BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ARAMARK REFRESHMENT SERVICES, INC

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS UNION, LOCAL NO. 662

Case 1
No. 70895
A-6476

(Seniority for Fill-In Scheduling)

Appearances:

Attorney Kyle A. McCoy, 6319 29th Avenue, NW, Rochester, MN 55901, appearing on behalf of the Union.

Attorney Richard A. Buntele, 4669 Woodscliff Circle, Anderson, IN 46001, appearing on behalf of Aramark.

ARBITRATION AWARD

Local No. 662, International Brotherhood of Teamsters, hereinafter referred to as the Union, and Aramark Refreshment Services, Inc, hereinafter referred to as the Employer or Company, are parties to a Collective Bargaining Agreement (Agreement or Contract) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. On August 9, 2011 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the alleged seniority rights violation of the Employer to allow Jerry Jakubek (Grievant) the opportunity to stay in the maintenance shop rather than run a delivery route. The undersigned was appointed as the arbitrator. Hearing was held on the matter on January 26, 2012 in Menasha, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was transcribed and is the official transcript of the proceedings. The parties filed initial post-hearing briefs (replies were waived by the parties) by April 10, 2012 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties did not stipulate to the issues to be decided by the Arbitrator and left it to the Arbitrator to frame the issues.

The Union states the issues as follows:

1. Did the Company violate the parties' Collective Bargaining Agreement when it scheduled the senior maintenance employee to a fill-in route though the junior maintenance employee was available?

2. If so, what is the remedy?

The Employer states the issues as follows:

Did the Company violate the terms and provisions of the Collective Bargaining Agreement when it assigned the grievant to run certain routes as a vacation and holiday fill-in?

The Arbitrator adopts the issue as set forth by the Union.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 4 – MAINTENANCE OF STANDARDS

Section 4.1 The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, vacations now granted and general working conditions, EXCEPT as hereinafter modified, shall be maintained at not less than the highest standards in effect 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.

ARTICLE 10 – SENIORITY

Section 10.1 A list of employees arranged in order of their seniority shall be posted in a conspicuous place in the Plant. Any disagreement on the seniority status of any employee shall be submitted to the Grievance Procedure within ten (10) days of posting, or the list shall be final.

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ARAMARK EMPLOYEE HANDBOOK

. . .

HOLIDAYS

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Since service at some facilities must be provided 365 days a year, employees may be required to work on holidays. The scheduling of holiday shifts will be at the discretion of the Component Manager. If additional labor is required and no volunteers come forward selection will be made on a reverse seniority order or as experience deemed necessary by Supervisor.

. . .

BACKGROUND

The Employer provides various services to businesses in the Menasha area including vendible commodities such as snacks, coffee and soft drinks. Drivers deliver product to their customers via pre-planned routes. The Grievant is a 39 year employee who has held different occupations with the Employer over the years including his present one in the maintenance department. In the past, employees other than regular drivers had been assigned to fill-in for vacationing drivers on a seniority basis with the least senior employee being assigned first. This Grievance arose after the Grievant was assigned to fill-in on a route for a vacationing driver although a less senior driver was available.

THE PARTIES' POSITIONS

The Union

The parties have had a decades-long practice mandating that junior employees are used first to "fill-in". The contract does not have a "zipper" clause but does have a "maintenance of standards" clause so faced with a past practice the Employer may not cancel it midterm and the practice did not end when the parties terminated their agreement.

The parties addressed this very issue in 2009 and decided this dispute in favor of the Union position. Although the Employer's witnesses testified at hearing that they could not recall this prior decision supporting the Union, the testimony of Union witnesses and the fact that the practice was honored thereafter undercuts that argument.

The Employer admitted that a past practice exists by virtue of the fact that the Company proposed discussions regarding the seniority-based procedure for replacing vacationing drivers. The Union's position was that it did not agree to change the seniority-based fill-in practice and the Company failed to follow up with any formal proposal and made no pronouncement that it intended to do otherwise.

There is no evidence that the past practice is unworkable. The other maintenance employee performed all of the fill-in routes in previous years and the Company made no claim that customers had negative reviews of his performance or the practice. The Company also made no claim that this result was not workable. The Company had the same number of employees when it negotiated the CBA in 2010 so any "need" alleged now was present at the time for the Company to articulate its need for change.

The past practice is an employee benefit and therefore any change must be bargained. Arbitrators are more likely to find a past practice binding where it involves a benefit of peculiar value to employees. (Referencing WEYERHAUSER CO., 95 LA 834, 839 (Allen, 1990)). This includes special rights granted to senior employees as here. (Referencing INTERNATIONAL MINERALS & CHEMS. CORP., 36 LA 92, 92 (Saunders, 1960)). In order to eliminate such a practice the Company must bargain for new, clear language. (Referencing UNITED STATES BORAX AND CHEMICAL CORP., 48 LA 641, 645-646 (Bernstein, 1967)). When a binding past practice exists, an employer cannot unilaterally abrogate such a practice without first engaging in the collective bargaining process. (Referencing AMERICAN SPIRIT GRAPHICS CORP., 126 LA 802, 806 (Befort, 2009). Here, the Company violated the parties' Agreement by unilaterally cancelling the past practice of using seniority to assign fill-in routes.

The Employer

The Union failed to present a case upon which relief can be granted. The Union lists Article 4 – Maintenance of Standards, and Article 10 – Seniority as being violated. When one examines these Articles it becomes clear that there was no violation of either one. Article 4 lists several examples of conditions of employment that the Employer has agreed to maintain at the highest level. They are wages; hours of employment; overtime differentials; vacation; and general working conditions. The Grievant was not able to state which of these items had been violated. He stated that wages did not change; his overtime differentials did not change; his vacations did not

change; and the only change which occurred as a result of him having to run a route was that his start time changed slightly. This change is so insignificant that it should be considered de minimus.

Regarding Article 10, the alleged seniority violation, the Grievant failed to indicate how his seniority had been violated. All he said in that regard was that "I should have the right for seniority." The Grievant has not suffered any loss of seniority; he is still the most senior employee. He is familiar with the Collective Bargaining Agreement and testified that it contains no language governing route coverage for vacations or holidays. Thus, no violation of either Article 4 or 10 has occurred.

The Union falls back on the old ploy of claiming a violation of past practice. In support of this allegation the Union called Union Business Representative Mike Thoms whose testimony was nebulous about any past practice because it never defined or explained what the past practice was. Further, his testimony was completely unsupported by any evidence or testimony. Surely, the Grievant would have had knowledge of such a past practice and testified about it.

The Union's final two arguments are a) the Company made a proposal in negotiations regarding this matter and it was not successful so it may not prevail in arbitration; and b) the Union filed a previous grievance which was granted and thus the Company cannot prevail here. Both arguments must fail. Union Exhibit 4, the Company's proposals made during the 2010 negotiations, contains as item no. 1 "Discuss replacement procedure for vacation and other absences." This is clearly a "discussion" proposal and not intended to be anything other than a matter for discussion and no formal proposal relating to vacation replacements was ever made during bargaining.

Regarding the argument relating to Union Exhibit 2, the grievance relating to an allegation that the Grievant was asked to run a route when a junior employee was available: this grievance reads "Settled – Company will call junior guy unless not available." The difficulty with this argument is that none of the Company representatives responsible for handling grievances recalls the grievance and the Branch Manager testified that it was not in her files. In his attempt to bolster the reliability of Union 2, Mr. Thoms testified that he had "actually filed for arbitration, requested a panel from FMCS" ; that he actually had a panel from FMCS; that he had contacted Mr. Wilson for the purpose of striking arbitrators; and that the grievance was subsequently resolved. Mr. Wilson testified that he had no recollection of the grievance. This raises the question of why, if the Union had made contact with the FMCS and had received a panel from them, they failed to present any documentary evidence of this. Such evidence would have sealed the case for the Union if it had been presented.

The Company did not violate the Collective Bargaining Agreement. There is no evidence in the testimony or in the evidence that the Company violated the Contract. Thus, the Union falls back upon the "age old" argument of past practice. There is no evidence regarding how vacation replacements were handled prior to 2008. Debra Bain testified, without contradiction that in 2008 (see Company Exhibit 2) employees in the Maintenance Department handled replacements on a shared basis without regard for seniority. Thus, any past practice existing prior to 2008 ended with this new procedure and because her testimony went unchallenged it must be given great weight.

For a past practice to be given binding effect there must be a mutuality of agreement over a period of time regarding the agreement. In this case the assignment of vacation replacements was and is a function of management and not the result of an agreement with the Union. It thus lacks the necessary mutuality required to raise management's action to the level of a (binding) past practice. The Company contends that the instant matter is a non-binding method of operation unilaterally instituted by management, and because the Company did not violate the Collective Bargaining Agreement and no controlling (binding) past practice exists, the grievance must be denied.

DISCUSSION

The Union argues that a valid and binding past practice exists at Aramark. That practice, according to the Union, is the more than 39 year practice of using less senior employees to fill-in on routes for vacationing route drivers. In the instant case the Grievant, Jerry Jakubek, is a maintenance worker with more than ten years seniority over the next, and only, more junior maintenance employee. (Through a series of cutbacks and layoffs the maintenance workforce has dwindled to two workers.) The Grievant was assigned to fill-in driving a delivery route even though the more junior employee was available. According to past practice says the Union, the more junior employee should have been assigned first, thus allowing the Grievant to "exercise his seniority rights."

In cases, as here, where the contract is completely silent respecting the given activity, a well-established practice which has been accepted and condoned by both parties may constitute an unwritten principle on how a certain type of situation should be treated. *See* TEXAS UTIL. GENERATING DIV., 92 LA 1308,1312 (McDermott, 1989)

> "It is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not

changed during contract negotiations." METAL SPECIALTY CO., 39 LA 1265, 1269 (Volz, 1962)

Commonly controlling factors in the decision of specific cases include the particular facts, the relevant Bargaining history, the relationship between the parties, and the subject matter of the practice or custom and its treatment (if any) in the collective bargaining agreement. In the absence of a written agreement, any alleged past practice, if it is to be binding upon the parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. CELANESE CORP. OF AM., 24 LA 168, 172 (Justin, 1954) and a long line of cases which follow it. A number of arbitrators have modified the CELANESE analysis slightly but the core elements required amount to essentially the same thing. The practice must be clear, consistent and accepted by both parties. In short, it must be mutually accepted and agreed upon, however the mutual acceptance may be tacit - an implied mutual agreement arising by inference from the circumstances. *See* T.J. MAXX, 105 LA 470, 474 (Richman, 1995)

In the instant matter the record supports the conclusion that the practice is one of long standing, perhaps as long as 39 years, and one which has been accepted by both parties. It thus meets the criteria set forth above and is binding upon the parties. This is evidenced by the Company's submission of its first Company Proposal in the most recent contract negotiations which reads as follows:

1. Article 10. Discuss replacement procedure for vacation and other absences.

. . .

It is clear that the Company sought to discuss the implementation of a change in this procedure. The Union testified, through Mr. Thoms, that it informed the Company that it had no interest in discussing a change in the seniority procedure and the Company did not press the issue further, thus acquiescing to the continued practice. The Employer argued that it did not seek to negotiate any changes in the seniority issue and made a distinction between "discussion proposals" and "action proposals", the seniority issue being merely a discussion proposal and not an action proposal which would have necessitated negotiations. The record further supports the existence of the parties' acceptance of the practice by virtue of the Company's Handbook which clearly adopts a seniority-based replacement procedure for the replacement of vacationing or otherwise unavailable workers. While a handbook, in and of itself, is not binding on the parties, it may aid an arbitrator in interpreting inconclusive contract language. Further, this practice is a benefit of peculiar personal value to the employees. It is rooted in seniority.

The Company did attempt to discontinue the practice effective on 10/22/10 in its memo of the same date. The problem with this attempt is that it came two months *after* the effective date of the new Agreement. The Undersigned agrees with the reasoning set forth by Arbitrator Mittenthal:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, . . . if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>
> The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding. Mittenthal, *NAA 14TH Proceedings*, at 56.

Arbitrators generally are unwilling to grant to any party by way of a past practice a demand that the party was unable to obtain at the bargaining table. *See* GRAND HAVEN STAMPEDE PRODS., 107 LA 131, 136-37 (Daniel, 1996); HS AUTO, 105 LA 681, 686 (Klein, 1995); DEAN FOODS VEGETABLE CO., 105 LA 377, 380 (Dichter, 1995); LOCKHEED AERONAUTICAL SYS. CO., 104 LA 803, 805-06 (Duff, 1995). The undersigned agrees with this reasoning. In this case the Company presented the issue at the bargaining table as a "discussion" item. In its brief the Company stressed that it was merely presented for discussion and not intended as anything more than that. Hence, it was not a repudiation of the practice and did not cease at that time.

The fact that the testimony of the Company employees differed from that of the Union witnesses in the area of a former grievance (similar to the present one) is not unusual and calls for the Arbitrator to make a decision on the veracity of each witness. The Employer's witnesses were unsure about the existence of the prior grievance and could not recall it nor could they "find it in (their) files." This as opposed to specific testimony from Mr. Thoms regarding the details of the grievance. I find the Union's testimony to be more credible in this regard.

The Employer argues that there is no evidence that it violated the Collective Bargaining Contract in Article 4 or in Article 10. Neither Article 4 nor Article 10 is directly applicable to

this situation, hence the need to determine whether a binding past practice exists. It also argues that Debra Bain, Branch Manager, testified that Employer Exhibit 2 proves that in 2008 fill-in was based on an equal distribution of labor without regard to seniority and consequently any past practice was discontinued at that time. I do not draw the same conclusion. Employer 2 does not include the Grievant and I draw the conclusion from this that he was not on the list because the Employer forgot about him; because his seniority was so high that he was purposefully left off the list; or that this was during the time period when the maintenance department and the warehouse department had been merged and the Grievant was then in the warehouse department. The record is fuzzy on this point, but in any event, the Undersigned is not persuaded by these arguments.

I find that the practice of selecting the most junior employees available as fill-in route drivers is a binding past practice; is of peculiar benefit to the employees; and may only be repudiated during negotiations for the new contract in 2013.

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

AWARD

1. The Company **did violate** the parties' Collective Bargaining Agreement when it scheduled the senior management employee to a fill-in route though the junior maintenance employee was available.

2. The Company shall cease and desist from violating the binding past practice of selecting the most junior employee available to run fill-in routes for vacationing or otherwise unavailable regular route drivers.

Dated at Wausau, Wisconsin, this 21st day of May, 2012.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
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