BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS LOCAL UNION NO. 695

and

SILGAN CONTAINERS CORPORATION

(Smoking Policy)
Case 4
No. 49069
A-5057

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, Attorneys at Law, 1555 North River Center Drive, Suite 202. Milwaukee, WI 53212 by Ms. Naomi E. Eisman, appearing on behalf of Teamsters Local 695.

Foley & Lardner, Attorneys at Law, 777 East Wisconsin Avenue, Milwaukee, WI 53202-5367 by Mr. Stanley S. Jaspan, appearing on behalf of Silgan Containers Corp.

ARBITRATION AWARD

Teamsters Local No. 695, IBT (hereinafter referred to as the Union) and Silgan Containers Corporation (hereinafter referred to as the Company or the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the imposition of a smoking ban at the Company's Waupun, Wisconsin facility. The undersigned was so designated. A hearing was held on June 28, 1993 at the City Hall in Waupun, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. No stenographic record was made. The parties submitted post-hearings briefs, which were exchanged through the undersigned on July 12, 1993. The parties requested an expedited decision. Now, having considered the evidence, the arguments of the parties and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties stipulated that the following issue was to be decided herein:

Does the implementation of the Company's no-smoking policy violate the collective bargaining agreement? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 1 - RECOGNITION

1.1 The Company recognizes the Union as the sole and exclusive bargaining agent for all employees at its Waupun, Wisconsin Can Plant, excluding Plant Manager, Superintendent, Supervisors, other employees who have the authority to hire, discharge, promote or demote those who are classified under the terms of the Agreement, and office employees.

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ARTICLE 7 - ARBITRATION

7.1 Any dispute or grievance arising as to the meaning or interpretation of this Agreement that cannot be settled between the higher official representatives of the Company and the Union shall be submitted to arbitration.

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7.3 The authority of the arbitrator shall be limited to the interpretation of this Agreement and to arbitration of grievances and disputes which may arise as to the meaning and interpretation of this Agreement. The Arbitrator, in each case, will be bound by the provisions of this Agreement and shall not have the authority to change, amend, or modify the provisions of this Agreement. The findings and decision of the Arbitrator shall be final and binding upon both parties to the dispute.

FACTUAL BACKGROUND

The Company manufactures sanitary cans for the food industry at a plant in Waupun, Wisconsin. Since 1959, the Union has been the exclusive bargaining representative of the Company's employees.

In January of 1993, the Plant Manager received a memo from the corporate offices directing that all Company facilities would be smoke free as of July 1st:

TO: All Plant Managers

As most of you are probably aware, the EPA recently reported that non-smokers who inhale second-hand smoke are at a significant risk to contract lung cancer.

It is clearly in the interest of our employees that we maintain an environment in our plants and offices which does not pose a known health risk to our employees where

possible and practical. Therefore, it has been decided that effective July 1, 1993, our plants and offices shall be smoke free throughout the Company.

It is recognized that this policy may necessitate some employee education, discussions with Union business agents and/or committees as well as a program to provide assistance to employees "kicking the habit". OHS, our EAP administrator, is going to work with us concerning assisting our employees. Details will be available shortly. Employee education programs, discussions with Union representatives, and any other items you think should be addressed in order to make implementation of this policy as smooth as possible, should be reviewed with a Human Resources department representative…"

This memo was accompanied by a formal policy statement accepting the EPA finding that second hand smoke posed a serious environmental risk to non-smokers, and stating that the Company was going to a non-smoking environment to provide a safer work place.

Smoking has always been allowed in some areas of the plant, although it has not been allowed on the plant floor or in the warehouse. As of January 1993, the Company allowed smoking in its two break rooms, in the rest rooms and in some offices.

The new policy was presented to the Union committee in early February. The Union asked that the Company designate at least one smoking area inside the plant. No agreement was reached. Ten days after the meeting with the Union, the Company posted the new policy. A grievance was filed on February 23, asserting that the Company was violating the established past practice of allowing smoking areas at the work place.

After the grievance was filed, the parties met two more times on the smoking policy, on March 3rd and 17th. The Union proposes in these meetings that a separate smoking area be established in one of the break rooms. The Company rejected this proposal, but did make some modifications in its policy. After the second meeting, the Company informed the Union that it would designate an outdoor smoking area where employees could smoke on breaks and during lunch, and would allow smoking in personal vehicles on the premises. In addition, the Company stated that it would assist employees with the cost of programs and aids for stopping smoking. However, the Company did not change its position that the Waupun plant would become non-smoking as of July 1st. The matter was not resolved and was referred to arbitration.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the Company ignored its duty to bargain over the no smoking policy. Since no-smoking policies are mandatory subjects of bargaining, they cannot be unilaterally imposed. In this case, there has been neither bargaining, nor any waiver of bargaining. The Union notes that the contract contains no management rights clause, and does not reserve to the Company the authority to make or promulgate work and safety rules.

Even if the Company had the right to unilaterally impose this type of work rule, it would be subject to a requirement of "reasonableness". The policy here is obviously unreasonable. It unnecessarily infringes on the personal freedom of employees without serving any compelling employer interest. The Union notes that there are two break rooms in the plant, and that designating one of them for smoking with some additional ventilation would remove the threat to non-smokers, while not infringing on the rights of smoking employees.

Neither the Union nor any individual employee could reasonably have anticipated the Company's smoking ban. It represents a unilateral change in working conditions, and thus violates the duty to bargain and the contract. For these reasons, the Union asks that the Company be ordered to rescind its no-smoking policy.

The Position of the Company

The Company takes the position that the smoking ban inside the facility is a reasonable exercise of management's inherent right to make and enforce reasonable work rules. This right is well established in labor relations, particularly where the rule is designed to insure safety and health in the work place. The Company notes that it has always restricted smoking at the Waupun facility, and has from time to time changed the smoking restrictions. The Union has never grieved these restrictions, thus acknowledging the Company's right to act unilaterally in this area.

The policy prohibiting smoking inside the plant is a direct response to the EPA report finding that second hand smoke is a human carcinogen. The changing awareness of the dangers of smoking to non-smokers is a reasonable basis on which to change the Company's past policies. The alternative proposed by the Union, transforming one of the break rooms into a smoking lounge, is impractical. It would require employees to take their breaks some distance from their work stations, impose a significant expense on the Company for ventilation, and would still pose a threat of smoke escaping into the general plant environment.

The Company argues that the Arbitrator has no authority to consider whether it has the duty to bargain over this change in policy. The Arbitrator's role is to interpret the Agreement, and there is nothing in the contract forbidding this rule. Further, the Company suggests that the change from its current policy of restricting smoking within the plant to prohibiting it inside but allowing employees to smoke outside is not so significant a change in

working conditions as to require bargaining. Even if the no-smoking policy is a mandatory topic of bargaining, the Company notes that there was never a demand for bargaining by the Union. Moreover, the parties met three times over the policy, and the Company substantially modified its initial position, while not acquiescing to the Union's demands. For these reasons, the Company asks that the policy be sustained and the grievance be denied.

DISCUSSION

The stipulated issue is whether the implementation of the Company's no-smoking policy violates the contract. The Union asserts that it does, both because the Company failed to bargain over the policy and because the policy is unreasonable.

With respect to the claim that the Company failed to bargain over the no-smoking policy, the Union cites the arbitrator's decision in Illinois American Water Company, 93-1 ARB ¶3240 (1993) for the proposition that bargaining must precede the imposition of such rules. 1/ This case, however, is distinct from Illinois American Water. There, a clear demand for bargaining had been made and the case came to the arbitrator on deferral from the National Labor Relations Board. There is no evidence that the Union in this case made a demand for bargaining over the no-smoking policy, nor that the policy has been challenged before the NLRB. The parties have not stipulated that the arbitrator may reach out to external law to resolve this case, and the arbitration provision of the contract would seem to prohibit such an expansion of the arbitrator's role:

> The authority of the arbitrator shall be limited to the interpretation of this Agreement and to arbitration of grievances and disputes which may arise as to the meaning and interpretation of this Agreement. The Arbitrator, in each case, will be bound by the provisions of this Agreement and shall not have the authority to change, amend, or modify the provisions of this Agreement.

For these reasons, I find that this case must turn on whether the Company has violated the existing collective bargaining agreement in promulgating the no-smoking policy. In so finding, I expressly decline to express an opinion or make a finding on any aspect of the dispute over the Company's duty to bargain under the Act.

1/ At the close of the hearing, it was apparent that the issues in this case were similar to those in Illinois American Water Company. The arbitrator was aware that the decision in the prior case had just been published. In order to avoid the possibility that one party have knowledge of the prior award and the other would not in the preparation their briefs, copies of the award were provided to both parties.

The contract is silent as to the Company's right to make and enforce work and safety rules. Even in the face of contractual silence, however, the right of an employer to make reasonable rules to ensure the safe and efficient operation of its plant is widely acknowledged and well established in industrial relations. It is a necessary under-pinning of the Company's right to operate the enterprise. The right is not unlimited. As defined by Arbitrator Carroll Daugherty, the right to unilaterally issue and enforce rules extends to those which "(1) do not conflict with any provision of the parties' agreement or of law and (2) are reasonably related to the safe, orderly, and efficient operation of the company's business." 2/

Aside from the Union's claim that the process of establishing this rule violated the duty to bargain, there is no argument that the substance of the rule violates either the law or the express terms of the collective bargaining agreement. The Union does, however, argue that the no-smoking policy violates an implicit term of the contract, because there is a binding past practice of allowing smoking inside the plant. The arbitrator has already addressed this argument, in Illinois American Water Co.:

> Where an unwritten practice has been unequivocal, clear, and mutually accepted over time, it may be treated as a contractual obligation. This is because the contract is negotiated with such practices in mind, and the proposals, concessions and judgments made in the course of bargaining are made on the assumption that these practices will continue during the term of the contract. The validity of this assumption depends upon the subject matter of the practice, since it is far more likely that the parties would expect an employee benefit to be continued than some particular management technique or practice, and whether it is of such significance that it might actually influence bargaining behavior.
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> Where the right to smoke has been held out as a binding past practice, arbitrators have overwhelmingly rejected the contention. Smoking has been found to be a privilege rather than a right, subject to limitation by employers seeking to prevent litter, reduce fire risks, contain insurance costs, safeguard the purity of their product or equipment, protect their company's image, or protect the health of smokers and non-smokers. In addition, it has long been held that even binding unwritten practices arise in a given set of circumstances, and that changes in those underlying circumstances will justify termination or revision of the practice. The change in circumstances here is the recognition that passive smoking creates a significant health risk to employees who do not choose to smoke. Certainly this information has not suddenly become available during the term of this contract. The health risks have been discussed and debated for years. As with most changes in societal attitudes, the process of accepting the

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2/ Industrial Finishing Co., 40 LA 670 (1963) at 671.

> existence of a problem and the need to respond to it is gradual, but it yields a decision to act at some point. The fact that the Company could have become convinced of the change in circumstances in August of 1990 or 1992 rather than August of 1991 does not alter the fact that the assumptions underlying the practice of allowing smoking throughout workplace have changed sufficiently to justify a change in the practice. Based upon the great weight of arbitral opinion holding that smoking at work is a privilege rather than a right, and because the dangers of passive smoking represent a material change in circumstances, I conclude that the rule restricting smoking does not violate any implicit term of the collective bargaining agreement. (93-1 ARB ¶3240, at page 4268, footnotes omitted).

I believe that this reasoning applies with equal force in the instant case. The Company expressly relied upon the Environmental Protection Agency's report finding that passive smoking represented a serious health hazard in deciding on a no-smoking policy for its plants. The identification of a serious workplace hazard by a government agency represents a material change in the circumstances under which the less restrictive smoking practice arose. Thus, even if smoking represented a benefit established by past practice, the Company would have been justified in modifying the practice after the EPA report.

Finally, the Union argues that the rule is unreasonable because there is a less restrictive alternative available. The Union argues that the break room in the assembly area of the plant could easily be transformed into an isolated smoking area. Even ignoring the evidence that the Company would have to spend some amount of money to vent this room to the outside and even then would not eliminate the passive smoking problem entirely, the Union's argument on this point misses the mark. The test of reasonableness is whether the rule as promulgated is reasonably related to the safe, orderly, and efficient operation of the Company's business. A wide range of options meet this test, and the Company is not required to select the one among them that is the least inconvenient for smoking employees. By eliminating smoking within the plant, while allowing smoking employees the opportunity to smoke outside at the same intervals in the day as they always have, the Company's rule reasonably seeks to eliminate a work place carcinogen without overreaching by regulating the purely personal behavior of employees. Whether or not it is the most reasonable response to the safety hazard posed by second-hand smoke, it is a reasonable response and is therefore within the Company's contractual authority.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The implementation of the Company's no-smoking policy does not violate the collective bargaining agreement. The grievance is denied.

Signed this 20th day of July, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator