need for a part-time employee arose on a Sunday.

Article II(c) provides that the Company may procure a *full-time* employee from a source other than the Union Hiring Hall only when "reasonable advance notice" has been given and the Union has failed to furnish a workman "within ninety-six (96) hours (excluding Sundays and holidays) after such notice." Once again, "reasonable advance notice" is limited to "not less than twenty-four (24) hours excluding Sundays and holidays." Here, the Company did give reasonable advance notice of its need for an additional full-time employee. By letter dated February 3, 1992, the Company requested applicants for a full-time meat cutter position who were "able to fill in for or eventually perform the full duties of a Meat Market Manager." The letter arrived at the Union on Tuesday, February 4, 1992, at 12:10 p.m. Twenty-four hour notice had thus been given at 12:10 p.m. on Wednesday, February 5, 1992. Ninety-six hours later, excluding Sundays, would have been 12:10 p.m. on Monday, February 10, 1992. Until that time, the company could not, pursuant to the parties' contract, procure a full-time employee from a source other than the Union Hiring Hall. The evidence shows that the Company called Robert Lewis and offered him the position of full-time meat cutter on Sunday evening, February 9, 1992. Robert Lewis officially began work the next morning, Monday, February 10, 1992. Hence, the Company procured a full-time employee prior to the expiration of the time for the Union to supply applicants under Article II(c).

Decision

The evidence is clear that the Company has violated the Hiring Hall Clause of the Collective Bargaining Agreement by procuring both part-time help and a full-time employee from a source other than the Union Hiring Hall. In hiring Robert Lewis as part-time help, the Company failed to give "reasonable advance notice" and failed to wait the minimum thirty-six hours, as required by Article II(d). In hiring Robert Lewis as a full-time employee, the Company violated Article II(c) by failing to wait the minimum ninety-six hours, excluding Sundays, after it had given "reasonable advance notice." Under Article II(a)(6) of the Hiring Hall clause, the Company's violations of Article II(c) and (d) entitles the Union to the remedy of termination of the Collective Bargaining Agreement.

The evidence also clearly indicates that the Union's grievance regarding Employee P__ was not properly or timely filed. There is no written communication from the Union to the Company during the fifteen days after the hiring of Robert Lewis which "clearly sets forth the issues and contentions" of Employee P__'s alleged grievance as required by Article X. Hence, the grievance has been forfeited and waived and is not a proper subject of this arbitration.

AWARD

1. The grievance regarding Employee P__ is not arbitrable.

2. For the reasons stated herein, the grievances regarding the procurement of part-time help and a full-time employee from sources other than the Union Hiring Hall is sustained. The Union may exercise its remedy under Article II(a)(6) and terminate the Collective Bargaining Agreement.

RICHCO PLASTICS CO. —

Decision of Arbitrator

In re RICHCO PLASTICS COMPANY and PLASTICS WORKERS' UNION, LOCAL 18, AAA Case No. 51-300-422-91-S, July 5, 1992
Arbitrator: Lamont E. Stallworth

TRANSFER OF EMPLOYEES

— Wage reduction — Past practice ▸120.205 ▸117.1132 ▸24.367

Employer properly reduced 15-year employee's wage rate after he was allowed to bump less senior employee, where collective-bargaining contract does not specifically address what wage rate employees shall receive after transferring into another job or obligate company to maintain same wage rate after transfer, and while evidence that employer had reduced other employees' wages in cases of promotions and demotions was insufficient to establish consistent past practice, evidence is also insufficient to establish past practice under which employees retain their current wage rate after being transferred.

Appearances: For the employer — Ralph A. Morris, attorney; Jim Fegen,

vice president and operations manager. For the union — John F. Ward, attorney.

WAGE REDUCTION

The Issue

STALLWORTH, Arbitrator: — The Parties submitted the following issue(s) to the Arbitrator:

1. Did the Company violate the Agreement when the Grievant's wages were reduced in April, 1991?
2. If so, what shall the remedy be?

Relevant Contract Provisions

ARTICLE V:
Management Rights

All of the traditional functions of the management of the business and the direction of the working force which are not specifically limited by the express language of this Agreement are exclusively vested in and retained by the Company, including, but not limited to, the following: the right to plan, direct and control all the operations or services to be performed in or at the plant or by the employees of the Company; to decide what work or services shall be performed in or made in the plant or by employees; to introduce new and improved methods, materials, equipment or facilities, or to change or eliminate existing methods, materials, equipment or facilities; to set production standards; to subcontract work and to shut down operations; to schedule working hours and prescribe and require overtime working hours; top hire, suspend, discharge for cause, or promote or demote, transfer or lay off employees from duty because of lack of work or for other legitimate reasons; and to establish and maintain reasonable rules or regulations not inconsistent with the provisions of this Agreement covering operations of the plant.

The Company shall retain the sole right to determine from time to time the products to be manufactured (or discontinued), their design and engineering, and the research thereon; and to determine all methods of selling, marketing, and advertising of products, including the pricing of products.

* * *

ARTICLE VIII
Seniority

Section 8.2 Definition. Seniority shall mean the length of continuous service with the Company of any employee from his last date of hire by the Company, including time lost due to industrial accident.

Section 8.3 Application of Seniority. Seniority shall prevail in layoffs, rehiring, filling vacancies and new jobs, if the skill, qualifications, and physical ability of the employees to do the required work is equal.

Section 8.4 Layoff and Recall. (a) *Temporary.* In cases of temporary curtailment of work not exceeding five (5) workdays, the classification(s) or group(s) affected need not be permitted to transfer in lieu of layoff but shall be laid off on the basis of seniority within the classification or group.

(b) *Other than Temporary.* During a reduction in force, other than temporary, employees shall be laid off from the classifications affected according to the test specified in Section 8.3 of this Article. Employees shall be recalled in the reverse order in which they were laid off.

* * *

ARTICLE XIV
Miscellaneous

Section 14.2 Individual Agreement. The Company agrees not to enter into any agreement or contract with the employees, individually or collectively, who are governed by this Agreement, which in any way conflicts with the terms and provisions of this Agreement. Any such agreement shall be null and void.

* * *

ARTICLE XVII
Wages

Section 17.1 Wage Increases: Effective January 18, 1990, non-probationary employees on the active payroll shall receive a general wage increase of .35 per hour.

Effective January 18, 1991, all non-probationary employees on the active payroll shall receive a general wage increase of .30 per hour.

Effective January 18, 1992, all non-probationary employees on the active payroll shall receive a general wage increase of .30 per hour.

Background

The instant dispute involves the reduction in the Grievant's wages after his job was eliminated. The Grievant, Mr. Rafael Carmona, was hired by the Company on May 10, 1977 into the position of Extrusion Operator B. At that time the Union and the Company were negotiating their first labor agreement. It went into effect on June 9, 1977.

The new labor agreement, as well as the ones following it, established wage rates and increases in the following way: the contracts established minimum rates to be paid to employees hired into various job classifications, along with progressive increases based upon the amount of time spent in the job. Therefore, the Grievant, who started at $3.42 per hour, received $3.54 per hour after thirty (30) days, and similar increases after six (6) and after twelve (12) months.

In addition, the Parties bargained general wage increases applicable to all employees, or to all employees who had reached the top rate in their classification. For example, under the first contract, all employees in jobs ranked in Classifications 1 through 4 received an additional $.19 per hour when the

Agreement went into effect, as part of the generalized wage increase. Second and third year increases were given only to employees who had reached the top rate in their classifications. The Grievant received both types of wage increases under this first contract.

The Grievant received several other promotions through the years, and continued to receive the period general wage increases as well. Thus, in October, 1978 the Grievant was promoted to an Extrusion Operator A position, which is a Class 5 position. In January, 1979, he was promoted to a Class 6 Assembly Helper position.

Under the second collective bargaining agreement, the Parties bargained a total of $1.05 per hour in general wage increases over the life of the contract for employees in the Grievant's classification. He received all of these increases, so that by 1982 his wages were $6.50 per hour.

The third collective bargaining agreement, covering 1983 through 1986, contained no wage increases, the Parties agreeing to a wage reopener in the second year of the Agreement. Under the reopener the Parties agreed to general wage increases of $1.20 over the period 1984–1986 for the Grievant's classification.

Prior to these rates becoming effective in 1984, the Grievant was transferred to a position in the Maintenance Department. He did not receive any reduction in pay, he did receive the general wage increases in the third Agreement, and his wage rate increased to $7.70 per hour as of January, 1986.

Under the next Agreement, the Grievant also received the general wage increases, bringing his hourly wage as of January, 1989 to $8.20 per hour. Under the current collective bargaining agreement the Grievant received the first two wage increases, bringing his hourly rate to $8.85 per hour in January, 1991.

In April, 1991, the Company eliminated the Grievant's janitor position, deciding instead to contract out its janitorial work. The Union did not grieve the decision to contract out the work. The Grievant was allowed to bump a less senior employee who occupied an Extrusion Operator position. When the Company moved the Grievant it reduced his hourly rate from $8.85 to $7.13 per hour, for a total reduction of $1.72 per hour.

The Parties disagree about whether the Grievant's transfer was a promotion or a demotion. The Union argues that he went from a Class 1 janitor's position to a Class 5 position. The Employer contends that the Grievant was demoted from a Class 10 to a Class 4 position.

The Union filed the instant grievance over the matter, dated April 18, 1991. The Company denied the grievance, contending that the Grievant's wages were cut because his job was eliminated, and no clause in the Agreement expressly requires the Company to pay the same wage rate to an employee who bumps another employee and moves into another classification.

The Parties were unable to resolve the matter and it proceeded to arbitration. At the arbitration hearing the Company presented evidence regarding its past practice, and the pay histories of the other employees in the same classification as the Grievant. This evidence will be discussed as necessary in the body of the opinion. It is within this factual context that the instant dispute arises.

The Union's Position

The Union contends that the Company violated the Agreement when it reduced the Grievant's wages upon *promoting* him into the Extrusion Operator A classification. The Union acknowledges that the Agreement is silent on bumping rights, but argues that it does allow employees protection against layoff, based upon their seniority, skill and ability.

The Union contends that because the Company desires to keep its most senior employees, it permits them to bump other employees with less seniority. Nothing in the Agreement permits the Company to reduce their wages, the Union argues, when they do permit employees to bump.

The Union provided a chart demonstrating that if the Grievant had remained in the Extrusion Operator Classification, into which he was hired originally, he would have received increases so that his wage rate would have been $8.58 at the time this incident occurred. According to the Union, the wage reduction imposed by the Company effectively eliminated all wage increases back to 1986. The Union contends that nothing in the collective bargaining agreement permits the Company to reduce the Grievant's wages back to that level.

The Union also contests the argument offered by the Company that it needed to reduce the Grievant's wages to bring them in line with several women who were transferred into the Extrusion Operator classification. The Union contends that these women were hired into a different classification, giving them a lower base wage

rate than the Grievant, and the other men in the position, who were hired directly into the Extrusion Operator classification. Therefore, the Union argues that the Grievant's case is more like the more junior men in the position, who earn more than the more senior women.

The Union argues further that the Company cannot claim a past practice exists allowing it to cut employee wages in this situation. According to the Union, the Company has not established a past practice on the basis of a single incident; a binding past practice, according to the Union, must be consistent, understood by both parties, frequent, of reasonable duration, and mutually accepted. In addition, the Union argues that the situation relied upon by the Company to establish past practice is distinguishable from the case at hand because the women in question had no prior experience in the Extrusion Operator classification, and therefore needed to be trained to operate the machines. In contrast the Union notes that the Grievant had prior experience in the classification. Therefore, the Union argues that the Company's reliance upon past practice does not justify its actions. In fact, the Union argues that the Grievant's own experience establishes a different past practice, since he was transferred to many different positions and none of the prior transfers resulted in any cut in pay.

The Union disputes further the Company's allegation that the Grievant's wages needed to be cut to thwart a claim of sex discrimination. Cutting the wages of male employees is not a valid remedy for past discrimination against female employees, the Union urges.

For all of the above reasons, the Union argues that the grievance should be granted. The Union requests that the Grievant be restored to his former wage rate with full back pay and no loss of seniority or other benefits.

The Company's Position

The Company contends that there has been no violation of the Agreement and, therefore, the instant grievance should be denied. In support of its argument, the Company argues first that the collective bargaining agreement does not specifically provide what rate an individual will be paid if he or she is bumped to a lower classification at the time of a layoff for lack of work. In fact, the Company notes, the collective bargaining agreement does not establish any bumping rights. Therefore, the Company argues, under the management rights clause, the decision it made to pay the Grievant the highest Class 4 rate did not violate the Agreement.

In support of this position, the Company cites an arbitration case with allegedly very similar facts, in which employees in a Group II wage classification were bumped into a Group I wage classification and reduced their rates. The arbitrator there upheld the employer's action and the Company in this case argues that the same rationale should prevail.

The Company also relies upon its past practice of reducing wages in some cases when an employee is bumped into another classification. The Company notes that when it performed this action in 1989 with six female employees in the same department the Union did not grieve the action. The Company notes further that the Parties renegotiated the collective bargaining agreement since that incident and made no effort to add any language concerning what rate of pay an employee would receive in the event of a bump.

The Company also contends that if the Company had continued to pay the Grievant at a higher rate of pay, while performing the same work as the other female employees with whom he worked, he would have subjected the Company to possible charges of sex discrimination or a violation of the equal pay provisions of the Fair Labor Standards Act.

In addition, the Employer notes that the Agreement contains a separate provision, Section 14.2, which prohibits separate agreements between the Employer and individual employees. If the Company paid the Grievant as he requests, the Company argues, other employees could invoked Section 14.2 as a basis for a grievance.

The Company notes that it took an action benefiting the Grievant by offering him another position, when it was not bound by the Agreement to do so. However, according to the Company, the Union has not met its burden of proving that the Company was obligated to pay him more than other employees in the classification who also had been bumped. Therefore, based upon all the foregoing arguments, the Company requests that the instant grievance be denied.

Opinion

This is a case involving a reduction in pay following the transfer of the Grievant to another job after his former job was eliminated. The Parties

have presented the following issue(s) to the Arbitrator:

1. Did the Company violate the Agreement when the Grievant's wages were reduced in April, 1991?
2. If so, what shall the remedy be?

The Arbitrator has considered the testimony, evidence and arguments presented by the Parties and concludes that the Company did not violate the Agreement when it reduced the Grievant's wages in April, 1991. The Arbitrator's findings, conclusions and reasoning are set forth below.

As described in greater detail above, the Grievant's wages were reduced when his position was eliminated by the Employer and he bumped into another position. The Grievant's position in the Maintenance Department was abolished as a result of the Employer's decision to subcontract the work, which was not grieved by the Union and is not in dispute in this case.

Nor is the Union contesting the Grievant's transfer to the job to which he was transferred, that of an Extrusion Operator. There is no language in the Agreement which expressly establishes bumping rights between classifications. Section 8.3 of the Agreement states that seniority shall prevail in layoffs, and Section 8.4 states that during a reduction in force employees shall be laid off from their classifications according to Section 8.3.

The Employer agreed to extend to the Grievant, a long-term employee of the Company with more than fourteen (14) years' service at the time of this incident, the right to exercise his seniority and bump a junior employee out of an Extrusion Operator position. The Parties agree that there is no language in the collective bargaining agreement which specifically addresses what rate of pay an employee shall receive who transfers into another job on the basis of his seniority, when his job has been eliminated.

The Union relies primarily upon the wage provisions of the current and former agreements, which mandated certain wage increases at various times. The Union contends that the Grievant's wages were primarily a result of general wage increases which were given to all employees at various times under various contracts, and that it violates the wage provisions of these agreements to retract those increases.

The Arbitrator notes at the outset that the wage provisions of the Agreements do not specifically address the situation at issue in this proceeding. There is nothing in the wage sections or anywhere else in the Agreement which specifically requires the Company to maintain the wages of an employee at the same rate when he or she is transferred to another position and job classification because of the elimination of the employee's position. Therefore, the Company's action is arguably supportable under the broad management rights clause of the Agreement alone.

However, the Company also has relied upon past practice to demonstrate that it has taken the same action with regards to other employees and the Union has not grieved those actions. The Company put into evidence the pay histories of six employees, demonstrating that on occasions when they were transferred because of the elimination of their jobs, their pay was reduced, just as was the Grievant's.

The Parties disagree about whether the Grievant in this case received a promotion or a demotion in regards to the job transfer in issue. The Union argues that it was a promotion, and that he occupied a Class 1 position before the change. The Company argues that it was a demotion, and that he occupied a Class 10 before his job was eliminated.

The Union suggests that the company's reduction of the Grievant's wages was clearly unjustified in view of the fact that the Grievant was *promoted*. However, the evidence shows that the Company reduced other employees' wages both in cases where the employees were promoted and in cases where they were demoted. For example, six employees were transferred to Extrusion Operator positions in 1989 and for each of these employees this change actually represented a bump *up* in classification. Yet each of the employees's pay was reduced at that time.

The Union suggests that the reason for this particular reduction in pay is that all six of the employees who transferred into the Extrusion positions needed training. In contrast, the Union suggests, the Grievant did not need any training since he already had performed the Extrusion Operator position.

The evidence does indicate that the Grievant was skilled and hard-working in the Extrusion Operator position, since this is the basis upon which the Company permitted him to advance to the Extrusion Operator A position, rather than Extrusion Operator B. The Arbitrator notes that the Company paid the Grievant at the highest base rate for the position into which he transferred. However, there is no evidence that in general, the Company established wages after transfers in relation to the skill of the employees. Rather, it appears that wages were set

according to the levels bargained by the Parties and contained in the labor agreements.

The Arbitrator is not convinced that the Company's evidence is sufficient to demonstrate a past practice of lowering employees' wages whenever they were transferred due to a job elimination. The Union suggests, for example, that there were other reasons for the pay reductions in the cases relied upon by the Company. And the Union suggests that the Grievant himself was transferred to a lower job classification and did not lose his rate of pay, sometime between 1982 and 1984.

There is not sufficient evidence for the Arbitrator to form any conclusions about the Grievant's transfer to the Maintenance Department. The Company's witness testified that when the Grievant was transferred it was believed that he would go to a higher classification, but that the level of work turned out to be more like that of a janitor. It is not clear to the Arbitrator whether the Company considered the Grievant a Class 10 or a Class 1 employee after this transfer.

There is not sufficient evidence for the Arbitrator to conclude that the past practice between the Parties was for the Company to retain an employee at his current rate when he was transferred or even demoted, as the Union suggests. Even if there is not sufficient evidence for the Company to establish a consistent past practice to the contrary, however, (i.e. a practice of reducing employees' rates in this situation), the Arbitrator concludes that the lack of any contractual provision in the Agreement guaranteeing this right effectively means that the Company did not have the obligation to retain the Grievant's rate when he transferred. The evidence of past practice that has been presented suggests that the contract has been interpreted in the past so as not to include any such obligation.

The Company acknowledges that it may seem unfair to the Grievant that he has lost the benefit of some previous wage increases because of his transfer. However, the Grievant has not been treated differently than other employees at the plant. Indeed, if the Company were to retain the Grievant at his former rate, other employees might have a claim of discrimination, based upon civil rights and equal pay laws or that the Company had violated Section 14.2 of the Agreement, which prohibits individual agreements between the Employer and employees.

The Company's position is also supported by arbitral authority. In a very similar case cited by the Company, the arbitrator stated,

> The parties' Agreement does not, in the opinion of the undersigned, provide that employees bumped into Wage Group I job titles shall be paid at their former rate. Rather, the contract is silent in this regard. That silence, in the opinion of the undersigned, indicates that employees bumped into lower classifications shall be paid at the rate established in the Agreement. Moreover, this interpretation of the contract is consistent with the unchallenged manner in which it was applied to Wage Group III and IV employees who were bumped to Wage Group II and III classification, respectively.

(*Joyce International*, 93 LA 124 (Arb. Bognanno, 1989).

On the basis of all the evidence and arguments the Arbitrator concludes that the instant grievance must be denied. There is no language in the Agreement which protects the employee from the action of which he complains and there is no consistent past practice which would demonstrate that the Parties have interpreted their bargain to support the Grievant's claim.

AWARD

The grievance is denied.

AMERICAN CRYSTAL SUGAR CO. —

Decision of Arbitrator

In re AMERICAN CRYSTAL SUGAR COMPANY [Hillsboro, N.D.] **and** AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 372, FMCS File No. 92/15899, September 18, 1992

Arbitrator: Daniel G. Jacobowski, selected by parties through procedures of the Federal Mediation and Conciliation Service

EMPLOYEE BENEFITS

— Sickness and accident disability — Unilateral policy change ▸117.123 ▸116.25 ▸24.363 ▸2.01

Employer whose disability-leave policy barred return to work without full release for normal duty properly changed policy so that employees could to return to work earlier from non-job sicknesses and accidents, with modified duties in accord with restrictions set by doctor and at same wage rate, where collective-bargaining contract is si-