

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL BEVERAGE SALES COMPANY

and

TEAMSTERS “GENERAL” LOCAL UNION NO. 200

Case 13
No. 60427
A-5963

Appearances:

Haus, Roman and Banks, LLP, by **Mr. William Haus**, 148 East Wilson Street, Madison, Wisconsin, 53703, appearing on behalf of the Company.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Mr. John J. Brennan**, 1555 Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin, 53212, appearing on behalf of the Union.

ARBITRATION AWARD

General Beverage Sales Company, hereinafter referred to as the Company, and Teamsters “General” Union Local No. 200, hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a request to initiate grievance arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over pay. Hearing on the matter was held at the Employer’s facility in Oshkosh, Wisconsin on January 8th, 2002. Post hearing arguments were received by February 25th, 2002. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties agreed upon the following issue:

“Was the Company required to pay its third shift employees for Tuesday night June 12, 2001 to Wednesday morning June 13, 2001?”

“If so, what is the appropriate remedy?”

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 10

MANAGEMENT

Section 10.01. It is agreed that the management of the Employer and its business and the direction of the 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.

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ARTICLE 12

HOURS AND OVERTIME

Section 12.01. For the purpose of computing overtime, the work week will begin at the beginning of Wednesday and end at the end of Tuesday and consist of forty (40) hours; this is a guarantee of forty (40) hours per week for full-time employees but shall not be construed as a guarantee of any number of hours of work in excess of forty (40) hours per week. In order for an employee to receive or be eligible for the forty (40) hour guarantee, the employee must be available for work. The Company will make reasonable effort to schedule an employee’s work so that the employee will receive two (2) days off consecutively, preferably Saturday and Sunday.

Section 12.02. Time and one-half (1-1/2) shall be paid for all work performed on Saturday as such and double time shall be paid for all hours worked on Sundays and Holidays. Provided that the Employer shall have the right to use part-time and/or temporary employees on Saturdays, Sundays and holidays and shall not be obligated to call in and offer work on these days to full-time employees. Part-time and temporary employees will be paid at the straight time hourly rate for all hours worked. Further, over-time will not be paid to full-time employees on these days if the work performed is part of their regularly scheduled shift.

Section 12.03. Neither overtime pay nor premium pay will be pyramided.

Section 12.04. It is recognized that from time to time there is need for working overtime. There will be no penalty for refusal on an individual basis to work overtime, but where all qualified employees refuse, then the Company shall have the right to select the employee or employees to work overtime starting from the bottom of the seniority list and if qualified, and the Company's decision will be final. In any event, truck drivers shall be expected to complete their route.

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ARTICLE 24

SHIFTS AND SHIFT PREMIUMS

Section 24.01. Shifts will be posted and selected by Seniority. Beverage first shift will normally work five (5) days at 8 hours a day. Second shift will normally work five (5) days at eight hours a day. Third shift will normally work four (4) days at 10 hours a day. Drivers may work either the four (4) day or five (5) day shift depending on the work schedule. Premium pay will be paid at the rate of one and one-half (1-1/2) times for work done on these shifts in excess of forty (40) hours in a workweek. The Company shall have the right to change shift schedules on seven (7) calendar days written notice, except that in the case of an emergency, a shorter notice may be given. This provision shall not apply to a modification of the hours of work, which, if modified, shall be by mutual agreement between the parties.

Section 24.02. A shift differential of twenty cents (\$.20) per hour greater than that paid for regular full-time work on the first shift will be paid for work done on the second shift. A shift differential of twenty-five cents (\$.25) per hour greater than that paid for regular full-time work on the first shift shall be paid for work done on the third shift. To be eligible for shift differential pay, the employee must have begun work that day on that shift.

Section 24.03. When an employee, member of the bargaining unit, is requested by the Company to take the place of or assume the duties of a non-bargaining unit supervisor, the employee will receive a lead man differential of ten cents (\$.10) per hour in addition to his regular rate of pay.

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ARTICLE 26

MAINTENANCE AND STANDARDS AND RULES OF CONSTRUCTION

Section 26.01. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect in Employer's unit at the time of the signing of this Agreement and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. This shall not apply to inadvertent or bona fide errors made by the Employer if corrected within ninety (90) days of notification by Union to Employer.

Section 26.02. In construing this Agreement, past practice shall not be considered (sic) except to the extent necessary in order to construe an express provision of this Agreement that is found to be ambiguous, and past practice shall not be or become a part of this Agreement.

Section 26.03. Nothing shall be deemed a past practice unless it meets each of the following tests:

- a) long continued;
- b) certain and uniform;
- c) consistently followed;
- d) generally known by the parties hereto; and
- e) must not be in opposition to the terms and conditions in this Agreement.

PERTINENT COMPANY POLICIES

Plant Closings

In the event that inclement weather conditions, or some other "act of God" keeps you from coming to work, you will receive your regular pay for the day or days taken off, provided that the Company officially declares that it is closed for that day.

When you think the Company may be closed, you should listen to the radio for announcements or call the company directly. In Madison and Oshkosh, you should call the company's 800 telephone message machine for information of a closing. Madison – (800) 638-6048, Oshkosh – (800) 635-2995, Eau Claire – (715) 834-1291 and Barron (715) 537-5258.

BACKGROUND

The Company operates a wholesale warehouse facility in Oshkosh, Wisconsin. The Company has a third shift operation that commences work at approximately 5:00 p.m. and works until 3:00 a.m., with four ten (10) hour shifts, Monday through Thursday. The work week runs from Wednesday to Tuesday, however, in the case of third shift employees, all work that commences on Tuesday is counted as Wednesday work. On the evening of Monday, June 11, 2001 there was an area wide power outage caused by a storm in the Oshkosh area. This power outage continued into June 12, 2001 and the Company contacted all but three (3) of the third shift employees and told them not to report to work due to the continued power outage. The three (3) employees that showed up to report to work found all the doors locked and returned home.

The Company's policy manual contains the following provision:

“Plant Closings.

In the event that inclement weather conditions, or some other ‘act of god’ keeps you from coming to work, you will receive your regular pay for the day or days taken off, provided the Company officially declares that it is closed for the day.”

Thereafter, the Company rescheduled the third shift employees to work on June 13, 2001 and did not pay any employees for the cancelled shift. The instant grievance was filed by the Union on June 26, 2001 and processed to arbitration in accord with the parties' grievance procedure.

UNION'S POSITION

The Union asserts the instant matter is straightforward. The Union argues the Company has for many years used a Company handbook which sets forth Company rules and policies. One of the policies is to pay employees for work days missed through no fault of the employees, at least where that workday is missed because of an “act of god.” The Union acknowledges the Company has the right to make and enforce reasonable rules. The Union points out these “reasonable rules” have been in full force and effect for many years. The Union also points to language in Article 24, Shifts and Shift Premiums, covering the work day of third shift employees, a ten (10) hour day, and that work will be paid at time and one half for work done in excess of forty (40) hours. In support of its position the Union also points to Article 26, Maintenance of Standards and Rules of Construction.

The Union argues employees were called and advised not to show up for work. Those the Company was unable to contact arrived to find the facility closed and locked up. The employees where also called in to work Friday, their normal day off, and received no overtime pay. The Union avers that if the employees had been properly credited with hours worked for Tuesday/Wednesday all time worked on Friday (over 40 hours) would have been subject to Article 24.

The Union points out that employees who were assigned to work the first and second shift, even if they did not come into work, were credited by the Company with enough hours to ensure them a forty (40) hour work week. The Union points out the Company refused to pay the third shift employees anything for the ten (10) hours they would normally have worked. The Union also points out that Mark Otto, Warehouse Manager, testified that the Company set a deadline as to when power had to be up in order for third shift employees to do business. When the power was not up by the deadline, employees were called and told not to report to work. Those employees who the Company were unable to contact arrived to find the doors locked, the lights turned off, and no other cars in the parking lot. It was obvious the facility was closed so the employees went home.

The Union also argues that Warehouseman Joe Weber testified he approached Mark Otto and asked if the employees who showed up to work would be paid and that Otto replied yes they would. While Otto denied he made any such comment the Union points out Otto acknowledged Weber made him aware he had arrived at the facility the night before.

The Union also points out that Otto further testified that it is unusual for third shift employees to work a Friday shift the employees were directed to do so to make up for the lost production. The Union stresses, first and second shift employees got paid for not working due to the storm but third shift employees were directed to actually work to get paid their normal forty (40) hours of pay.

The Union concludes that despite the Company's attempt to distinguish third shift employees and the ridiculous claim that the plant was not "officially" closed, in order for the Company to prevail the Arbitrator would have to ignore the clear plant closing language, ignore the admission that third shift employees were called and told not to report to work and ignore the admission the call off was directly related to the storm. The Union would have the Arbitrator credit the third shift employees with time not worked due to an act of god and pay the third shift employees for the Friday shift at time and one-half.

COMPANY'S POSITION

The Company contends the grievance fails to cite any violation of the collective bargaining agreement and contends there is explicit contract language to support the Company's actions in the instant matter. The Company argues that Article 24 allows it to change shift

schedules in the case of an emergency and contends a power outage that affected the plant must be considered an emergency that would justify a short notice of change of shift schedule.

The Company also disputes that the employees were told they would be paid for the shift. The Company contends that even if they were, it was an after the fact utterance, not relied on to anyone's detriment and can not have the effect of a contractual commitment by the Company. The Company also asserts it had an absolute and explicit right under the terms of the contract to schedule and require employees to report to work on Friday. The Company also points out that additional compensation, premium pay, is not paid for work performed on Saturday, Sunday or a Holiday if it is a part of the regularly scheduled shift and forty (40) hours has not been exceeded. The Company asserts there is no basis for extra pay under the circumstances in the instant matter.

The Company also contends it honored the guarantee of a forty (40) hour work week. The Company points out twenty-six (26) employees received extra pay to make up for the guaranteed work hours. The Company further argues that the Union belatedly claimed the Maintenance of Standards provision was violated and it did not state such a claim at the time the grievance was filed. The Company argues the highest standard in effect was the forty (40) hours of work guarantee and this was honored by the Company. The Company argues that under the plant closing policy there must be an "Act of God" that prevents employees from coming to work, yet three employees actually came to the plant. The Company asserts the Company must "officially" declare that it is closed and avers that it did not do so in the instant matter. The Company also contends it does not make sense to say bargaining unit employees are entitled to both the forty (40) hour guarantee and the plant closing policy. The Company also argues it can not be denied that the power outage was an emergency and therefore the Company had the right to reschedule the work.

The Company also contends considerations of equity warrant a denial of the grievance. The Company points out that nineteen (19) employees worked during the day in question and did not receive ten (10) hours of pay. The Company contends the ten (10) employees who did not work are attempting to receive a ten (10) hour windfall. The Company contends the grievants are not attempting to maintain standards but to push the envelope. The Company also points out that the Union did not present any evidence that pay had ever been granted to employees under similar circumstances.

The Company would have the undersigned deny the grievance.

DISCUSSION

The record herein demonstrates that the Company has had a long standing policy that provides that if it officially closes because of an "act of god" the employee will receive their regular pay for the day or days taken off. The Oshkosh area suffered a major power outage due to a storm during the week of June 11th, 2001. As a result the Company's computers went down

and it was unable to provide work orders for its ten (10) warehousemen. The Company then called as many of the ten (10) as it could contact and told them not to report to work.

The Company has argued that it did not officially close. The Arbitrator sees no merit in this argument. The Company sent home all employees, including non-represented employees. Management then turned off the all the lights, locked the doors and went home. When three (3) of the employees arrived at the plant they found no cars in the parking lot, no lights on and no doors open. The Arbitrator concludes that when Management determined to turn off the lights and lock all the doors it “officially” closed the plant. All ten (10) employees were available for work. It was the Company who told them not to work. Thus the Arbitrator concludes that the Company violated the policy, a reasonable work rule, and thus violated the collective bargaining agreement when it did not pay the grievants for the ten (10) hours they were not worked because of the plant closing.

The Company has argued that it could reschedule employees in an emergency under Article 24.01. The Company can reschedule employees, however, if it closed the plant, as it did herein, the Company has to pay the employee the regular pay the employee would have received had the employee worked. Any hours worked by the employee over forty (40) would be at time and one-half rates. Thus when the Company failed to pay the ten (10) warehouseman time and one-half rates for hours worked the Friday-Saturday shift the Company violated the collective bargaining agreement.

The Company has argued the Union failed to identify which provisions of the collective bargaining agreement the Company was alleged to have violated and this somehow requires a dismissal of the grievance. However, the grievance form itself allows for “any other relevant articles of the contract.” Thus not all, or any, specific contract provision must be cited by the Union in the filing of the grievance.

The Company has also argued that the forty (40) hour workweek guarantee overrides the issue herein and that as the Company only worked the grievants for forty (40) hours the grievants are in effect attempting to pyramid their wages. The Arbitrator finds no merit in this argument. The Plant Closing Policy clearly provides that if the employee is available for work and the Company closes the Plant the employee will receive their regular pay. If the Company desires to have additional work done during that workweek it is at the Company’s discretion.

Therefore, based upon the above and foregoing, and the testimony, evidence and arguments presented the Arbitrator finds the Company was required to pay third shift employees for the Tuesday/Wednesday shift. The Company is directed to make the grievants whole for all ten (10) hours and to pay the grievants a half-time rate for hours worked on Friday/Saturday.

The grievance is sustained.

AWARD

The Company was required to pay third-shift employees for Tuesday evening (6-12-01) through Wednesday morning (6-13-01). The Company is directed to make the grievants whole for all ten (10) hours and to pay them a half-time rate for hours worked on the Friday/Saturday shift.

Dated at Madison, Wisconsin, this 15th day of May, 2002.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

