

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 TEAMSTERS LOCAL 695 : Case 1  
 : No. 44553  
 and : A-4691  
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 NABISCO BRANDS, INC. :  
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Appearances:

Mr. David L. Keenan, General Counsel, appearing on behalf of the Company.  
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, Attorneys at Law,  
 by Ms. Marianne Goldstein Robbins, appearing on behalf of the  
 Union.

ARBITRATION AWARD

Pursuant to a request by Nabisco Brands, Inc., hereinafter referred to as the Company, and Teamsters Union Local 696, hereinafter referred to as the Union, the Wisconsin Employment Relations Commission on March 18, 1981, designated Mr. Thomas L. Yaeger of the Commission's staff as an impartial arbitrator to conduct a hearing and issue and award in the Barbara Christensen grievance. A hearing in the matter was held on March 21, 1991 at Madison, Wisconsin, and this proceeding was conducted in accordance with the binding arbitration provisions of the collective bargaining agreement between the parties that was in effect at all times material hereto. A stenographic record was made of the proceeding and the parties filed post-hearing briefs which were received by July 27, 1991.

ISSUE:

At the commencement of the hearing each party gave its version of the issue in this case. The Union stated the issue to be:

Did the Company violate the collective bargaining agreement when it transferred the position of Lab Aide -raw materials to a senior Lab Technician outside the bargaining unit? If so, what is the appropriate remedy?

On the other hand, the Employer believed the issue to be:

Did the Company violate the collective bargaining agreement when it assigned certain raw material quality control duties to a nonbargaining unit Laboratory Technician?

Because the parties were unable to agree on a statement of the issue I have determined the issue to be:

Did the Company violate the collective bargaining agreement when in May, 1990, it assigned the grievant's raw materials testing duties to a Lab Technician and replaced those duties with quality control on-line testing responsibilities? If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

RELEVANT CONTRACT PROVISIONS

RECOGNITION

Section 1. The Employer recognizes the Union as the sole and exclusive collective bargaining representative for all production and maintenance employees of the Employer; but excluding office clerical employees, guards, and supervisors as defined in the Act.

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ARTICLE I - MANAGEMENT RIGHTS

Section 1. The Union recognizes that the Employer retains the sole and exclusive right to manage its business in such a manner as the Company shall determine, subject only to such limitations as are expressly specified in this Agreement. The Employer's right to manage its business shall include, but not be limited to, its exclusive rights to determine the methods and means by which its operations are to be carried on, to introduce new and improved methods, equipment or facilities or change or eliminate existing methods, equipment or facilities, to assign work, to schedule hours of work; including overtime and to establish the size and composition and quality and quantitative standards of work.

ARTICLE VII - GRIEVANCE & ARBITRATION PROCEDURE

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Section 4. Authority of Arbitrators. The Arbitrator shall have no right to add to, subtract from, nullify, ignore, or modify any of the terms of this Agreement....

BACKGROUND:

The Company operates a production facility in Stoughton, Wisconsin. In its Stoughton plant, it manufactures taco shells and a taco sauce mix. The Union is the collective bargaining representative of "all production and maintenance employees of the employer; but excluding office clerical employees, guards, and supervisors as defined in the Act."

This grievance concerns a dispute involving the reassignment of raw material testing from a Lab Aide to a Lab Technician in or about June of 1990.

The decision to reassign these duties and responsibilities was made in February of 1990 by the Plant Quality Control Manager, Fisher. At that time, the raw material testing was being performed by the first shift Lab Aide. The change in assignments resulted from a determination by Fisher that it was more appropriate to assign the newly expanded raw material quality control activities to a Lab Technician instead of continuing to have these activities performed, as they had in the recent past, by a Lab Aide. The result of this shift in assignments meant that the Lab Technician who had previously been performing on-line testing functions could now devote all of his/her time to raw material inspection functions, special projects and supervisory duties. It also meant all first shift on-line testing would be performed exclusively by Lab Aides thereby creating a greater distinction between hourly and salaried employees on first shift. 1/

The decision to change the alignment of first shift Lab Aide and Lab Tech responsibilities was communicated to the Union in or about February of 1990. That decision was premised on the Company Quality Control Manager's stated desire to develop a distinction between salaried and hourly employees, make improvements in the traceability program and make the department stronger and improve its integrity. However, before the decision could be implemented the Company determined to shut down a portion of its third shift production which resulted in the elimination of a third shift Lab Aide and a third shift Lab Technician. 2/ The Company then moved the third shift Lab Technician to first shift and assigned all raw material quality control responsibilities to that individual. This resulted in the grievant, Christensen, the Lab Aide on first shift who had been performing routine raw material testing being assigned the hourly on-line quality control testing duties that the first shift Lab Technician had been performing on a rotational basis with the first shift Lab Aide. That Lab Technician was then assigned to a new Packaging Technician position.

This change in assignment did not result in any loss of pay or seniority status for the grievant. However, subsequent to the reassignment of duties, Christensen filed the subject grievance which was not able to be resolved during the grievance procedure.

The Union contends that all lab employees who are not supervisors have always been included within the bargaining unit as Lab Aides. Historically that has meant that the one Lab Tech or senior Lab Tech position on each shift has functioned as the person in charge or supervisor, and has not been included

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1/ The hourly/salary distinction has also been a means of distinguishing between union and nonunion employees in the plant.

2/ The Union received notice on May 7, 1990 that the Company would be eliminating "corn products on 3rd shift, increasing 2nd shift by one corn line and laying off approximately 15 employees."

in the bargaining unit. The Union maintains that with this exception, all other lab work falls within the bargaining unit. Thus, when the Company transferred the raw material inspection responsibilities performed by Lab Aide, Christensen, to a Lab Tech position outside the bargaining unit, it violated the Recognition Clause of the parties' collective bargaining agreement. It contends that this violation is all the more egregious in that it occurred when 16 bargaining unit employees were on layoff. The affect of the Company's actions in assigning non-supervisory lab work to nonbargaining unit personnel abrogated the protection of the Recognition Clause on job security.

The Union notes that the first shift Lab Tech position to which the raw material inspection responsibilities were assigned was a non-supervisory lab position involving the testing of raw materials and water systems and the recording of the data. The Union insists that this is not a supervisory position and therefore does not fall within the exclusionary language of the Recognition Clause. Consequently, even if the Company had created a position title requiring more background, knowledge and exercise of discretion, these duties alone are not sufficient to remove the position from the unit in the absence of a substantial supervisory component. The facts establish that this newly created first shift Lab Technician is not a bonafide supervisory position inasmuch as it has virtually no supervisory responsibility. The supervisory component continues to remain where it was, with the other first shift Lab Tech position. Thus, the job remains what it has always been, a lab job which is not supervisory, and therefore properly within the bargaining unit.

The Union, therefore, believes the Arbitrator should sustain the grievance of Barbara Christensen and find that the Company violated the collective bargaining agreement by transferring raw material inspection responsibilities from the grievant to a newly established Lab Tech position on the first shift.

The Company's arguments in support of its position can be summarized as follows:

1. The collective bargaining agreement expressly provides that management has the right to assign work and determine job content.
2. Nothing in the contract restricts management's right to assign the work and no such restriction can be implied.
3. The work in dispute has not previously been exclusively performed by bargaining unit employees.
4. In the instant case the Company's decision to reassign the disputed work was based upon legitimate business reasons.
5. The reassignment of duties had no substantial adverse impact on the bargaining unit.

The Company concludes that what was done in the instant case was to exercise its contractual right to assign work in good faith and for legitimate business reasons in a manner which produced no substantial adverse impact on the bargaining unit. Consequently the Company requests the Arbitrator to deny the grievance.

#### DISCUSSION

The dispute in this case as set forth in the grievance itself, which was filed by Barbara Christensen on May 16, 1990, surrounds Christensen's demand that the Company rescind its decision to assign the raw material testing responsibilities that she had been performing to a nonunion first shift Lab Technician, Cindy Seely. In support of this claim, the Union contends that the contract precludes the Company from assigning these raw material testing responsibilities to a Lab Technician position, a position which has historically been excluded from the bargaining unit. The Union claims the Recognition Clause prohibits the realignment of job duties wherein duties which have historically been considered bargaining unit work cannot be assigned to nonbargaining unit employees. The Company relies upon the absence of any contractual prohibition against such assignments, and points to the Management's Rights clause which delineates its sole and exclusive right to manage its business, including the right to assign work. It has argued and has adduced testimony to establish that there were legitimate business reasons for its decision to remove the raw material testing duties from the grievant's lab aide position.

Disputes over the assignment of bargaining unit work to nonunit employees, where there is not an explicit contractual prohibition against doing so, has been confronted by many arbitrators over the years. Their decisions have gone both ways. Those who have found such assignments to be permissible have premised their decisions on the absence of a specific contractual prohibition coupled with a finding that the right to assign work is reserved to management, and/or the assignment was made in good faith based upon the circumstances presented. Those arbitrators who have decided that such assignments are impermissible have concluded this is not a right found in many general management rights clauses, or that such action violates the recognition or seniority clauses. 3/ These arbitrators conclude that "the transfer of work customarily performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore one of the contract's basis purposes."

In analyzing the facts of this case, it is clear that over many years the responsibilities involved with raw material testing have been performed both by Lab Aides, like the grievant, and Lab Technicians, like Cindy Seely. The testimony established that both the Lab Aide and Lab Tech positions have quality control testing responsibilities. Indeed, before the realignment of duties in this case, Lab Techs and Lab Aides could be found performing the same responsibilities on different shifts within the plant. For example, the first shift Lab Tech performed on-line testing prior to the realignment of duties. However, on the second and third shifts, and possibly also on the first shift, Lab Aides were performing on-line testing. Clearly this evidence establishes that there is no clear cut delineation of job duties and areas of responsibility between the Lab Aide and the Lab Tech positions.

Therefore, the facts of this case do not establish that these duties have historically, customarily or always been performed by Lab Aides. Thus, even under the rationale expressed by those arbitrators who view the Recognition Clause as a prohibition against the assignment of unit work to nonunit employees a pre-requisite to such a finding is that the work has customarily been performed by unit employees. Those clearly are not the facts in this case. Consequently, a finding cannot be made that the Employer has taken work which

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3/ See Elkouri and Elkouri How Arbitration Works, (4th Ed. 1985) at pp. 547-551.

customarily has been performed by bargaining unit employes and assigned it to nonbargaining unit employes. These facts, taken together with the Management's Right Clause which states that the right to assign work rests exclusively with the Company, makes a finding for the grievant in this case impossible.

However, it should be noted that even though the Employer has the contractual ability to make work assignments and has assigned duties which are being performed by unit employes to nonunit employes, it does not necessarily follow that the current nonunit employes would not be found to be appropriately included within the bargaining unit. However, that is not the issue before the undersigned and, that issue is most appropriately resolved in a forum other than grievance arbitration.

AWARD

Based on the foregoing and the record as a whole the undersigned finds that the Company did not violate the collective bargaining agreement when in May, 1990, it assigned the grievant's raw material testing duties to a Lab Technician and replaced those duties with quality control on-line testing responsibilities. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 1st day of November, 1991.

By \_\_\_\_\_  
Thomas L. Yaeger, Arbitrator