

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	Case 1
GENERAL TEAMSTERS UNION, LOCAL 662,	:	No. 49261
	:	A 5073
and	:	
	:	
GENERAL PARTS, INC. OF WISCONSIN,	:	
d/b/a CARQUEST DISTRIBUTION CENTER	:	
	:	

Appearances:

Ms. Naomi E. Eisman, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, Milwaukee, WI 53212, appearing on behalf of General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, referred to below as the Union.

Mr. Don Komis, President, General Parts, Inc. of Wisconsin d/b/a CarQuest Distribution Center, 1906 North Peach Avenue, Marshfield, WI 54449, appearing on behalf of the Employer and, on the brief, Mr. George K. McPherson, Jr., and Ms. Catherine M. Hobart, Smith, Currie and Hancock, 2600 Harris Tower, Peachtree Center, 233 Peachtree Street, N.E., Atlanta, GA 30303-1530, referred to below as the Employer, or the Company.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission designated the undersigned to resolve the instant grievance filed by the Union. A hearing was held on July 13, 1993, and the parties were given full opportunity to present their evidence and arguments. The hearing was not transcribed and the parties filed briefs and reply briefs by August 24, 1993.

ISSUE

The Union frames the issue as follows:

Whether or not the Employer violated the collective bargaining agreement by failing to post the WATS operator position; and if so, what is the appropriate remedy?

The Employer frames the issue as follows:

Whether the agreement requires the Company to post and fill the position for a WATS employe.

The parties agreed at the hearing that the Arbitrator would frame the issue in the Award. The undersigned frames the issue as follows:

1. Did the Employer violate the contract by not posting the vacant WATS operator position previously held by Ron Leonhard until February 8, 1993?
2. If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

The parties' 1991-93 collective bargaining agreement contains the following pertinent provisions:

Article II
Recognition

Section 201 - Employees Covered Under Agreement.

The Employer recognizes the General Teamsters Union Local No. 662, affiliated with the International Brotherhood of Chauffeurs, Teamsters, Warehousemen and Helpers of America, as the exclusive bargaining agent for all truck drivers and helpers, warehousemen, order pickers and packers, and shipping and receiving employees employed at the Employer's Marshfield, Wisconsin facility, EXCLUDING all office, clerical employes, salesmen, guards, and supervisors as defined in the National Labor Relations Act.

. . .

Article VIII
Promotion, Demotion, and Transfers

Section 801 - Posting:

801.1 When new jobs are created or vacancies occur and transfers or promotions become necessary, such jobs shall be posted for at least three (3) working days on the company bulletin board and in the garage. Employees desiring these jobs shall sign such posted notice, and shall thereby be deemed to have made application for such jobs. Copies of completed postings shall be furnished to the Union on request.

. . .

801.5 When an employe leaves a job in order to demonstrate his fitness for the job created by a vacancy, as herein provided, the job thus left open, if any, may be filled by the Employer in accordance with seniority within the classification affected during the period of training herein after provided. In the event the trainee demonstrates his ability to handle the new job duties competently within the thirty (30) day training period, he shall be deemed to be transferred to the new job and there upon his former job shall be filled in accordance with the provisions of this ARTICLE.

. . .

Article XI
Employer's Responsibilities and Functions

Section 1101 - Management Rights: Except as otherwise provided for in this Agreement, the Employer retains all rights, functions and duties of management which it has by law, including, but not limited to, the right to hire, suspend or discharge for just cause; the right to assign jobs and transfer employes; the right

to increase or decrease the working force; the right to determine the products to be handled, produced or manufactured; the right to determine the layout and equipment to be used and to determine the processes, techniques, methods and means of handling, processing or distributing the Employer's product; the right to determine the location of business, including the establishment of new locations and the relocation or closing of old locations; the right to determine the financial policies of the business; the right to determine the management organization of the business; the right to establish policies regarding the selection of new employes, production standards and judgment of workmanship required; the right to maintain discipline and control regarding the use of the Employer's property; and the right to establish safety, health and property protection measures where legal responsibility of the Employer is involved.

. . .

Article XXI
Miscellaneous Provision s

Section 2104 - Subcontracting: The Employer agrees that no work or services presently performed or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, person, or non-unit employe. The Employer may, however, subcontract work when all of its regular employees are working.

BACKGROUND

The Company sells parts and supplies for automobiles, trucks, tractors and snowmobiles. The business was purchased by the Company from Distributor's Warehouse, Inc., in August of 1992. Orders received from customers are filled and shipped. Orders can be obtained in several ways. Office sales staff may call existing customers and solicit orders. Customers may contact the Company over a WATS line and place orders. Some customers may access the Company's computer system and place orders directly.

The Union represents various employes of the Company. For at least twenty (20) years, the Union has represented WATS operators. In addition to receiving telephone orders from customers, WATS operators check on parts availability, answer technical questions, and perform billing functions. At one point there were at least two (2) full-time and two (2) part-time WATS operators. Over the years, the number of orders processed by the WATS operators has decreased, in part because of improved technology. During the last two (2) rounds of bargaining the Company proposed that the WATS operator positions be removed from the bargaining unit. Because the Union did not agree, the positions remained in the unit.

Prior to August of 1992, only employes represented by the Union performed WATS operator duties. Beginning in August of 1992, calls placed to WATS operators were directed to non-unit office clerical employes when WATS operators were busy handling other calls. Some, but not all of the calls handled by the clerical staff are received near the noon hour and the close of business. Up to four non-unit clerical employes had been utilized to answer WATS line calls.

During the early part of 1993, the two bargaining unit WATS operators were told by management that their positions might be eliminated in the future

because of reduced work load. In February of 1993, Ron Leonhard, a WATS operator, transferred into a customer return position. The Company decided not to post Leonhard's position when he transferred. Later, the Company hired an additional non-unit office clerical employe. Part of the duties of the new office clerical employe include answering WATS line calls. Since Leonhard's transfer occurred, one bargaining unit WATS operator and five non-unit office clerical employes have been handling WATS line calls.

The grievance was filed March 23, 1993 asserting that the company violated the contract by failing to post and fill the WATS operator position and by providing the work to non-unit office staff. The grievance was denied by the Company thus leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union's Initial Brief

The Union argues that Article XXI, Section 2104 of the collective bargaining agreement specifically prohibits transferring bargaining unit work to non-unit employes. The Union maintains that arbitrators generally will not allow an employer to assign unit work to non-unit employes. The Union cites NCR Worldwide Service Parts Center, 74 LA 224 (Mathews, 1980), a case in which the arbitrator prohibited the assignment of unit work to non-unit employes even when the employer claimed that an excessive workload justified the assignment.

The arbitrator ruled that the Company's action violated an agreement provision which guaranteed unit work for bargaining unit members. The Union also argues that the contract restriction in assigning unit work exists regardless of past practice to the contrary. In Bethlehem Steel Corp., 57 LA 299 (Harkless, 1971), the company had assigned unit work to non-unit employes for a period of ten years. The arbitrator ruled that these assignments violated the contract because the work clearly belonged to members of the unit. In the instant case, the Union asserts that the work of the WATS operator falls squarely in the bargaining unit. Not only is the position identified in the wage and job classification schedule, but testimony at the hearing also shows that the Union has represented the WATS operators for over 20 years. It is clear from the testimony provided by Employer witnesses that an additional non-unit office clerical employe was hired after Mr. Leonhard transferred to another unit position. The duties of the new non-unit clerical employe include WATS operator functions.

The Union also argues that the removal of bargaining unit work from the unit violates the entire agreement. Through its action, the Company has avoided the job posting, subcontracting and recognition provisions of the contract. In support of this premise, the Union cites several cases in which arbitrators have held that transferring unit work violates the entire agreement. American Bakeries Company, 46 LA 769, 772 (Hahn, 1966). Continental Tennessee Lines, Inc., 72 LA 619, 621 (Cocalis, 1979). Even if the Employer's desire to reassign work outside the bargaining unit is for good faith reasons, that cannot be allowed in the face of specific contract language to the contrary. Doing so would render the contract meaningless and could lead to the erosion of the unit, Wyman-Gordon Company, 57 LA 688 (Hogan, 1971).

As a remedy, the Union requests that the WATS operator position be posted and awarded to the most senior employe. According to the Union, the Employer should be required to pay the Union for the number of hours Mr. Leonhard would have performed the WATS operator duties from the time of transfer.

The Company's Initial Brief

The Company argues that the Management Rights clause gives the Company the right to determine whether a job will be posted. The contract does not restrict management's right to determine manning needs. Management also has

the right to assign duties and operate the business in an efficient manner. The Company asserts that it has the sole right to determine the existence of a vacancy. While Section 801 governs the procedure for filling a vacancy, the Company concluded that a vacancy was not created when one of the WATS operators transferred. This conclusion was reached because of the diminishing workload in the WATS area which has been occurring for a number of years. The Company cites Duquesne Brewing Co., 35 LA 649 (Dworkin, 1960) and Rheem Manufacturing Co., 46 LA 1027 (Block, 1966), in support of the premise that management has the right to consider workload requirements before declaring a vacancy for a position. Because of the diminished workload, the Company was under no obligation to post the WATS operator position.

The Company further argues that it has the right to unilaterally eliminate jobs due to the modernization of business practices. The Company contends that over the years, ordering procedures have become increasingly automated. Arbitrators have recognized the right of employers to eliminate positions when legitimate business reasons, such as computerization, exist. Dresser Industries, 96 LA 1063 (Nicholas, 1991). In that case, the arbitrator also ruled that management had the right to reassign residual duties to supervisory personnel when they are de minimis and closely related to the duties performed by the supervisors.

The Company also asserts that any limitation on the Employer's right to eliminate jobs must be definite and specific, citing Container Corporation of America, 91 LA 329 (Rains, 1988).

On those bases, the Company asserts that it had the unrestricted right to eliminate a WATS operator position. With decreases in work and improved technology, there was insufficient work for 2 full-time employes. Further, the contract does not dictate the number of employes to occupy unit positions. The Company points out that the number of Union employes remained the same after the WATS operator transferred to customer returns.

According to the Company, the Union has been aware of management's concern about WATS operator workload for quite some time. This issue has been discussed during the last two rounds of collective bargaining when the Company proposed the removal of the position from the bargaining unit. The Company asserts that the remaining WATS operator is only minimally occupied during the workday.

In summary, the Company maintains that the vacancy did not exist because there was a lack of work and that therefore the contract was not violated. The Company therefore requests that the grievance be denied in all respects.

The Union's Reply Brief

The Union objects that the Employer's brief includes information that was not presented at the hearing. The Union contends that the Company's brief attempts to rewrite the record and violates the Code of Ethics and Procedural Standards for Labor-Management Arbitration. The Union takes the position that the arbitrator cannot consider facts contained in the brief that were not presented at the hearing.

The Union argues that the Company violated the contract when it failed to post the vacant WATS operator position. The contract was also violated when the WATS operator duties were transferred to non-unit office clerical personnel. The Union asserts that the evidence does not support the position of the Company that there was a decrease in the WATS operator workload. However, the evidence does show that an additional office employe, who has some WATS operator duties, was hired after the vacancy in the unit position occurred. The Union also points to the testimony of Union Steward Gary Franz that the office clerical staff performed increased WATS operator duties after

the disputed position became vacant. For these reasons, and the others identified in the initial brief, the Union argues that the grievance should be sustained.

The Company's Reply Brief

The Company denies that bargaining unit work was transferred to non-bargaining unit personnel. The Company maintains that a large portion of the work performed by WATS operators has been eliminated due to the computerization of the ordering process. Because of this computerization, the number of bargaining unit WATS operators has steadily decreased. The Company asserts that five years ago, there was enough WATS operator work to keep two full-time and one or two part-time employees busy. As technology has improved, the number of orders taken by WATS operators has diminished to the point that the remaining WATS operator has no more than one or two hours of WATS duties to perform each day.

The Company argues that the Union has failed to prove that any WATS operator duties were ever given to non-unit personnel. Further, the fact that the Company once tried to remove the WATS positions from the unit does not prove that WATS employee duties were assigned to non-bargaining unit employees.

The Company also reasserts its position that it has the ability to determine when a vacancy exists. Based upon the decreased workload for WATS operators, the Company made a good faith determination that a vacancy had not occurred. The Company asserts that it is not required to bargain over the elimination of a unit position when the work involved has been eliminated due to technological changes. For these reasons, and those asserted in the initial brief, the Company maintains that it did not violate the contract and that the grievance should be dismissed.

The Company points out that if the Arbitrator rules that the WATS operator position should have been posted and awards back pay, back pay should only be awarded for the time when one WATS operator was utilized by the Company. The Company argues that since two full-time employees were paid as WATS operators until February 7, 1993, back pay should not be awarded for a WATS employee prior to February 8, 1993.

DISCUSSION

The issue to be decided is whether the Company violated the contract by not posting the vacant WATS operator position previously held by Ron Leonhard.

The first matter to be addressed involves the Union's allegation that the Employer introduced new facts in its brief that were not presented at the hearing. Rules of proper arbitration procedure preclude the introduction of new evidence in post-hearing briefs. The Employer's brief does include statistical information and other factual references which were not part of the hearing which occurred on July 13, 1993. The information was available to the Company at the time of the hearing and should have been introduced at that time so that the Union would have been in a position to respond. Accordingly, the undersigned has adopted the approach normally taken by arbitrators to only consider the evidence which was submitted or referred to at the hearing as well as arbitral citations identified in the briefs.

The undersigned agrees with the Company's position that, generally speaking, it has the right to determine whether or not a vacant position needs to be filled. The Company appropriately relies on the management rights clause for this authority. The Duquesne Brewery, supra, award supports the Company's contention that work load requirements can be considered prior to declaring a position vacant. In Duquesne, supra, the company's right to eliminate a position because of reduced work load was affirmed. In Rheem, supra, also

cited by the Company, the arbitrator ruled that the employer could on a reasonable basis, determine whether or not an opening exists. Thus, the arbitrator determined that the job posting language provided the procedure to be followed in filling vacancies, but did not mandate that all vacancies be filled.

The undersigned also agrees that the Company has secured the right, through its management rights clause, to eliminate positions because of modernization. In Dresser, supra, the employer began using computers to improve scheduling and material routing which eventually lead to the elimination of some positions. The arbitrator ruled that the employer had the right under the circumstances to eliminate dispatcher positions and reassign residual duties to supervisors.

If the circumstances and contract language surrounding the elimination of the WATS operator here were the same as in the cases cited by the Company the instant grievance would be dismissed by the Arbitrator. Significant differences exist however that result in a different outcome. In the cases cited by the Employer, positions were eliminated because there was a lack of work for various reasons. While the Employer provided testimony that the work load of the WATS operators had decreased, unlike the cited cases, the essence of the job remained but was transferred to non-unit employees.

Specifically, Dave Lockwood, Comptroller, testified that effective in August of 1992, non-unit office clerical staff began performing WATS operator responsibilities. When the WATS operators were busy, WATS calls were handled by the non-unit employees. While some of these calls may have been handled during busy times before lunch and the end of the day, the record further establishes that anytime the WATS operators were occupied, non-unit employees received the WATS line calls. Although there may be other contributing factors involved, the diversion of these calls to the office staff must be viewed as a contributing factor to work volume decreases experienced by the WATS operators. Unfortunately, the extent of the office staff's role in performing WATS operator duties was not identified by either party.

Several months after the office clerical staff began handling WATS calls, the Company encouraged the two full-time WATS operators to consider transferring to available vacant positions. A Company representative indicated that the reduced workload placed their positions in jeopardy. In February, 1993, one of the WATS operators made a lateral transfer to a vacant position. The Company chose not to post and fill that employee's WATS operator position, but did create and fill an additional non-unit office clerical position. Steve Heroux, Operations Manager, testified that part of the responsibilities of this new non-unit position included WATS operator duties.

Gary Franz, Union Steward, credibly asserted in his testimony that the office staff appeared to be performing more WATS operator work after Leonhard transferred. The hiring of an additional clerical employee with some WATS responsibilities seems to support this view. The Company did not submit any evidence at the hearing showing the amount of time the non-unit office staff performed WATS operator duties or otherwise rebutting Franz's testimony on that subject. Also there is not any showing that the remaining WATS operator picked up all of the WATS calls previously taken by Leonhard. On that basis, the Arbitrator is satisfied that the Company assigned most all of the WATS calls that Leonhard would have taken to non-unit employees.

While the Company has secured significant operational latitude via Article XI, Section 1101 Management Rights, Article XXI, Section 2104, Subcontracting, provides significant restrictions. The subcontracting clause states:

The Employer agrees that no work or services presently

performed or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, person, or non-unit employee. The Employer may, however, subcontract work when all of its regular employes are working.

Section 2104 prohibits the Employer from using its generally reserved rights to assign work and to decide whether to fill or not fill a vacancy in such a way as to transfer, assign or convey to non-unit employes any part of the work or services being performed by the bargaining unit as of the date of execution of the agreement. When it decided not to post Leonhard's job and rather to transfer, assign or convey most or all of the WATS calls he would have taken, to non-unit personnel (notably including one newly-hired office clerical employe), the Employer violated that Section 2104 prohibition. The Company's contention that Leonhard's transfer maintained the size of the bargaining unit workforce does not bring the Company's actions at issue in this case within the exception language in the last sentence of Section 2104. First the record supports that Leonard transferred to an existing position previously held by a unit member rather than to a new position. Secondly the Section 2104 language would permit the Company to "subcontract" WATS work within the meaning of Section 2104 only if the regular employes performing that work are working.

By eliminating the WATS operator position formerly held by Leonhard rather than posting and filling it, the Company effectively removed a bargaining unit position and prevented a regular bargaining unit employe from working in that position. Even if there had been an expansion of the number of employes performing the customer return work to which Leonhard transferred that would not relieve the Company of its Section 2104 obligation not to subcontract WATS call work within the meaning of that Section unless by doing so it did not affect the number of regular bargaining unit employes performing that WATS call work. Here, that number was reduced by one, and the Company therefore violated Section 2104 by failing to post Leonhard's position and by assigning most or all of the WATS work previously performed by Leonhard to non-unit employes.

Even though four non-unit office staff performed WATS operator duties prior to the grievance, the Union has not relinquished its right to pursue the instant grievance. It is likely that no objection was raised because both WATS operators continued to perform the WATS work. The Union's desire to retain WATS operator work has been evident over the last two rounds of collective bargaining. During those periods of negotiations, the Company had proposed to remove the two (2) WATS operators from the bargaining unit. The Union did not agree to these proposals and the positions remained in the unit. The Company attempts to put this negotiations history in its best light by asserting that the Company was providing notification to the Union about the need to eliminate these positions. The undersigned disagrees with the Company's characterization and concludes that the plain language of the proposal captures the intent of the proposal which was to remove the WATS operators from the unit. Had the intent of the Company been to inform the Union about the need to eliminate the positions, more precise communication, possibly in a different forum could have been provided. Approving the Company's actions at issue in this case would allow them to achieve something that was unobtainable during negotiations.

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

AWARD

The grievance is sustained. The Company violated Article XXI, Section 2104, Subcontracting, by not posting the vacant WATS operator position previously held by Ron Leonhard and by assigning bargaining unit WATS operator duties to non-unit employes. The Company is ordered to post and fill the WATS

operator position previously held by Ron Leonhard. After successfully completing the thirty (30) day training period, the successful bidder shall receive back pay equal to the difference between his/her pay rate and the WATS operator rate back to February 8, 1993. If a new employe is hired to fill the WATS operator position, because unit employes fail to bid and/or complete the training period, no back pay is due.

Dated at Madison, Wisconsin this 19th day of November, 1993.

By William K. Strycker /s/
William K. Strycker, Arbitrator