IN THE MATTER OF AN ARBITRATION

BETWEEN:

IPSCO SASKATCHEWAN INC.
(hereinafter the "Employer")

- and -

UNITED STEELWORKERS OF AMERICA, LOCAL 5890
(hereinafter the "Union")

ARBITRATION AWARD

Arbitrator:	E. R. Gritzfeld, Q.C.
For the Union:	Mr. Jeff Kallichuk Mr. Peter Susa
For the Employer:	Mr. Larry LeBlanc Mr. Mike Carr Ms. Jana Odling
Date of Hearing:	November 16, 1998

AWARD

The grievor, Brian Milo, has been employed by the employer for more than 20 years. Over that period of time he has held various positions. During the period 1975 - 78 he held the position of Loader Recorder. He is presently classified as a Welder.

In 1995, there was a general shutdown of the steel division of the company because of economic conditions. Of the 380 workers in this division all but 38 were given lay off notices. The 38 workers were retained to do ongoing work. The lay off lasted for 15 days.

The grievor after receiving his lay off notice checked the seniority list and found 2 persons junior to him were retained by the company as loader recorders. He thereupon completed the bumping form in which he stated,

> "As a result of being displaced from my position of Welder, I wish to apply for the position of Loader Recorder in the Shipping Department. I have the necessary qualifications to do this job. This job is presently held by Roger Bourret who is junior to me on the seniority list."

The grievor stated that he had been a loader recorder for three years during the period 1975-78 and he therefore was entitled to bump into this position because of his seniority.

The employer denied the grievor's application to bump and the grievance followed. The company in denying the grievance stated,

> "The job has changed substantially since the employee last performed the job. There is no obligation to provide an 8 hour familiarization period where there is no reasonable prospect that the employee, even after an 8 hour familiarization period, would be able to perform that job efficiently."

The grievor testified that he performed those procedures set forth in the Job Description

of Loader Recorder in effect during the period when he was so employed. He further testified that the only change to the Job Description under which he laboured and the present Job Description was the addition of the words, "Observes and follows all safety rules and regulations" added to the Job Description in March 1981.

The Job Descriptions, I was told, are a joint effort of the Employer and the Union. Job proposals are prepared by one or other of the parties. The proposals are then the subject of discussion by the parties. The discussions eventually lead to a Job Description. The employer suggested that the 1981 Job Description is now somewhat out of date because of things now done electronically.

The employer led evidence to the effect that the job in later years has changed materially. It was pointed out that since the grievor held the position the range of products has expanded, the amount of supervision has decreased, there are substantial changes in the size of trailer hauling the product and ongoing changes in the loading procedure. An important addition too to the work was the introduction of the computer. The person in charge of the shipping department testified that it would take someone who had not done the job for 25 years four months to become proficient in the position of Loader Recorder and the time to become proficient would even be longer for someone who had never handled the position. I gathered that the knowledge and experience to handle the computer work was one of the primary reasons for the length of time required for a worker to become proficient in the position.

The grievor submitted that the seniority rules should govern. I was referred to Article 12.01 of the Collective Agreement which states,

"Within various lines of progression, transfers, job postings and labour pool, the

> responsibility of the management for the efficient operation of the plant is recognized. It is therefore understood and agreed that management shall have the right to pass over any employee if it is established that he does not have the qualifications, ability or physical fitness to perform the work involved, even if he were given a reasonable trial or training period."

and to Brown and Beatty (3d ed.), c.6, para 6.0000,

> "Although any of these matters may vary in each collective agreement ,most arbitrators would subscribe to the view that:
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> > 'Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore that an employee's seniority should only be affected by very clear language in the agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.'"

I was also referred to a number of cases in which arbitrators determined that an opportunity should be granted so that employees could demonstrate that they were capable of doing the job.

The employer referred me to this section of the collective agreement,

> **"Article 12.10**
> **Displaced Employee**
> (m) In the event that he cannot retain a position in his own line, or a job which is not within a line of progression, a displaced employee may apply (by filling out a bump form) for one of the following depending upon the circumstances arising from his being displaced (copies of the bump form shall be sent to the Union):
>
> **(iii)(b)** Any jobs outside the lines of progression, "noted" above the displacement line in Appendix E, held by a junior employee provided he has done that job for a

period exceeding thirty (30) consecutive days and can still perform that job efficiently with a familiarization period.

"Note: The familiarization period mentioned in the above provisions shall be a period not exceeding eight (8) hours."

The grievor says he should have been given an opportunity to demonstrate ability to do the job.

I was referred to a number of sections from Brown & Beatty (3d) and Palmer, (3d), and to a number of arbitration decisions all of which dealt with this principle

Brown and Beatty states at para 6:3210,

"...The senior employee will not be required to prove, nor will the employer be entitled to insist, that he could perform the job to perfection. Rather, reasonable ability to perform the required task is the bench mark for assessing the ability and qualifications of such a person. However, such an employee will be required to prove that he had sufficient present ability to perform the job without the need for a training period unless the agreement specifically provides for such training. This may be particularly so in the circumstances of a lay-off rather than a promotion."

In *Re Reynolds Aluminium Co. of Canada Ltd. and International Molders and Allied Workers Union, Local 28*, 26 L.A.C. (2d) 266. Arbitrator Shime denied an employee grievance relating to lay-off. Both the employer and the union agreed that it would take some time for an employee to learn the job.

The Collective Agreement contained this clause,

"It is understood and agreed that in all cases of lay-off and recall, preference shall be given to employees based on seniority, provided they are able to fill the requirements of the work available."

Arbitrator Shime at p.269 said,

> "A lay-off usually results in a checker board situation in which a number of employees are laid off while the others exert their seniority rights to move into different jobs resulting in a jumping around of various employees in the plant to a number of jobs. If all these employees had to be given instruction in how to perform, it is quite likely that the operation would be severely impaired, and it is precisely in this type of situation, which is generally caused by downturn in economic events, that the employer does not wish to bear the expense of training a number of employees. That is not to say that there are not lay-off which involve very few employees and might not require such an expense, but bearing in mind the circumstances of a lay-off and the economics involved, the language of a collective agreement should be quire clear in requiring instruction in cases of lay-off."

While Article 12.10 gives the displaced person (the grievor) the right to bump in if he can still perform the job efficiently with a familiarization period, the familiarization period by agreement is restricted to a period not exceeding eight hours.

The onus in such a case would appear to be on the grievor to show that he could do the job.

Brown and Beatty para. 6:3200.

> "Within those standards of arbitral review, and regardless of how the concept of ability qualifies the criterion of seniority, it usually follows that if it can be affirmatively established that the grievor had the requisite ability, then the arbitrator will sustain that employee's grievance unless the employer can offer some reasonable explanation for not having awarded her the job."

The evidence before me was that the grievor held the position for the period 1975-78. The evidence also was that there have been technological changes, a part of which was related to the computer. According to the person in charge of shipping who introduced the loader people to the computer, it required a period of four months before a person would be proficient in using

the computer.

There was no evidence from which I could have concluded that the grievor could have still performed the job efficiently with an 8-hour familiarization period.

It follows that the grievance is denied.

Elton R. Griffeld, Q.C.