

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ELLSWORTH CO-OP CREAMERY

and

TEAMSTERS GENERAL UNION LOCAL 662

Case 14
No. 62126
A-6056

Appearances:

Stephen L. Weld, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Ellsworth Co-op Creamery.

Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters General Union Local No. 662.

ARBITRATION AWARD

Pursuant to the terms of the 2002-2005 contract between Ellsworth Co-op Creamery (Employer) and Teamsters General Union Local 662 (Union), the Wisconsin Employment Relations Commission assigned me to arbitrate a November 22, 2002 grievance that alleges the Employer violated the contract by changing a posted schedule without employee consent.

Hearing was held in Ellsworth, Wisconsin on June 4, 2003. The hearing was not stenographically recorded. The parties filed post-hearing briefs by July 24, 2003.

ISSUE

The parties were unable to reach agreement on a statement of the issue to be resolved through this Award but gave me the authority to frame the issue after considering their respective positions. Having considered the matter, I conclude that the following statement of the issue is appropriate:

Is the grievance arbitrable?

If so, did the Employer violate the contract when it changed the regular posted shifts of employees?

If so, what remedy is appropriate?

DISCUSSION

Article 22, Section 1 of the contract states in pertinent part:

All regular employees shall have work schedule posted by noon on the Wednesday preceding the next scheduled week. No change shall be made without mutual consent between the affected employee(s) and the Employer.

On Tuesday, November 19, 2002, an employee on the posted work schedule quit with no notice. That employee was scheduled to work later that week on Thursday, Friday and Saturday. To cover these shifts and avoid payment of overtime, the Employer changed the regular posted shifts of some employees, posted a revised work schedule and then notified affected employees. All affected employees worked the hours on the changed schedule.

An employee whose hours did not change filed a grievance alleging the Employer's action violated Article 22, Section 1. Because the grieving employees' hours did not change, the Employer argues he was not contractually entitled to file a grievance and thus that the grievance is not arbitrable. The Union correctly contends that there is no such contractual limitation on who can file a grievance. Under Article 7, an "employee" can file a grievance. Because the grievant was an "employee", the grievance he filed is arbitrable.

The Employer then contends that all affected employees save one consented and thus that any potential violation of Article 22 is limited to that employee. The record establishes otherwise.

The Employer made the change and then advised the affected employees. The contractual requirement of "mutual consent" requires discussion and consent before the change is made. Employee acquiescence to the change after it is made is a far cry from "mutual consent."

The Employer next argues that it was confronted with an emergency which allowed a change in the schedule without mutual consent. While there may be emergency circumstances that would allow for change without mutual consent, this was not one of them.

The Employer had more than a day within which to seek consent to cover the Thursday shift. While it would have been harder and less convenient to seek and obtain consent within that time frame than to simply make the changes, there is no evidence that following the contractual requirement of obtaining "mutual consent" would not have allowed cheese production to continue without interruption.

Given the foregoing, I conclude that the Employer violated the contract by changing work schedules without mutual consent. To remedy that violation, the Employer shall immediately pay each employee whose work schedule changed an amount equal to half the employee's hourly rate times the number of hours the employee worked outside the original posted schedule.

Dated at Madison, Wisconsin, this 16th day of December, 2003.

Peter Davis /s/

Peter Davis, Arbitrator

rb
6614