BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL 662

and

EAU CLAIRE PRESS COMPANY

Case 15
No. 66397
A-6253

(Route Grievance)

Appearances:

YingTao Ho, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Stephen Weld, Attorney, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on January 23, 2007, in Eau Claire, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs on February 26, 2007, whereupon the record was closed. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided herein. The Union framed the issue as follows:

> Did Eau Claire Press violate the collective bargaining agreement in the manner with which it realigned long haul and motor route delivery routes on December 4, 2006? If so, what shall be the remedy?

The Company framed the issue as follows:

> Did the Company violate Article 6 when it realigned its routes effective December 4, 2006? If so, what is the appropriate remedy?

Having reviewed the record and the arguments in this case, the undersigned adopts the Union's wording of the issue. Thus, the Union's wording of the issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 2006-2008 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 5

. . .

Section 6. Work Schedules

. . .

The basic work schedule shall be a five (5) day workweek and <u>in no event</u> will exceed forty (40) hours per week. Because of the past history under this collective bargaining agreement and that fact that it is known that some individuals wish to work in excess of five (5) days per week, the Company will endeavor to provide the number of seven (7) day shifts which it believes will coincide with the wishes of current employees or future employees.

<u>ARTICLE 6</u>

<u>MAINTENANCE OF STANDARDS AND MANAGEMENT RIGHTS</u>

. . .

<u>Section 2</u>. Except to the extent specifically abridged by specific provisions of this Agreement, the Employer reserves and retains solely and exclusively all of its common law, statutory and inherent rights to manage its own affairs as such rights existed prior to the execution of this Agreement.

Except as expressly modified by other provisions of the contract, the Employer possesses the sole right to operate its business and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the business;

B. To hire, layoff, promote, transfer, schedule and assign employees in positions within the bargaining unit;

C. To maintain efficiency of operations;

. . .

E. To introduce new or improved methods or facilities;

F. To change existing methods or facilities, including but not limited to the right to alter, rearrange, add or delete a route from any driver's route.

G. To determine the kinds and amounts of services to be provided and the number or kind of classifications to perform such services;

H. To determine the methods, means and personnel by which the Employer's operations are to be conducted;

. . .

ARTICLE 8

JOB BIDDING

Section 1. When the Employer decides a vacancy or new route exists in the bargaining unit, it shall be posted for bids.

. . .

ARTICLE 18

HEALTH AND WELFARE

. . .

Section 3. General Provisions.

Drivers with standard hours of thirty-five (35) or more hours per week will be considered full-time and eligible for full-time benefits the same as current full-time drivers. Drivers with standard hours between thirty (30) or more hours but less than thirty-five (35) hours per week shall be eligible for part-time benefits the same as current part-time employees. Those drivers with standard hours less than thirty (30) hours per week are not eligible for fringe benefits.

. . .

ARTICLE 20

WORK WEEK – STARTING TIMES

Section 1. The workweek shall be from **Sunday through Saturday**. Scheduling of employees shall continue according to present practice.

Schedule of motor route and long haul loading times shall be set at the discretion of the Circulation Director, or the designated supervisor, to meet the Publisher's needs.

. . .

ARTICLE 29

MISCELLANEOUS

Section 1.

A. The Circulation Director, or the designate supervisor will determine which roads the direction of travel and what the load of each motor route and long haul will consist of.

B. The Circulation Director, or the designated supervisor, will determine the load sequence order and loading times of all routes. No change of load sequence order or loading time will be permitted without permission from the Circulation Director.

. . .

SIDELETTER
Attached to
Eau Claire Press Company
Long Haul Motor Route Drivers Contract
March 1, 2006 through December 31, 2008

Because some drivers will lose benefits or receive reduced benefits as a result of the negotiated settlement, the parties agreed that the Employer will allow drivers, who move from full-time status to part-time status and part-time status to no benefit status, to increase their number of days on their route if the change will result in the incumbent retaining their existing benefits. If increasing the number of days on a route does not allow the employee to retain his/her benefit status, the Eau Claire Press Company will allow drivers, whose status is changed and benefits reduced as a result of the negotiated contract changes, to bump into other routes which would allow them to retain their existing benefits.

. . .

BACKGROUND

The Company publishes the *Leader-Telegram*, west-central Wisconsin's only daily newspaper. The Union represents some of the Company's employees in two separate bargaining units. The employees in one bargaining unit are press and mailroom employees. The 37 employees in the bargaining unit involved in this case are long haul and motor route drivers. They are newspaper delivery drivers. They currently deliver papers on afternoons during weekdays and mornings on weekends. Their deliveries are made on routes which are set by the Company. Stops on these routes are added and subtracted daily. The Company routinely audits, modifies and changes routes and has for at least 30 years. When the Company modifies or changes a route, this can change the employee's overall work hours.

Drivers report to work 15 minutes before their routes are scheduled to begin to pick up their papers. As an example, if a driver's route starts at 12:45 p.m., they report by 12:30 p.m. After drivers finish making their deliveries, they drive back to the plant, check their vehicle and perform their paperwork.

All employees work at least five days a week but some voluntarily work seven days a week. As of October 11, 2005, 13 employees worked between 35 and 40 hours a week; 15 employees worked between 30 and 35 hours a week; and 9 employees worked between 20 and 30 hours a week. As an example, Shawn Shafer worked about 5 hours per day, 6 days a week, for a total of about 31 hours a week. The drivers with the longest routes had the highest weekly hours. Conversely, the drivers with the shortest routes had the lowest weekly hours.

. . .

Before bargaining commenced for a successor to their 2003-05 collective bargaining agreement, the Company advised the Union that it was concerned about the cost effectiveness of the circulation department, and as a result, it planned to make proposals in bargaining which were designed to improve the efficiency and cost effectiveness of the newspaper's circulation/distribution system.

In the parties' subsequent negotiations, they addressed those issues. Specifically, Company negotiators averred that the Company's distribution costs were higher than its competitors, and they expressed a desire to cut costs. Company negotiators also raised the matter of delivery times for the newspaper. They averred that the existing routes made timely delivery difficult and they wanted to get the paper to customers earlier than they were. At the time, the delivery deadline was 5:30 p.m. on weekdays and 8 a.m. on weekends. Company negotiators indicated they wanted to change that so that the delivery deadline was 5:00 p.m. on weekdays and 7 a.m. on weekends. Those two topics (the reduction of distribution costs and the timing of deliveries) ultimately led to discussions about the existing (distribution) routes. Company negotiators indicated that the Company was exploring changing the existing routes. The parties then talked about changing the length and composition of routes and auditing them (i.e. the routes). Auditing a route refers to deciding whether the route should stay as is or be changed. In the past, the auditing of routes was done by the Company's distribution manager. The distribution manager had audited some of the routes, but not all of them. The Union proposed in bargaining that all of the routes be audited, and that this analysis be performed by an outside expert. The Company eventually agreed to do so.

Another topic addressed in bargaining was the threshold for receiving fringe benefits. (Note: This topic was also related to the Company's desire to cut costs in the circulation department). Under the parties' 2003-05 collective bargaining agreement, employees who worked 30 or more hours were considered full-time and eligible for full-time benefits, while employees who worked between 20 and 29 hours were considered part-time and eligible for part-time fringe benefits. Thus, employees were eligible for full-time benefits if they worked 30 hours or more per week, and part-time benefits if they worked 20 hours or more per week. As of October 11, 2005, everyone in the bargaining unit qualified for some benefits.

At one point during this bargaining, Company negotiator Steve Weld stated that if the Company wanted to, it could reduce the employees' hours to below the threshold for receiving benefits; if that happened, no employees would receive benefits.

At another point during bargaining, the Company proposed raising the number of hours required for an employee to achieve full-time and part-time benefit status. Specifically, the Company proposed increasing the benefit cutoffs to 35 standard hours for full-time benefits and 30 standard hours for part-time benefits; those employees with less than 30 hours per week would not be eligible for benefits. In arguing for this change to 35/30 hour cutoffs, the Company noted that the Union's other bargaining unit at the Company (i.e. the press and mailroom employees), already had those benefit cutoffs (i.e. 35/30). The Union eventually accepted the Company's proposal. Thus, the threshold for full-time benefits became 35 hours per week, the threshold for part-time benefits became 30 hours per week, and employees with less than 30 hours per week did not qualify for benefits.

When the parties negotiated these new benefit benchmarks in May, 2006, they knew how many employees were above and below the threshold of 30 hours. Specifically, they knew there were 27 employees who were scheduled 30 hours a week or more and there were 9 employees who were scheduled less than 30 hours a week. The 27 employees who were scheduled 30 hours a week or more still qualified for some benefits, while the 9 employees who were scheduled less than 30 hours a week no longer qualified for benefits. To address their situation, the parties negotiated ways employees who experienced a benefit loss/reduction could alleviate/remedy that impact. The end result of their negotiations on that point was a sideletter which detailed two options for employees adversely affected by the higher benchmarks to retain their benefits. The sideletter, which was attached to the parties' 2006-2008 collective bargaining agreement, specified that "because some drivers will lose benefits or receive reduced benefits as a result of the negotiated settlement", those employees could either increase the number of days they worked, or "bump into other routes which would allow them to retain their existing benefits."

FACTS

Following the settlement of the parties' 2006-2008 collective bargaining agreement in May, 2006, the Company hired an outside consultant, RouteSmart Technologies, to analyze the Company's routes and provide an objective and independent evaluation of the Company's existing circulation/distribution system. The Company's goals in doing this route review were to achieve earlier daily delivery of the newspaper; increase the distribution system's capacity to add circulation; increase advertising capabilities by dividing circulation areas/routes according to zip codes so that community-specific ads could be inserted into the paper; and reduce employee benefit costs.

RouteSmart subsequently audited the existing distribution system using software which allowed it to analyze newspaper routes. After doing so, RouteSmart recommended significant changes in the number and length of routes. Specifically, it recommended that the existing 37 routes be realigned and shortened, and that about 10 new routes be created.

The Company accepted this recommendation and decided to reorganize its distribution system. Specifically, it decided to realign and shorten the existing 37 routes and create over 10 additional routes. The Company took this action to achieve earlier daily deliveries of the paper; increase advertising capabilities in location-specific areas; increase the distribution system's capacity to allow for circulation growth; and reduce employee benefit costs.

On September 21, 2006, at an employee meeting, Distribution Manager Ken Hanson informed employees about the impending route realignment. He told the employees that the existing routes were being realigned and shortened, and that new routes were being established. He indicated that the reasons for the route reorganization were to achieve earlier daily delivery (and increase customer service satisfaction); increase advertising capabilities in location-specific areas within the distribution system; and increase the distribution system's capacity to allow for circulation growth and add/absorb additional customers. He also addressed the impact this route reorganization would have on their hours and benefits. With regard to their hours, he told the employees that since they were going to have shorter routes after the reorganization, their daily work hours were going to be reduced (from what they currently were). He also told them that none of the routes would be longer than 30 hours, so all of them would be working under 30 hours a week. With regard to their benefits, he told them that since they were all going to be working under 30 hours a week (which was the contractual threshold for benefits), no one would qualify for benefits anymore. He further said that the Company's goal was to keep drivers' weekly hours under 30.

The Company implemented the route realignment on December 4, 2006. All the routes changed at that time. The realigned long haul routes were ether 24.45 or 27.75 standard hours per week, while the realigned motor routes were between 19 and 26 standard hours per week. The realigned weekday and Saturday routes were between 3 and 3.5 standard hours, while Sunday routes were between 3.5 and 4 standard hours. These "standard hours" include delivery time, the 15 minutes spent working before deliveries begin, the time it takes the driver to drive back to the plant after delivering the last paper, and the time to do the necessary paperwork. Distribution Manager Hanson, who set up the new routes, indicated that he can expand a 3 or 4 hour route, but cannot expand a 5 hour route (because it runs up against the time the paper is to be delivered).

This route reorganization had several economic consequences. One consequence was that since there are now more routes than there used to be, the Company needs more employees to drive those routes and more vehicles for them to drive. The increased costs associated with same are not identified in the record. Another consequence was that by shortening the routes, the employees' work hours were reduced. Employees now work fewer hours per day than they did before the route realignment. Following the route realignment, none of the employees in the bargaining unit work more than 30 hours per week, so none qualify for benefits. Thus, the number of employees receiving benefits went from 27 prior to the realignment to zero after the realignment. The cost savings to the Company from this action are not identified in the record.

The Union filed a grievance which alleged that the route realignment and reduction in route size violated "Article 6 and all applicable articles including arbitration case law violating the covenant of good faith and fair dealing." The grievance sought to "restore [all] routes to their previous status." The Company denied the grievance, whereupon it was appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union contends the Company violated the collective bargaining agreement in the manner with which it realigned long haul and motor route delivery routes on December 4, 2006. It makes the following arguments to support that contention.

The Union avers at the outset that this case is not about the Company's management right to manage its business and change routes. Instead, as the Union sees it, this case involves the covenant of good faith and fair dealing which is inherent in the Company's exercise of its reserved management rights. According to the Union, the covenant of good faith and fair dealing requires that an employer not exercise its management rights in a way which unilaterally renders other provisions of the collective bargaining agreement meaningless. In the Union's view, that is what happened when the Company designed new routes which were all under 30 hours. The Union points out that this change ensured that no employees received benefits because 30 hours is the threshold for qualifying for fringe benefits. The Union argues this change was an abuse of the Company's management rights.

Next, assuming that there is a gap in the collective bargaining agreement regarding whether the Company can make the fringe benefit clauses nullities by reducing all routes to under 30 hours, the Union asks the arbitrator to fill the gap using the parties' bargaining history to find the parties' intent. The bargaining history which the Union relies on is as follows. It notes that when the parties negotiated the change of benefit cutoffs to 35 hours for full-time benefits and 30 hours for part-time benefits, they understood that this change affected some employees. In order to help those employees retain their benefits, the parties agreed to a sideletter whereby those employees were given two ways to retain their benefits: they could either increase the number of days they worked, or they could use their seniority to bump into a longer route that allowed them to retain their benefits. According to the Union, the sideletter shows that both sides assumed there would still be routes with enough hours to pay benefits. The Union submits that if the Company's intent was that the sideletter was going to become meaningless later, it never mentioned it in bargaining. Additionally, the Union notes that the parties discussed equalizing driver benefits with benefits for the press and mailroom employees, who did receive benefits despite the higher 35/30 hour benefit cutoffs. Finally, the Union emphasizes that it thought that the only employees affected by the benefit threshold change were the nine employees who worked less than 30 hours per week. The Union avers that the parties never discussed the possibility that the changes to benefit cutoffs would deny benefits to all bargaining unit members. As the Union sees it, this bargaining history establishes that the parties never discussed, let alone reached agreement on, letting the Company eliminate all employee benefits by realigning routes. Building on that premise, the Union cites Elkouri for the proposition that when an arbitrator is called upon to decide a situation unforeseen when the collective bargaining agreement was written, he should consider and enforce what the parties would have agreed to if they had the opportunity to consider the issue during bargaining.

Next, the Union asks the arbitrator to evaluate the Company's claimed business justifications for its decision to realign routes and decide if they were a pretext for an illegitimate motivation. According to the Union, the Company's claimed business reasons for the realignment should not pass muster. Here's why. First, the Union notes that the new routes are between 3 to 4 hours long. The Union maintains those numbers were artificially chosen, and it was not necessary to limit the daily routes to those numbers. The Union avers that if the routes were longer, the papers could still be delivered to customers by 5 p.m. on weekdays and 7 a.m. on weekends. The Union asserts that there is no need for the long time cushion which has been built into each route between the last paper delivery and the delivery deadline. By the Union's calculations, this time cushion is between 55 minutes to 1.75 hours for weekdays and 1.5 to 2.5 hours for weekends. Second, the Union contends it was not necessary to reduce the daily routes to 3 to 4 standard hours to preserve room for route growth (i.e. to allow for circulation growth). The Union asserts there is no evidence that a route 30 hours or longer would lack room to grow. Third, the Union contends it was not necessary to reduce the daily routes to 3 to 4 standard hours to increase advertising capabilities in location-specific areas (i.e. to allow for zip code zoning). To support that premise, it notes that long haul routes deliver to multiple zip codes even after the realignment. Conversely, multiple drivers still deliver in one zip code only. As the Union sees it, zip code zoning cannot be used to justify the Company's decision to reduce the daily routes to 3 to 4 standard hours.

The Union argues that the real reason the Company realigned routes was to avoid paying benefits to employees (said another way, to deprive employees of their fringe benefits). To support that premise, it cites the fact that the Company put a heavy emphasis in bargaining on cutting costs. It also cites the fact that when Distribution Manager Hanson announced the route changes at an employee meeting, he said that the Company's goal was to keep the drivers' weekly hours under 30. The Union characterizes this as the "but for cause" of the Company's decision to reduce the length of the routes. According to the Union, this was an illegitimate motive which tainted the Company's decision to realign routes.

Finally, building on that last point, the Union contends that the Company cannot realign routes for the purpose of depriving employees of contractual fringe benefits. The Union maintains that rather than using route realignment as a tool for deleting the fringe benefit provisions of the collective bargaining agreement and the related sideletter, and saving hundreds of thousands of dollars in operating expenses that way, the Company should have attempted to achieve the savings by making open and honest proposals in bargaining to eliminate fringe benefits. The Union believes that had that happened, the Company would have paid some consideration in return. Obviously, that did not happen.

The Union therefore asks the arbitrator to overturn the route realignment and grant the grievance in its entirety.

In order to remedy this contractual violation, the Union seeks the following. First, it asks that the routes that were put into place in December, 2006 be undone. Second, it does not ask the arbitrator to make new routes or realign the routes on his own, but instead asks that the routes that were in place before the realignment be restored. Third, it asks that all the affected employees be made whole for the benefits they would have received if the realignment had not occurred. The Union opines that once this action is taken, and the old routes are restored, then the Company may realign the routes, "so long as any such realignment is not motivated by a desire to avoid paying employee benefits, and do not result in loss of benefits for all routes."

Company

The Company contends it did not violate Article 6 of the collective bargaining agreement when it realigned routes for long haul and motor route drivers effective December 4, 2006. It makes the following arguments to support that contention.

The Company characterizes this grievance as challenging the Company's decision to reorganize its distribution system. Building on that premise, it emphasizes that the Union did not cite a single contract provision which the Company allegedly violated by reorganizing its distribution system. Instead, the Union relied on the covenant of good faith and fair dealing argument. The Company avers that the covenant of good faith and fair dealing is neither a contract provision nor express language.

The Company contends there is a contract provision which is directly on point in addressing its decision to reorganize the distribution system, namely the management rights clause. The Company relies on numerous parts of that clause to support its contention that it had the right to take the action that it did.

First, it relies on Section 2, A of that clause which gives it the right to direct all operations of the business. According to the Company, that provision makes it clear that the Company has the right to make all operational decisions. It submits that even if its decision to reorganize the distribution system turns out to be the wrong business decision, it still had the right to make that decision – right or wrong – because it reserved the right to make it. Building on that premise, the Company contends that there is no contractual obligation that management decisions be made for the "right" reasons, that they be "reasonable", or that they not be arbitrary or capricious.

Second, it relies on Section 2, B of that clause which grants the Company the right to hire, schedule and assign employees.

Third, it relies on Section 2, C of that clause which gives it the right/duty to maintain efficiency of operations. It notes in this regard that in the round of bargaining that led to the current collective bargaining agreement, circulation and distribution efficiency, cost cutting and cost-effectiveness were major points of discussion. It further notes that in response thereto, the parties discussed employee benefits, and ultimately negotiated a modification of the benefit schedule which significantly raised the number of work hours required for an employee to achieve part-time and full-time benefit status. A direct and anticipated consequence of that agreement was a loss or reduction of benefits for certain drivers. The parties subsequently negotiated a sideletter which detailed the options available to those adversely affected employees.

Fourth, it relies on Section 2, E of that clause which gives it the right to introduce new or improved methods. It notes in this regard that in the round of bargaining which led to the current collective bargaining agreement, Company negotiators indicated that they wanted to get the papers to customers sooner, and this topic led to discussions about reorganizing, changing, auditing, cutting and analyzing routes, and using an outside company to perform that analysis.

Next, it avers that there is specific language in the collective bargaining agreement which gives it the right to add, modify, delete and change routes. To support that premise, it relies on the following provisions. First, it cites Section 2, F of the management rights clause which gives the Company the right "to alter, rearrange, add or delete. . . from any driver's route." Second, it relies on Article 20, Section 1, paragraph 2, and Article 29 which give the Circulation Director the specific authority to determine loading time, load sequence and "what the load of each motor route and long haul will consist of." Third, the Company relies on Article 8, Section 1 which provides that "When the Employer decides a vacancy or a new route exists in the bargaining unit. . ." the contractual bidding process must be followed. According to the Company, this provision makes it clear that the decision to establish a new route is the Company's call, provided it follows Article 8 in filling it (i.e. the vacant route). The Company maintains that all these provisions are consistent with the Company's "sole right" to manage the company, unless "specifically abridged by specific provisions of the agreement" or "expressly modified by other provisions of the contract." The Company contends there are no such abridgements or modifications in the contract; there are no contractual limits on the ability of the Company to determine how many routes there will be, when they will start, and where they will go.

Sixth, the Company asserts that Section 2, G of the management rights clause also gives it the right to create new routes and reduce the length of existing routes. The Company hopes that having more routes will result in more prompt deliveries. Even if it does not though, the Company avers there is no evidence to refute its assertion that the route reorganization was undertaken to meet delivery goals, increase advertising capabilities in location-specific areas within the distribution system, and increase the distribution system's capacity to absorb additional customers.

Finally, the Company argues that the instant grievance is overly broad, and its suggested remedy would amend, modify and/or nullify language in Articles 6, 8, 20 and 29. The Company notes that the contractual arbitration clause prohibits the grievance and arbitration procedure from being used to amend, modify, nullify or add to the provisions of the Agreement. In the Company's view, that's exactly what the arbitrator would be doing if he sustained the grievance. The Company therefore asks that the grievance be denied.

DISCUSSION

When the employees were told at the employee meeting that their daily work hours were going to be reduced (from what they currently were) due to the impending route realignment, that all of them would be working under 30 hours a week, and that none of them would qualify for benefits anymore, they probably shared some common reactions. I surmise that their shared common reactions were shock, disbelief and anguish. I further surmise that after they learned the news, the employees probably said something to the effect of: Can the Company cut my hours like that? Aren't my work hours protected? Didn't the Company's actions violate the collective bargaining agreement? The short answers to those questions are as follows: yes, the Company can cut employees' work hours; no, the employees' existing work hours were not protected; and no, the Company's actions did not violate the collective bargaining agreement. The following discussion explains why.

My discussion is structured as follows. First, I will address the applicable contract language. After that, I will address the parties' bargaining history.

The first contract provision which is going to be reviewed is the section entitled "Work Schedules" (Article 5, Section 6). The reason I'm addressing that provision first is because I see it as being very important to the outcome of this case. Here's why. As already noted, the route realignment resulted in the employees' existing work hours being cut and/or reduced. I think it stands to reason that a contract provision dealing with work hours would be implicated under the circumstances.

The focus now turns to an examination of that language. The first sentence of that section sets forth what the parties decided to call "the basic work schedule." Specifically, it says that "the basic work schedule shall be a five (5) day workweek and <u>in no event</u> will exceed forty (40) hours per week." (underline in original). The second sentence then goes on to allow employees to work seven days a week if they want. Those employees that choose to work seven days a week are still subject to the limitation established in the first sentence that their weekly hours cannot exceed 40 per week. Those two sentences are all that is said about "the basic work schedule." In my view, the meaning of that section is plain, clear and unambiguous. The first sentence establishes a maximum number of hours that employees can work per week. The maximum is 40 hours per week. However, while this sentence specifies a maximum number of hours that employees can work per week, it does not specify a minimum number of hours that employees will work in a day or a week. The parties could have specified any number as the minimum number of hours that employees will work in a day or a week. No number was specified though.

Having just identified what Article 5, Section 6 says, it is now going to be contrasted to work day provisions in other collective bargaining agreements. Some contractual work day provisions guarantee a workday of a particular length or number of hours. Still other contractual workday provisions identify a normal workday. Obviously, the former (i.e. a guarantee) offers stronger protection to employees than the latter, because a guaranteed number of workday hours prevents an employer from cutting employee work hours. Article 5, Section 6 does not fit into either of these categories. That language is silent on the length of the workday. It does not identify the length of a normal workday, let alone guarantee a workday of any particular length. Since this provision sets no minimum daily work hours, it does not protect employees from having their daily work hours cut and/or reduced. Based on this express language, the Company has no contractual obligation to employ employees any minimum number of hours per day or week. Thus, nothing in Article 5, Section 6 prevents the Company from cutting and/or reducing employees' existing work hours.

The second contract provision which is going to be reviewed is the sideletter which was attached to the collective bargaining agreement. Although the parties' bargaining history will be addressed later in this discussion, it suffices to say here that in the last round of bargaining, the parties negotiated a sideletter which detailed the options available to those employees who were adversely affected by the higher benefit benchmarks which the parties agreed on. The sideletter said that "because some drivers will lose benefits or receive reduced benefits as a result of the negotiated settlement", those employees had two options to retain their benefits: they could either increase the number of days they worked, or "bump into other routes which would allow them to retain their existing benefits."

The Union reads the sideletter to preclude the Company from cutting and/or reducing the employees' work hours to less than 30. I find that interpretation is not supported by the language itself. Here's why. As just noted, the sideletter gave those employees adversely affected by the higher benchmarks two options to retain their benefits. The first option referenced in the sideletter (i.e. that employees could increase the number of days they worked) mirrors the promise made in the second sentence in Article 5, Section 6 that employees can work seven days a week if they want. That being so, the first option in the sideletter did not cover new ground (contractually speaking). The second option in the sideletter did cover new ground though. It provided that those employees (whose benefits were lost or reduced as a result of the new higher benefit benchmarks) could "bump into other routes which would allow them to retain their existing benefits." I agree with the Union that this sentence shows an assumption, as the Union put it in their brief, that "there would remain routes with enough standard hours to pay benefits." However, an assumption is not a guarantee. Simply put, this language does not guarantee that there will still be routes with enough hours to pay benefits. If the Union wanted such a guarantee, it needed to negotiate language which guaranteed that there would still be routes with enough hours to pay benefits (for the affected employees to bump into). As an example, the parties could have written language which said that there will be x number of routes that will pay benefits (and thus be over 30 hours). They did not do that. Similarly, the parties could have written language which said that employees will work a certain number of hours per day, or that employees would keep their existing number of hours if the routes changed. Once again, they did not do that. Consequently, all I've got to work with, so to speak, is the language in the sideletter as written. After reviewing same, I find there is no guarantee in that document that the Company had to continue to have routes with enough hours to pay benefits. Additionally, there is no guarantee in that document that employees' work hours would stay the same if the routes changed. That being so, nothing in the sideletter prevented the Company from changing and/or reducing employees' work hours to less than 30.

The contract language which has been addressed thus far has essentially dealt with the topic of cutting and/or reducing work hours. The focus now turns to contract language which deals with route realignment. That topic (i.e. route realignment) can fairly be characterized as the cause in the cause and effect relationship involved herein. What I mean by that statement is that the Company's decision to realign routes was the cause which had the effect of shorter routes and fewer work hours for employees.

There is specific contract language which gives the Company the right to add, modify, delete and change routes. The following shows this. First, Section F in the management rights clause says that the Company has the right "to alter, rearrange, add or delete. . .from any driver's route." Second, Article 20, Section 1, paragraph 2 and Article 29 give the Circulation Director the specific authority to determine loading time, load sequence and "what the load of each motor route and long haul will consist of." Third, Article 8, Section 1 provides that "When the Employer decides a vacancy or a new route exists in the bargaining unit. . ." the contractual bidding process must be followed. This provision makes it clear that the decision to establish a new route is the Company's call, provided it follows Article 8 in filling it (i.e. the vacant route). All these provisions are consistent with the Company's "sole right" to manage the company and direct all operations of the business. The only qualification to this grant of authority is if the Company's actions are, in the words of the management rights clause, "specifically abridged by specific provisions of this agreement" or "expressly modified by other provisions of the contract." There are no such abridgements or modifications in the collective bargaining agreement on the Company's right to control routes and/or reorganize its distribution system. Specifically, there are no contractual limits on the Company's ability to determine how many routes there will be, when they will start, where they will go, what their size will be, or how long they will be.

Having found that the contract language reviewed above does not expressly bar the Company from changing and/or reducing the employees' hours, or creating new routes which were all under 30 hours per week, the focus now turns to whether the collective bargaining agreement implicitly bars the Company from doing that. The Union contends that it does and relies on the covenant of good faith and fair dealing to support that premise.

I've decided to begin my discussion on the topic of the covenant of good faith and fair dealing by quoting the following from Elkouri regarding same:

> The implied covenant of "good faith and fair dealing" is similar to the principle of reason and equity, and is deemed to be an inherent part of every collective bargaining agreement. Indeed, this implied covenant is sometimes referred to as the doctrine of reasonableness. The obligation prevents any party to a collective bargaining agreement from doing anything that will have the

> effect of destroying or injuring the right of the other party to receive the fruits of the contract, and it applies equally to management and labor.
>
> Elkouri and Elkouri, How Arbitration Works, Sixth Edition, p. 478. (Citations omitted).
>
> Arbitration and judicial decisions often cite the implied covenant of good faith and fair dealing in a number of other contexts, but the doctrine serves as little more than an interpretive tool to aid arbitrators and judges in their case-by-case determinations of breaches of collective bargaining agreements. Arbitrators frequently use the implied covenant of good faith and fair dealing in their discussions of subcontracting issues. The same is true when the issue being arbitrated involves other aspects of reserved management rights. Essentially, the implied covenant of good faith and fair dealing serves as a springboard for a case-by-case determination of reasonableness. Thus, the covenant serves as the basis for the proposition that managerial discretion must be exercised reasonably and discretionary management decisions will be reviewed to determine if they were arbitrary, capricious, or discriminatory.
>
> It should be noted that the implied covenant of good faith and fair dealing does not inject new obligations or duties into the labor agreement. . . .
>
> Ibid, pages 479 and 480 (Citations omitted).

Aside from giving an overview of the topic, this language was quoted for two reasons. First, it establishes that the covenant does not inject new obligations onto the employer. Second, it identifies the standard which is commonly used to review the employer's actions, namely a reasonableness standard. These two topics will be addressed in the order just listed.

The Union wants me to hang my hat, so to speak, on the covenant of good faith and fair dealing and use that principle as the basis for finding a contract violation. Although the Union does not say so explicitly, it is obvious from their argument that they want me to find that in this case, the implied covenant of good faith and fair dealing outweighs specific contract language. Were I to so find, that would be contrary to the accepted rule of contract interpretation. The general rule of contract interpretation is that specific language takes precedence over something that is inferred, implied or implicit. In the context of this case, that means that the implied covenant of good faith and fair dealing does not outweigh the specific contract language previously identified (namely, the work schedule provision, the sideletter, and the management rights clause) and does not inject new obligations onto the Company.

Next, as noted above, the covenant of good faith and fair dealing serves as the basis for arbitral review of the employer's exercise of its management rights. Accordingly, the focus turns to a review of the Company's actions relative to exercising its management rights and realigning routes.

The first question is what standard is going to be used in this review. The standard which the Union asks me to use is to evaluate the Company's claimed business justifications for its decision to realign routes and decide if they were a pretext for an illegitimate motivation (the illegitimate motivation being avoiding paying benefits to employees). The Union contends that if the Company had an illegitimate motivation for its decision to realign routes, then it tainted the Company's entire decision to realign routes and the Company's decision can be overturned on that basis. I'm not going to use that standard. Here's why. As previously noted, Elkouri identifies the standard which is commonly used to review an employer's actions relative to exercising its management rights, and it is the reasonableness standard. That's the standard I'm going to use. That standard is admittedly easier for the Company to meet than the standard proposed by the Union.

Before I apply that standard though, I've decided to review, once again, the basis for the Union's objection to the route realignment. The Union does not object to the creation of additional routes. Instead, its objection is that the routes were reduced in length and shortened. That action, in turn, reduced the length of the employees' workday. The daily routes for all employees are now between 3 to 4 hours long. The Union argues it was not necessary to shorten the daily routes to those numbers (i.e. 3 to 4 hours daily); the routes could have been longer than that. The Union notes that if the routes had been longer than 3 to 4 hours daily, some of the employees would have worked at least 30 hours a week and qualified for benefits.

The focus now turns to the question of whether the Company exercised its managerial discretion reasonably in realigning routes and cutting the employees' hours.

The Company asserts that the route reorganization and corresponding cut in employees' hours were done for the following business reasons: to meet delivery goals, increase advertising capabilities in location-specific areas within the distribution system, and increase the distribution system's capacity to absorb additional customers. Notwithstanding the Union's contention that those reasons should not pass muster, I find that they do. Specifically, I find that the aforementioned reasons constitute reasonable business justifications for the route reorganization and corresponding cut in employees' hours.

There was one more reason though beside those referenced above for the route reorganization and reduction in employees' hours. I'm referring, of course, to the cost savings to the Company associated with having no employees work enough hours to qualify for benefits.

The Union argues that this reason is an illegitimate reason which warrants overturning the Company's decision in its entirety. I find otherwise. Here's why. It is noted once again that I am not deciding herein if the Company had an illegitimate motivation for changing routes and cutting hours. That's not the standard. The standard being used here is a reasonableness standard. That distinction is very important. I just found that the Company's stated business reasons for the route reorganization were reasonable. The fact that one more reason for the route reorganization was to cut costs does not cause that (previous) finding to be overturned. In other words, the additional reason of cutting costs does not result in the Company's actions failing to pass muster under a reasonableness standard. Consequently, the Company's exercise of its management rights in this case passes a reasonableness standard.

It follows from that finding that in this case the covenant of good faith and fair dealing does not implicitly bar the Company from changing and/or reducing employees' hours, or creating new routes which were all under 30 hours per week.

. . .

I further find that the parties' bargaining history supports the contract interpretation noted above. Bargaining history is a form of evidence arbitrators commonly use to help them interpret contract language and ascertain the parties' intent regarding same.

As the Union sees it, I'm being asked herein to decide a situation which was unforeseen when the collective bargaining agreement was written. Building on that premise, the Union asks me to use the parties' bargaining history to fill that gap in the existing contract language. However, the record evidence indicates that the instant situation (i.e. I'm referring to the Company eliminating all benefits by realigning routes and reducing hours) was not unforeseen in bargaining. The following shows this. First, in bargaining, the parties talked about realigning routes. Specifically, they talked about changing the length and composition of routes and auditing them (i.e. the routes). Second, in bargaining, when the parties were discussing work hours and benefit thresholds, Company negotiator Weld told Union negotiators that if the Company wanted to, it could reduce employees' hours to below the threshold for receiving benefits; if that happened, no employees would receive benefits. Weld's statement put the Union on notice that there was no language in the collective bargaining agreement which prevented the Company from changing and/or reducing employees' hours to below the benefit threshold. These two components of the parties' bargaining history establish that the situation which occurred later (i.e. I'm referring to the Company's reducing employees' hours to below the benefit threshold) was not unforeseen when the collective bargaining agreement was written.

. . .

A final comment. It pains me greatly to sign this award because I am well aware of its impact on the affected employees and their families. I am truly empathetic with their plight. Oftentimes, when I sign an award that results in an employee's loss of benefits, the employee did something that warranted that outcome. The classic example is where a discharge is upheld. Here, though, the affected employees did not do anything which warranted the loss of their benefits. They were simply called into a meeting one day and told that due to a route reorganization, their hours were being cut and they were losing their benefits. That strikes me as harsh and callous. However, the parties did not empower me, via their arbitration clause, to impose fairness and equity. Instead, they empowered me, via their arbitration clause, to interpret and enforce the collective bargaining agreement as currently written. I've concluded that the Company could do what it did (i.e. cut the employees' hours to under 30 per week) because the collective bargaining agreement does not expressly bar the Company from doing that (i.e. from changing and/or reducing employees' hours, or creating new routes which were all under 30 hours per week). While the Union wants me to infer that restriction into the collective bargaining agreement via the covenant of good faith and fair dealing, I have not done so because that particular restriction needs to be contracted for. It cannot simply be inferred into existence. Accordingly, no contract violation has been found.

In light of the above, it is my

AWARD

That Eau Claire Press did not violate the collective bargaining agreement in the manner with which it realigned long haul and motor route delivery routes on December 4, 2006. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 18th day of May, 2007.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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