BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL DRIVERS AND DAIRY EMPLOYEES UNION LOCAL NO. 563

and

GALLOWAY COMPANY

Case 8
No. 42160
A-4437

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Frank Kortsch, on behalf of General Drivers and Dairy Employees Union Local No. 563.
Mr. Robert Torgerson, Attorney at Law, on behalf of the Galloway Company.

ARBITRATION AWARD

General Drivers and Dairy Employees Union Local No. 563, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Galloway Company, hereinafter the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Company subsequently concurred in the request and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on July 7, 1989 in Neenah, Wisconsin. There was no stenographic transcript made of the hearing and the time for filing of post-hearing briefs was closed on August 31, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated there are no procedural issues for purposes of this arbitration and stipulated to the following statement of the issue:

> Did the Company violate the Labor Agreement by unilaterally prohibiting smoking or use of tobacco products on Company premises or in Company vehicles by employes, visitors, contractors, truck drivers and milk handlers?

CONTRACT PROVISIONS

In addition to the grievance and arbitration provisions, the following provisions of the parties' Labor Agreement are cited:

> ARTICLE 4 - MAINTENANCE OF STANDARDS
>
> SECTION 4.1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of the Agreement if such error is corrected within ninety (90) days from date of error.
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> . . .
>
> ARTICLE 7 - STEWARDS
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> SECTION 7.1. The Employer recognizes the right of the Union to designate job stewards and alternates.
>
> SECTION 7.2. The authority of job stewards and alternates so designated by the Union shall be limited to, and shall not exceed, the following duties and

activities:

(a) The investigation and presentation of grievances in accordance with the provisions of the collective bargaining agreement;

(b) The collection of dues when authorized by appropriate Local Union action;

(c) The transmission of such messages and information which shall originate with, and are authorized by the Local Union or its officers, provided such messages and information:

1. have been reduced to writing, or,
2. if not reduced to writing, are of a routine nature and do not involve work stoppages slow-downs, refusal to handle goods, or any other interference with the Employer's business.

SECTION 7.3. Job stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business except as authorized by official action of the Union.

SECTION 7.4. The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall not hold the Union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slow-down, or work stoppage in violation of this Agreement.

BACKGROUND

The Company operates a dairy plant in Neenah, Wisconsin and the Union represents the bargaining unit consisting of approximately 29 hourly employes in the plant. The plant itself is approximately 1/2 block long and contains six floors. The Company takes delivery of raw milk at the plant and processes the raw milk and manufactures sweetened condensed milk, frozen dairy dessert mixes and sweeteners. The Company, as a producer of dairy products, is required to comply with certain federal and state sanitary codes which are administered by various state and federal agencies. Those administrative codes restrict or prohibit the use of tobacco products by personnel engaged in the handling and processing of milk products, e.g.:

Chapter Ag 31

DAIRY PLANT STANDARDS

. . .

Ag 31.04 Personnel. (1) CLEANLINESS. Persons working in the plant shall wash their hands before beginning work and before returning to work after using toilet facilities, eating, smoking, or engaging in other activities which may result in soiling their hands. Expectoration or use of tobacco in any form is prohibited in any room or compartment where exposed products are prepared, processed, stored or otherwise handled. Clean, light-colored, washable outer garments and caps, and hair nets or hair restraints shall be worn when engaged in receiving, sampling, processing or packaging products.

. . .

Chapter Ag 70

FROZEN DESSERTS

. . .

Ag 70.04 Personnel. (1) CLEANLINESS. Plant employes shall wash their hands before beginning work and before returning to work after using toilet facilities, eating, smoking, or engaging in other activities which may result in soiling their hands. The use of tobacco by any person in rooms or compartments where frozen desserts or ingredients are exposed, shall be prohibited. Clean, white or light-colored washable outer garments and caps shall be worn by all persons engaged in handling dairy products, mix or frozen desserts. Paper caps or hair nets are acceptable.

. . .

Chapter Ag 80

GRADE A MILK AND MILK PRODUCTS

Ag 80.01

. . .

(20) PERSONNEL; CLEANLINESS. (a) Dairy plant employes shall thoroughly wash their hands before beginning work and as often as necessary to remove soil and contamination. No employes shall resume work after visiting the toilet room without thoroughly washing their hands.

(b) All persons engaged in the processing, pasteurization, handling, storage, or transportation of milk, milk products, containers, equipment, and utensils shall wear clean outer garments.

(c) The use of tobacco by any person while engaged in the processing, pasteurization, handling, or storage of milk or milk products is prohibited.

The plant is inspected both by the federal and state agencies and by customer inspectors. There are four major types of contamination about which the Company is concerned: off flavor, off odor, bacterial and particulate contamination. The contracts that the Company has with its customers contain indemnification clauses for products and ingredients which requires that the Company be responsible for all consequential damages that result from the product being contaminated.

In the past the Company permitted smoking in certain designated areas, i.e., the lunch room, the locker room, the maintenance room on the ground floor and outside of the building.

For years the Company has posted plant rules on the bulletin board in the plant. The plant rules in 1987 provided in relevant part:

GALLOWAY COMPANY

PLANT RULES

August 26, 1987

In order to promote harmonious working conditions and equal treatment for all, the following work rules are established.

An employee who fails to maintain at all times proper standards of conduct or violates any of the following rules shall subject himself to disciplinary action including discharge.

. . .

The following acts or conducts are prohibited.

4. Smoking, except in areas expressed (sic) designated for that purpose.

. . .

In the spring of 1988 the Union steward, Richard Boelter, communicated a request to management on behalf of some of the employes that smoking be prohibited in the lunch room and the Company subsequently granted that request.

In late July of 1988 the Company posted the following notice to all employes on the bulletin board in the plant:

TO: All Employee's

FROM: Norm Rodgers

DATE: July 25, 1988

SUBJECT: Smoking

As of Jan. 1, 1989 the Galloway Co. will inforce (sic) a No Smoking Policy on Galloway Co. premises, and in Co. vehicles.

This will become a Co. policy and will be included in Co. plant rules as of that date, anyone that violates these rules will face disciplinary action.

If you need advice or help in the smoking cessitation (sic) program call the no's listed below and ask for the following people:

Theda Clark - Sandy Hagen 729-3375

St. Elizabeth - Tess Reedy 738-2392

If you have any questions ask Norm for more information.

A copy of the above notice was sent to the Union's business office.

In late November of 1988 the parties began negotiations on a successor labor agreement and reached tentative agreement in mid-December of 1988. The no smoking policy was not raised or discussed by either party during those negotiations. About that same time the Company issued the following notice and posted it on the Company bulletin board reiterating its intention to institute a no smoking ban:

TO: All Employee's

FROM: Norm Rodgers

DATE: December 15, 1988

RE: No Smoking and/or use of tobacco products policy

This is a reminder to all employees on the "No Smoking or use of tobacco products" policy. As of January 1, 1989 the Galloway Company will enforce a "No Smoking" policy on company premises, whether owned or leased, including company vehicles and/or while on company time.

> This will become a company policy and will be included in company plant rules. As of that date anyone violating these rules and regulations will face disciplinary action up to and including discharge.
>
> This policy applies to all employees, visitors, contractors, truck drivers, milk haulers or anyone who comes to our facility.
>
> POLICY OBJECTIVE
>
> To help the individual health of employees by providing a tobacco and smoke free environment at the Galloway Company and to insure the integrity and safety of Gallowcy (sic) Company products.
>
> PROCEDURE
>
> Effective January 1, 1989 all staff, managers and supervisors will enforce the "No Smoking" policy.
>
> For your help to stop smoking call the following numbers:
>
> Theda Clark - Sandy Hagen 729-3375
>
> St. Elizabeth - Tess Reedy 738-2392

Effective January 1, 1989, the Company has not permitted the use of tobacco products, either smoking or chewing, on Company premises or in Company vehicles and the prohibition extends to all employes of the Company and visitors alike.

The Union subsequently grieved the Company's no smoking rule. The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

UNION:

The Union asserts that after 30 years of being able to smoke in designated areas, the Company unilaterally imposed the absolute no smoking policy on employes, notifying them of that ban the day after the signing of a new three year agreement. The Union notes that smoking was not raised in negotiations. The Union takes the position that, by its actions, the Company violated Article 4 - Maintenance of Standards, by unilaterally changing conditions of employment.

The Union's secretary-treasurer, Dennis Vandenbergen, testified that it was his position that the knowledge and actions of the Steward, Boelter, in relaying the request for a smoking ban in the lunch room and any knowledge that he had as to the Company's intended no smoking policy, could not be imputed to the Union because of the very limited authority stewards are given under Article 7.

As a remedy, the Union requests an order that Article 4 of the Agreement precludes the unilateral implementation of the no smoking policy and that the Company be directed to return conditions to the *status quo ante*.

COMPANY:

The Company takes the position that it had the right to unilaterally establish the no smoking rule in the plant. In support of its position, the Company asserts that management has the fundamental right to unilaterally establish reasonable plant rules that are not inconsistent with law or the labor agreement. When the agreement is silent on the subject of plant rules, as in this case, management has the right to establish and enforce such rules "as an ordinary and proper means of maintaining efficiency and of directing the conduct of the working force". *Citing*, Elkouri and Elkouri, *How Arbitration Works*, (4th Ed.) 553. It also asserts that this is true in the absence of a management rights clause in the agreement, as it is well established that it is an inherent right of management to unilaterally issue and enforce rules pertaining to discipline, efficiency and conduct expected of employes, as well as rules regarding the health and safety of others, as long as they are not contrary to provisions of the agreement. *Citing*, *Trojan Luggage Co., Inc.* 81 LA 409, 412. It is asserted that such action may take place during the term of the agreement. The Company contends that it has consistently exercised its right to unilaterally issue plant rules since the initial agreement with the Union in 1952 and without objection from the Union. Those plant rules have been modified by the Company, also without objection from the Union. The

Union's inaction after receiving the notice of the new rule in July of 1988 and the failure of the Union to object to the new rule during bargaining in late 1988, demonstrates the Union's clear understanding that the Company had the right to unilaterally adopt the rule.

Secondly, the Company contends that the rule prohibiting the use of tobacco products on the Company premises and in Company vehicles is reasonable. The test of whether a rule is reasonable is whether or not it is reasonably related to legitimate objectives of management. The Company contends it has two legitimate objectives in this case -- maintaining the health of its employes and maintaining an uncontaminated work place to insure quality products and compliance with government and customer sanitary requirements. It asserts that it is "universally accepted" that the presence of tobacco smoke in the work place constitutes a health hazard. Citing, the 1986 U.S. Surgeon General's Report. The request from the employes to prohibit smoking in the lunch room demonstrates that they recognize that health hazard. The Company also asserts that the uncontroverted testimony of its witnesses clearly demonstrated that prohibiting the use of tobacco products on Company premises significantly increases compliance with sanitation requirements, reduces the risk of contamination to its products, reduces the potential for claims arising from contamination, and increase the marketability of its products due to better customer confidence in the products. The argument that federal and state regulations do not prohibit smoking in all areas of the dairy plant does not recognize the Company's need to avoid contamination so as to remain a viable competitor and reduce the potentially devastating product recall costs due to contamination. Also, the new no smoking rule is not discriminatory, as it applies to all employes of the Company and to all other persons on Company premises.

Third, the Company asserts that its new rule banning the use of tobacco products is consistent with the developing law restricting and/or prohibiting smoking in public places, and given that, employes should be accustomed to such restrictions. Further, the new rule is not contrary to Article 4 of the Agreement and, hence, need not be negotiated. There is no provision in the Agreement granting the employes the right to use tobacco products on Company premises. Also, the use of tobacco is not "an express condition of employment" or a condition of employment arising from past practice, since the Company has consistently restricted the right to smoke in the past and has unilaterally modified those restrictions from time to time without objection from the Union. The Company cites a number of arbitration awards where the arbitrator concluded that smoking was not a "condition of employment" or a "working condition".

Lastly, the Company contends that there is no merit to the Union's assertion that the new rule is invalid because the Union was not given notice of the rule. The Company followed its normal procedure in this case for changing plant rules by giving written notice to all employes by posting the notice on the bulletin board and also sent the notice to the Union's office. The Company notes that the Company's president, Tim Galloway, testified that in discussions on the matter in January of 1989 with the Union's business representative, Neil Hietpas, the latter admitted that he had received the letter in July of 1988, but claimed it was invalid because it had not been sent by registered mail. Hietpas was present at the arbitration but was not called by the Union to rebut Galloway's testimony. The Company asserts that, therefore, Galloway's testimony is conclusive on that issue.

DISCUSSION

First it is noted that, as the Company asserts, management has the right to unilaterally establish reasonable work rules so long as those rules are not contrary to law or the terms of the parties' agreement. The evidence indicates that in this case the Company has been promulgating plant rules for years without objection from the Union. The evidence also indicates that in the past those rules have included restrictions on smoking, limiting the right to smoke to designated areas. While copies of the plant rules have not been sent to the Union's business office, or to Vandenbergen or Hietpas personally, they have been posted on the bulletin board in the plant next to the time cards. The Union's steward testified that he was aware of the plant rules. He also testified that he communicated the request from a group of employes to the Company asking that the plant rules be amended to prohibit smoking in the lunch room. The Company granted that request.

The evidence further indicates that the no smoking rule is reasonably related to a legitimate objective of management in this case. The Company's witnesses testified with regard to the measures the Company has taken to prevent contamination of their products, as well as to the likely severe cost impact on the Company should contamination of the product occur. While the state and federal regulations do not require that smoking be completely prohibited in dairy plants, the requirements that smoking or the use of tobacco be prohibited where the products are exposed or produced and the requirement that employes wash their hands after smoking indicate that there is a sanitary

concern regarding the use of tobacco products in areas where dairy products are being produced or stored. The rule is also not discriminatory, as it is applied not only to the employes in the bargaining unit, but also to all other employes of the Company and also to any visitors who come onto the Company's premises.

The Union's strongest argument is that the right to smoke in designated areas is a "condition of employment" that the Company must maintain under Article 4 - Maintenance and Standards. Assuming, for the sake of argument, that the right to smoke in designated areas is a "condition of employment" covered by Article 4, that provision does not require that such conditions, not otherwise expressed in the Agreement, must be maintained in perpetuity. As noted previously, the Company has the right to unilaterally establish plant rules and those rules are subject to challenge by the Union. In this case, however, the Union was informed in July of 1988, i.e., prior to the start of negotiations for a successor agreement, that the Company would be amending the no smoking rule to completely prohibit smoking effective January 1, 1989. Galloway's unrebutted testimony was that the notice issued by the Company dated July 25, 1988, was sent to the Union's business office and that in his discussions with Hietpas in January of 1989, the latter acknowledged having received that notice. The Union's steward, Boelter, also testified that he was aware of that notice. Both Boelter and Hietpas were on the Union's bargaining team that negotiated the parties' present agreement in late 1988. Regardless of the fact that Vandenbergen was not aware of the Company's intentions, their knowledge of the Company's intent to amend the rule must be imputed to the Union. Further, the Company issued a reminder in mid-December of 1988, at or about the same time the parties reached tentative agreement on the successor agreement, that it was putting the new rule into effect January 1, 1989. That was prior to the parties signing the new agreement.

Given the Company's notice to the Union of its intent to amend the rule to completely prohibit smoking on Company premises or in Company vehicles, the Union's knowledge of the Company's intended action and its failure to raise an issue regarding that intention during negotiations, it is concluded that the Company acted within its rights in promulgating the new no smoking rule and did not violate Article 4 of the parties' 1989-91 Agreement in doing so.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 27th day of November, 1989.

By ______________________________
David E. Shaw, Arbitrator