

In the Matter of the Arbitration between

Trial Periods

..... :
Kansas City Area Transportation Authority, :

Employer, :

and :

Sharon Bradford's
Grievance

Division 1287, Amalgamated Transit Union, :

Union :

Appearances

Employer

Mark S. Bryant, Attorney
Gayle Holliday, Deputy General Manager - Administration
Fern Cole

Union

Marsha J. Murphy, Attorney
Otis Rusher President, Division 1287
Lester Parker, Vice President, Division 1287
Patricia Burgess, Financial Secretary-Treasurer
Nancy Santillan, Member, Executive Board
Sharon L. Bradford, Grievant

(Draft) Arbitrator's Opinion and Award

The Union and the Grievant charge that the Employer violated the collective agreement by refusing her a four week trial period on a job for which she was the sole applicant. The parties agreed that the matter was properly at arbitration before a Board of Arbitration composed of Gayle Holliday, Employer-approved Arbitrator; Jane L. Schaeffer, Union-appointed Arbitrator, and Merton C. Bernstein, Impartial Arbitrator jointly selected by the parties. As agreed, a hearing was held on January 5, 1982; it continued on January 6. The parties appeared as shown above, presented witnesses and documents, and cross-examined. They agreed to file briefs postmarked by

February 8. The last brief was received by the Impartial Arbitrator on February 16, 1982, thereby closing the hearing.

Question Presented

The parties were unable to agree upon the formulation of the issue. The Union's broader formulation seems the more apposite. It reads:

Did the Company violate Section 4.4 of the collective bargaining agreement when it failed to give Sharon Bradford a four (4) work week trail period for the job of fixed asset clerk?

Contract Provisions Invoked

Section 1.1. Purpose of Agreement, provides, in part, at Page 2:

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 provides, in part, at page 9:

(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 hereinafter contained in the 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. (Emphasis by Employer.)

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, shall submit his/her bid in writing within said three (3) workdays. The bidder with the greater seniority in his/her 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/she 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/she shall return to his/her 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/her Unit seniority to bump any job of a rate classification higher than that of his/her original job in his/her 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 of four (4) workweeks, the Authority may offer the job to the employee in the Seniority Unit affected deemed by it to be best qualified and if he/she accepts will train him/her, if required, at the schedule of step rates, and when he/she is reasonably qualified, assign him/her to the job at the job rate; or the Authority may fill the job with a new employee. Prior to hiring a new employee a former employee will be called back in accordance with Section 1.16.

* * *

The Union will be furnished a copy of all jobs posted for bid.

Employees will not be encouraged or discouraged in bidding or not bidding on a job by any representatives of the Authority or Union. Employees to whom open or new jobs are assigned will be permitted to make the change without unreasonable delay.

Employees shall have the right to bid on any open job posted in their Seniority Unit.

Contentions

The Union contends that section 4.4 provides for two different situations in filling a posted job: (1) where one or more bidder "is qualified, [he/she] will be assigned to the job as soon as possible." (2) However, if no "qualified" bidder appears, lesser demonstrated ability suffices to give the most senior bidder the right to the "four [4] workweek trial period." It argues also that the Employer should take into account the employee's overall performance. This seems to fit under the rubric of "merit", a consideration specified by section 4.4.

The Employer, in contrast, argues that the agreement gives it the sole right to set job qualifications, which it

has done by establishing a passing grade of 75 for examinations in five subjects it has determined are pertinent to the job in controversy, Fixed Asset Clerk. Those subjects are (using its terms) accounting, checking, copying, calculator, and math. The Grievant took the five examinations twenty-five times (four times for some of them, and six and seven times for others) but achieved grades regarded by the Employer as passing only in four subjects (twice in one subject); she never did pass the math test according to the Employer's standards. (It does not seem appropriate to count as correct an incorrect answer that the Company marked correct on the same examination taken subsequently.)

The Union challenges the right of the Employer to set a rigid passing grade. It argues that the test lacks validity and it presented extensive testimony on that point. Further, it contends that setting a rigid standard negates the trial period provision. In addition, it argues that the Grievant suffered test anxiety and especially math test anxiety, thereby making the tests especially inappropriate for the particular candidate.

The Employer contends that even if it could not rely solely on the test scores, it nonetheless properly concluded that the Grievant did not have sufficient ability to warrant a trial period. It argues that it has a right to require minimal ability, that not just anyone who takes it into his/her head to bid a job must be given a four week trial. It argues that the mechanics of the four week trial are very disruptive and that the device should be required only with candidates

whose demonstrated ability promises a good chance of success.

The Employer asserts that it fills jobs immediately only when qualifications and experience show that a bidder can do the job without question. It properly used the trial period for those who demonstrate they have the ability to do the work to test out whether they can actually perform it in reality. It argues that it is a trial not a training period. Moreover the Employer asserts that after the grievance was filed, it did take into account the totality of the Grievant's past performance and potential. While it found her adequate to her job as Mail Clerk, it noted two occasions on which the Grievant had left the token safe unlocked, indicating inadequate reliability.

The Union argues that sufficient checks exist in the Employer's system to catch errors that the Grievant might make in the Fixed Asset Clerk job. The Employer argues that it must be able to rely upon the accuracy of the Fixed Asset Clerk's work, that many of the checks do not routinely occur for some time and that running reconciliations for error consumes time and money which it should be spared. In sum, it argues that, although it would closely supervise an employee during the trial period, it should be spared the disruption, time and expense of a trial period for a bidder whose demonstrated basic ability is open to serious question.

Construing the Contract

Section 1.12 reserves to the Employer considerable authority, but not quite so much as the Employer claims. It declares, in pertinent part, that the Employer may "determine

the minimum qualifications of experience . . . for any job" (emphasis added). But it subjects these already limited powers to "the grievance procedure [for] any individual . . . whose qualifications may be questioned."

Experience is not at issue here; only qualifications are. Read literally, the Employer's authority extends only to "individuals". However, that seems overly literal. The Employer surely may promulgate general rules for qualifications; all would be better served by that. But subjecting the Employer's authority in regard to qualifications to the grievance procedure certainly implies that the rules promulgated for qualifications are pertinent to the jobs concerned and reasonably measure ability or potential. The Employer does not seem to seriously question such a reading. If the Employer requirements seem pertinent and reasonable, the Union surely has the burden of proving them otherwise.

The Union seems eminently correct that section 4.4 provides for two different situations -- when a bidder qualifies for immediate assignment and when no bidder qualifies, in which latter case "bidders qualified for a four (4) workweek trial period" will be assigned. It does not follow, however, that the Employer may not establish some common minimum qualifications for both (here passing the same tests) if the tests do in fact test basic ability to perform the job. The Employer may properly set such minimum for both immediate assignment and the four week trial period provided that it has some cogently differing and higher qualifications for those who warrant immediate assignment.

We find cogent the Employer's argument that the four week trial need not be for all comers, no matter how unlikely their chances of success. The contract calls for "bidders qualified" for a trial period. It impliedly requires "ability and merit" before seniority becomes a tie breaker.

So, the initial question becomes whether the five tests and the passing scores set by the Employer measure ability with such reliability that they may be used as the automatic, indispensable minimum for qualifying for not only immediate assignment but the trial period, as well.

The Tests - Described and Considered

As noted, the Employer used five tests to measure qualifications for the Fixed Asset Clerk position. The Union does not seriously question the pertinence of the test subjects to the job. Indeed, all the skills seem involved in the position.

The Union does question the reliability of the tests and their adequacy as the litmus tests for qualification and ability. The tests were prepared by some persons connected with the Occupational Research Centers of Purdue University and Employer personnel experts quite some time ago. The Employer could not produce the Manual that normally would accompany such a testing instrument and would describe what it does test, its reliability and standard error. The Employer evidently relied heavily on the origin of the test package as implying that it had been properly validated. In addition, it was testified that personnel administrators, familiar with testing based upon graduate courses, judged the tests

reliable after administering them to a handful of employees.

But the Union's expert witness cast serious doubt upon the use of these individual tests with individual passing grades as automatic determinants of minimum qualifications. For one thing, each segment is very brief. For example, the math test contains only 15 questions. Such brief tests, he testified, result in a very large margin of standard error. Moreover, each segment has a time limit. This, the expert testified, transformed them from a power test (measuring ability) to something else. The validation of such limits, he indicated, would require extensive study. Thus, while he declared that the tests seemed quite plausible as measures of ability in the subject matter areas, lacking validation studies and knowledge of the standard error associated with them would make almost any specified passing grade invalid.

The Employer's reliance upon validation studies which it is assumed the Purdue unit made seems quite misplaced, judging from the brief instructions for administering the tests. It presented "norms" that showed only the distribution of correct answers among the applicants for clerical jobs at Purdue and eight companies (apparently industrial concerns). The instructions observed that "Best employment test practice requires that each user accumulate his own applicant norms as early as possible... The safest and best way is for each user to develop his own norms if at all possible".

The instructions belie that any passing grades had been established by ORC. The instructions give no hint that the performance of those hired had been checked against test

scores. The Employer's testimony shows only that those of its employees who did pass the tests by its standards had performed satisfactorily on the job, that no one who has then been given a four week trial had been found wanting.

Moreover, the expert witness testified that it was a mistake to assign a passing grade to components, that the individual subject matter tests apparently were meant to be used together. He also may have assumed in preparing to testify without benefit of having seen the tests or instructions that some validation tests had been made.

At some earlier time, the Employer had set 70% as the passing grade for each of the subject matter tests. When it decided it was necessary to upgrade clerical performance, it made 75% the passing grade. (The Grievant's best grade in the math test was 73%.) It seemingly has no basis for such a shift other than the assumption that higher passing grades would produce better qualified clerical employees. Just how rough a measure this boost supplied can be deduced from the fact that a 15 question test with 100 as the top grade means that each correct answer counts for 6.66%. Thus when 70% was the passing grade, eleven correct answers were indispensable to produce a grade above 70 -- that is, 73%. Boosting the passing grade to 75 meant, in fact, that twelve correct answers thereafter were required, that is, not 75%, but 80%.

The tests and the grades chosen as passing appear to have been rough cut measures of basic competence in the subjects tested rather than scientifically validated, precisely calibrated measures of that competence. Thus, I conclude that the Union

is correct that the Employer may not use grades below 75 (indeed for math 80) as the sole means for disqualifying an applicant.

The Employer also argued that it did not have the financial resources for the extensive testing needed to validate an examination as a test of competence to perform particular tasks. That seems a reasonable proposition. Presumably it has not found other tests that have been so validated by some testing organization.

We can only conclude that lacking such tests (whether or not they exist or can exist), the Employer may not arbitrarily select a test with an arbitrarily selected passing grade, especially an examination that is so brief as to involve an enormous standard error.

However, it does not follow that the tests can be used for no purposes whatsoever. Rather, essentially as the Union argues, the test results should be taken into account along with everything known about a bidder's ability and potential.

Assessing the Grievant's Ability

As noted, the Employer's second line of defense for its refusal of the four week trial was that, from everything it knew of the Grievant, she did not demonstrate the ability to do the many complicated record keeping, accounting, calculating, and computational tasks required of a Fixed Asset Clerk.

The Employer presented a considerable amount of evidence, consisting in large measure of the kinds of analyses and records a Fixed Asset Clerk must prepare, demonstrating that the position constantly requires extensive computations (including calculations involving addition, multiplication and division

using fractions and percentages) and that they must be precise and accurate. These accounting and calculating activities result in charging participating communities for the several kinds of charges for which they are liable to the Employer. They and the Employer must have figures for such purposes upon which they can rely.

As noted, the Grievant took the several examinations a total of 25 times with the following results:

<u>TEST DATE</u>	<u>ACCOUNTING TEST</u>	<u>CHECKING</u>	<u>COPYING</u>	<u>CALCULATOR</u>	<u>MATH</u>	<u>JOB</u>
2/19/81	65%	67%	50%	67%	53%	F/A
3/2/81	65%	-77%	67%	56%	53%	Utility
4/30/81	-90%	-80%		56%	73%	Utility
6/2/81				22%		Data Entry
6/3/81			59%	44%		Data Entry
6/5/81			-78%			Data Entry
6/12/82	62%	50%	69%	67%	53%	G/L
6/18/81				-78%	60%	F/A

As can be seen, she "passed" four of the five. (An employee may take the tests any number of times and may retake even an exam that he/she has passed in an effort to better his/her score.) Some of the scores are low indeed.

The Union's expert concluded that the very randomness of the test scores, when taken with the fact that the Grievant is a minority female and the test a timed one, indicate test anxiety. He had the actual tests taken by the Grievant available to him only at the hearing.

When asked whether the persistence of precisely the same errors in many of the exams showed inadequate grasp of concepts rather than anxiety, he responded that that factor -- present in some of the answers in the calculator and math exams -- militated against the randomness indicated by the total scores themselves. Moreover, it was clear that the expert adhered to his pre-hearing conclusion of test anxiety without a close analysis of the patterns of the actual examination performance of the Grievant. Thus, we conclude that the Grievant's apparently poor performance derived in no small part from her weak conceptual grasp of the not very difficult problems given to her.

Her Junior College transcript does not contradict the test performance. After receiving a C in Introductory Algebra, she withdrew from Algebra. And she received a D in Accounting Principles II. She did not complete an accounting course offered by the Employer, apparently because of illness.

In sum, the Employer had evidence which indicated a poor conceptual grasp of simple calculating and math procedures. Yet the job requires constant and accurate application of such principles. Although, all computations are done with a calculator, the Employer argues convincingly that basic math "sense" is required so that the Fixed Asset Clerk is able to check his/her own work to see if they make apparent sense. For example, one of the math problems asks for "5% of $.27 = ?$ ". Four out of five times the Grievant gave an answer in excess of 1, indicating lack of understanding that the answer was necessarily a very small part of a number itself far less than 1.

Pretty clearly, on the job "trial" would not improve a performance flawed from the first by inadequate conceptual grasp. This is not to say that the Grievant lacks the intelligence to master such concepts. It may simply be that she did not know how to go about getting adequate assistance to overcome the basic conceptual mistakes. Courses, alas, do not necessarily do the trick. The Grievant shows by her Junior College attendance that she has ambition and the grit to pursue education (in addition to a job and raising a family). That the efforts did not bear the desired fruit does not mean that basic ability is lacking.

But the Employer is correct that it has the right to ask for demonstrated ability and good promise that the trial period will work out well.

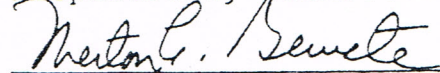
Applying the Union's proposed test, that total job performance be used in deciding whether to give a four week trial, does not help the Grievant. She has had an attendance problem. And, on two occasions she left the token safe unlocked, a substantial and basic lapse in the performance of her clerical duties. These factors, which the Union urged as pertinent before the Employer adduced the particulars, do not aid the Grievant's candidacy.

The Employer argues the potentially disruptive effects of the four week trial period device. It argues persuasively that the four week period is a "trial" not a training period. Although most of us need to learn the routines of a new job, it is not unreasonable to require that we exhibit at the outset the essential ability to perform the basic duties of a job

to which we are to be assigned. Indeed, if there are too many aspects of a new job to be learned, the trial is likely to turn out badly. The Employer does not ask for too much when it demands a demonstration of basic competence for the tasks of the particular job. The Grievant has not yet shown that she would be a good bet for a four week trial period.

AWARD: Grievance denied.

Respectfully submitted,



Gayle Holliday,
Employer-appointed
Arbitrator

Merton C. Bernstein,
Jointly-selected
Arbitrator

Jane L. Schaeffer,
Union-appointed
Arbitrator

February 22, 1982