

IN THE MATTER OF ARBITRATION BETWEEN

KERRY INGREDIENTS)
"Employer")
AND) FMCS Case No. 050427-03268-7
IBT, LOCAL NO. 160) Job Elimination
"Union")

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: September 16, 2005

DATE OR RECEIPT OF POST-HEARING BRIEFS: November 20, 2005

APPEARANCES

FOR THE EMPLOYER: Timothy G. Costello, Attorney
Krulkowski & Costello, S.C.
7111 West Edgerton Avenue
Milwaukee, WI 53220
Tom Bailey, Regional Director, Operations
Lynn Holt, Human Resources Manager
Steve Benish, Plant Superintendent

FOR THE UNION: Richard A. Williams, Attorney
Williams & Iversen
1611 West County Road B, #208
St. Paul, MN 55113
Wayne Perlebery, Secretary-Treasurer

INTRODUCTION

This grievance arises out of the actions of the Company in eliminating three specially crafted positions, mutually negotiated between the Union and the Company to accommodate the physical limitations of three employees as a result of workers compensation injuries sustained while working for the Company. The Union contends that the actions of the Company, resulting in the elimination of these positions, are violations of the express terms of the collective bargaining agreement as well as an acknowledged past application of the agreement with respect to these three jobs. The Union respectfully requests that the Grievants be reinstated to jobs identical to those they were holding at the time of their termination and be made whole with respect to wages, benefits and seniority.

THE ISSUE

The parties were unable to agree on the statement of the issues and deferred to the Arbitrator for the final framing of the issues:

Union Version: Whether the Company had the right under the terms of the collective bargaining agreement to eliminate the three specifically crafted jobs held by the Grievants. If not, what is the appropriate remedy?

Company Version: Whether Kerry violated its Collective Bargaining Agreement with Local 160 when it awarded one (1) fat mix/intake position to a junior employee, and not any of the three (3) Grievants who had greater seniority and who Local 160 claims had the technical knowledge to perform the posted job but would have to violate their medical restrictions to perform that job? If so, what is the appropriate remedy?

Arbitrator Version: The Union as the moving party, has a preferential edge in setting the terms of the disputed issue, as long as its statement reasonably expresses a contractually restable question. It does so in this case.

PERTINENT CONTRACT LANGUAGE

ARTICLE I RECOGNITION

Section 1. The Employer recognizes the Union as the sole and exclusive collective bargaining agency for all of its employees employed in the plant at Albert Lea, MN, exclusive of plant manager, superintendents, Company foremen, inventory personnel, fieldmen, laboratory technicians and office personnel. (2002-2005 Agreement, Joint Exhibit 1 at 2)

**ARTICLE VI
SENIORITY**

**

Section 3. Seniority rights shall, at all times, prevail in all matters regarding employment...When layoffs are necessary, the Employer agrees that, subject to technical knowledge requirements, the youngest employee, in point of service, will be laid off first and when work resumes, the oldest employee, in point of service, unemployed, will be recalled first, if available. (2002-2005 Agreement, Joint Exhibit 1 at 5)

**ARTICLE VI
SENIORITY**

**

Section 3. Seniority shall be determined by job classification in conjunction with overall plant seniority. Seniority rights shall, at all times, prevail in all matters regarding employment and in the event there is a vacancy in any job, the employee having the greatest seniority shall be entitled to that job provided he has the technical knowledge, skills and the ability to perform the job...In an effort to keep the most seniority employees working, the company commits to training the most senior employees for an opening in which they are not qualified in lieu of laying them of. (2002-2008 Agreement, Joint Exhibit 2 at 5. New language inserted in the subsequent agreement based upon company negotiating proposals.)

**ARTICLE XXV
MANAGEMENT RIGHTS**

Section 1. The Union recognizes that the management of the Company, the direction of the working forces, the determination of the number of employee's (sic) it will employ or retain, and the right to hire or to release Employees because of lack or (sic) work or for other proper and legitimate reasons are vested in and reserved by the Employer. (2002-2005 Agreement, Joint Exhibit 1 at 18).

POSITION OF THE COMPANY

The contract grants Kerry the right to abolish and create jobs if it had "proper and legitimate reasons." Local 160 stipulated that Kerry did have proper and legitimate reasons for its decision. Thus, in this arbitration, Local 160 does not challenge the abolishment of the Grievants' created jobs or the creation of jobs from certain duties formally performed by the three (2) Grievants in these jobs.

The entire remaining substance of Local 160's grievance involves the bid process on three (3) positions. The first one was a "janitor/intake" position and the second and third one were a newly created position entitled the "fat mix/intake operator." The three (3) individuals listed above, Swenson, Madrigal, and Saltou, all bid on all three (3) positions. The janitor/intake position was awarded to an individual with more seniority (Gene Shilling), and as a result, there is no claim. Local 160 agreed with this assessment at the hearing. The second and third positions were for the same job. However, due to a continued decline in business Kerry never

filled the third position. To date, it remains unfilled. The only issue in this arbitration is the second position.

Local 160 never identified which of the three (3) Grievants should have been awarded the position. Presumably, it would be the most senior one, but Local 160 never introduced any evidence to prove, or even suggest, that individual had the technical knowledge to perform the job. Further, based on Local 160's stipulation that all three (3) Grievants would have to violate their medical restrictions to perform the job, it would appear that Local 160 is only requesting that the Arbitrator symbolically award the job to the most senior Grievant with no backpay and that if the Grievant ever becomes physically able to perform the job in the future, that he becomes entitled to it. Kerry does not agree that this type of remedy is even available if the grievance is sustained and would also point out that, although advances in medical science do occur, the Grievants' medical restrictions were all permanent. If those restrictions change, the Grievants would be free to bid on that position when there is a posted vacancy.

Kerry did award the second position (i.e., the fat mix/intake position) to a junior employee based on all three of those Grievants' pre-existing medical restrictions. The fat mix/intake operator position had a "bagging" job duty associated with it originally. However, after three (3) negotiation sessions, it was agreed that the bagging operation was the most physically demanding and could be transferred from the fat mixture/intake operator position to another position not at issue in the present matter.

Kerry also reduced the hour requirement from a standard twelve (12) hour shift to a flexible ten (10) to twelve (12) hour shift depending on work load in an effort to qualify the Grievants. Despite that adjustment of the duties and the lowering of the daily hour requirements of the fat mix/intake operator position, the three (3) Grievants could not perform the job duties of that position without violating their express medical restrictions.

It is important to note that Kerry did not lightly pass over the Grievants when it awarded the fat/mix intake position to a junior employee. Kerry sent all three Grievants to have physical examinations conducted to determine if their existing medical restrictions were still valid and whether those restrictions would preclude them from the janitor/intake or fat/mix intake positions. All three Grievants returned with medical restrictions that would have to be violated if they were awarded the fat/mix intake position. When the janitor/intake position went to a more senior employee, Local 160 abandoned that claim.

Swenson was restricted to an eight (8) hour day and the fat/mix intake position required ten (10) to twelve (12) hour days. In addition, Swenson was precluded from certain lifting and wheeling operations associated with the fat/mix intake position. Madrigal also was restricted to an eight (8) hour day. He was also restricted from performing other lifting, wheeling, and other physical duties of the fat/mix intake position. Saltou also was restricted to an eight (8) hour day. Further, he could not perform certain lifting or wheeling duties required of the fat/mix intake position.

Kerry was somehow prohibited from taking into account the medical restrictions of an employee when awarding a job bid. Despite the fact that its argument flies in the face of

common sense, Local 160 argues that the contractual language specifically restricts Kerry's discretion when awarding job bids to the following two factors: (1) seniority and (2) technical knowledge to perform that job.

Local 160 also contends that the successor agreement marked specifically incorporated new language which introduced a third factor which allowed Kerry to take into account the physical capabilities of applicants on job bid postings.

Although 160 is accurate about the amendments to the Collective Bargaining Agreement, it fails to acknowledge certain retained rights that Kerry had available when it made its decision to award job bids. The language change to the successor agreement was simply a codification of those rights that Kerry always had when making decisions on job bids. If Kerry did not retain those rights, a strict reading of the contractual provisions, like Local 160 advocates, would lead to an absurd and nonsensical result. In addition, Kerry cannot allow an employee to work in violation of his or her medical restrictions without violating public policy.

Local 160 did not offer any proof to establish that the Grievants possessed the necessary technical knowledge to perform the fat/mix intake position. Kerry did not concede that issue. Thus, the Grievants did not even clear one of the two hurdles that Local 160 argues were the only contractual factors in determining who should be awarded a job bid.

Kerry retained implicit rights to use an employee's physical capability in its determination when awarding job bids. The Management Rights provision in Article XXV reserves to Kerry the "right to hire or to release employees because of lack of work or for other proper and legitimate reasons are vested in and reserved by the Employer." If Kerry explicitly retained the right to release employees for "proper and legitimate reasons," it assuredly retained the right to deny job bids to employees for the same "proper and legitimate reasons" because the award or denial of job bids is a subset of releasing employees from employment.

Thus, common sense and logic dictate that the right to award or deny a job bid was a right retained by Kerry as long as it used "proper and legitimate reasons" in its decision. Bypassing an employee who was unable to physically perform the position without violating his express medical restrictions was a proper and legitimate reason.

Kerry has the retained right to use other factors besides technical knowledge to determine if an employee should be awarded or denied the job bid as long as those factors qualify as "proper and legitimate reasons." For example, mandating that an employee have a Commercial Driver's License or be free of a food borne illness qualifies as a proper and legitimate reason just like the reason that an employee must be physically capable of performing the job duties of the position.

The only reasonable reading of the contract is that it presumes that the employee bidding on the job is capable of performing it. Otherwise why would he or she bid on it? Local 160 cannot argue that an employee who lacks proper government licensing required for a job or was exposed to mad cow disease should be awarded a job bid at Kerry simply because he or she has seniority and the technical knowledge to perform the job.

Requiring an employee to be physically capable of performing the duties of the job is akin to the license requirement and the lack of food borne illness requirement. All three reasons are not explicitly listed in the Collective Bargaining Agreement, yet Kerry retained the right to use those factors because it is presumed in the contract and they are “proper and legitimate reasons.”

In addition, language set forth in Section 4 of Article VI also supports Kerry’s position. Section 4 states that “In filling such vacancies or new jobs, seniority rights shall, at all times, prevail.” However, the contract then goes to state:

Should there be no bidders, the Company may temporarily assign the least senior employee qualified to do the position, or should no qualified individuals from within the bargaining unit be available, recruit and hire from the outside to fill the position.

Although the current grievance did not involve a situation of “no bidders,” the contractual language set forth above demonstrates that the parties contemplated and agreed that individuals would not be assigned to a position unless they were “qualified.” Although “qualified” is not defined, it is notable that the parties used the term “qualified” instead of the phrase “technical knowledge.” Based on the usage of the more general term “qualified” as opposed to the narrower phrase “technical knowledge,” the more reasonable interpretation would be that an individual’s medical restrictions would preclude him or her from being “qualified” and thus, not entitled to a job bid.

The parties agreed that the least senior employee would not be forced into a position unless he or she is qualified, or in other words, physically capable of performing the job duties. It would defy common sense to argue that if the most senior employee bids on a job and was not physically capable of performing the job, he or she is entitled to it. Yet, if no one bids on it and the junior employee is forced to take it, then that junior employee has to be qualified (i.e., physically capable of performing) for the job.

The contract presumes that an employee is capable of performing the job, including meeting the physical requirements. Swenson, Madrigal, and Saltou undisputedly could not physically perform the fat/mix intake job.

It would produce an absurd and nonsensical result if Kerry was prohibited from using an employee’s physical abilities in its decision to award or deny a job bid. It would produce an absurd and nonsensical result if Kerry did not retain the right to use an employee’s physical abilities in its determination of which individual is to receive a job bid.

Although the parties are in agreement that the Arbitrator does not have any authority to decide issues of positive law, a collective bargaining agreement is to be read in light of positive and decisional law. It is presumed that the parties do not negotiate “illegal” provisions in a collective bargaining agreement.

Local 160's interpretation ignores the protections afforded to the three Grievants by law that they cannot be forced to work outside of their restrictions. To allow such action would not only violate public policy, but would also place Kerry in the untenable position of being responsible for further medical care and potentially permanent injuries to those individuals.

POSITION OF THE UNION

The three jobs at issue with respect to this arbitration are:

1. The Fax Mixing Job, which is paid at the Mixers' rate, was held by Donicio Madrigal.
2. The Intake job, which is paid at Labor Grade B, was held by Lynn Swenson.
3. The Janitor Job, which is paid at a special rate that was calculated to coordinate with the temporary partial disability benefits being paid to the job holder (Randy Soltan) pursuant to the Minnesota Workers' Compensation Law.

The Mixer rate and the Labor Grade B were pay rates which existed at the time that the Collective Bargaining Agreement governing this dispute was negotiated between the parties. The special rate for the Janitor position also predated Joint Exhibit 1.

The Fat Mixer job that was modified to accommodate the job holder's physical limitations secondary to a workers' compensation injury, which injury which occurred during the term of the collective bargaining agreement.

The other two jobs (Intake and Janitor) were also created to meet the specific limitations of the job holders as a result of workers' compensation injuries which predated Joint Exhibit 1. These jobs were specifically crafted to exclude physical tasks outside of the physical limitations of the job holders.

These jobs were not specifically listed in the collective bargaining agreement because the Local Union's Principal Officer and Business Agent was concerned that if these jobs were listed, employees in the unit senior to the holders, but without disabilities, might bid on them. This agreement was not a popular one with some of the unit members, but it was one that the Union made in order to protect the interests of the affected employees and to assure their continued employment.

The layoff language in Joint Exhibit 1 that controls this dispute limiting out of seniority or to layoff only to those situations where the senior person lacked "technical" knowledge necessary to perform the job was language which preexisted Joint Exhibit 1.

The seniority language in the current agreement was expanded at the time of its negotiations, as a result of Company proposals made during the negotiation process.

This new language added in addition to the language previously in the collective bargaining agreement, the language "skills and the ability to perform the job." This resulted in the language being changed to expand the situations in which a senior person could be passed

over for a job to those situations where they not only lack technical knowledge, but also to those situations where their skills and ability to perform the job.

Also at the time that Joint Exhibit 2 was negotiated language was added which obligated the Company to keep the most senior employees working by training them for an opening for which they did not qualify before laying the employees off.

In August 2004, during the active term of Joint Exhibit 1, the Company determined that it desired to reorganize the jobs covered by the terms of the collective bargaining agreement and to create new jobs. As part of this process, they took all of the duties from the three light duty jobs described above and added to them additional work which was outside the physical restrictions of the three employees holding the job.

The Company made these changes without first negotiating with the Union, notwithstanding the provisions of the recognized clause.

The actions of the Company, de facto, resulted in the unilateral elimination of jobs that had been specifically crafted to meet the physical limitations of the individuals holding the jobs. This was done without consulting the Union.

The Company's actions, in addition to changing the jobs so that they no longer served the purpose for which they were created, also deprived the holders of those jobs of any opportunity to work within the bargaining unit.

The Company posted the new jobs that had incorporated duties of the eliminated jobs. This resulted in an employee senior to the Grievants being awarded one of the jobs as well as the award of another of the new jobs to a junior employee. This occurred because of the inclusion in the new jobs of duties beyond physical limitations of the Grievants. The end result was that the Grievants could not qualify for any bargaining unit position regardless of seniority. All of the Grievants are senior to individuals still working and the Union timely grieved the Company's actions.

The Union anticipates that the Company will point to the Management Rights clause as a justification for its actions. An examination of the history of the job positions involved, coupled with the Management Rights clause language and other changes made at the Company's request to the terms of the collective bargaining agreement, demonstrate that the Management Rights clause provides no basis for the actions of the Company.

The reason for this is two-fold. It is well recognized that management rights clauses do not operate to permit companies to take action that is precluded by the terms of the collective bargaining agreement or any practices that arise under that collective bargaining agreement. In this case, there is both specific contract language as well as practice that preclude the Company from taking the grieved actions pursuant to rights reserved or granted the Company under the Management Rights clause.

The Seniority Clause clearly provides that in the event of a layoff, employees must be laid off in seniority order. The only exception set forth in the collective bargaining agreement was in the event that the employees lacked the “technical knowledge” to perform the job. In this case, there can be no doubt that the employees had the technical knowledge to perform the jobs the Company unilaterally eliminated. They had successfully been performing those jobs. In fact, the unilateral changes made by the Company related solely to physical tasks to be performed. There is no claim on the part of the Company, that the employees lacked the technical knowledge. The Company’s sole claim is that the employees lacked the physical ability to perform the new jobs because of limitations secondary to workers compensation injuries. This is, in and of itself, an admission that the contract was violated. It is these physical tasks that were specifically negotiated out of the jobs at the time they were mutually agreed to. There is no basis for a unilateral renegeing on that agreement during the term of the contract.

Any doubt that physical limitations did not constitute lack of “technical knowledge” was put to rest during the negotiations between the Company and the Union for the subsequent collective bargaining agreement. During those negotiations, the Company made proposals that resulted in new language becoming a part of the Seniority clause. That language expanded the exceptions from lack of “technical knowledge” to lack of “technical knowledge, skills and the ability to perform the job.” The references to “skills” and “ability” were added at the request of the Company to expand the scope of exceptions to the seniority rule. This conclusively establishes the two new exceptions were not available to the Company under the applicable collective bargaining agreement. A fortiori, it follows that the actions of the Company in terminating these employees was a violation of express provisions of the collective bargaining agreement.

Regardless of whether the Company had the right to create new jobs without negotiating with the Union, it had no right to de facto eliminate positions that had been carefully crafted through negotiations with the Union to accommodate physical limitations of the job holders, which limitations arose out of work place injuries with the Company.

The second reason that the Management Rights clause does not apply is the fact that the three jobs the Company unilaterally modified were jobs with special status that were specially created under the terms of the collective bargaining agreement in order to provide employment to specifically identified employees who had workers compensation injuries arising out of their employment with the Company. The record is clear that these jobs were specifically crafted to accommodate these employees’ medical limitations. It is also clear that the parties specifically understood that these jobs would not be posted. This agreement was made between the Union and the Company because the Union recognized that since these jobs had less demanding physical requirements than other jobs in the plant, if they had been posted under the terms of the collective bargaining agreement a senior employee would have had the right to claim the job. Thus, it is absolutely clear that these jobs had special status within the collective bargaining agreement. They were jobs that were sui generic and related to specific terms and conditions of employment for specifically identified bargaining unit members. Because of this status, there is no way that the Company could modify or change these jobs in such a way as to disqualify the job holders from those positions.

The Company contends that it merely created new jobs, which is its right under the terms of the Management Rights clause. As a general rule, that is a correct statement. The Company may in some circumstances create new jobs and then negotiate with the Union over a pay rate for those jobs. However, in this case it is clear that they were not new jobs. They were the same job with physical requirements added, physical requirements the parties had mutually agreed would not be part of the job at the time each job position was negotiated. Furthermore, under the collective bargaining agreement any new jobs created would be subject to the bidding procedures and would go to the senior bidder. The parties also had a specific agreement at the time they were negotiated that, because of the nature of these positions, they were not to be posted.

The gravamen of this grievance is not that the Company created new positions, but that the Company, under the guise of new job creation, eliminated jobs that were vested rights within the collective bargaining agreement, mid-term, without the Union's agreement. In fact, given the nature of these jobs and their status under the collective bargaining agreement, the Union had no obligation to negotiate their elimination and the Company had no right to demand that it do so.

The Company certainly has the right to take steps to make operations more efficient. The actions of the Company were being done in anticipation of a legitimate general reduction in force. Notwithstanding the legitimacy of those objectives, the Company is still limited in terms of the collective bargaining agreement.

During the course of the negotiation of the subsequent agreement, the Company addressed the limitations that the previous contract placed on its ability to reorganize and eliminate jobs and reduce employment. It negotiated with the Union and, as a result of those negotiations, the exceptions to the seniority rules were expanded. As part of those negotiations there was new language put in the seniority clause that created an affirmative obligation on the part of the Company to retain any senior employees who might otherwise be terminated for lack of technical skill or qualifications for the remaining jobs.

This contractual scheme is contrary to the actions taken by the Company under the prior contract where these terms and conditions were not present.

All the principles of interpretation, application and enforcement of collective bargaining agreements demand that the grievance be sustained and that the Grievants be reinstated to their positions, made whole with respect to back pay and benefits, and that they not be placed on layoff until such time as the Company has complied with all of the provisions of the current collective bargaining agreement regarding their entitlement to hold positions within the unit.

During the hearing the Company contended that of the three new positions created, only two of them had been filled and, in fact, one of them had been filled by an employee who was senior to the Grievant who had been in the specially negotiated and modified job the new position replaced. That claim is immaterial to the issues presented in this arbitration. The question is not whether these individuals qualified for new positions created by the Company. The issue is whether the Company had, under the terms of the collective bargaining agreement, the right to unilaterally abolish the specially crafted jobs.

The jobs, the pay rates, and the job duties had been specifically and specially negotiated between the Union and the Company. Two of the jobs had predated the existing collective bargaining agreement and were continued when the new collective bargaining agreement was signed. The third (Fat Mixer) job was one that was created during the course of the collective bargaining agreement using the same principles and protocol used in the other two jobs.

In addition, an application of the language in the seniority provision of the collective bargaining agreement demonstrates that regardless of how the Company chooses to characterize the new jobs, i.e., either (a) newly created jobs; or (b) modifications of the jobs held by the three Grievants, it has no right to permit anyone who is junior to any of the Grievants to perform any work in those jobs. The collective bargaining agreement provided only one exception to the layoff by seniority rule in the contract. That exception was if the individuals lacked the technical knowledge for their respective jobs. Clearly in the instant case, all three individuals had to have the technical knowledge for the job. They had all been successfully performing those jobs for years. The duties that disqualified them from the newly created jobs had nothing to do with technical knowledge. The new duties had to do with physical limitations, primarily regarding weight; the exact limitations that had been deliberately excluded from the abolished jobs.

These contractual limitations perhaps made it impossible for the Company to combine positions or create as many new positions as it wanted to in an effort to have a general reduction in force. As was pointed out above, however, collective bargaining agreements exist in large part to impose such limitations on employers. It is immaterial that it was inconvenient for the Company to abide by the terms of the collective bargaining agreement or that the agreement kept the Company from making the changes to the bargaining unit as rapidly or in the same way as it desired. At bottom, what the Company did was a violation of the terms of the collective bargaining agreement.

The Company may contend that under the new seniority clause language which was negotiated into the subsequent (now current) collective bargaining agreement, that the Company now has the right to put these employees on layoff. Whether that is the case can only be determined after the employees are reinstated. At that point in time, in the event the Company chooses to try to eliminate those jobs, that issue would have to be addressed under the terms of the current collective bargaining agreement. Likewise, in the event it is ultimately determined that the Company has the right to modify, change or eliminate these jobs under the present agreement, that agreement gives the employees rights to be retained for other jobs that their seniority would permit them to hold. Under these circumstances, the appropriate remedy is for the Arbitrator to direct the Company to reinstate these employees to positions identical to those they held at the time they were terminated and make them whole with respect to back pay, benefits and seniority.

DISCUSSION AND OPINION

No material facts remain in dispute in this matter – although the parties disagree over how to characterize certain key facts. For instance, the Union describes the Company's actions as abolishing three jobs reserved under the contract for the three employees who have physical

limitations, and doing so without negotiating the matter with the Union – thereby terminating the Grievant’s employment.

The Company’s version of the disputed action begins with denying the Grievant’s were terminated but, rather, were laid off with recall rights. Further, the Company claims it did not abolish any jobs but instead created new jobs by taking parts of various jobs where work was declining and adding these together so as to make a useful new job. Finally, asserts the Company, there are not three jobs at issue here, but only one because only one remains unfilled for lack of work; one has been filled by a senior employee in accordance with the labor contract, leaving only the fat mix/intake job open on a 10/12 hour shift schedule.

The question of whether the Grievants were terminated or laid off was deferred to the parties for clarification of the terms of contractual layoff and recall rights and no longer is before the Arbitrator. For puposes of this resent review the Union accepted the Grievant’s status as laid off.

The consequential semantical dispute, however, remains over whether these jobs were abolished in the process of creating the new combined jobs, as the Union views the action, or as the Company defines it, partial jobs with declining work content were combined to create visible new jobs.

Attempting to resolve the underlying dispute in this matter by a mere parsing of language for the purpose of presenting a semblance of contractual coverage would be meaningless. Arbitrators serve as virtual surrogates for the parties in order to discern the intent and purpose of their bargain.

Applying this concept of the Arbitrator’s role to the facts and contract in this case prompts the conclusion that neither party could have logically intended to set up these jobs as to be permanently frozen and sheltered from the market-driven production needs of the entire enterprise. Neither can it be reasonably assumed that the Union would have abdicated its voice in final determination of how and when inevitable changes in these jobs would take place.

This seeming dilemma calls for the kind of problem-solving approach which the U.S. Supreme Court has referred to from the Steelworkers’ Trilogy¹ through Misco² as “shop law” as opposed to the rigors of contract law rules inappropriately applied to that peculiar document called a collective bargaining agreement.

A searching analysis of the complex interplay of competing contractual rights under the particular facts of this case yields the following conclusions:

- The addition of new duties and extended hours to the jobs in question constitute substantial changes in the terms and conditions of employment for its three Grievants who had, up to then, enjoyed a negotiated protected job status. Such protected status was

¹ 363 U.S. 574 46 LRRM et. Seq. (1960).

² 464 US 29 108 S.Ct. 88 L. Ed 2d 286 (1987).

evidenced, in substantial part, by the removal of tasks which were beyond their medical restrictions and the extension of work hours beyond what had been medically approved.

- These jobs were further set apart and sheltered by mutual agreement not to list them by direct reference in the collective bargaining agreement thereby removing them from the contractual posting and bidding process.
- Notwithstanding the status of these three jobs as fully embedded in the labor contract by past practice which protected them from job bidding, there was no evidence presented to support the Union's claim that the parties' mutual intent was to exempt these jobs from the strong management rights provision authorizing the release of employees "for other proper and legitimate reasons."

This articulation of management rights clearly implies that if insufficient work remains in a job to justify the full time employment of the assigned employee, management retains the right to lay off such employee if or until the addition of new or combined tasks and duties provides adequate work to warrant filing the new combined job.

- Collateral to this conclusion is the prevailing arbitral authority which holds that unless a clear and forceful limitation can be found in a collective bargaining agreement on an employer's inherent right to improve the efficiency of operations through elimination of or redistribution of work within the bargaining unit, existing classifications cannot be considered frozen.
- The true rule in arbitration is that absent any such clear and forceful restriction on management's inherent or in this case express rights to combine or redistribute duties in the interests of efficiency (certainly a "proper and legitimate" purpose) the duty to negotiate covers only the effects of such change.
- So-called decision bargaining is required only in the event of major institutional changes such as plant closings, transfer of major parts of operation, or successorship obligations on sale of business. Even in these situations decision bargaining is limited to timely advance announcement and willingness to meet with no obligation to reach agreement.³
- Effects bargaining directed at dealing specifically with terms and conditions of employment affected by new job creation, job accretion, job combination and involves typically such issues as change in wage rate, additional training requirements, seniority group assignment and like considerations. Again, what is not required – except for a showing of good faith business purpose – is any form of prior agreement from the union to such changes in job content, tools, equipment, or methods of production.

In the instant case, the Company presented abundant evidence that the changes described including addition of certain new duties and extension of working hours were entirely for proper and legitimate reasons as mentioned in Article XXV. The Union's claim that the substantive

³ Hill and Sinicropi, Management Rights, BNA Books (1986), pp. 412-415.

changes in duties were mere pretexts for eliminating the physically limited Grievants from its workforce lacks persuasive proof.

The move from shorter hours and a longer work week to a shorter work week of longer days was not directed specifically at the Grievants' jobs but, instead, was part of a series of plant-wide adaptations to lower production needs resulting from falling demand. The Union's vigorous efforts to shield the physically limited workers from the adjustments and retrenchments imposed by the Company's economic downturn is praiseworthy. The sad reality in this case remains, however, that no contractual support or past practice obligation can be found to freeze these Grievants' former job requirements so as to accommodate their medical restrictions.

Having established that Kerry had the authority under the Management Rights clause to change the work content of the Grievants' jobs and to increase the hours of their workday, the sole question remains of whether or not their actions are, defacto, a impermissible renege on an oral agreement supported by long practice. As stated in the Union's opening statement at the hearing, these jobs were specially crafted through direct negotiation to provide employment comparable with the medical restrictions of the three Grievants, all of whom were disabled by job-related injuries. Because these were created through direct negotiations, they can only be abolished through direct negotiations.

An essential element of proof is lacking in the Union's case and that is any evidence to support the proposition that the oral agreement guaranteed that the job content at issue in this case would remain unchanged in perpetuity, regardless of the production needs of the business. No arbitral authority that I am aware of prohibits an employer from changing the content of jobs unless and until such change is negotiated (absent clear contract language requiring such negotiations).

In sum, past practice standing alone cannot serve to preserve the job content of the positions formerly held by the Grievants. It is well established that past practice prevails only as long as the conditions which gave rise to the practice remains intact. The credible testimony described how these sheltered jobs were created at a time when demand for the Company's products ran high and production need accommodated the special arrangement. The undisputed facts now show the Company going through a period of slowing demand and reduced production – a time calling for greater efficiency in order to survive. Under these latter conditions the Company cannot be bound to retain in place such special accommodations as it formerly practiced in regard to the job content of the positions involved in this case.

It is important to note that the parties never memorialized the special work arrangement for the three Grievants in writing. Absent such a writing it remains a matter of mere speculation as to the intent of the parties in regard to the permanency of this arrangement under different circumstances than existed at the time this accommodation to the Grievants' disabilities were drafted.

Neither were any witnesses to the bargaining history leading to establishment of the special arrangements available to shed light on the intent of the parties. Indeed the current owner Kerry Ingredients, inherited the arrangement when they bought out the predecessor ownership.

Accordingly, no one in present management can speak to the bargaining history involved. Neither was any officer or member of the Union available to testify in regard to bargaining history.

In any event, analysis of the seniority provision in place at the time of the Grievants' layoff should not be read so narrowly as to conclude that the sole mention of technical knowledge constitutes the only requirement besides seniority to determine the rank order of layoffs. As the Company correctly argues elemental logic dictates that commonsensical qualifications besides sheer technical knowledge are always assumed.

Thus, the job specs for a truck driver may not necessarily specify that the incumbent hold appropriate licensure but, obviously, he/she cannot hold the job otherwise. In like vein, a person who cannot discern different fine shadings of color would not qualify as a graphic artist even if the job description does is silent in this regard.

To carry the analogy to the instant circumstances, even though the labor contract only lists technical knowledge, the Grievants cannot retain a claim on the new combined jobs if their medical restrictions, per se, prevent them from performing the work. The subsequent introduction of words covering physical abilities should not be read to mean that such requirement was not assumed before the parties agreed to make it explicit in the current contract.

DECISION

Based on the foregoing findings and conclusions, the grievance is denied.

12/15/2005
Date

John J. Flagler, Arbitrator