

IN THE MATTER OF THE ARBITRATION BETWEEN

PAULSON'S SUPER VALU, INC.

“EMPLOYER”

And

**UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 1116**

“UNION”

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) **FMCS NO. 07-0615-55833-7**
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) **RICHARD R. ANDERSON**
) **ARBITRATOR**
)
) **OCTOBER 29, 2007**
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)

APPEARANCES

EMPLOYER

John C. Hauge, Attorney
Dan Tucheck, Store Manager
Paul Hennen, Operations Supervisor

UNION

Timothy W. Andrew, Attorney
Colin Korpi, Grievant
Tom Cvar, Business Manager

JURISDICTION

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on September 8, 2007 in Duluth, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on September 8, 2007. Post-Hearing Briefs were timely received from both parties on October 13, 2007. The record was then closed and the matter was taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that is effective from July 22, 2006 through July 18, 2009, hereinafter the Agreement.¹ The language in Article 15 [Grievance and Arbitration procedure] of the Agreement provides for the filing, processing and arbitration of grievances. Section 15.5 defines the jurisdiction of the Arbitrator and establishes the Arbitrator's sole decision-making authority. While Section 15.5 calls for tripartite arbitration, the parties waived this provision and stipulated to the sole jurisdiction and authority of this Arbitrator

THE ISSUE

The issues are two-fold. The Employer, contrary to the Union, raises an arbitrability issue. The parties stipulated that this procedural arbitrable issue is, "Whether the grievance is arbitrable or not". The parties further stipulated that the substantive issue

¹ Joint Exhibit No. 2. A new Agreement was ratified on January 22, 2007 effective February 1, 2007 through January 31, 2010. Joint Exhibit No. 1.

is, "Whether the employer violated the Agreement by not filling a vacant Assistant Manager position; and if so, what is an appropriate remedy?"²

BACKGROUND

Paulson's Super Valu Stores Inc., hereinafter the Employer, is located in International Falls, Minnesota. Since the end of January 2002, the Employer has operated a full-service grocery store with meat, deli, bakery and grocery departments. There is also a self-service gasoline station contiguous to the grocery store. The Employer is one of several grocery stores owned by Robert Paulson. It is the only grocery store involved herein. UFCW Local 1116, hereinafter the Union, represents approximately 40 employees in a wall-to-wall unit at the grocery store.³ The bargaining unit is set forth in Article 2 [RECOGNITION].

On May 30, 2007, the Union filed a grievance on behalf of Colin Korpi, hereinafter the Grievant, protesting the Employer's refusal to elevate the Grievant to a full-time position.⁴ Union Business Manager Tom Cvar's grievance letter to Store Manager Dan Tucheck stated,

UFCW Local 1116 is filing a formal grievance on behalf of Colin Korpi. UFCW Local 1116 feels that Article 10, Seniority Sections 10.7 and 10.13 have been violated when a full-time position was not filled when an opening occurred.

In Section 10.7, the first sentence states: (when an opening occurs for full-time employees, present part-time employees shall be given the first opportunity to fill such openings, provided they have the ability to perform the work.) No one was given the opportunity to fill this position.

² While the parties stipulated to the failure of the Employer to fill the Assistant Manager's position, the Union made it clear when stipulating that they are also alleging that the Employer violated Sections 10.13, 19.8 and 19.9 by not promoting the Grievant to a full-time position. This is specifically alleged in the grievance.

³ The Employer recognized the Union and signed the contract that was in place when it purchased the store in 2002.

⁴ Joint Exhibit No. 4

Section 10.13 states: (When a full-time employee terminates their employment with the employer, the employer cannot replace the full-time employee with two (2) part-time employees.) When you moved into the Managers position, your position was filled by Chris Rognerud and Mr. Rognerud's full-time position was not filled.

There has been a well established past practice that when a full-time position becomes available the position is filled with another full-time employee.

Please make Mr. Korpi whole in all aspects. I will be awaiting your reply. If you have any questions on this matter, please call me.

By letter dated June 4, 2007, the Employer through Paulson denied it violated the terms of the Agreement and raised an arbitrability issue.⁵ Paulson's letter to Cvar stated:

Dan Tuchek has forwarded me your letter regarding a grievance on behalf of Colin Korpi.

Section 10.7 does not state that we are required to fill a vacant full-time position. Section 10.13 states "When a full-time employee terminates their employment with the employer, the employer cannot replace a full-time position with two part-time positions. We have not added part-time positions.

You failed to mention section 19.8 which states "Where practicable to do so, a full-time employee shall be replaced by a full-time employee." We do not feel it is practicable at this time to replace the full-time position.

Section 15.8 states, "All grievances must be submitted in writing within (30) calendar days of their occurrence to receive consideration or they are barred". Since Mr. Tuchek left his past full-time position in September 2006. We do not understand why you are even considering this grievance.

Please let me know if you need any other information from us.

On June 6, 2007, Cvar responded in writing to Paulson.⁶ The letter stated:

In your letter dated June 4th 2007, you state that Article 10, Section 10.7 of the Contract does not state you are required to fill a vacant Full-Time position. It is the opinion of UFCW Local #1116 a Full-Time opening has occurred by Dan Tuchek's (Union position) moving into the Store Manager position.

You also state that as per Article 10, Section 10.13 you have not added Part-Time positions. That statement may be correct, however, when Mr. Tuchek

⁵ Joint Exhibit No. 5.

⁶ Joint Exhibit No. 6.

moved into the Manager position, you moved Mr. Chris Rognerud (a Full-Time Union position) into Mr. Tuchek's Full-Time Union position, thus vacating Mr. Rognerud's night position. (He had five (5) nights a week where he handled the locking up and closing of the store.)

You then replaced Mr. Rognerud's Full-Time position with Mr. Colin Korpi, a Part-Time employee who locked up on the other two (2) nights per week. Currently Mr. Korpi, who is Part-Time, locks up five (5) nights a week, and Mr. Mike Kuldaneck, another Part-Time employee, locks up the other two (2) nights which Mr. Korpi previously held. Again, Section 10.13 states: "When a Full-Time employee terminates their employment with the Employer, the Employer cannot replace the Full-Time employee with two (2) Part-Time employees." This is what you have clearly done.

In your second paragraph you state Article 19, Section 19.8 states: "Where practicable to do so, a Full-Time employee shall be replaced by a Full-Time employee." While we do not believe this provision is controlling to this dispute, please advise UFCW Local 1116 why it is not practicable at this time; and examples. Just to say so is clearly not a good enough reason.

To address your 3rd paragraph, you state that Article 15, Section 15.8 states: "All grievances must be submitted in writing within thirty (30) calendar days of their occurrence to receive consideration, or they are barred." The failure to fill the jobs in question with full-timers is a continuing violation of the CBA and therefore the grievance is timely.

Again please make Mr. Korpi whole in all respects. I am awaiting your reply,

On June 13, 2007, Paulson sent Cvar another letter that stated, "*After receiving your letter dated June 6, 2007 we stand by our denial of the grievance.*"⁷ Thereafter, the Union filed for arbitration with the Federal Mediation & Conciliation Service (FMCS).⁸ On June 20, 2007, the undersigned was notified by Union Counsel Timothy Andrew via e-mail that I had been selected as the neutral arbitrator in this matter.

⁷ Joint Exhibit No. 7.

⁸ Exact date unknown.

RELEVANT CONTRACT PROVISIONS

Article 1 — Intent and Purpose

Section 1.2. All Employer rights, functions, responsibilities and authority not specifically limited by the express terms of this Agreement, are retained by the Company and remain exclusively within the rights of the Company.

Article 9. Holidays

Section 9.1. Sunday Operations: Sunday operations shall be part of the regular work week but shall be conducted according to the terms and conditions set below:

Sunday operations shall be outside the regular work week for the purposes of Health & Welfare contributions. Sunday hours of employment shall not be subject to minimum scheduled hours requirement, nor shall Sunday hours be counted to determine full or part-time employee status. Sunday hours shall be included in all other appropriate employee benefit computations including wage progression, minimum call-in hours, vacations, holiday pay, and Pension.

Full-time employees shall receive their existing rate of pay and an additional three dollars (\$3.00) per hour on all hours worked on Sunday.

Part Time employees shall receive their existing rate of pay and an additional three dollars (\$3.00) per hour on all hours worked on Sunday.

Article 10 — Seniority

Section 10.7. When an opening occurs for full-time employees, present part-time employees shall be given the first opportunity to fill such openings, provided they have the ability to perform the work. Part-time employees will not accrue seniority over a full-time employee, but will have seniority as far as other part-time employees are concerned. Seniority will not apply to the scheduling of hours or work of part-time employees, except as provided herein. No part-time employee shall have his/her hours reduced in an effort to discriminate against said part-time employee. Seniority in regard to all matters other than layoff, rehire, or reduction in hours shall be limited to each seniority group.

Section 10.13. When a full-time employee terminates their employment with the employer, the employer cannot replace the full-time employee with two (2) part-time employees.

Section 10.13. (Old Language in 2001-2003 Agreement) Where a full-time

employee can be hired in the place of two (2) part-time employees, this shall be done.

Article 14 — Agreement Violations

Section 14.1. All claims for back pay or loss of wages arising under this Agreement on account of any violations of terms hereof must be made in writing within (30) days from the pay day following the accrual of the claim, and if not made within such period a claim shall be barred. The Employer shall not be required to pay back pay on grievances for more than a ninety (90) day period prior to the filing of the grievance.

Article 15 — Grievance and Arbitration Procedure

Section 15.1. Should a difference arise between the Employer and the Union or employees as to the meaning and application of the provisions of this Agreement or as to the compliance of any party with any of its obligations under this Agreement, an earnest effort shall be made to settle such differences immediately under the following procedure by negotiations:

Section 15.2. Between the employee affected and his/her department head or between the employee affected, a committeeman and the department head.

Section 15.3. By the committee and the representative of the Union and an executive of the Employer, at which time either side may call in an outside representative.

Section 15.4. Any dispute, difference or grievance relative to the interpretation of or adherence to the terms of this Agreement which has not been concluded within ten (10) days after reduction in writing under Step Two of the procedures as shown in 15.3 above, may be referred by either party within three (3) days to a board of arbitration, composed of three (3) members, one (1) designated by the Employer, one (1) designated by the Union, and the third (3rd) to be mutually agreed upon by the representatives of the parties. Should the representatives of the Union and the Employer fail to agree upon a third (3rd) party within three (3) additional days, the third (3rd) person shall be appointed as follows:

The party initiating the arbitration procedure shall request a panel of five (5) names from the Federal Mediation and Conciliation Service. The neutral arbitrator shall be selected from the list submitted, unless the parties mutually agree otherwise. The selection shall be made by alternately striking four (4) names, the party to make the first strike being determined by drawing lots. The remaining name shall be the neutral arbitrator.

Section 15.5. The entire matter in controversy as aforesaid shall be referred to

this arbitration board for disposition, and whatever disposition is made shall be binding upon the Union, employee, and Employer. However, such board shall not have the power to add to or modify any of the terms or conditions of this Agreement.

Section 15.6. The decision of the majority of the board of arbitration shall constitute the decision of the board of arbitration and be final. Should any expense be involved for the service of the above-mentioned third (3rd) member of the board of arbitration, such expense shall be borne equally by the Employer and the Union.

Section 15.7. At any step in this grievance procedure, the Executive Committee of the Union Local shall have the final authority, in respect to any aggrieved employee covered by this Agreement, to decline to process a grievance, complaint, difficulty or dispute further if in the judgment of the Executive Committee such grievance or dispute lacks merit or lacks justification under the terms of this Agreement, or has been adjusted or justified under the terms of this Agreement to the satisfaction of the Union Executive Committee.

Section 15.8. All grievances must be submitted in writing within thirty (30) calendar days of their occurrence to receive consideration or they are barred.

Article 19 — Rates of Pay

Section 19.8. Where practicable to do so, a full-time employee shall be replaced by a full-time employee.

Section 19.9. The Employer does not have to have an employee in these classifications where an employee is not assigned or does not perform the total duties of the classification.

RELEVANT FACTS

The following are facts that this Arbitrator deems relevant to the determination of the instant issue.

The store is in operation from 6:00 a.m. until 10:00 p.m. seven days a week. Employees are classified either full-time or part-time.⁹ Full-time employees enjoy extra benefits such as paid holidays, health and welfare and higher wage rates.

⁹ Full-time employees work 32 hours a week or more. Part-time employees work less than 32 hours per week. Sunday hours are not counted in determining full-time or part-time status pursuant to Section 9.11.

Approximately eight of the 40 employees are full-time. As stated earlier herein the store is open from 6:00 a.m. until 10:00 p.m. Employees are scheduled days or nights without regard to full-time/part-time status or seniority. The shifts overlap with day shift employees starting at various times between 6:00 a.m. and 12:00 noon and night shift employees starting at various times after 12:00 noon.

Former Store Manager Tim Muehler notified Operations Manager Paul Hennen by telephone in mid-August 2006 that he would be resigning effective the following Labor Day weekend. Approximately a week later, Hennen appointed Assistant Store Manager Dan Tucheck interim Store Manager. In mid-October 2006, Tucheck was appointed permanent Store Manager. This action was announced to Department Heads in a store meeting shortly thereafter, and to all employees shortly thereafter in a store meeting held at the local Holiday Inn on October 22, 2006.¹⁰ During the same time frame Hennen contacted Cvar and told him of Tucheck's promotion, which took him out of the bargaining unit. During this conversation Hennen inquired about keeping Tucheck in the Union until he reached his 20th anniversary in January 2007. After some discussion, Cvar agreed to this.

Assistant Store Manager, Tucheck worked primarily days from 8:00 a.m. to 4:00 or 5:00 p.m. His primary duties consisted of ordering for the regular grocery shelves, ordering merchandise from Paulson's warehouse,¹¹ scheduling the stockman employees, ordering direct store delivery items for the dairy, ordering ice cream, pizzas, and all other direct store delivery items. He also stocked, filled advertised items, ran the

¹⁰ Employer Exhibit No.2.

¹¹ Besides getting merchandise from Super Valu, Robert Paulson maintains a warehouse that supplies the various stores he owns with certain types of merchandise.

service counter, occasionally cashiered and was the Manager-on-Duty (MOD) when the Store Manager was not there.¹² When Tucheck assumed the Store Manager position, he retained most of his previous Assistant Store Manager's duties with the exception of some minor ones. These included ordering items from Bob Paulson's warehouse every Monday, which full-time employee Chris Rognerud assumed. This took an hour to an hour and a half. He also relinquished his "tagging"¹³ of merchandise, which was assumed by Produce Manager Steve Landmark. Finally, Kim Carlson, who works in Frozen Foods and Dairy assumed his previous duty of breaking down milk pallets when they arrived.¹⁴

According to Tucheck and Hennen, sometime in October they discussed the Assistant Manager's position. It was decided not to fill the Assistant Manager position since Tucheck was comfortable performing both the duties of Assistant and Store Manager. This decision was never conveyed to either the employees or the Union.

Prior to Muehler leaving, both he and Tucheck worked primarily during the day. When Tucheck assumed his Store Manager position full-time employee Rognerud, who had previously worked five nights, began to work fewer nights and more days.¹⁵ After Tucheck's promotion, Rognerud initially worked two nights per week; however, after March 25, 2007, he worked exclusively during the day unless a MOD was needed

¹² MOD is not a contractual position. It is a title given to the individual in charge of the store when the Store Manager is not present. A MOD's duties will be examined subsequently herein.

¹³ Replacing shelf tags.

¹⁴ It is not known how long of a time period these duties encompass; however, it appears the time period is minimal. Carlson is part-time. It is not known whether Landmark is full or part-time.

¹⁵ Employer Exhibit No. 1.

during nights.¹⁶ Meanwhile, the Grievant who has been employed as a part-time grocery employee for 16 years began to be scheduled increasingly more nights. Prior to Muehler leaving, the Grievant was traditionally scheduled to work two nights per week with MOD duties; however, it was not unusual for him to be scheduled as many as four nights.¹⁷ After Tucheck's promotion, he began to work nights exclusively with MOD duties; and continued to do this as of the date of the hearing.¹⁸

The MOD is not a contractual or a permanent position. Store Managers have perpetuated a practice of using a handful of employees to oversee the store operations when they are not present. MOD's are generally long-term employees who can be either part-time or full-time and are well versed in the operation of the store. The employees designated as MOD's after Tucheck became Store Manager included Rognerud (FT Grocery), the Grievant (PT Grocery), Carl Swanson (FT Grocery/Meat), and, on occasion, Brett Eidmann (PT Grocery/Produce); and in April 2007, Mike Kuldaneck (PT Grocery/Produce) was added to this list of employees. Although they have extra responsibilities they are not paid more. There is a MOD at night, and also during days or weekends whenever the Store Manager is not present. Besides his regular work duties, the MOD is responsible to open up or close the store, make sure employees are doing their job and help customers with an issue or complaint. They also have special authority with respect to the cash register system. They have the

¹⁶ Tucheck testified that the reason Rognerud was transferred to days was that he needed him on days when he was promoted, and that Rognerud was the individual that he wanted to work with on days.

¹⁷ The Grievant used the term Night Manager rather than MOD to describe his night shift duties as the employee in charge.

¹⁸ Joint Exhibit No. 8.

master key for the computer to override transaction errors. They also have check approval authority as do customer service personal working in the front of the store.

Prior to Tucheck's assuming his Store Manager position, Rognerud was consistently the MOD on his night shifts. When the Grievant worked nights and Sunday days, he generally was the MOD. There were times, however, when other employees had MOD responsibilities while he also worked. After Rognerud assumed day shift duties, the Grievant was generally the MOD on his night shifts.

According to the Grievant, when it appeared that Tucheck would be the Store Manager, he asked Tucheck if he was going to get moved up to the full-time Night Manager position that Rognerud previously held. According to the Grievant, Tucheck said he was not sure yet, that he was not even sure that he would get the Store Manager's position and that he would look into it. The Grievant further testified that approximately four to six months later he again asked Tucheck about assuming a full-time position. According to the Grievant, Tucheck responded that this was the first time that he had inquired about this; to which the Grievant said "no", that it was the second time. The Grievant further testified that Tucheck then told him they wanted to wait until summer before they came up with any decisions. Tucheck also told him that he did not have the most seniority and that part-time employee Kim Carlson, who is in Frozen Foods and Dairy, had more seniority than he.

The Grievant also testified that while Tucheck was the interim Store Manager he asked Hennen if Tucheck was going to get the Store Manager position. He also asked if Rognerud was going to get the Assistant Store Manager position, and if he was going to get the full-time position that Rognerud had held. According to the Grievant, Hennen

said he was not sure and was looking into it. The Grievant further testified that four or five months later, he again asked Hennen about assuming Rognerud's full-time MOD position. According to the Grievant, Hennen stated that if there was going to be another full-time position, they would have to post it and pick the most qualified person for the opening.

Tuchek testified that he and the Grievant only had one conversation about him becoming full-time. In December of 2006 or January of 2007, he approached the Grievant because he had heard from the other employees that the Grievant was interested in becoming full-time. He asked the Grievant why he had not raised this issue with him before. Tuchek said the Grievant responded that he didn't realize that he had not talked to him, whereas they engaged in a brief conversation. According to Tuchek, he told the Grievant that he did not know what the Paulson's were going to do about that position and they never discussed it again.

Hennen testified that the Grievant approached him around the time that Muehler left and said he would be interested in a full-time position if Rognerud moved up leaving his full-time position available. According to Hennen, he told the Grievant at the time that they were not sure what was happening, that they were interviewing candidates for Muehler's position, that if they did have a full-time position open they would post it within the store and that he would be considered at that time. Hennen further testified that this was the only time that he was ever approached by the Grievant regarding this subject.

Cvar testified there are no Union representatives (stewards) at the store. He visits the store approximately every four to six weeks. He further testified that he was never

informed by either store employees or management that the Employer was not going to fill the full-time night position that Rognerud had vacated. He also testified that he was not aware that a full-time position had been eliminated or that the Employer did not fill the Assistant Store Manager position vacated by Tuchek until the Grievant contacted him in late May of 2007 to file a grievance.

Evidence adduced at the hearing also disclosed that the Employer eliminated or did not fill other store positions when they became vacant. The Agreement wage grid provides for inclusion in the bargaining unit of a full-time manager position called the Bakeoff Manager. The Bakeoff Manager position has not been filled at the Store since Paulson purchased the Store in 2002.

When Paulson purchased the Store, Shelly LaFrance was retained as a full-time Front End Manager. As Front End Manager, LaFrance scheduled the cashiers and utility (carry out) employees. She also supervised the service center, trained cashiers, utility and service center employees, and worked in the service center and as a cashier. She injured her back prior to the Employer purchasing the store at which time she was out of work for a long period. She returned to work for a short time, had surgery, again was out for an extended period and resigned in late April 2005 because of her injuries.¹⁹ Her scheduling duties were transferred to the Store Manager. Her remaining duties were dispersed among other full-time and part-time employees. Neither her full-time position nor her Front End Manager position was subsequently filled. When LaFrance terminated her employment, Hennen testified that the Employer never notified Cvar of this action and is not obligated the Agreement to do so. There is also no

¹⁹ Employer Exhibit No. 3.

evidence that employees notified the Union either. However, as dues-paying members of the Union, Union office personnel should have been aware that LaFrance left her employment when her dues deductions ceased. According to Cvar, he was never notified by his office staff of this action.

Finally, the evidence disclosed that the Grievant was not the most senior part-time employee.²⁰ He is fourth on the list behind Carlson who works in Frozen Foods and Dairy; Linda Brown who is a part-time grocery clerk; Dan Johnson who works in the Deli; and Janis Costley who is the Bookkeeper.

UNION POSITION

The Union's position is that the grievance is procedurally arbitrable. The Union argues that even under a strict reading of the language in the grievance procedure, the grievance is timely.

- Article 14 does not mandate dismissal of the grievance. It is only a limitation on claims for back pay or lost wages.
- Article 15 also does not require dismissal of the grievance. In order to set the time lines in motion a "difference" must exist "*between the Employer and the Union or employees as to the meaning and application of the provisions of this Agreement or as to the compliance of any party with any of its obligations under this Agreement...*". When the Employer would never give the Grievant a straight answer, the Grievant contacted the Union. Thus, it was only when the Grievant decided that the Employer was not going to fill a full-time vacant position and

²⁰ Employer Exhibit No. 5

called Cvar on May 23, 2007 asking to file the grievance that a "difference" arose obligating him to file a grievance. The Union then promptly filed the grievance on May 30, 2007, well within the 30-day time limitations in Section 15.8.

- The grievance is also timely because the failure to fill the full-time Night Manager position is a continual violation of the Agreement. During each payroll period two part-time employees, including the Grievant, who earn less money and receive no health insurance as compared to the previous incumbent, are performing the hours and duties previously performed by a full-time employee. As a result, each paycheck received by the Grievant that does not have full-time pay and benefits is a continual violation of the Agreement.

The Union's position on the substantive merits is that the Employer violated Section 10.13 and Section 19.8 of the Agreement by not promoting the Grievant to the full-time night position vacated by Rognerud.²¹

- Section 10.13 states that, " When a full-time employee terminates their employment with the employer, the employer cannot replace the full-time employee with two (2) part-time employees." Muehler's resignation from the Store Manager's position followed by Tucheck's promotion to the position started a chain reaction. Rognerud was then transferred to days to fill the void caused by one less full-time grocery employee working days. Rognerud's move to days then created a vacancy in the full-time night MOD position. His former position is now manned almost 100% of time by the Grievant. The other MOD, who works

²¹ Although the Union initially argued in its opening statement at the hearing that the Employer also violated Section 19.8, it did not pursue this argument in its Brief.

the other two nights per week is also part-time. The Grievant was assigned one to three hours a week less than Rognerud, thus preventing him from becoming a full-time employee. Part-time employees are now picking up the one to three hours vacant since Rognerud's transfer to days..

- If the Employer's action is allowed, Section 10.13 becomes meaningless. The Employer has the management right to transfer employees and to fill a full-time position with another full-time position. But if the resulting full-time vacancy caused by the transfer is filled by two part-time employees, the net result is one less full-time employee and one more part-time employee. This is exactly what Section 10.13 was negotiated to address.
- The Employer seeks to confuse positions with employees if it argues that Rognerud's position is not vacant because it transferred to days when he was reassigned. The evidence, however, clearly shows that there was a distinct position consisting of five 2:00 p.m. to 10:p.m. MOD shifts per week held by Rognerud up until September of 2006.
- The Union states that it is irrelevant if Rognerud may not be performing the duties of Assistant Manager and/or that the Grievant may not be performing the exact same duties as Rognerud when he worked five nights a week as MOD. The Union does not question the Employer's right to assign duties and work hours to employees. However, it cannot simply tweak a few duties and change starting times by a few hours to escape the restrictions of Section 10.13. Section 10.13 does not specifically address positions, shifts or duties. It is much broader. It prohibits the replacement of full-time employees with part-time employees.

The Union also argues that the Employer's action also violates Section 19.8 because it is impractical to replace a 40-hour per week full-time employee with a 36-39 hour per week part-time employee.

- Section 19.8 states that, "Where practicable to do so, a full-time employee shall be replaced by a full-time employee."
- The Employer offered no evidence that it was impracticable to replace the full-time night MOD with a full-time employee. There was no fundamental change in the Employer's operations or business necessitating the elimination of a full-time MOD position at night, and the Employer has not cited any. Instead, the best evidence shows that it is practicable to replace the vacant full-time night MOD with another full-time MOD. The only significant difference between the two jobs is that the Grievant starts one to three shifts per week at 3:00 p.m. instead of at 2:00 p.m., the time Rognerud started, thus working fewer hours per week. The only purpose of the Employer's action was to save money since part-time employees are paid less and have no health insurance or other benefits.
- Finally, the Employer argued that it would have to post a full-time position and the Grievant would not have received it because he was not the most senior or qualified. The Grievant is only one of three employees with MOD experience. The other two, Swanson and Rognerud, are already full-time employees. The Grievant is obviously qualified because he has been a MOD for a number of years and was assigned to extra nights as a MOD because of his previous experience.

EMPLOYER POSTION

It is the Employer's position that the grievance is not arbitrable because it is barred by the Agreement.

- Article 15.8 establishes specific timelines of when a grievance can be filed. According to Section 15.8, "*All grievances must be submitted in writing within thirty (30) calendar days of their occurrence to receive consideration or they are barred.*" The Union claimed in its May 30, 2007 grievance that the Employer violated Sections 10.7 and 10.13 of the Agreement by failing to promote the Grievant into Rognerud's "Night Manager" position after Rognerud allegedly assumed Tucheck's Assistant Manager position. The evidence shows that Tucheck's promotion to the Store Manager position became permanent in mid-October of 2006, and the Employer then consolidated the duties of the Store Manager and Assistant Manager. Further, that a Night Manager position never existed, and that no full-time or part-time vacancy existed after the Assistant Manager position was eliminated. The undisputed evidence shows that notice was provided to the Grievant and other employees in mid-October 2006. Finally, the evidence shows that it took the Union over seven months (220 days) to file a written grievance.
- The Union and the Grievant knew or should have known about the events that gave rise to the grievance. The Union admits that the Employer was under no obligation to notify it of its management decision not to fill the Assistant Manager position. Cvar visits the store regularly and failed to learn from the Grievant or

- The grievance alleges that the Grievant was harmed when the Employer failed to promote him to a full-time position when the Assistant Manager position became vacant in mid-October 2006. Even crediting the Grievant, it should have been apparent to him in January of 2007, after alleged conversations with Tuchek and Hennen that he was not going to be promoted to a full-time position within the foreseeable future. Even if he did not know it then, the evidence shows that the Grievant knew or should have known that he was not going to be promoted no later than February 2007 when Rognerud began working strictly days. Moreover, there is no evidence to show that the Employer conspired to mislead the Grievant or that he was in fact misled.

The Union's argues that the failure to fill the Assistant Manager position and promote the Grievant to full-time is a continual violation. If accepted, the Union's argument renders Section 14.1 and 15.8 invalidate.

- The practical implication of this is that all alleged contract violations are continual. Clearly, if correct, it acts to destabilize labor relations and increase the chance for labor unrest. The result is also inconsistent with the intentions of the parties as demonstrated by the plain language of the contract. Article 14.1 is particularly instructive in this regard, as it bars untimely wage loss claims. Those claims are

most appropriate for application of the continuing violation theory. Knowing that, the parties' bargained to limit such claims when made more than 30 days after they accrued. This is a clear expression by the parties of their desire to prohibit application of the continuing violation theory and should not be ignored.

- There is also legal precedent limiting application of the continuing violation theory. The Supreme Court precluded application of the continuing violation theory to acts of employers that it deemed "discrete acts".²² The Court defined discrete acts to be actions taking place at a particular point in time. Among the discrete acts identified by the Court in Morgan were an employer's "termination", "failure to promote", "denial of transfer" and "refusal to hire."²³ The Employer's decision to promote Tucheck and consolidate the Assistant Manager and Store Manager positions was a discrete act. The Employer's decisions to not hire a full-time employee after Tucheck's promotion and not promote the Grievant to full-time position were also discrete acts. Finally, the Employer's scheduling decisions were all discrete acts.

The Employer's position on the substantive merits of the grievance is it did not violate the Agreement even if the grievance was timely. The Union has the burden to prove that the Employer violated the Agreement as alleged, which it has failed to do so.

- The Employer bargained for and retained the right to manage its business. Section 1.2 states, "*All Employer rights, functions, responsibilities and authority*

²² National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 and 114 (2002).

²³ Id. at 110-114

not specifically limited by the express terms of this Agreement, are retained by the Company and remain exclusively within the rights of the Company." No where in the Agreement is there language that prohibits the elimination of a position or the right to consolidate two or more positions or to schedule employees as it sees fit. Article 19.9 supports the Employer's right to eliminate or consolidate positions. It states, "*The Employer does not have to have an employee in these classifications where an employee is not assigned or does not perform the total duties of the classification.*"

- Article 10.7 is not applicable because it applies after a vacancy exists.
- Article 10.13 is also not applicable. It states, "*When a full-time employee terminates their employment with the employer, the employer cannot replace the full-time employee with two (2) part-time employees.*" The Employer never replaced a full-time employee with two part-time employees.
- Past practice also supports the Employer's position. The Union has never demanded that Paulson's hire a Bakeoff Manager and has never filed a grievance complaining that Paulson's violated the contract by not filling the full-time Bakeoff Manager position or eliminating the Bakeoff Manager position or dispersing the duties of the Bakeoff Manager to other store employees. Also, after LaFrance resigned, the Union did not demand that Paulson's hire a replacement Front End Manager and has never filed a grievance complaining that Paulson's violated the Agreement by not hiring a Front End Manager or for eliminating the position or for dispersing her former duties to other employees.

- Finally, the Grievant did not have an expectation that he would be promoted to a full-time employee and has no standing to bring a grievance. He was not injured by any alleged violation since he was not the most senior part-time employee in the Grocery Department, and by application of Article 10.7, he would not have been chosen to fill that position. Both Carlson and Brown have more seniority. While Brown worked primarily in the front-end and may not have been qualified for a full-time stock position, Carlson already worked as a stockman and would have been selected for the position before the Grievant.

OPINION

Based upon all of the evidence adduced it is clear that the grievance was not timely filed. Section 15.8 mandates that a grievance must be filed within 30 days of the occurrence of an alleged violation of the Agreement. The time limits for filing a grievance commences when the condition precedent occurs that triggers the grievance. This condition precedent is the alleged failure to fill the Assistant Manager's position and promote the Grievant to a full-time position, which occurred in mid-October of 2006. The grievance was not filed until May 30, 2007 some seven months after the Employer made a decision to combine the Assistant Store Manager's position with the Store Manager's and failed to fill the full-time night position vacated by Rognerud when he was transferred to days. Throughout this time period the grieved positions remained unfilled.

While arbitrators may deviate from the express contractual time limits, sufficient cause must be shown.²⁴ Such is not the case here. At best, the Grievant should have known by early February of 2007 that the night full-time position would not be filled when Rognerud completely ceased working nights.

Even crediting the Grievant's testimony, the Employer never indicated or misled the Grievant into believing that it intended to fill the grieved positions. Rather, the Grievant failed to exercise due diligence in pursuing the Employer's failure to fill these positions. The evidence disclosed that he inquired into becoming full-time before the Employer made the decision to combine the Manager and Assistant Manager positions. After the positions were combined, the Grievant inquired twice, Once with Hennen and once with Tucheck, both in late December 2006 or early January 2007. He was well aware that the positions remained unfilled yet he never contacted the Union nor sought its assistance in filing a grievance until May 30, 2007. Further, Cvar visits the store at least once every four to six weeks and had to know that there was a full-time position vacant after he learned of the promotion of Tucheck in mid October 2006. Since there is no Union representative (steward) present, it was his responsibility, as the Employer points out, to police the Agreement. Had employees let him know or he inquired, timeliness may not have been an issue.

Also, contrary to the Union's assertions, there is no continuing violation of the Agreement. As pointed out by the Employer, the nature of the alleged contract violation is not continual; rather, it occurred at one point in time—when the positions were not filled.

²⁴ Elkouri & Elkouri, How Arbitration Works, Fifth Edition, pgs. 278-279 (1996)

Even assuming arguendo that the grievance was timely filed, there is no violation of the Agreement. The Union has the burden to prove a contractual violation occurred, and has failed to do so. The Employer had the management right under Section 1.2 to eliminate the Assistant Manager position and not create a replacement full-time position. It also had the right to assign employees to shifts and to transfer employees between shifts. Further Section 19.9 gives the Employer the right not "*to have an employee in these classifications where an employee is not assigned or does not perform the total duties of the classification*". Clearly, Rognerud was not performing all of the duties of Assistant Store Manager; rather as the evidence disclosed, Tuchek continued to perform these duties almost exclusively.

There is also nothing in Section 10.13, as correctly pointed out by the Employer, that requires the Employer to fill a vacant full-time position. The Section states, "*When a full-time employee terminates their employment with the employer, the employer cannot replace the full-time employee with two (2) part-time employees.*" The clear language of this Section only addresses terminations, not transfers. Even if Tuchek's leaving his full-time position could be arguably construed as a termination, there is no evidence that two part-time employees replaced him.²⁵ Finally Rognerud's full-time position was never eliminated. Rather, Rognerud was merely transferred to days where he retained his full-time status.

²⁵ Prior to Tuchek becoming Store Manager, there was one full-time employee, Rognerud, at nights and one part-time employee, who was usually the Grievant. Thereafter, this ratio continued until February 2007 when Rognerud worked strictly days and there was no longer a full-time night position. Thereafter, there were two part-time employees at night rather than the previous one part-time employee.

Finally, Section 19.8 does not require a specific full-time position to be replaced with another full-time position. The Section states, "*Where practicable to do so, a full-time employee shall be replaced by a full-time employee.*" The clear and unambiguous language grants Employer's discretion in replacing a vacant full-time position so long as it does not violate Section 10.13. The Union is obviously concerned with losing full-time positions. However, if it wants to avoid the elimination of any full-time position(s), it should bargain this into the Agreement.

In view of the foregoing, I conclude that the grievance was untimely filed. Moreover, assuming *arguendo* that it was timely, there is no violation of the Agreement.

AWARD

It is hereby ordered that the grievance in the above entitled matter be and hereby is denied for the reasons set forth in this Decision.

Dated: October 29, 2007

Richard R. Anderson, Arbitrator