IN THE MATTER OF AN ARBITRATION BETWEEN

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 662

and

JACOB LEINENKUGEL BREWING CO., LLC

Case 5
No. 73190
A-6573

AWARD NO. 7908

Appearances:

Kyle A. McCoy, Soldon Law Firm, 1678 Glenwood Road, Ann Arbor, Michigan, appeared on behalf of the Union.

Ross A. Robinson, MillerCoors, LLC, 3939 W. Highland Boulevard, Milwaukee, Wisconsin, appeared on behalf of the Company.

ARBITRATION AWARD

On May 23, 2014, the International Brotherhood of Teamsters, Local 662, filed a request with the Wisconsin Employment Relations Commission for a panel of arbitrators relating to a dispute between the Union and the Jacob Leinenkugel Brewing Company. On June 26, 2014, I was advised that I had been selected to hear and decide the matter. A hearing was scheduled for November 7, 2014, but was cancelled. In lieu of an evidentiary hearing, the parties submitted a stipulation as to the facts, which was received on November 7, 2014. Briefs were submitted by November 28, 2014.

STIPULATIONS SUBMITTED BY THE PARTIES

Stipulation of facts:

The Parties to this matter – IBT Local 662, and Jacob Leinenkugel Brewing Company, LLC stipulate to the following facts:

1) The Company and the Union have been parties to a series of labor contracts. The current contract, covering the period April 22, 2013 through May 1, 2016 …

2) On or about March 12, 2014 a grievance was filed by Dann Jackson, Union Steward. The grievance asserts that "John Buhrow (Brewmaster) is doing the lab tech job," and the relief requested is "fill position with a union worker." … The grievance shows an erroneous filing date of 4-12-2014, but this is not material to the arbitration. There are no timeliness issues and no other arbitrability issues preventing the Arbitrator from rendering an Award.

3) The job titled "Lab Tech" is part of the bargaining unit. The job titled "Brewmaster" is a non-unit, management job, with responsibility for the Brewing Department at the brewery.

4) Dan McCabe, General Manager, gave a written response to the grievance on March 12, 2014, stating that "John Buhrow is filling in for a Union employee's vacation time, as has been the long standing past practice for this position, and is consistent with Article 16 of the Collective Bargaining Agreement." McCabe's response also notes that the Union employee, Jack Gehweiler, had declared his intent to retire and the job would then be posted. McCabe's response to the grievance is attached …. When Gehweiler retired, the job was posted and was filled and is being done by a union employee.

5) There was a past practice over multiple labor contracts of Brewmaster John Buhrow filling in for Lab Techs, including when they were sick, on vacation or during any other type of vacancy. The status of this "past-practice" under the current labor contract is at issue here.

6) On April 8, 2013, during negotiations leading to the current labor contract, Union Business Agent Tim Wentz gave a letter to Company Spokesperson Ross Robinson that stated the Union did not intend to carry over into the next collective bargaining agreement any past practices falling under Article 16, and that the Company "must have them written into the successor Agreement" to prevent discontinuance. …

7) The Union also verbally stated during negotiations that it believed the Company would need to bargain for specific

past practices if the Company desired practice continuation under the new agreement.

8) The Company gave no indication that it agreed with the letter, and it did not agree that the letter could change the contract language.

9) During the negotiations the Company stated that the language in the contract cannot be overruled by a letter provided by one party to the other, and that the Company believed the contract language would need to be modified for the letter to have any effect.

10) The language of Article 16 in the current labor contract was not changed in the negotiations and is the same as the language of Article 16 in the prior contract.

11) The issue for resolution by the arbitrator is: Does the Company violate Article 16 of the labor contract when it assigns the non-unit Brewmaster to perform unit work by filling-in for a unit Lab Tech when they are sick, on vacation or during any other type of vacancy?

12) The parties agree that they are only seeking a prospective remedy.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 4

MANAGEMENT RIGHTS

Subject to the terms of this Agreement, the management of the business and the operation of the plant and the direction of the working force and the authority to carry out all duties, functions, and responsibilities incidental thereto, is vested exclusively in the Company, including, but not limited to, the right to hire, promote, suspend or demote, discipline or discharge, to transfer or layoff, to determine the type of products to be manufactured, to close down the plant or any department thereof, to plan and schedule production, to determine the methods, processes and means of manufacturing, the right to contract out for goods and services, a right which has been exercised in the past by brewing and packaging beer in Milwaukee, including the right to expand

production of beer to other locations and brewers, the right to establish new jobs, abolish or change existing jobs, to introduce new or improved methods or facilities and change existing methods and facilities, to take whatever action is necessary to comply with State or Federal law, to determine what constitutes good and efficient plant practices or operation, and the right to make and enforce rules and regulations. Rights not expressly waived by the Agreement are retained by the Company. The listing of specific rights in this Agreement is not intended to be, nor shall be considered restrictive of, or a waiver of any right of the Company not listed herein whether or not such rights have been exercised by the Company in the past. In exercising its right, the Company will not violate the terms of this Agreement.

ARTICLE 16

SUPERVISORY EMPLOYEES

No employee in a supervisory capacity shall perform work under this Agreement except in cases of emergency or for purposes of instruction. This shall also apply to all other employees of the Employer who are not in this bargaining unit, unless otherwise agreed to by the Union and the Employer. The above may be waived by consent of the Union Steward, or a supervisor may perform unit work that is consistent with past practice. This does not preclude the Employer from performing Shipping Clerk functions on Saturdays if shipping personnel are unwilling to work all Saturdays that the office is open.

ARTICLE 35

ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the entire agreement between the parties, and no verbal statements or past practices shall supersede any of its provisions. Any amendments supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. Waiver of any breach of this Agreement by either party shall not constitute a waive [sic] of any future breach of this Agreement.

DISCUSSION

The parties agree that a practice of the Brewmaster filling in for Lab Techs has existed for multiple labor contracts. During negotiations for a successor collective bargaining agreement, the Union gave notice that it wanted the practice terminated. Under some circumstances, the burden would shift to the Company to preserve the practice at the bargaining table. However, in this dispute the practice is referred to in the body of the contract.

Article 16 begins with a general provision that prohibits supervisors from performing bargaining unit work. It goes on to provide certain exceptions to the rule. Those exceptions allow supervisors to perform unit work in emergencies, for instruction, by mutual agreement, where there is a waiver, or "… a supervisor may perform unit work that is consistent with past practice." There follows a limited exception involving Shipping Clerk functions. The provision relevant to this dispute is that involving past practice.

There is no dispute in this proceeding as to what constitutes a past practice. The practice does not operate to clarify an otherwise ambiguous contract provision. In this dispute, the practice is known to the parties and has been formally incorporated into the agreement as a substantive provision. The Company is prohibited from having supervisors perform unit work, with certain articulated exceptions. The past practice is one of those exceptions written into the agreement.

The Union contends that the practice was terminated by the April 8, 2013 letter from the Union to the Company. It is the view of the Union that with the elimination of the practice the exception to the rule barring supervisors from performing unit work has been canceled. If the Company wanted the practice to continue, the Union asserts that it was incumbent on the Company to negotiate that exception into the contract. The Company disagrees and poses the question: What does the language mean if the Union is right? I agree with the Company.

The parties left the reference to the practice in the contract. Both parties understood the practice was an exception to the restriction on supervisors performing unit work. By incorporating the reference to the practice into the contract, the practice itself has become contractual. It cannot simply be terminated unilaterally. If the Union is right, it poses the question: What would the company bargain? Seemingly, it would bargain a provision much like the one in the contract, permitting supervisors to fill in for employees who are sick or on vacation. That hardly seems necessary given the understood meaning of the mutually understood words the parties left in the agreement.

The Company asks what the words "... a supervisor may perform unit work that is consistent with past practice" mean, if the Union is right that the practice has been terminated. There is no satisfactory answer to the question. There would exist a substantive provision in the agreement which would have no meaning. Such an odd result defies common sense and is to be avoided.

All parties to this bargain understood the meaning of the past practice exception provision. The Union cannot unilaterally declare the words to have no meaning and thus eliminate a substantive provision of the contract.

AWARD

The grievance is denied.

Signed in Madison, Wisconsin, this 27th day of February 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

William C. Houlihan, Arbitrator