BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS LOCAL 662

and

ASSOCIATED MILK PRODUCERS, INC.,
FALLS DAIRY DIVISION

Case 2
No. 53976
A-5471

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman S.C., by Ms. Leeann Gruwell Anderson, on behalf of the Union.
Felhaber, Larson, Fenlon & Vogt, P.A., by Mr. Edward J. Bohrer, on behalf of the Company.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Jim Falls, Wisconsin, on August 27, 1996. The hearing was not transcribed and the parties thereafter filed briefs which were received by October 18, 1996. Based upon the entire record and arguments of the parties, I issue the following Award

ISSUE

The parties have agreed to the following issue:

> Did the Company violate the contract by assigning bargaining unit work to non-bargaining unit employes and, if so, what is the appropriate remedy?

DISCUSSION

The Company operates a milk processing plant in Jim Falls, Wisconsin. There, unprocessed milk from independently-owned milk trucks is unloaded in four (4) intake truck bays by haulers who are not employed by the Company and who are unrepresented by any union. The milk is then transferred into the plant for processing.

On January 1, 1996, the Company reorganized its operations by reducing its milk intake department and by transferring four (4) milk intake employes to other jobs in the plant. To that

end, the Company posted the following notice (Joint Exhibit 3):

Effective January 1, 1996
Intake Procedure

As of January 1, 1996: We will

* Only have one person in each intake. None in the wash bay.

* You might have to open and close the overhead doors.

* We will try to open the top cover, if not, you are welcome to do so.

* The filter must be put on each truck.

* Hook up the back of the truck like always.

* Please try to catch the milk, it really helps our Ridge and Furrow system.

* Before you start the pump, the intake person must have the butterfat samples in place.

* You can start the pump; we will be responsible for the direction of the milk.

* Always make sure the top is open on your truck. When the truck is empty, please drain it real good if you are going to the washer.

* We will take the filter off and close the cover if we are available. You can wait or close it yourself.

* When it's time to wash the truck, we will assist you with the washer. You can put it in if you want to.

* Start the washer and mark the load number on the wash chart.

* You must make sure the wash tag is filled out and signed.

* Make sure the dipper is washed and sanitizer is put in.

* Again, when time is available, we will assist you at all times.

*** Any questions or problems, please call:

. . .

That reorganization, which did not result in any layoffs, reduced the number of bargaining unit employes in the intake department from 13 to 9. The reorganization since that date has enabled haulers to perform certain bargaining unit work which previously had only been performed by bargaining unit personnel.

The Company subsequently promulgated the following notice:

AS OF WEDNESDAY, MARCH 6,
THE MILK HAULERS WILL NOT
BE ALLOWED TO GO ON TOP
OF THE TRUCKS.

ED WELCH
DIVISION MANAGER

Chief Union Steward Mark Woodford testified that the reorganization left the wash station empty; that the haulers after January 1, 1996, began to wash their own trucks; that the haulers are not trained to do the clean-in-place ("CPI") system; that it always has been "strictly taboo" for haulers to do bargaining unit work; that because of fewer employes, "Intake workers are running to get their work done"; and that this has caused them to suffer "a high stress factor". He further stated: "What's our work is always our work. It's a closed shop."

On cross-examination, he said that haulers previously washed the outside of their own trucks but never the inside and that he has seen haulers on the top of their trucks. He also acknowledged that milk from the plant is regularly sent to be processed by non-bargaining unit employes.

Roy Jones, an operator in the Intake Department, testified that haulers never opened truck covers before January 1, 1996; that they never got up to the top of their trucks; that they never cleaned utensils; and that they never hooked up the trucks to the CPI. He also said that despite the posting of a notice stating that they could not get on top of their trucks, haulers are still doing so when he is not present. He further testified that haulers are still hooking up their trucks; that they

are catching milk on a "steady" basis; and that they sometimes start the pumps, wash the inside of their trucks, fill out charts, fill out tags and wash the dipper. Jones - whose hours have been changed because of the reorganization - added that he has complained about this situation to management, but to no avail.

Former Intake Worker Greg Thompson testified that he was transferred to the Cheese Department and explained how his hourly wage has been red-circled because of the reorganization. He also addressed some of the changes which the reorganization has caused.

Operations Manager Frank Atkinson explained that the reorganization was needed because milk production has dropped; because milk trucks are now bigger, thereby cutting down on the number of trucks bringing milk to the plant; that semi-trucks from other plants now arrive at 6:00 a.m., thereby doing away with the "rush" which previously existed in the middle of the day; and that extra bargaining unit employes are brought in in the afternoon whenever there is a busy time. He added that there "very definitely" is less bargaining unit work than before and he pointed out that the Company's Blair, Wisconsin, plant is about the same size as the Jim Falls plant and that it has only one intake department employe. He added that haulers "are not supposed to" fill out tags or get up on the top of their trucks and that the Union has never told him that they were doing so. He also said, "Whenever there is a crisis, I do bargaining unit work" and that the haulers have always helped with the doors.

On cross-examination, Atkinson acknowledged that four (4) jobs have been totally eliminated. He also said that bargaining unit employe Roy Paulson was warned for running on a wet floor when he had no reason to do so, rather than because he had too much work to do. Atkinson admitted, "I made some wrong judgments there" when he promulgated the January 1, 1996, notice, and that, "We don't want it to happen", i.e., to have the haulers perform bargaining unit work.

The Union filed the instant grievance on January 4, 1996, wherein it complained that non-bargaining unit workers were doing bargaining unit work.

In support thereof, the Union asserts that the Company's assignment of intake bargaining unit work to the dairy haulers violated the contractual recognition clause; that said assignment violated the employee's seniority rights and the contractual wage clause; and that no past practice supports the Company's assignment. The Union also claims that the Company is still violating the contract in spite of its March notice and that the only appropriate remedy is to order the Company to return the four (4) intake positions to the intake department pursuant to Article 6, Section 6(f), of the contract.

The Company, in turn, contends that its reorganization represents a sound business decision; that it has tried to work out problems by giving further instructions to the haulers; and that it has "the fundamental and basic right to determine the number of bargaining unit employes

that are needed in its operations."

The Company is correct about this latter point. For in the absence of a manning clause or other specific contract language dictating otherwise, an employer retains its inherent right to determine the number of employes it wishes to employ. That managerial right goes to the very core of managerial discretion.

Hence, there is no merit to the Union's assertion that the Company under Article 6, Section 6(f), can be required to restore the last four (4) intake department workers. That proviso states:

> **(f)** All job openings to be posted would be those that would operate on a regular basis of at least four (4) hours per day in any classification. It is recognized that some jobs would operate less than four (4) hours per day; however, those jobs need not be posted, but rather any employee may exercise their seniority upon request to work on that job, providing it is in the same classification and providing they do not have full-time work on their regular paid job. It is also understood that some jobs operate full-time part of the year and less than four (4) hours other times during the year. If such a job should become open at a time that it is not operating at least four (4) hours a day, said job will not have to be posted until it is operating four (4) hours a day. Temporary vacancies because of vacation, illness or leave of absence will not create a job opening.

This language only applies when the Company decides to fill positions. But, it has no bearing on the situation here because:

> "It is generally recognized that in the absence of a contract provision limiting management's rights in regard to filling vacancies, as for example, a clear requirement to maintain a certain number of employees on a particular job, it is management's right to determine whether a vacancy exists and whether and when it will be filled." How Arbitration Works, Elkouri and Elkouri (BNA, 4th Ed., 1985), p. 517.

Accordingly, since the Company has decided not to fill the four (4) vacant slots, Article 6, Section 6(f), has no bearing on this matter.

As for the assignment itself, there is no specific contract provision expressly stating whether the Company can or cannot make such an assignment. This case therefore turns on two competing principles: the Company's right to make legitimate business decisions and the practice

here which establishes that bargaining unit employes traditionally have performed this work.

As for the former, it is clear that the Company had a valid business reason for reducing the number of intake employes. Thus, Operations Manager Atkinson testified that milk production has dropped; that there are fewer milk trucks; that there no longer is any "rush" to unload trucks; and that the Company's Blair, Wisconsin, plant has only one intake employe. All of this shows that the Company has the right to reduce the number of intake employes here in the absence of any clear contractual language dictating otherwise.

However, the record also reveals a well-developed past practice to the effect that haulers are not allowed on the top of their trucks; that haulers cannot start the pumps; that they cannot wash the inside of their trucks; and that they cannot fill out tags, wash utensils, handle filters, or fill out charts. As a result, only bargaining unit personnel can perform these duties. The Company therefore violated this past practice by allowing haulers to perform this work.

This brings us to the question of remedy.

The Union cites Buhr Machine Tool Corp., 61 LA 333, (Sembower, 1973), and Hill & Sinicropi, Remedies in Arbitration (BNA, 2nd Edition, 1991), at 352-353, in support of its claim that the only appropriate remedy is to order the Company to reinstate the four positions it has eliminated.

In Buhr, Arbitrator John F. Sembower ruled that the employer violated a contractual subcontracting clause when it followed a policy of not filling vacant positions and awarding that work to subcontractors. That is why he stated: "By far the most significant and novel issues presented by this arbitration is the question of whether so-called 'attrition' can constitute an 'erosion' of the bargaining unit." Id. at 339.

He found that "subcontractors have come into the plant itself and performed work which has typically been performed by the Company's own employes." Ibid. In a subsequent backpay proceeding, he calculated that 40,000 hours of bargaining unit work had been subcontracted and that, moreover, the normal 15 hours of overtime for many employes had been considerably reduced because of the subcontracting.

That is hardly the case here since the Company has reorganized its intake department so that it now operates with four (4) fewer employes and since no employes have suffered a reduction in their hours and none have been laid-off because of the reorganization. As a result, this is not a case where subcontracting has resulted in any direct reduction in the employe complement. Instead, the record shows that the Company can operate with four less employes and that, furthermore, the haulers have not performed all of the work formerly performed by those four employes. That is why Buhr is factually distinguishable and why it is inappropriate to grant the remedy requested by the Union.

Hence, the Company cannot be forced to reinstate the four (4) intake positions it has eliminated since there no longer is enough work for them to do. However, at least one transferred employe has been red-circled and his rate has been frozen. Given the contractual breach which has occurred, I find that any such transferred employes are to be paid during the contract's duration whatever wages they would have earned had they remained in the intake department.

The Union points out that haulers have continued to perform bargaining unit work even after the Company has directed them to not do so. In order to ensure that this problem does not recur, I suggested at the hearing that the Company inform its haulers that they cannot perform bargaining unit work. Since the Company pays these haulers, it can make sure that this directive is followed.

The Company therefore is prohibited from having the haulers - or anyone else from outside the bargaining unit for that matter - perform bargaining unit work such as standing on top of trucks, starting pumps, washing the inside of trucks, filling out tags, washing utensils, handling filters and filling out charts. At this point, there is no reason to believe that the Company will not immediately comply with such a directive. As a result, there is no need now to consider whether any monetary penalty should attach to any failure to heed this directive.

However, if the Company does not follow this directive, the Union then will be able to request whatever remedy is needed to ensure full compliance with this Award.

In light of the above, it is my

AWARD

1. That the Company violated the contract by assigning bargaining unit work to non-bargaining unit employes.

2. That the Company shall immediately cease and desist from having non-bargaining employes perform bargaining unit work such as standing on top of trucks, washing the inside of trucks, starting pumps, filling out tags, washing utensils, handling filters, and filling out charts.

3. That to resolve any questions which may arise over application of this Award, I shall retain my jurisdiction for at least the next six (6) months.

Dated at Madison, Wisconsin, this 21st day of January, 1997.

By Amedeo Greco /s/

Amedeo Greco, Arbitrator