

IN THE MATTER OF ARBITRATION BETWEEN

TEAMSTERS LOCAL 289)	
)	
)	
Union,)	ARBITRATION
)	AWARD
and)	
)	PULL-UP WORK
)	GRIEVANCE
PAN-O-GOLD BAKING)	
COMPANY,)	
)	
Employer.)	FMCS Case No. 081105-51029-3

Arbitrator: Stephen F. Befort

Hearing Date: March 6, 2008

Briefs Received: April 28, 2008

Date of decision: May 9, 2008

APPEARANCES

For the Union: James Hansing

For the Employer: Paul Zech

INTRODUCTION

Teamsters, Local 289 (Union) is the exclusive representative of a unit of employees employed by Pan-O-Gold Baking Company in the greater Minneapolis, MN area (Employer). The Union claims that the Employer violated the parties' collective bargaining agreement by failing to pay route sales drivers the appropriate contract rate of compensation when such employees voluntarily performed in-store "pull-up" work above

and beyond their regularly scheduled duties. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits. The parties waived the contract's provision for a three-member panel and agreed to submit the dispute to a single arbitrator.

ISSUES

1. Did the Employer violate the terms of the parties' collective bargaining agreement by unilaterally assigning bargaining unit pull-up work to non-unit employees? If so, what is the appropriate remedy?
2. Did the Employer violate the terms of the parties' collective bargaining agreement by declining to pay route sales drivers the contract rate of compensation when such employees voluntarily perform in-store pull-up work above and beyond their regularly assigned duties? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I JURISDICTION

Section 1. The Employer agrees to recognize Local Union No. 289, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America as the sole collective bargaining agent for the employees covered by this Agreement. There will be no discrimination against an employee because of union affiliation.

* * *

Section 7. It is agreed that there shall be no change in the method of employment of drivers and inside employees and that all employees shall be hired according to the terms of this contract and no other arrangement, method of remuneration or agreement between the Employer and employee shall supersede the terms of this Working Agreement.

**ARTICLE VI
VACATIONS AND HOLIDAYS**

Section 8. There shall be no Sunday, holiday or dropout day delivery by sales drivers. If any such deliveries are required by unusual or emergency situations, they will be handled by Union personnel other than route sales drivers. Supervisors will not be required to handle deliveries on Sundays or holidays. If deliveries are handled by supervisors on drop-out days, they will be given equal time off at a later time to be determined by agreement with management.

**ARTICLE IX
WAGES – SALES DRIVERS**

Section 1. All sales drivers shall receive a commission rate on all net sales except “private label” at ten percent (10%). Private label commission will be at six and one-quarter percent (6-1/4%).

The base pay for all routes will be as follows effective on the first day of the pay week closest to the following dates:

12/1/06	\$312.40
12/1/07	312.40
12/1/08	312.40
12/1/09	315.00
12/1/10	325.00

**ARTICLE X
HOURLY EMPLOYEES OTHER THAN DRIVERS**

Section 1. Hours. It is agreed and understood that all employees coming under this classification shall adhere to the following conditions:

Section 2. Each Employer agrees that the five (5) day work week, as established, shall be continued in full force and effect for all employees. Anyone called in to work on a day not regularly scheduled shall be guaranteed a minimum of four (4) hours at time and on-half (1-1/2) the regular rate of pay.

* * *

Section 9. Demands for overtime wages or any other claim must be made not later than two (20 weeks after the payday that follow the week in which overtime or the discrepancy occurred.

* * *

Section 13. All hourly employees will be paid at 90% of the regular earnings for the first six months of employment, and 95% of their regular earning for the second six months of employment.

The experienced rate for hourly employees, other than Transport Drivers, will be as follows; and will begin on the beginning of the pay week closest to the following dates:

12/1/06	\$13.65/hour
12/1/07	\$14.15/hour
12/1/08	\$14.70/hour
12/1/09	\$15.30/hour
12/1/10	\$15.90/hour

**ARTICLE XIV
TERMINATION AND SAVINGS CLAUSE**

The parties acknowledge that during the negotiations which resulted in this Agreements, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and the understandings and agreement arrived at by the parties, after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

FACTUAL BACKGROUND

The Employer operates a wholesale baking company with headquarters and production facilities in St. Cloud, Minnesota. The Employer distributes bakery products throughout the Upper Midwest with distribution depots in two Twin Cities locations (Plymouth and Oakdale), as well as in Rochester, Mankato, Des Moines, and Dubuque.

The Union represents employees at the St. Cloud production facility and at the various distribution depots in two separate bargaining units. The collective bargaining agreement applicable to the distribution unit, typically referred to as the Minneapolis unit,

applies to two job classes: route sales drivers and inside warehouse employees. *See* Article 1, Section 7.

Route sales drivers (RSDs) are responsible for delivering bakery products to retail store clients for resale. Their duties include loading the product at the warehouse, transporting the product to the various stores, placing the product in the stores, removing old product, and building and maintaining relationships with store clients. The job description for the RSD position lists “stock shelves” as a major job task. Because of the quasi-entrepreneurial nature of these jobs, the RSDs are compensated on a base rate plus commission basis. Approximately 92 RSDs currently are covered by the Minneapolis contract.

A smaller number of inside warehouse (warehouse) employees work at each of the distribution depots. These workers assist the RSDs in loading delivery vehicles and maintain the warehouse in an orderly fashion. Warehouse employees earn \$14.70/hour for a guaranteed forty-hour workweek.

In the mid-1980’s, the Union was successful in negotiating a five-day workweek for RSDs. Article 6, Section 8 of the parties’ contract provides that the Employer shall not assign RSDs to perform delivery work on Sundays and “dropout” days (Wednesdays). Because the Employer needed workers to restock store shelves on these off days, particular at the growing number of big box grocery stores, the Employer adopted a number of human resource strategies. First, the Employer hired part-time “pull-up” employees who work approximately 20 hours per week pulling merchandise from the back rooms of assigned stores to the display shelves. At present, 49 pull-up employees earn \$9.00/hour. Second, approximately 16-20 RSDs volunteer to perform

pull-up work on Sundays and/or Wednesdays. The Employer also compensates these RSDs at a \$9.00/hour for this work, a rate lower than that provided for either regular delivery work or for warehouse work. Third, until recently, the Employer occasionally assigned warehouse employees to perform back-up pull-up work during their regularly assigned workweek.

In early 2007, the Employer implemented a new time-tracking system. During the ensuing transition, the Employer erroneously began paying warehouse employees at a rate of \$9.00 per hour for time spent performing pull-up work. The Union filed a grievance, and the Employer eventually acknowledged that it was obligated to pay warehouse employees at the \$14.70/hour contract rate even when performing pull-up work. While processing this grievance, the Union claims that it learned for the first time of the work being performed by the non-union pull-up workers. The Union continued to press its grievance claiming that the pull-up tasks were unit work that should be governed by the parties' contract. Among other claims, the Union argues that the RSDs also should be paid \$14.70/hour while performing volunteer pull-up tasks.

The Union also filed unfair labor practice charges with the Regional Office of the National Labor Relations Board. The Union alleged that the Employer committed the following four unfair labor practice violations:

- 1) By failing and refusing to recognize and deal with the undersigned labor organization as the contract representative of the employees who perform pull-up duties;
- 2) By unilaterally changing the hourly wage rate of the employees assigned to perform pull-up duties, violating the express terms of the parties' labor agreement by paying employees who perform pull-up duties at \$9.00 per hour;

- 3) By assigning bargaining unit work such as pull-up duties to non-bargaining unit personnel; and
- 4) By failing and refusing to provide the undersigned labor organization with relevant information.

The Regional Director has deferred consideration of these charges pending the outcome of this arbitration proceeding.

At the hearing, the Employer elicited testimony from its former legal counsel, Ed Bohrer, who represented the Employer in labor negotiations for more than 25 years. Mr. Bohrer identified notes from bargaining sessions in 1999 and 2000 concerning the St. Cloud unit in which the Union sought to discuss the Employer's use of part-time pull-up employees. Mr. Bohrer testified that the Employer held firm during these negotiations in declining to include any contract provision that would apply to the pull-up employees.

POSITIONS OF THE PARTIES

Union:

The Union contends that pull-up duties constitute unit work subject to the parties' collective bargaining agreement. As such, the Union maintains that the Employer violated the parties' agreement by unilaterally assigning this unit work to non-unit pull-up employees. The Union further argues that the Employer violated the parties' agreement by failing to compensate RSDs who perform extra-shift pull-up work at the contract rate applicable to warehouse employees. In addition to these core claims, the Union also urges the arbitrator to determine that pull-up employees are part of the Minneapolis area bargaining unit and to address two other matters raised for the first time at the arbitration hearing.

Employer:

The Employer argues that the grievance should be denied in its entirety. The Employer contends that the plain language of the contract and the past practices of the parties establish that pull-up work is not covered by the contract. As a result, the Employer maintains that it has not violated the parties' agreement either by assigning pull-up work to non-unit employees or by compensating RSDs who voluntarily perform pull-up work on their off days at a non-contract rate of pay. Finally, the Employer submits that the additional issues sought to be raised by the Union are beyond the scope of this proceeding.

DISCUSSION AND OPINION

A. The Scope of the Grievance

Beyond the two core issues identified above, the Union's post-hearing brief asks the arbitrator to rule on two additional matters. The Union's brief describes these additional issues as follows:

- Whether the part-time employees characterized by the employer as unrepresented "pull-up employees" are a part of the bargaining unit.
- Whether the employer's action in unilaterally taking away pull-up work from floor/warehouse employees and in changing the method of compensating RSDs for pull-up work on their days off violated Article I, Section 7.

Both of these issues are beyond the scope of this proceeding. By the former issue, the Union asks the arbitrator to clarify the scope of the appropriate bargaining unit so as to encompass the part-time pull-up employees. Unit composition, however, is a representational matter over which the National Labor Relations Board has exclusive jurisdiction. It is well-settled that such matters are not appropriate for resolution in

arbitration. See The Boeing Co., 349 NLRB No.91 (2007); Advanced Architectural Metals, 347 NLRB No. 111 (2006); Marion Power Shovel Co., 230 NLRB 576 (1977).

As the Board stated in the *Marion Power Shovel* decision:

The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than an arbitrator.

230 NLRB at 577-78.

The Union's latter proposed issue seeks to challenge two purported changes in policy that the Union claims were revealed by Employer witnesses during the arbitration hearing. These matters, however, were not identified as contested issues at the hearing, and the parties did not develop a factual record sufficient to make possible a resolution of these issues.

For those reasons, these additional matters are not appropriate for resolution in this proceeding. This ruling, however, is without prejudice to the Union's right to assert these claims in an appropriate forum.

B. The Merits

As to the merits, the Union's principal contention is that pull-up tasks are bargaining unit work governed by the parties' collective bargaining agreement. In support of this contention, the Union points out that the job description for the RSD position expressly lists "stock shelves" as a major job task. Once it is recognized that pull-up tasks constitute work belonging to the bargaining unit, the Union maintains, the Employer's conduct in this matter violates the parties' agreement in two separate, but related, ways: 1) by unilaterally assigning unit work to non-unit personnel (the part-time pull-up employees); and 2) by failing to pay RSDs who voluntarily perform pull-up work

above and beyond their regularly scheduled RSD shifts the same rate of pay provided to warehouse employees when they occasionally perform pull-up work.

The problem with this line of reasoning is that it is inconsistent with the past practices that the parties have followed for more than twenty years. James Akervik, the Employer's Vice Chairman, testified that the Employer has utilized part-time, pull-up employees since the mid-1980's to perform shelf-stocking work on the two days per week on which RSDs are not contractually obligated to work. In addition, Akervik's testimony described how the Employer has permitted RSDs since the 1980's to perform pull-up work on a voluntary basis on their off days, with pay provided at a non-contract rate. These factual assertions are uncontroverted in the record,

It is well-recognized that a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A "past practice" arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenhal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 623-26 (6th ed. 2003).

In this instance, the parties' manner of handling pull-up work over the past twenty years certainly is clear, consistent, and long-lived. The only point of dispute concerns whether these practices were mutually accepted by the parties. The Union contends that they were not. In this regard, Mike DeBuck, President of Local 289 since 2005, testified that he was unaware of the existence of the part-time pull-up employees or the fact that

RSDs earn a non-contract rate of pay for off-duty pull-up work until the Union filed its initial grievance in this matter and made informational requests of the Employer in support of that grievance.

In spite of this testimony, the weight of the evidence sufficiently establishes that the Union was aware or should have been aware of the past pull-up work practices. First, these practices were open, widespread, and continued for more than twenty years. As Mr. Akervik testified, the Employer currently employs 49 part-time, pull-up employees in the Minneapolis contract area. Second, a sizeable group of RSD union members had direct knowledge of the off-duty RSD pay arrangements because they personally performed such work on a non-contract pay basis. Mr. Akervik testified that approximately 16-20 RSDs – approximately 20% of the total RSD cohort – currently volunteers for this off-duty work. Third, Ed Bohrer, the long-term legal counsel for the Employer, testified that the Union's chief negotiator, Secretary Dan Bartholomew, sought to bargain about the status of pull-up employees in both 1999 and 2000. Although this bargaining history arose in the context of the St. Cloud unit rather than the Minneapolis unit, the chief bargaining representatives with respect to the two contracts were identical, and the pull-up practices in the two units were similar. Fourth, Mr. Bartholomew, the long-term Local 289 spokesperson with the best information concerning the Union's knowledge, did not testify at the arbitration hearing. Given these overall circumstances, the Union's position that it was not aware of the pull-up practices is not credible.

AWARD

The grievance is denied.

Dated: May 9, 2008

Stephen F. Befort
Arbitrator