1994 WL 871898 (Arb.)

IN THE MATTER OF THE ARBITRATION BETWEEN Butler Refrigerated Meats, Inc. AND
General Teamsters, Local Union No. 538
Arbitration Decision
Federal Mediation and Conciliation Service No. 94-15891
October 31, 1994

IRWIN J. DEAN, JR., ARBITRATOR

APPEARANCES:

For the Employer: Susan Gromis Flynn, Esquire

For the Union: Stephen H. Jordan, Esquire

JURISDICTION

This arbitration proceeding involves a dispute between Butler Refrigerated Meats, Inc., hereinafter referred to as the "Employer", and the General Teamsters, Local Union No. 538, hereinafter referred to as the "Union". The dispute between the parties concerns whether the Employer violated the parties' collective bargaining agreement when it failed to call the Grievant, Mark Kushner, to perform overtime work on February 19, 1994.

The matter was referred to the Arbitrator, Irwin J. Dean, Jr., by the Federal Mediation and Conciliation Service. A hearing was held on October 12, 1994, in Pittsburgh, Pennsylvania. At the hearing, the parties were afforded an opportunity to present all pertinent testimony and exhibits and to cross-examine witnesses. All witnesses testified under oath.

Following the conclusion of the October 12, 1994 hearing, neither party elected to file a post-hearing brief. Accordingly, at the conclusion of the hearing, the record in this matter was deemed to be closed.

BACKGROUND

The Employer is a wholesale distributor of meat products. The Employer's employees, including its drivers and warehouse employees, are members of a bargaining unit which is represented by the Union. On Saturday, February 19, 1994, the Employer had scheduled eighteen (18) warehouse employees to work as well as a number of drivers, including one (1) part-time driver. When the part-time driver appeared for work, he was informed that the available delivery runs had been assigned to more senior drivers. Because the parties' collective bargaining agreement guaranteed the part-time driver four (4) hours' pay even though work might not be available for him, the Employer directed the part-time driver to perform warehousing duties about the loading dock. The driver performed these

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1994 WL 871898 (Arb.)

duties until he was assigned to drive a special delivery order to a customer.

The Grievant, Mark Kushner, is a full-time warehouse employee. The Grievant had worked a full, five (5) day week between February 14 and February 18, 1994. Upon learning that the part-time driver had been assigned to perform warehouse work, the Grievant initiated this grievance, contending that he should have been called in on an overtime basis to perform the work which had been assigned to the part-time driver. The Grievant submitted that because three (3) of the eighteen (18) scheduled warehousemen had not reported for duty, the Employer had an inadequate complement of warehousemen and that he would certainly have been called in had the part-time driver not been assigned the work. The Employer denied the grievance, contending that the parties have maintained a long-standing practice under which drivers routinely perform warehousing duties when they are otherwise unoccupied, such as when driving work is not immediately available or when a driver has completed his deliveries and has returned to the plant prior to the end of the regular eight (8) hour work shift. The parties were unable to resolve their dispute through the preliminary stages of the grievance procedure set forth in the collective bargaining agreement, and the matter has accordingly been referred to this Arbitrator for full, final and binding resolution.

UNION POSITION

The Local Union has represented the Employer's bargaining unit employees since the 1970's. During that time the parties have negotiated a number of collective bargaining agreements, the most recent of which became effective on June 1, 1993, and will extend until June 1, 1998. Union witnesses testified at the arbitration hearing that the parties' prior agreements had been schematic and did not provide sufficiently detailed provisions concerning seniority rights, job bidding procedures and the scope of management rights. The Union indicated that its officials perceived that the earlier, less specific agreements had been interpreted by the Employer as authorizing it broad discretion in the exercise of its management rights. The dissatisfaction with the earlier contracts centered primarily about the areas of work assignments and the Employer's practice of assigning employees duties outside of their regular job classifications.

Because of these perceived deficiencies in the earlier agreements, the Union sought a more detailed agreement which would establish a regular job bidding procedure based upon seniority. The Employer agreed to the Union's request and Article V of the parties' collective bargaining agreement was extensively revised to provide explicit job bidding procedures. Although these bidding procedures are not directly at issue in this grievance, the Union observes that the bidding procedures are based upon recognized job classifications. Union witnesses confirmed that during negotiations, the Employer acknowledged that it would attempt to avoid cross classification assignments to the extent it could. Additionally, the Employer also acknowledged that the recognized job classifications must be respected in assigning overtime. Article VII(G)(1) requires that:

All warehouse overtime shall be offered first to warehouse employees by seniority, and then to all employees by seniority, so long as the employee is

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1994 WL 871898 (Arb.)

qualified.

The Union submits that by assigning the part-time driver to perform warehouse duties on the loading dock, the Employer violated both the letter and spirit of the agreement. As indicated above, the overall structure of the parties' collective bargaining agreement recognizes distinct job classifications. The Union argues that implicit in the concept of distinct job classifications is a requirement that work must be assigned to employees within the proper classification. Moreover, the Union urges that the Arbitrator must find from the facts adduced at the hearing that had the disputed work not been assigned to the part-time driver, it would have been necessary to call in the Grievant or another warehouseman to perform the work on an overtime basis. Three (3) of the scheduled warehousemen had not reported for work and the Employer was obviously short-handed.

In an attempt to divert the Arbitrator's attention from the critical issue in this case, the Employer attempted to maintain at the arbitration hearing that acceptance of the Union's position would require that the subject driver remain idle unless or until a delivery run became available. The Employer accuses the Union of attempting to impose a working condition under which an employee should be paid even though he cannot be assigned to regular driving duties. The Union observes that the Employer's argument is an obvious exaggeration. The Union objects to drivers being assigned to perform work ordinarily performed by employees in other classifications. Even though there may have been no available delivery run to which to assign this driver, he could have been assigned other duties which the Employer's other drivers routinely perform, such as servicing the vehicles or moving them about the lot to optimal locations. The Union, of course, has no objection to requiring that an employee called in to the facility perform productive work during any contractually guaranteed call-in period. That is not the same, however, as a justification for crossing recognized classification boundaries.

At the arbitration hearing in this matter, the Employer attempted to argue that it assigned the Grievant consistent with its long-standing practice of assigning drivers to perform warehouse duties when they might otherwise be idle. The Union observes that even if such a practice existed, it could not overcome the clear intention of the current collective bargaining agreement that the distinction among job classifications must be respected. Although the Employer asserted that this practice has continued even under the current collective bargaining agreement, Union witnesses credibly testified that they had been unaware of any other occurrence and that their lack of knowledge was the only reason that the Employer's actions were not challenged in an earlier grievance proceeding.

The Union concludes that the credible evidence in this case demonstrates that the Employer has violated the collective bargaining agreement as well as oral commitments it made during negotiations toward the current contract. The Union urges that the Arbitrator sustain the grievance and that he award the Grievant the eight (8) hours' pay at overtime rates which he would have received had he been called in to perform the disputed work. The Union also requests that the Arbitrator enter a directive to the Employer that it must comply with the agreement and assign work according to classifications in the future.

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1994 WL 871898 (Arb.)

EMPLOYER POSITION

The Employer observes that the facts underlying this grievance are not in dispute. The Union's grievance seeks only an interpretation of the provisions of the parties' collective bargaining agreement and a determination of whether the agreement requires the relief which the Union demands. Where a grievance seeks a definitive construction of a collective bargaining agreement, the Union ordinarily bears the burden of proving that the construction which it proposes is either supported by express language in the collective bargaining agreement or derives from a long-standing practice which is now an actual obligation of the Employer. The evidence submitted at the hearing, however, does not meet either standard. The collective bargaining agreement provisions which the Union identified to the Arbitrator as supportive of its position are simply irrelevant to the facts of this case. Additionally, the only evidence concerning a relevant past practice was the Employer's evidence that cross classification assignments have been accomplished in many other instances in which drivers might otherwise be idle. On the basis of the relevant, credible evidence, the grievance must be denied.

The Employer acknowledges that in the most recent collective bargaining agreement, the parties expanded contract language concerning the seniority rights of bargaining unit employees. The most significant refinements of the current collective bargaining agreement are the amendments to Article V, which establish a system of job bidding by seniority. In accordance with that provision, the Employer posted regular positions for bid and those positions were awarded on a seniority basis. The Union's suggestion, however, that the new bidding procedure somehow precludes cross assignments in all circumstances is simply not supported by the contract language. The management rights clause contained in Article IV of the agreement continues to allow the Employer "the right to move and transfer employees from one work assignment to another, and the right to schedule hours of work for employees...." Article V does not diminish the inherent management right to assign employees to insure efficient operations. There is no evidence to suggest that when the part-time driver was briefly assigned to work on the loading dock that he displaced or in any manner impaired the rights of regular warehousemen who had bid on their positions under the Article V procedure. Consequently, Article V is entirely silent on the question raised by the Union's grievance.

Similarly, the Union can take no comfort in the provisions of Article VIII(G) which regulate the manner in which overtime opportunities must be distributed. The Employer's witnesses confirmed that, although new, Article VIII(G) does no more than codify the parties' traditional practice of awarding available overtime within classifications so long as employees are willing to perform the assignment. Of course, the applicability of Article VIII(G) presumes that an overtime opportunity is available. On February 19, 1994, there was no overtime opportunity available. The part-time driver was assigned to perform duties which would not have been assigned to any employee on an overtime basis. As the Employer's witnesses confirmed, much of the weekend work in the warehouse is of a routine, non-urgent nature and could have been performed the following week without any disruption. Although the Union invites the Arbitrator to infer that because three (3) warehousemen had not appeared for work that a call-in would have been

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1994 WL 871898 (Arb.)

necessary, the testimony demonstrated that the Employer has come to expect higher than normal levels of absenteeism on its weekend shifts and has adjusted its schedule accordingly. The absence of three (3) warehousemen did not result in understaffing. The staffing levels were set in anticipation that a number of warehousemen could be expected to be absent.

Not only was there no overtime opportunity available, the assignment which the Union protests is of a kind which has traditionally been accepted. The Employer confirmed that it is not uncommon for drivers to have no scheduled delivery runs when they initially report to work or for the drivers to complete their assigned deliveries prior to the end of the normal work shift. In such cases, drivers have traditionally been assigned to work in the warehouse or on the loading docks so that they may perform productive activity during the entire work shift. Prior to this grievance, the Union has never protested this type of assignment. Although the Union submits that it failed to grieve the Employer's practice because the Union was unaware of the practice, the argument is ultimately unconvincing. It is certainly quite apparent to anyone on the scene that a person who regularly works as a driver is performing warehousing duties. The Employer did not and could not conceal that this type of assignment was occurring on a regular basis. The Union should be charged with knowledge of the practice and by its failure to grieve must be deemed to have acquiesced in cross assignments of this type.

The Employer concludes that the assignment of the part-time driver to perform warehousing duties while awaiting a delivery run on February 19, 1994, violates no controlling provision of the collective bargaining agreement and is, in fact, consistent with long-standing practices which authorize such assignments in similar circumstances. The grievance must be denied.

ISSUE

Did the Employer violate the parties' collective bargaining agreement when it failed to call the Grievant, Mark Kushner, to perform overtime work on February 19, 1994? If so, what shall the appropriate remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE IV - MANAGEMENT RIGHTS

(A) The Employer retains the exclusive right to manage the business and to direct the employees in the performance of their work and duties. Such right shall include, but not be limited to, the utilization of any equipment or machinery in the operation of the business, the right to lay off employees for economic reasons, the right to move and transfer employees from one work assignment to another, and the right to schedule hours of work for employees, and the right to establish reasonable work rules and regulations governing the operation of the business and the performance and work of the employees, provided, however, that the rights established for the Employer herein shall not be in violation of any of the provisions of this Contract.

....

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1994 WL 871898 (Arb.)

ARTICLE V - SENIORITY

....

(C) On an annual basis, or on an as needed basis, the Company agrees to meet with a Union committee to establish the number of scheduled runs or warehouse jobs to be bid by seniority, and to establish a bidding procedure, subject to the Company's business requirements. In assigning remaining runs, the Company will honor the employees' seniority wherever possible.

....

ARTICLE VIII - HOURS OF WORK

....

(C) The Company shall establish a bidding system by seniority for starting times, work week, equipment, overtime and routes. Schedules are to be posted by Thursday of the preceding week before the quitting time of the Employee. If the Company decides to institute a seven (7) day work week, the Company agrees to meet and discuss such changes with the Union prior to beginning such schedule.

....

(F) In regard to sixth and seventh day work, employees will be guaranteed eight (8) hours work, but they shall be guaranteed four (4) hours work if they are scheduled and report for work and the work is discontinued by mutual agreement or in the event of layoff for lack of work or other legitimate business reason or in the event of any act or circumstance beyond the control of the Company such as a labor dispute, fire, flood, storm, ice, and Act of God, riots, power failure or major computer breakdown.

(G) 1. All warehouse overtime shall be offered first to warehouse employees by seniority, and then to all employees by seniority, so long as the employee is qualified.

2. All driver extra and seventh day overtime shall be offered first to the driver by seniority, and then to all employees by seniority, so long as the employee is qualified.

....

DISCUSSION

The issue presented for review in this grievance is whether the Employer committed a contract violation when it assigned a part-time driver to perform warehousing duties about the loading dock in lieu of calling in a warehouseman on an overtime basis to perform those duties. The Union submits that the most recent collective bargaining agreement substantially increased the seniority rights of bargaining unit employees with the aim of enhancing the distinction among job classifications. The Union submits that the purpose of the new job bidding procedures was to curtail the Employer's historical practice of assigning duties to employees which were often outside of their regular job classifications. That

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1994 WL 871898 (Arb.)

this was the Union's objective was clearly announced during negotiations. Union witnesses confirmed that in addition to the language changes that were incorporated into the most recent agreement, the Union was assured by the Employer that it would attempt to respect the distinction among classifications in making job assignments.

The Employer counters that although the Union sought and received a formal bidding procedure in the collective bargaining agreement seniority article, it did not win a blanket restriction against assigning duties across classifications where operational needs or efficiencies might require such assignments. Nor did the Union win any overtime guarantee in the most recent negotiations. The Employer submits that although the Union may object to the assignment of the part-time driver to perform loading dock duties, it simply has identified no contract provision which was violated by that assignment. In fact, Employer witnesses confirmed that assignments of the very type in question have routinely been made where drivers return early or where delivery runs are not initially available to them. The Employer reasons that because the contract is silent and because it acted in accordance with recognized practice, it cannot be guilty of a contract violation.

The parties acknowledge that their dispute involves no factual controversy but turns only upon the proper interpretation of the collective bargaining agreement. Because this is not a disciplinary proceeding, the Union bears the burden of proving that a violation has occurred. Ordinarily, to meet this burden, the Union must identify some provision of the contract which it claims has been violated. The Arbitrator must then examine the contract language to determine whether the complained of conduct is in fact in contravention of the identified provision. Alternatively, if the collective bargaining agreement is silent, the Union can ordinarily prove a breach only by identifying and proving the existence of a past practice which would prohibit the Employer action which it challenges.

The Union has identified two (2) contract articles which it urges in support of its position. The Union initially claims that Article V of the collective bargaining agreement prohibits assignments of the type at issue in this proceeding. A careful review of Article V, however, fails to convince the Arbitrator that the bidding procedure established thereunder was ever intended to address the type of irregular assignment from which this grievance arises. Article V establishes a bidding procedure for regular positions. The Employer has identified regular positions and has awarded them on a seniority basis. There is no express prohibition against the occasional assignment of duties across job classifications. Moreover, the assignment in question does not appear to undermine Article V's essential purpose of requiring the Employer to define specific positions and award them by seniority. There is no evidence in this record to suggest that the occupant of a bid position was displaced, that his duties were altered or that such an employee was in any manner adversely affected. Consequently, the Arbitrator cannot agree with the Union that the Employer's assignment of the part-time driver violated any express provision of Article V.

The Union objects, however, that the bidding procedures implicitly recognize a distinction among job classifications. In creating positions upon which employees

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1994 WL 871898 (Arb.)

may bid, the overall structure of the collective bargaining agreement recognizes a distinction between drivers and warehousemen. Assigning across classifications dilutes this division and undermines the clear intent of the parties.

The Arbitrator is unable to agree with the Union's argument. Although the collective bargaining agreement indeed recognizes distinctions among job classifications, it does not establish that the classifications are inviolate. As the Employer observes, it has retained under the management rights clause some authority to reassign employees. In other provisions of the collective bargaining agreement, the parties have acknowledged that, under certain conditions, drivers may be required to work at least temporarily as warehousemen. For example, the collective bargaining agreement expressly provides that a driver who loses his operating privileges for any reason shall be reassigned as a warehouseman. If the intention of the parties was to create an impenetrable division between warehousemen and drivers, they could hardly be expected to include a provision which would presumably allow a driver to transfer to the warehouse even if his loss of operating privileges was the result of his own misconduct. In short, the Arbitrator cannot agree with the Union that the agreement prohibits assignments of the type at issue.

Nor can the Arbitrator accept the Union's reasoning that Article VIII(G)(1) requires that the Grievant be awarded overtime compensation as the result of this disputed assignment. As the Employer correctly observes, Article VIII(G)(1) does no more than establish a procedure for the distribution of overtime whenever overtime opportunities are available. The credible evidence convincingly establishes that no overtime opportunity existed on February 19, 1994. The work to which the driver was assigned was not critical and could have been performed the following week by warehouse employees regularly scheduled to work at that time. Had the driver not been assigned, no additional employees would have been called in to perform warehouse duties.

As indicated above, the Arbitrator must conclude that the Union has failed to identify any specific contract provision which prohibits the types of assignment of which it complains. The Arbitrator is also unconvinced that this assignment violates any oral commitments which the Employer may have made during the course of negotiations. Although this agreement does not contain an integration clause which might invalidate any agreements made during negotiations which did not survive into the final instrument, the commitment which the Union's own witnesses describe falls far short of an absolute prohibition against cross classification assignments. The Union's witnesses testified that the Employer agreed that it would attempt to avoid assignments across classifications in the future. In this instance, the Employer sought to assign productive duties to an employee who would otherwise be idle. Although the Union suggested that the driver could have been assigned duties within his classification, the suggestions it offered, such as moving vehicles about the lot, appear to be little more than busy work. The assignment which the Employer made is consistent with a practice which it has historically followed and continues to follow under the current agreement. The Arbitrator is unable to conclude under the circumstances of this case that the Employer violated even the verbal commitment which the Union described.

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After carefully considering the particular facts and circumstances of this case, the Arbitrator is not persuaded that the Union has met its burden of proving that the disputed assignment constituted a violation of the parties' collective bargaining agreement. The grievance must therefore be denied.

AWARD

The grievance is denied.

1994 WL 871898 (Arb.)

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