of department policies and procedures. She also thought that it was necessary that the applicant get at least 75% on each of the following tests: math, accounts payable, calculator, checking, copying and 35wpm typing. Throughout the day, while she was testifying, she referred to the vacancy as an "accounting position" and the need for the

applicant to have a basic debit/credit understanding.

The accounts payable test she thought was " basic accounting". In her opinion the job called for a sufficient knowledge of accounting which would enable a person to perform their job as a accounts payable clerk. That included, she said, an understanding of the meaning of debt/credit, an ability to reconcile accounts and the ability to make general entries to the general ledger.

None of the applicants, she said, passed all of the required tests. All of them, she said, failed math.

The most senior of the four Grievants she said was Gwen Rich who achieved a score of 75% or better on all of the tests except the math test. On that test she had a score of 69%. In her opinion, she said, this indicated that Gwen Rich had a weak conceptual grasp of math.

In connection with the absentee record of Gwen Rich. Cole testified that while Rich's absentee record in 1983 did not exceed the Company average it did exceed the Company average in 1984 and for part of 1985. Since her attendance, Cole said, had not been consistently good she was not acceptable for promotion.

On cross examination Fern Cole, admitted that Gwen Rich had an average score of 76% on her five test scores! Cole also admitted that Pat Shaw had an average of 75% on her five test scores and that Sharon Bradford, who passed all of the tests except math received 73% on math which was just 2% short of the passing score required on that test. Cole also acknowledged that Edwina Christian only missed some of the math questions which involved fractions.

With reference to the attendance of the four (4) Grievants, it was brought out that Sharon Bradford, who had an otherwise perfect attendance, was absent above the acceptable average because of a workmens compensation injury she received and because in 1982 she was pregnant. Both therefore were sick leaves and not unexcused absences. Two (2) of the Grievants, Pat Shaw and Edwina Christian had acceptable attendance records. Gwen Rich also had an acceptable attendance record but was absent for a period of time because of a medical condition. (Again sick leave and not unexcused absences.)

Linda Coleman who was employed April 15, 1985 to fill the vacancy of accounts payable clerk even though she had not previously worked for the KCATA and who currently holds the job of Accounts Payable Clerk testified as a witness for the Union.

After being sworn, at the outset of her testimony, she readily admitted that she understood and realized that if this Grievance was sustained she would probably lose her job. She then went on to relate what she did in a typical day as the Accounts Payable Clerk.

Her day began, she said, with the receipt of invoices from the vendors from whom goods and services were purchased by KCATA. She alphabetized those invoices and then filled out a payment voucher for each vendor. After checking to determine that all of the vendors invoices were listed on the same voucher she then checked to see if a discount was offered to KCATA. If so, she said, she calculated the dollar amount of the discount and entered it on the voucher.

other days there were as many as twelve different discounts to compute. All of the calculations were done on a calculator. The discounts did not represent very much money since each discount ranged in amounts from only 17 cents to \$22.00.

She said she then coded all of that information on a payment voucher and created a batch sheet for each 25 payment vouchers. Her supervisor, she said, then reviewed and initialed each batch sheet and sent them to data processing where the information is entered into a computer. If there are any errors the computer usually catches them. If errors are spotted, the vouchers are returned to the accounts payable clerk for correction.

As the accounts payable clerk she said she also completed a small mileage report for buses which are chartered. This requires a little addition and division on a calculator. That report too is reviewed by her supervisor. In addition she completed two fuel reports which involve addition on a calculator. Those reports were reviewed by her supervisor. Finally she said she reconciled two bank statements which required addition and subtraction on a calculator and that reconciliation was likewise reviewed by her supervisor.

She said that her work never involved the use of any fractions and that the ability to add, subtract, multiply or divide was not necessary as long as she had a calculator. When asked what was the main skill required of her as an accounts payable clerk, she said, "its probably not a skill, but I would call it patience. Patience is probably the number one necessity,

and after that being able to run a calculator."

When asked on cross examination whether or not it was necessary for her to be taught basic accounting when she was hired initially as the accounts payable clerk, she replied, "this is not an accounting position, so there would be no need to teach me accounting." She then went on to explain that the "accounts payable clerk is a clerk position, and not an accounting position."

"I am not required", she said, to make accounting entries or accounting judgments. I only need to know the difference between an invoice and a credit memo. Further than that I really don't need to know about debits and credits. It is clerical work." She said she thought she was "significantly over qualified for her job and had no need whatsoever to know the difference between a credit and a debit."

When she began working for the Authority she said she received several hours of instruction from the temporary employee who had been doing the work before she was hired. She said that her job, rather than being a challenge, was boring. After she finished testifying the Union completed its case by calling to the stand each of the Grievants.

Edwina Christian, one of the Grievants testified that she had never recieved any disciplinary warning notices suspensions or other bad marks concerning either her work or her conduct. She began work as a bus driver and from there was transferred to the information center. From there she became a data entry clerk. She had graduated high school about seven

years before she went to work for the KCATA. In between the time she graduated high school and went to work for KCATA she worked for the City of Kansas City in the Water Department, in the Probation Department and in the Alcohol Training Program as a clerk typist. She is currently an information clerk for KCATA and in addition to her other duties sells monthly passes whenever she pinch hits for the PBX Operator. For a while she worked, both at Phillips Petroleum Company and at Macys, as a cashier. In high school she took an accounting course, an algebra course and a bookkeeping course. She demonstrated by her answers to a number of questions that she knew the difference between a credit and a debit.

Gwen Rich currently is also an information clerk at KCATA. Prior to going to work for KCATA she had been an independent consultant with a cosmetic company and in that capacity had to keep records and had to rely on her knowledge of math and bookkeeping to be successful in her work. She graduated from high school in Kansas City in 1945. In the interim period she had worked for other companys where the job requirements did not involve the use of math or bookkeeping. She explained that she was absent most of January and February of 1984 because she attended an alcohol addiction recovery program in Shawnee Mission Hospital and thought that she was now completely curred.

ie Patricia Shaw, formally known as Patricia Williams and Patricia Hamilton is employed by the KCATA as a PBX Receptionist and Lost and Found Clerk. Prior to that she had been an information clerk and prior to that a data entry clerk. She began working for the KCATA as a schedule clerk which involved

typing up route schedules for the bus drivers. She had to check to make sure that the times on the route sheets and the headway sheets for the drivers were correct and accurate.

Prior to going to work for KCATA she worked for General Services Administration in the Personnel Department. In that connection she did some bookkeeping. She was a high school graduate and attended Penn Valley Community College where she took math, accounting and business courses.

She said that during 1983 she was pregnant. Her child was born in 1984. In 1985 she had major surgery. This accounted for her high degree of absenteeism, (actually sick leave) during that period.

The last Grievant to testify was Sharon Bradford a mail clerk for the KCATA. In addition to being a mail clerk she has some clerical duties involving the posting of sick leave and vacation time. Prior to that she had been an information clerk, receptionist and PBX operator. She graduated High School in 1968 and attended Penn Valley Community College off and on for 8 years. While at Penn Valley she completed courses in fundamentals of accounting, math for business, introduction to data processing and introduction to business and personal finance. She believed that she suffered from math test anxiety. She explained that her duties as a Union Steward often took her away from her regular work and that this may have irritated her supervisor.

COMPANY'S POSITION

Company contends that neither Gwen Rich, Edwina Christian, Patricia Hamilton-Shaw, nor Sharon Bradford are qualified for a four (4) workweek trial period as Accounts Payable Clerk because none of them, as the Agreement required, possessed sufficient ability and merit.

The Agreement provides that ability and merit being sufficient, seniority shall prevail in determining those eligible for the four (4) workweek trial period. This is a modified seniority clause which gives the senior employee preference only if he/she possesses sufficient ability to perform the job. Under this type of "sufficient ability clauses" only minimum qualifications are generally enough.

Since it is rare that there will be an employee in the company who has had previous work experience of a similar nature to fill a job vacancy an employee is only promoted to a four (4) workweek trial period.

To fill this promotion, the KCATA considered (1) the written tests; (2) applicants attendance record; (3) applicants past job performance at the Kansas City Area Transportation Authority; and (4) related experience, if any with the KCATA or others.

The KCATA believes that the tests were reasonable and appropriate for the job opening and suggests that the opinion of Arbitrator Burnstein who considered the tests in a previous Arbitration case be given precedential value.

Arbitrators generally have held that written tests used to determine ability must be (1) specifically related to the requirements of the job, (2) fair and reasonable, (3) administered in good faith and without discrimination and (4) properly evaluated. The math and accounts payable tests consist of basic accounting/bookkeeping concepts and procedures.

Martha Howard who last held the position of Accounts Payable Clerk had taken those tests and was assigned to a four (4) workweek trial period after she passed them.

Employer believes that it is probable that each of the applicants had the intelligence to pass the math test but did not devote sufficient time in preparation for taking those tests. Failure to prepare for the tests therefore, according to Company, demonstrates that the applicants do not merit the promotion.

The only objective indicia of the applicants ability to perform the math calculations or their understanding of basic accounting concepts of procedures is their respective test performance.

Company therefore submits that the failure of all of the Grievants to pass the basic math tests and the inability of two of the applicants, Edwina Christian and Patricia Hamilton-Shaw to pass the accounts payable tests was sufficient reason for the Company to deny them a four (4) workweek trial period for the vacancy.

Because the Accounts Payable Clerk is the only employee in the Company available to take care of that particular job it is necessary that the person filling that job have a good past record of attendance. Except for one of the past years the

absenteeism of Gwen Rich, Patricia Hamilton-Shaw and Sharon Bradford exceeded the Company average. In 1983 Bradford was absent 5% and Rich was absent 3% of their assigned work time. In 1984 Bradford was absent 16% and Rich 27% .

While admitting that none of the applicants had ever been disciplined for poor attendance the question remains as to whether their poor attendance merits a promotion. For this reason alone therefore Company beleives it was justified in refusing to give Gwen Rich , Patricia Hamilton-Shaw or Sharon Bradford a four (4) workweek trial period as the accounts payable clerk.

In regard to current job performance Company points out that Grievant, Patricia Hamilton-Shaw, who is currently assigned to the PBX Center, accepted collect personal telephone calls in December of 1984 and in February and March of 1985.

In addition to answering the phones Shaw also handles the sale of monthly bus passes to the public. On a number of occasions she has failed to put the cash box, which contains the bus passes and \$30.00 in cash, in the vault at night when she leaves. In 1984 Shaw had a shortage of \$15.00 for which she reimbursed the Company.

Sharon Bradford, in connection with her work, has demonstrated an inability to reconcile bank statements because she has been unable to reconcile the adjustments she had to make for the insufficient funds checks which were returned and which had been given to her for the purchase of bus passes.

Additionally Bradford, as utility clerk in the payroll

department, often has errors in her calculations for sick leave and vacation benefits.

Based upon their current job performances the KCATA beleives they are not entitled to a four (4) workweek trial period.

In conclusion the Company contends that the tests given to the Grievants are an excellant review of their probability of success at the job they are applying for and do not violate the Agreement.

UNION'S POSITION

Linda Coleman, the current accounts payable clerk testified that failing the math test did not indicate that an applicant was not qualified for a four (4) workweek trial period. She said, for instance, that her work did not involve the use of any fractions. She also stated that all of the additions, subtractions, divisions and calculations of percentages required on the job were done by her on a calculator.

She emphasized that the Accounts Payable Clerk is a clerical job and is not an accounting position. "I am not required," she said, "to make accounting entries or accounting judgments." "All I need to know about accounting is the difference between an invoice and a credit memo." "Other than that," she said, "I don't really need to to know about accounting concepts of debits and credits in order to do my work as the Accounts Payable Clerk, which is simply a clerical job." "All that is required," she said, "was patience and the ability to run

a calculator." She thought that she, herself, was significantly over qualified for the job.

In order to qualify for a trial period of four (4) workweeks the KCATA requires that: (1) the applicant pass all of the required tests; (2) have a consistently good attendance record; and (3) have a good work record.

Fern Cole, the Director of Finance testified that none of the four (4) Grievants passed the math test and that she thought it was the most important test. The Union points out, however, that none of the Grievants finished the Math test. Each of them missed or left blank at least one or more of the questions. They were not given enough time to finish the test.

In addition to failing the math test, Cole testified that Rich had " unacceptable attendance" being away from her job close to 25% of the time. In arriving at that figure Cole failed to give Rich credit for contractual time off; three weeks of vacation and ten holidays. Time that any employee at KCATA would not be at work. In addition in 1984 Rich was absent most of January and February and part of March because she was on sick leave in an alcohol recovery program in the Shawnee Mission Hospital. Cole, however, included that sick leave in calculating Rich's 1984 absence average. Rich actually had 16 months of perfect attendance from January 1983 to May 1985. In 1983 for instance her absenteeism was only 3% compared to the Company wide rate of 10%. Rich never accumulated more than 25 points for unexcused absences under the KCATA program and so she never came near the 75 point level which would have required that written notice be issued to an employee.

Rich had once been selected as KCATA's "employee of the month". An honor for which only one out of seven or eight hundred employees is selected each month. She also recieved numerous commendations letters while she was employed at KCATA. In addition Rich had previous bookkeeping experience prior to going to work for KCATA.

Cole testified that Bradford, in addition to failing the math test, had a unsatisfactory job performance record in that she failed to accurately compute the sick leave cards. Her failure, Cole said, was that Bradford would mix the unit of measurement on the cards by interchanging days and hours. Cole, however, failed to mention that in 1984 KCATA converted to using days instead of using hours in the computation of time cards. In the three year period in which Bradford totaled up sick leave cards for several hundred office and shop employees, evidence showed that there were only 12 errors.

Bradford was accused of having excessive absences. Actually once she was on sick leave and on another occasion because she suffered a job related Workmens Compensation Injury, her absences should have been excused.

The so called inability of Bradford on one (1) occasion to properly seal envelopes was the result of a mechanical problem with the Pitney Bowes sealer. Her immediate Supervisor, Sue Witen, testified that Bradford was " very cooperative" and a good worker. Supervisor Witen concluded that Bradford "maintained an acceptable level of performance". In addition, Bradford had other positive factors entitling her to a four (4) workweek trial

period. She completed several courses at Penn Valley Community College such as fundamentals of accounting and math for business.

Cole testified that she did not give Patricia Shaw a trial period as Accounts Payable Clerk because, in addition to failing the math test, she thought Shaw had poor attendance. However, Shaw testified that she was absent because she was on maternity leave in 1984 and had major surgery in 1985. She was away, therefore, on both occasions for sick leave and not for unexcused absences.

Edwina Christian, was also accused by Cole of having a poor performance record. Actually Christian's absentee rate was well below the Company's average and she had a satisfactory job performance record. She did not, during the calendar year 1984, receive any disciplinary notices or counseling sessions. In addition Christian had previous experience in reviewing charge accounts and balancing charge payments when she worked at Macy's and Phillip Petroleum, prior to coming to work for KCATA.

Martha Howard who previously held the position of Accounts Payable Clerk was given a four (4) week trial period in 1982 because she passed all the tests even though she had been suspended because of lack productivity and poor workmanship, had failed to enter proper data into the computer and had failed, on a number of occasions, to follow instructions according to memos in her personal file.

The purpose of the four (4) workweek trial period is to afford an employee the opportunity to demonstrate that he or she has the ability for the job in question. To show that she could, with some familiarization, achieve the necessary skills within a

reasonable amount of time in order to perform the job in an acceptable manner. The employees of the KCATA by agreement are given a preference over outside applicants (new hire) in the filling of job vacancies.

While Section 1.12 of the Agreement reserves to the management the right to "determine the minimum qualifications of experience, health and physical and mental fitness for any job" that right has significant limitations. First and foremost is the limitation imposed upon management because of the seniority rules. Union points out that in 1982 Sharon Bradford, one the Grievants, filed a grievance because Company did not promote her to a different job opening.

Arbitrator Merton C. Bernstein, in that case, considered the rules promulgated by Company to determine the qualifications which an applicant had to meet to be entitled to the promotion. He said that such rules had to be pertinent to the job opening and reasonably measure ability or potential. Instead, he said, he believed that the tests and grades chosen as passing (which were the same tests as in the instant case) appear to have been rough cut measures of basic competence in the subjects tested rather than scientifically validated, precisely calibrated measures of that competence. For that reason he concluded that the failure to pass the tests could not be used as the sole means for disqualifying an applicant.

That conclusion, Union claims, reflects the weight of Arbitrable authority requiring a test to be related to the skills and knowledge required in the job. (See, for instance,

The math test which was given was not related to the knowledge required for the job. Linda Coleman, the one person who would know, testified that she was never called upon to make any calculations involving fractions. So the fact that all of the Grievants missed one or more of the fraction questions on the math test does not mean they were not competent. That test, therefore, should not be used to disqualify them.

In addition the math test failed to reasonably measure potential ability. Putting a time limit on the test transformed it from a test measuring ability to something else. Whatever, validity the test originally had as a reasonable measure of ability was destroyed by tampering with it. By adding an additional question without giving the applicants additional time it became a different test. The unreasonable time restraints rendered the math test unreliable as an indicator of the Grievant's mathematical abilities.

While tests may be used as an aid in judging ability or as a "verification" of ability, an employer may not base his determination of ability solely upon the results of the tests. (See Elkouri and Elkouri, How Arbitration Works page 622 Fourth Edition 1985). It appears that Company refused to give the four (4) workweek trial period to applicants who failed the tests even if they were otherwise qualified.

The use, therefore, of the tests as a criteria in awarding the four (4) workweek trial periods are contrary to the weight of Arbitrable authority in general and certainly

contravenes the award of Arbitrator Bernstein in 1982.

Decision

"One of the most severe limitations upon the exercise of managerial discretion is the requirement of seniority recognition. Indeed, the effect of seniority recognition is dramatic from the standpoint of employer, union, and employee alike since every seniority provision reduces, to a greater or lesser degree, the employer's control over the work force and compels the union to participate to a corresponding degree in the administration of the system of employment preferences which pits the interests of each worker against those of all the others.

In the absence of a definition of the term in the collective agreement, seniority 'is commonly understood to mean the length of service with the employer or in some division of the enterprise.' Seniority 'means that men retain their jobs according to their length of service with their employer and that men are promoted to better jobs on the same basis.' 'It is generally recognized that the chief purpose of a seniority plan is to provide maximum security to workers with the longest continuous service.' (Elkouri and Elkouri How Arbitration Works Fourth Edition, page 586)

The KCATA, obviously, like many other companies is reluctant to give up its control over the work force and quite naturally would like to avoid a burdensome seniority system. Having agreed to do so, however, when it entered into the agreement with Union it is now left with no choice. It must accede to its original promise and allow the Union, under the terms of the agreement, to provide maximum security to its members with the longest continuous service.

Job security is a benefit to members of the Union that

is equal to, or, at least, almost equal to higher wages. Union achieved a substantial degree of job protection at the bargaining table when it received from the Company a promise that in the layoff or promotion of its employees it would give preference to the employee with the longest continuous service.

As Arbitrator Jones said in Overly Mfg. Co. of Cal. 68 LA 1343, 45-46 (1977):

"A major reason why unorganized workers decide to elect a union as their representative is to insulate their job tenure from the adverse effects of the preferential treatment of favored workers in cases of workforce reduction and work opportunities or the retaliatory decisions of supervisors whom they might offend.

"The seniority system has obvious imperfections when compared to an ideally efficient method for determining whom to retain or dismiss in a workforce reduction. To the extent that it is enforced, however, seniority does militate against personal retaliation or preference. * * * "

In the give and take that prevails at the bargaining table Union, in the instant case, consented to a type of a modified seniority clause. It agreed that the senior employee was entitled to preference only if he or she had sufficient ability and merit. Under this type of provision it is only necessary to determine whether an employee with seniority would probably do the job. If he probably could then in any comparisons between such an employee with seniority and either a junior employee or new hire the job must be given to the senior employee. (How Arbitration Works, Fourth Edition, page 612 and American Sawmill Machinery Co. 79 LA 106, 108 (1982) where Arbitrator Harrison held, under this type of clause, that "job

must be given to the senior bidder . . . regardless of how much more competent some other bidder may be.")

In another recent case where the senior employee admitted, in effect, that he could not do the job but that "he could learn to do it and was willing" Arbitrator Schwartz, Atlantic Spring Mfg. Co., Inc. 79 LA 1147, (1982) held that the company violated the agreement when it awarded the job to a junior employee it believed to be better qualified by reason of his training and experience. In this case the junior employee is the equivalent to new hire)

To the same effect see Lancaster School Dist., 72LA 693 (1968) where Arbitrator Raymond held that the School District acted capriciously and unreasonably when it promoted a less senior employee who it believed to be better qualified for the job vacancy than the Grievants. In that case the agreement between The School District and the custodians contained a modified seniority clause which, in effect, "made the employer's decision as to the final selection of the most satisfactory and/or best qualified applicant final and binding" In reaching that conclusion Arbitrator Raymond held that "Management's action must not be capricious, arbitrary, discriminatory . . . or unreasonable". (emphasis supplied)

And lastly in Illinois Bronze Point Co., 71 L.A. 850, 852 a case much like the instant case, Arbitrator Garmen held:

" The issue of seniority vs. ability is a common problem for managements and unions and sometimes it can be a very complicated one. There are many different possible ways to analyze and describe or define "ability", e.g.:

general or specific knowledge, mental capacity or alertness, physical strength or dexterity, experience or skill on the particular or similar jobs or productivity, etc.

. . .

The Agreement refers only to "ability" and does not differentiate between present and potential ability, . . . In addition, while it does not state, as some contracts do, that the senior bidder must automatically be given a trial period, it states that a senior employee "who has the ability to do the job" . . . is entitled to a "thirty calendar days" trial period. . ."

Turning now to the case at hand Arbitrator is concerned and even more, actually believes, that Finance Director Fern Cole as well as others in the Company, for reason or reasons unknown to Arbitrator, exaggerated and grossly misunderstood and misinterpreted the nature of the work which the accounts payable clerk did.

Referring constantly, as she did, to the job of the Accounts Payable Clerk as an accounting position, which it is not, she, as well as others in the Company, unfairly and unreasonably led the KCATA to breach it's Agreement with Union by hiring a new employee, Linda Coleman, who, in her own words was over qualified, as the Accounts Payable Clerk.

In order to do so, sick leave, pregnancy and workmen's compensation leave as well as other excused absences such as vacations rightfully taken by the Grievants over the years were unfairly lumped together to make it appear that some or all of the Grievants did not merit a promotion because they were absent to often.

In addition a passing score of 75% on each test given to

the Grievants was required rather than on average score of 75% on all 5 of the tests or, as in the case of one of the Grievants, an unwillingness to bend just 2% on one of the tests for not giving the Grievant a four (4) week trial period.

Nor was there sufficient credible evidence that the so called "math" test was pertinent to and reasonably related to the skill and knowledge required for the job.

In spite of the average, acceptable work performance by all four of the Grievants over their past years with the Company the KCATA accused, but was unable to prove, that any of the Grievants were not entitled to a promotion. A promotion, that is, to a four (4) workweek trial period for a job which did not require a very high level of skill or intelligence.

It is important to bear in mind that what is at stake here is not a job promotion but only the opportunity for each of the Grievants to demonstrate that they could satisfactorily perform the work of an Accounts Payable Clerk if they were given a four (4) week trial period to prove it. None of them is asking for a permanent position. Each of them believes that the Agreement assures them that if the opportunity arises they will be given such a chance to demonstrate their ability to perform on the job.

The KCATA, upon whom the burden rested to prove the four (4) Grievants were not entitled to that chance was not able, in the opinion of Arbitrator, to discharge that burden. The evidence in that regard which Company adduced at the hearing was woefully lacking in probative value. The Grievance therefore should be

sustained.

Award

Grievance is sustained and the KCATA is ordered and directed to promote the Grievant with the most seniority to a four (4) workweek trial period as the Accounts Payable Clerk.

It is so ordered this _____ day of October, 1985

Melvin L. Newmark
Jointly Selected Arbitrator

The undersigned hereby concurs in/dissents to the foregoing Decision.

Gayle Holliday
Gayle Holliday
Employer - Appointed
Arbitrator

Dated: Oct 15, 1985

The undersigned hereby concurs in/dissents to the foregoing Decision.

Otis L. Rusher
Otis Rusher
Union - Appointed
Arbitrator

Dated: October 15, 1985