

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS "GENERAL" LOCAL UNION
NO. 200

and

GENERAL BEVERAGE SALES COMPANY--
OSHKOSH

Case 11
No. 53589
A-5439

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, by Mr. John J. Brennan, appearing on behalf of the Union.
Boardman, Suhr, Curry & Field, Attorneys at Law, 1 South Pinckney Street, P. O. Box 927, Madison, Wisconsin 53701-0927, by Mr. Steven C. Zach, appearing on behalf of the Company.

ARBITRATION AWARD

Teamsters "General" Local Union No. 200, hereafter the Union, and General Beverage Sales Company, hereafter the Company, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. The Union, with the concurrence of the Company, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. Hearing was held on May 20, 1996, in Oshkosh, Wisconsin. The hearing was not transcribed and the record was closed on August 7, 1996, upon receipt of post-hearing written argument.

ISSUE:

The parties were unable to stipulate to a statement of the issue.

The arbitrator frames the issues as follows:

1. Did the Company violate the collective bargaining agreement by promoting Dan Horejs to a working supervisor and by failing to post a vacancy in the first shift Warehouseman position which had been occupied by Dan Horejs?
2. If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 1

RECOGNITION

Section 1.01. The Employer recognizes Teamsters "General" Local Union No. 200, affiliated with the International Brotherhood of Teamsters as the statutory collective bargaining agent for the collective bargaining unit consisting of all truck drivers and warehousemen, but excluding salesmen, clerical workers and supervisors as defined in the Act.

Section 1.02. The term "employee" as used in this Agreement shall include warehousemen and truck drivers (excluding office clerical employees, professional employees, salesmen, guards, supervisors, and janitors, and excluding beer driver-salesmen compensated in whole or in part by the payment of a commission).

Section 1.03. Neither the Company nor the Union will negotiate or make collective bargaining agreements covering any of the employees in the bargaining unit unless such negotiating or making of collective bargaining agreements are through duly authorized representatives respectively of the Company and the Union.

Section 1.04. Based on the present number of employees and shifts, there shall be two (2) supervisors who shall be entitled to do bargaining unit work. The day shift liquor supervisor may perform occasional or limited bargaining unit work in order to ensure the smooth flow of operations. This provision is not intended to eliminate bargaining unit work. For each additional five (5) employees added to the bargaining unit, the Company may add another supervisor who shall be entitled to do bargaining unit work.

ARTICLE 2

UNION SECURITY AND CHECK OFF

Section 2.01. Union Security. All present employees who are members of the Union on the effective date of this section shall remain members of the Union in good standing as a condition of

continued employment. All present employees who are not members of the Union, and all employees who are hired hereafter shall on and after the 31st working day following the beginning of their employment or on and after the 31st working day following the beginning of their employment (sic) or on and after the 31st working day following the effective date of this Section, whichever is the latter, become and remain members in good standing of the Union as a condition of employment.

. . .

ARTICLE 5

SENIORITY

. . .

Section 5.06.

- a) Job posting shall take place for future openings in the following work classifications, subject to the terms and conditions set forth in section 6(b) hereof:
 - 1) assignment to the first, second or third shifts;
 - 2) assignment as a warehouseman;
 - 3) assignment as a driver.

- b) Whenever a job is created or becomes vacant and the employer in its discretion determines to fill that vacancy or job, the job shall be posted for a period of five (5) calendar days. Employees shall be entitled to bid for the job by signing the job posting. Such vacancy or new position shall be filled with the senior employee bidding, provided, however, that said employee is in the employer's judgment as described in Section 1 of this Article capable of performing the work. During the five (5) calendar day posting period, the employer may temporarily fill the job. The employee may at the Employer's discretion be required to serve a thirty (30) calendar

day trial period before being assigned permanently to the job. If the employee fails to qualify or desires to return to his former job at the end of the trial period, he shall be returned to his former job without loss of seniority rights or other benefits. Said job would then be given to the second most senior man who posted for the job. If no one signs up for such job, then the employer shall assign a person to the job, taking into consideration the question of seniority as described in Section 1 hereof.

. . .

ARTICLE 10

MANAGEMENT

Section 10.01. It is agreed that the management of the Employer and its business and the direction of its working forces are vested exclusively in the Employer, and that this includes, but is not limited to, the following: to direct and supervise the work of its employees; to hire, promote, transfer or lay off employees or demote, suspend, discipline or discharge employees; to plan, direct, and control operations; to determine the amount and quality of the work to be performed, to schedule the hours of work and assignment of duties; and to make and enforce reasonable rules. The Employer's exercise of the foregoing functions shall be limited only by the express provisions of this contract and Employer has all the rights which it had at common law except those expressly bargained away in this Agreement and except as limited by Statute.

Section 10.02. The exercise by the Employer of any of the foregoing functions shall not be reviewable by arbitration except in case such function is so exercised as to violate an express provision of this contract.

. . .

BACKGROUND:

The Company and the Union are parties to a collective bargaining agreement which covers

certain employees who work at General Beverage Sales, hereafter Beverage, or General Beverage Beer Distributors, hereafter Beer. Beer and Beverage, which operate independently from one another, each have three shifts.

Prior to September, 1995, Beer and Beverage each had one working supervisor on second shift and one working supervisor on third shift. Neither Beer, nor Beverage, had a working supervisor on first shift. Each working supervisor performed bargaining unit work.

In September, 1995, Mark Otto, a bargaining unit employee who worked as a Driver, was promoted to working supervisor on first shift in Beverage and Dan Horejs, a bargaining unit employee who worked as a first shift Warehouseman in Beer, was promoted to working supervisor on first shift in Beer. Following these promotions, the Company posted a vacancy in a Driver position, but did not post a vacancy in a first shift Warehouseman in Beer.

On September 25, 1995, Union Steward Michael Wilke filed a grievance on behalf of Union members which stated that "Job Posting - Jobs are not getting posted. When an employee leaves or gets promoted, also the Union believes that Dan's job should also be posted in the warehouse and not as a Driver." The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

The Company moved bargaining unit work out of the Union by renaming Dan Horejs from "employee" to "supervisor." Immediately prior to and after the name change, Horejs performed the same duties. Consequently, bargaining unit work began to be performed by supervisory personnel the minute Horejs became a supervisor.

Steward Mike Wilke confirmed that Horejs' job duties have not changed. Wilke further confirmed that, in his 13 years at the warehouse, bargaining unit work had never been taken away in such a fashion before.

Wilke's testimony contradicts the Company's contention that work in the warehouse has decreased. While the Company argues that Horejs' duties have changed because he now does POS, Horejs has always done POS. Nor is the inventory a new duty. The Company's contention that Horejs no longer unloads boxcars or semis is contrary to the record evidence.

Employee Mark Otto was promoted to a supervisory position at, or about, the same time as Horejs. Horejs' position, like Otto's position, should have been posted and filled in accordance

with Article 5.

The contract allows only two supervisors to perform bargaining unit work. This includes the day shift liquor supervisor, Mark Otto. Since Dave Behring and Lyle Krueger also do bargaining unit work, the Company has already passed its limit.

There are no other employees on first shift in the Beer Department. Therefore, who does Horejs supervisor?

Of the full-time warehouse employees, beer and liquor together, there are currently six supervisors and eight bargaining unit people. This is beyond the contractual allowance of one additional supervisor for each five employees added to the unit. The drivers are properly excluded from this count since they have no supervisors.

During the most recent negotiations, the Company proposed that all beer employees become non-union. At that time, there were three bargaining unit employees in the beer warehouse: Horejs, Wilke and Chad Wegner. This proposal was rejected by the Union. The Company attempts to accomplish the same thing by simply renaming the bargaining unit employees so that, in effect, they become non-union. Section 1.04, on which the Company relies, specifically disallows the Company from using that section to eliminate bargaining unit work.

The source of job security is found in the labor agreement's recognition clause, considered together with the wage clause, the seniority clause and other clauses establishing standards for covered jobs and employees. If the Company is allowed complete freedom to remove bargaining unit work from the unit, the aforementioned provisions of the agreement would have been negotiated by the Union for no particular reason.

The Union does not contend that the Company cannot promote from within. However, after that promotion, the Company must fill that vacancy or assign the bargaining unit work elsewhere. It cannot allow promoted employees to take bargaining unit work with them. It is not the removal of the person to which the Union objects; it is the removal of the work.

The grievance should be sustained. The Company should post a vacancy in the first shift Warehouseman position vacated by Horejs or Horejs should be brought back within the unit.

Company

Article 10 provides the Company with the contractual authority to promote Horejs to a supervisor. Section 1.04 provides the Company with the contractual authority to use Horejs as a working supervisor. Under the provisions of Article 5 and Article 10, the Company has the discretion to fill, or to not fill, a vacancy.

At the time that the parties negotiated Section 1.04, there were ten employees at the Company and the Company was permitted, by the terms of the agreement, to have two working supervisors. Thus, a ratio of one to five between working supervisors and unit members was established. This ratio is confirmed by the remaining provisions of Section 1.04 which permit the Company to add an additional working supervisor for each additional five employees.

Given that there are thirty-one employees at the Company, the formula contained in Section 1.04 entitles the Company to six working supervisors. With Horejs and Otto, the Company employs six working supervisors.

Contrary to the claim of the Union, truck drivers are "employees" as that term is used in Section 1.04. Horejs supervises drivers with respect to truck inventories.

The sentence in Section 1.04 which states "This provision is not intended to eliminate bargaining unit work." is not relevant because it relates back to the previous sentence, which sentence involves the day shift supervisor. In any event, bargaining unit work has not been eliminated by the Company.

The Company did not promote Horejs in an attempt to eliminate bargaining unit membership. Such an argument is contrary to the evidence which establishes that total bargaining unit membership is at an all-time high.

The Company's decision to promote Horejs to a first shift supervisor was based upon such factors as changes in POS sales and inventory procedures, as well as changes in beer truck inventory procedures. While there has been a loss of membership in Beer, this loss is due to declining beer sales.

The Company is not violating the terms of the labor agreement by having promoted Horejs to supervisor and having him continue to do some bargaining unit work. The grievance should be denied.

DISCUSSION:

Section 1.04, relied upon by the Company, states as follows:

Section 1.04. Based on the present number of employees and shifts, there shall be two (2) supervisors who shall be entitled to do bargaining unit work. The day shift liquor supervisor may perform occasional or limited bargaining unit work in order to ensure the

smooth flow of operations. This provision is not intended to eliminate bargaining unit work. For each additional five (5) employees added to the bargaining unit, the Company may add another supervisor who shall be entitled to do bargaining unit work.

The language of Section 1.04 has not been changed since it was first placed into the collective bargaining agreement. At the time that the language was negotiated, the Company had ten full-time bargaining unit employees. By permitting two working supervisors for ten employees, the parties agreed to a ratio of one working supervisor for every five employees. By agreeing to the last sentence of Section 1.04, the parties agreed that this ratio could be maintained as the bargaining unit increased.

At the time that the parties entered into the current collective bargaining agreement, the Company had more than twenty full-time bargaining unit employees and had four working supervisors. The Union did not grieve the Company's use of four working supervisors.

The evidence of bargaining history and past practice is consistent with the Company's construction of Section 1.04, i.e., that Section 1.04 permits the Company to maintain a ratio of one working supervisor to five bargaining unit employees, but is inconsistent with the Union's construction of Section 1.04, i.e., that Section 1.04 allows only two supervisors to perform bargaining unit work. The undersigned is persuaded that the Company's construction of Section 1.04 is the more reasonable construction.

As the Company argues, Article I, Recognition, defines the term "employee." Since this definition of "employee" includes "warehousemen and truck drivers," and Section 1.04 does not otherwise define the term "employee," the undersigned rejects the Union's assertion that truck drivers are not "employees" for the purposes of Section 1.04.

At the time of the grievance, the Company had at least thirty full-time bargaining unit employees. 1/ Thus, the Company has the Section 1.04 authority to employ six working supervisors. With the promotion of Mark Otto and Dan Horejs to the position of working supervisor, the Company employs six working supervisors. 2/

In Section 1.04, the parties expressly limited the authority of the "day shift liquor supervisor" to perform bargaining unit work. It follows, therefore, that, if the parties had

1/ The testimony of Joel Minkoff.

2/ The other four working supervisors are Steve Schneider, Todd Borchardt, Dave Behring and Lyle Krueger.

intended any restriction upon the amount, or type, of bargaining unit work performed by a working supervisor, then the parties would have expressed such a limitation. Since such a limitation is not expressed, the undersigned rejects the Union's assertion that Horejs cannot be assigned bargaining unit work which he had performed as a bargaining unit employe.

As the Union argues, the third sentence of Section 1.04 states that "This provision is not intended to eliminate bargaining unit work." On its face, this statement is susceptible to more than one interpretation. This statement, however, does not stand alone. Rather, it must be construed within the context of Section 1.04.

Section 1.04 expressly entitles supervisors to perform bargaining unit work. Thus, the assignment of bargaining unit work to supervisors, per se, cannot be considered to be an elimination of bargaining unit work. Within the context of Section 1.04, the most reasonable construction of the third sentence of Section 1.04 is not that bargaining unit work cannot be removed from the bargaining unit and assigned to a supervisor, but rather, that bargaining unit work cannot be assigned to a supervisor if the assignment eliminates the work of a bargaining unit employe. The assignment of bargaining unit work to Horejs did not eliminate the work of any bargaining unit employe.

To be sure, the decision to not post a first shift Warehousemen position in Beer reduced bargaining unit opportunities for first shift work. However, since Section 5.06 (b) expressly provides the Company with discretion to fill, or to not fill, a vacancy, the Company is not contractually required to post the first shift Warehousemen position vacated by Horejs. 3/

As the Union argues, with Horejs' removal from the bargaining unit, Beer does not have any bargaining unit employe on first shift at the Warehouse. 4/ This fact, however, does not establish that Horejs does not supervise any employe. The testimony of Joel Minkoff demonstrates that Horejs has supervisory authority over truck drivers and their inventories. 5/

3/ Given this discretion, the fact that the Company previously posted positions which had been vacated by a promotion to working supervisor cannot be considered to be an acknowledgment that the Company has an obligation to post such positions. The record demonstrates that there have been changes in Beer, e.g., declining beer sales, increasing POS sales, and changes in inventory procedures which, over time, have reduced the need for a first shift Warehouseman and increased the need for a first shift supervisor. The record does not warrant the conclusion that Horejs was promoted out of the unit for the purpose of eliminating a bargaining unit position in Beer.

4/ Apparently, Steve Schneider, the second shift working supervisor in the Warehouse in Beverage also works solo at the Warehouse. See Union Exhibit #1.

5/ Some of this authority had been exercised by other supervisors, such as the Beer Sales

Neither the language of Section 1.04, nor the evidence of the parties' past practices, demonstrates that the additional working supervisor must be assigned to supervise the five additional bargaining unit employees. Nor does the record establish that the parties have agreed that a working supervisor must be assigned to supervise any other threshold number of bargaining unit employees. Rather, the record establishes that there is only one criteria which must be met before the Company may add a working supervisor, i.e., the Company must add five bargaining unit employees.

Supervisor, and some of this authority resulted from the restructuring of the POS program.

As the Union argues, on May 17, 1995, during the parties' most recent contract negotiations, the Company proposed the following:

PROPOSAL FOR GENERAL BEVERAGE AND BEER
OSHKOSH:
BEVERAGE EMPLOYEES TO REMAIN IN
LOCAL #200
BEER EMPLOYEES TO BECOME NON UNION

1. CURRENTLY THERE ARE THREE BARGAINING UNIT EMPLOYEES WORKING IN THE BEER WAREHOUSE:
 1. DAN HOREJS
 2. MIKE WILKE
 3. CHAD WEGNER

EACH EMPLOYEE WOULD BE GIVEN THE OPPORTUNITY TO RETURN TO THE GENERAL BEVERAGE OSHKOSH BARGAINING UNIT OR BECOME PART OF THE GENERAL BEER OSHKOSH WAREHOUSE AND DELIVERY STAFF. EACH EMPLOYEE WOULD BE GRANTED A ONE YEAR TIME PERIOD TO MAKE A CHANGE FROM THE BEER TO THE BEVERAGE COMPANY.

2. GENERAL BEER OSHKOSH WILL BE LOOKING TO HIRE 1-2 PEOPLE AS SUPERVISORS FOR THE WAREHOUSE / DELIVERY STAFF. EACH OF THE THREE EMPLOYEES LISTED ABOVE ARE POTENTIAL CANDIDATES AND WILL BE GIVEN INVITATIONS TO INTERVIEW FOR THE NEW POSITIONS.
3. WHEN THE BEER COMPANY IS IN NEED OF EXTRA DAILY HELP FOR THE WAREHOUSE THEY WILL DRAW FROM THE BEVERAGE COMPANY BARGAINING UNIT LABOR POOL.
4. NO FULL TIME EMPLOYEES WILL LOSE THEIR EMPLOYMENT THROUGH THIS CHANGE IN JOB

STATUS.

As the Union argues, this proposal was rejected by the Union and ultimately dropped by the Company.

If the Company had been successful in obtaining the Union's agreement to the above proposal, then Beer would not have a bargaining unit employe on the first shift in the Warehouse. 6/ However, the Company did not need Union acquiescence to the Company's bargaining proposal to make Horejs a working supervisor; to make the determination to not fill the bargaining unit position vacated by Horejs; or to assign Horejs bargaining unit work which he had performed as a bargaining unit employe. 7/ The reason being that existing contract language provides the Company with such authority. Contrary to the argument of the Union, the Company has not exercised a right which it attempted, but failed, to obtain during contract negotiations.

As the Union argues, arbitrators have relied upon a labor contract's recognition, wage, and seniority clauses to conclude that bargaining unit work may not be transferred outside the bargaining unit. The decisions of such arbitrators are not controlling because, in the instant case, the parties have negotiated language which expressly provides the Company with the right to assign bargaining unit work to supervisors.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Company did not violate the collective bargaining agreement by promoting Dan Horejs to a working supervisor and by failing to post a vacancy in the first shift Warehouseman position which had been occupied by Dan Horejs.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16th day of January, 1997.

6/ Indeed, if the Union had agreed to the Company's proposal, there would have been no bargaining unit employes in Beer. At least one employe remains in Beer, i.e., Wilke.

7/ Contrary to the argument of the Union, it is not evident that Horejs performs exactly the same duties which he had performed as a bargaining unit employe.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator