

**THE MATTER OF ARBITRATION BETWEEN**

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**BAKERY, CONFECTIONARY,  
TOBACCO WORKERS AND GRAIN  
MILLERS, LOCAL NO. 300,**

**Union,**

**and**

**KRAFT FOODS GLOBAL INC,**

**Employer.**

**SAME-DAY SENIORITY  
GRIEVANCE**

Arbitrator: Stephen F. Befort  
Hearing Dates: March 1 and August 9, 2011  
Post-hearing briefs received: October 7, 2011  
Date of Decision: October, 28, 2011  
  
APPEARANCES  
For the Union: Stanley Eisenstein  
For the Employer: James Fuller

**INTRODUCTION**

BCTM Local 300 (Union), as exclusive representative, brings this grievance claiming that Kraft Foods (Employer) violated the parties' collective bargaining agreement by failing to make lay-off decisions in 2008 and 2009 based on clock number or sequencing number seniority with respect to employees who were hired on the same day. The Union contends that the Employer's actions were contrary to clearly established past practice, while the Employer

maintains that a 2004 agreement with the Union extinguished any such practice. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

### **ISSUE**

Did the Employer violate the parties' collective bargaining agreement when it retained an employee with a lower sequencing number and laid off other employees with same-day seniority but with higher sequencing numbers? If so, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE 5 – SENIORITY**

Section 1 Employees on the Company payroll, including those employees who have been laid off subject to recall, and those employees on leave of absence who return to work with no break in service, shall have plant-wide seniority on layoffs.

No new employees subject to this Agreement shall be hired until all employees who have been laid off have returned to work or have been given the opportunity to do so.

#### **ARTICLE 28 – LABOR MANAGEMENT**

Section 1 The management of the business of the Company, the direction of its working forces, the schedules and quantities of production and the methods, processes and means of manufacturing, are prerogatives of the Management.

### **FACTUAL BACKGROUND**

The Employer operates a bakery on Kedzie Avenue in Chicago that produces cookie and cracker products under the Nabisco label. The Union has long represented production and maintenance employees at this facility. As of March 2009, the Chicago Bakery employed approximately 1,110 BCTM bargaining unit employees.

This grievance involves the order of layoffs. Article 5 of the parties' collective bargaining agreement generally requires that layoffs be made in the inverse order of seniority. The issue posed with respect to this grievance concerns the fact that many employees at the Chicago Bakery were hired on the same day. The parties assert different understandings and practices with respect to the handling of same-day seniority.

The Union contends that the Employer has a longstanding practice of determining layoffs among those employees who were hired on the same day on the basis of clock numbers or sequencing numbers. Union President Edward Burpo testified that the Employer, since at least 1968, has given each employee a "clock number" that determines the pecking order for same day seniority. According to Burpo, the lower the clock number, the greater the seniority. At some point, the Employer converted to a computer-based tracking system in which "sequencing numbers" replaced clock numbers. Burpo testified that the sequencing number order of preference generally mirrored that of the prior clock number system. He testified that, to his knowledge, the Employer had never deviated from this practice until 2008 and that this deviation gave rise to the instant grievance. Union witnesses Louis Rodriguez and Wyomia Neal, with a combined 69 years of work experience at the Chicago Bakery, both corroborated Burpo's testimony concerning the Employer's same-day seniority practice.

In contrast, Brad Rauchfuss, who served as the Employee Relations Manager at the Chicago Bakery from 2001 to 2004, testified that the Employer sometimes based layoff and recall decisions for employees with same-day seniority on job-related capabilities. The Employer also offered the testimony of Bradley Burmeister who served as the Chicago Bakery's labor scheduler from 2005 to 2008. Burmeister walked through a September 2005 schedule and explained how the Employer retained certain machine operators and utility workers during a

layoff in spite of their sequencing numbers because of the Employer's need for workers with these particular abilities. Finally, the Employer introduced evidence showing that 14% of the employee clock numbers did not match the corresponding sequential order of how employees actually were placed on the plant-wide seniority list.

Rauchfuss testified that he confronted a number of scheduling issues during his tenure at the Chicago Bakery. One of these issues concerned the fact that the Bakery had more workers than work which resulted in frequent layoffs and recalls. This, in turn, led to a number of grievances challenging the manner in which these layoffs and recalls were handled. The Employer, meanwhile, decided to implement a new computer-based scheduling system that would match employees with open job slots.

Rauchfuss stated that he and other management personnel had numerous meetings with Union representatives in which they attempted to deal with the scheduling problems and the resulting grievances. These meetings, according to Rauchfuss, also involved collaborative brainstorming concerning the rollout of the new automated scheduling system.

Rauchfuss testified that these discussions eventually led to a June 2004 meeting in which he claims that Burpo offered the suggestion that employees who were hired on the same day be treated as "interchangeable." Rauchfuss asserted that this led him to draft a proposed letter agreement stating that "Employees who were hired on the same day (same seniority day) are interchangeable for the purposes of layoff/recall, forced overtime, and departmental transfers." Rauchfuss testified that he presented this letter to Burpo during a meeting on June 24, 2004, and that while Burpo indicated his assent to this general principle, he wanted some assurance that the Employer would not discriminate against certain employees in taking these actions. Rauchfuss testified that he then revised the letter agreement by adding an ending parenthetical provision

stating “(provided it is done in a non-discriminatory fashion).” Rauchfuss further testified that he and Burpo then signed the modified letter agreement.

The Union maintains that the purported letter agreement of June 24, 2004 is not authentic. The Union points out that the agreement, as submitted into evidence, bears the date of 6/24/02 rather than 6/24/04. In addition, Burpo testified that he never signed such an agreement. Burpo further testified that he could not have signed such an agreement on June 24, 2004 since he spent most of that day attending a meeting at the Employer’s warehouse facility in Addison, Indiana, which is approximately 40 miles from the Chicago Bakery.

Burpo testified that the first time that he saw the purported letter agreement was during negotiations for a national agreement in 2008. Burpo testified that the Employer was attempting to obtain an agreement that it need not follow seniority strictly in making layoffs and that the Employer’s negotiator produced the June 24, 2004 letter agreement as evidence that the Chicago local already had agreed to such an arrangement. When the Union negotiator showed the agreement to Burpo and asked if he had signed it, Burpo replied “no, this is bullshit.”

The record evidence concerning if and how the parties subsequently referenced the purported June 24, 2004 agreement is mixed. The Employer introduced two documents, one from 2005 and one from 2008, which specifically state that the Employer is entitled to schedule employees with same-day seniority on the basis of qualifications. The Union, on the other hand, introduced evidence showing that the Employer did not reference the purported agreement during negotiations at the local level in either 2004 or 2008 when the Employer was seeking broader scheduling flexibility.

At the arbitration hearing, the Employer offered the testimony of Eric Speckin as an expert witness in the area of handwriting and document analysis. Speckin testified that he has

handled approximately 3,000 cases involving document examination and testified as an expert in more than 200 proceedings. Speckin compared 12 documents containing the acknowledged signatures of Ed Burpo with the signature set out on the June 24, 2004 letter agreement. Speckin testified that he examined the signatures for the purpose of detecting both the possibility of forgery or tracing as well as to ascertain the handwriting habits displayed in the representative signatures. Based on this analysis, Speckin expressed the highest possible level of professional certainty that the signature on the letter agreement was that of Mr. Burpo.

The specific grievance at issue concerns the Employer's handling of layoffs in December 2008 and January 2009. In both instances, the Employer, having the need to lay off employees with same-day seniority, selected employees with lower sequencing numbers than Rodney Beasley who was retained. The Employer defends that selection on the grounds that there was a need for an employee who could perform mixing duties and Beasley was being trained as a mixer. Burpo testified, however, that he observed Beasley perform floor sweeping duties on two occasions during December 2008.

## **POSITIONS OF THE PARTIES**

### **Union**

The Union contends that the Employer violated the parties' collective bargaining agreement by retaining Beasley rather than other employees having lower sequencing numbers during the December 2008 and January 2009 layoffs. The Union claims that these actions were inconsistent with a longstanding past practice of basing layoffs for employees having same-day seniority on the order of assigned sequencing numbers. The Union argues that the purported letter agreement of June 24, 2004 does not abrogate that practice because that agreement was never executed and thus is not authentic. The Union additionally asserts that the agreement is

without effect by virtue of the fact that the Union clearly repudiated its acceptance of that document during the 2008 negotiations.

### **Employer**

The Employer argues that it retained Beasley during the two layoff rounds because of his needed ability as a mixer, and that this action did not violate any provision of the parties' agreement or any binding past practice. The Employer initially contends that the Union has not established a sufficiently clear and unequivocal practice of basing layoffs among those employees with same-day seniority on the basis of sequencing numbers. In any event, however, the June 25, 2004 letter agreement abrogated any arguable practice by expressly acknowledging that the Employer may determine the order of layoffs for those with same-day seniority on any basis that is not discriminatory. The Employer argues that this letter is authentic based upon both the testimony of Rauchfuss and the expert opinion of Speckin. With the former past practice now extinguished, the Employer asserts that nothing in the parties' agreement limited the Employer's ability to retain Beasley during the two layoffs.

## **DISCUSSION AND OPINION**

### **The Contract Language**

The plain language of the parties' collective bargaining agreement provides the starting point in any contract interpretation dispute. In this respect, Article 5, Section 1 provides as follows:

Employees on the Company payroll, including those employees who have been laid off subject to recall, and those employees on leave of absence who return to work with no break in service, shall have plant-wide seniority on layoffs.

No new employees subject to this Agreement shall be hired until all employees who have been laid off have returned to work or have been given the opportunity to do so.

While this language recognizes the principle of seniority with respect to layoffs, it does not more specifically address the issue of layoff rights for those employees who were hired on the same day. The Employer argues that it retains authority to determine the order of layoffs with respect to those employees who are tied in seniority by virtue of the agreement's management rights clause which states

The management of the business of the Company, the direction of its working forces, the schedules and quantities of production and the methods, processes and means of manufacturing, are prerogatives of the Management.

Reading these two provisions together, it is clear that the plain language does not compel the sequencing number order of preference urged by the Union. The Union, accordingly, must look beyond the four corners of the contract in order to establish that this grievance should be sustained.

### **Past Practice**

The Union argues that the parties have adhered to a past practice by which layoffs among employees with same day seniority are determined on the basis of the inverse order of sequencing numbers. Union President Burpo testified that, to his knowledge, this practice has been followed without deviation for the past 40 years. Louis Rodriguez and Wyomia Neal essentially corroborated his testimony.

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



ELKOURI, HOW ARBITRATION WORKS 605-30 (6th ed. 2003). Each of these factors appears to be met in this instance.

The Employer only mildly disputes this conclusion. Rauchfuss, in this regard, testified that during his tenure as Employee Relations Manager at the Chicago Bakery, the Employer considered ability to do the job as a factor in making some same-day seniority layoff decisions. Nonetheless, the prevalence of the past practice is underscored by the fact that Rauchfuss clearly valued obtaining the June 24, 2004 letter agreement as a basis for gaining more flexibility in making layoff decisions.

Viewing the record as a whole, the Union adequately has demonstrated the existence of a binding past practice. Pursuant to this practice, the parties' agreement, at least until modified, required that the Employer make same-day seniority layoff decisions based on the inverse order of assigned sequencing numbers.

#### **The June 24, 2004 Agreement**

The Employer contends that if such a past practice existed, a letter agreement executed on June 24, 2004 effectively terminated that practice. The specific terms of this agreement, as introduced into evidence, states as follows:

Employees who were hired on the same day (same seniority day) are interchangeable for the purposes of layoff/recall, forced overtime, and departmental transfers (provided it is done in a nondiscriminatory manner).

This document contains the signatures of Brad Rauchfuss and Edward Burpo. The Employer argues that this agreement constitutes a mutual agreement that the Employer no longer needed to break ties with respect to same-day seniority on the basis of sequencing numbers. According to the terms of this agreement, the Employer, instead, may determine the order of layoffs within its discretion so long as the basis for that determination is not discriminatory in nature.

The Union challenges the authenticity of this document on a number of grounds. First, the Union points out that the document bears the date of June 24, 2002, rather than the asserted June 24, 2004 date. Second, Ed Burpo testified that he never signed such an agreement. In this regard, he testified that he never saw this purported agreement until it was produced in support of the Employer's bargaining proposal during the 2008 national-level negotiations. Finally, Burpo testified that he could not have signed such an agreement on June 24, 2004 because he spent the bulk of that day attending a meeting at a Kraft Warehouse facility in Addison, Indiana. In support of this contention, Burpo produced detailed notes of the Addison meeting.

The Employer also introduced evidence in support of its claim that Burpo knowingly and voluntarily entered into this agreement. First, Rauchfuss testified as to Burpo's asserted position that individuals with same day seniority are "interchangeable" for purposes of layoff and recall. He also described the meeting on June 24, 2004 during which he and Burpo negotiated the wording of the letter agreement. Second, Human Resources Administrator Rita Lopez testified that she encountered an elated Rauchfuss on his way to the copying machine sometime in 2004, saying that he was about to make a copy of an agreement concerning same- day seniority. She testified that she saw Burpo's signature on the document, but that she did not read the document's contents. Third, former labor scheduler Burmeister, in his testimony, explained how he used employer needs and employee abilities in scheduling work during September 2005. In an accompanying email message, Burmeister wrote;

FYI-I just had a meeting with [Union officer] Walter Howard concerning how we handled last week's lay-off (i.e. keeping people from layoff based on job class with same hire date) and I'm happy to tell you that the Union was totally on board with it. He said he realized we are not bound by the "seniority number," but can go by the hire date with ability.

Perhaps the most significant evidence concerning the authenticity of the June 24, 2004 letter agreement was the expert testimony of Eric Speckin. Speckin, an acknowledged handwriting expert, compared 12 documents containing the undisputed signatures of Ed Burpo with the signature contained on the June 24, 2004 letter agreement. Based on this analysis, he expressed the highest possible level of professional certainty that the signature on the letter agreement was that of Burpo.

During the Union's cross examination, Speckin admitted that he could offer no opinion as to when the signatures on the purported June 24, 2004 letter agreement were actually affixed. He also did not offer any explanation as to why the noted date of June 24, 2002 differed from the purported execution date of June 24, 2004.

In the end, the authenticity of the letter agreement cannot be determined with any mathematical certainty. The testimony of Ed Burpo denying that he affixed his signature to this document was seemingly sincere. Yet, the objective evidence clearly supports the authenticity of this agreement. Even if there is some doubt as to whether it was signed precisely on June 24, 2004, there is little doubt that it was signed by Burpo at some point in time. Moreover, the document clearly evidences an agreement by the parties to alter their past practice with respect to the treatment of same-day seniority for the purpose of layoffs and recalls. The document, accordingly was effective in extinguishing the prior past practice based on sequencing numbers.

### **The Union's Repudiation of the Letter Agreement**

The Union alternatively argues that it should not be bound by the June 24, 2004 letter agreement because it affirmatively repudiated that alleged agreement during negotiations for a national level contract in 2008. In support of this contention, the Union cites to evidence establishing that both Jim Condran from the Union's International unit and Burpo objected to the

authenticity of the June 24 document when it was presented during the 2008 negotiations. In making these objections, the Union also clearly voiced its objection to determining layoffs on any basis other than seniority.

While it is well-recognized that a party may repudiate the ongoing validity of a past practice during negotiations following contract expiration, it does not follow that a party may create or re-establish a past practice by repudiating a document that ended a prior past practice. *See generally* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 619-20 (6th ed. 2003). The basic underlying notion of a binding past practice is that the conduct of the parties may evidence a tacit mutual agreement as to the parties' understanding of their respective contractual obligations. Thus, while a party's repudiation of an existing practice may serve to undercut the mutual assent necessary to that practice's continuing validity, the repudiation of an agreement that had previously terminated a past practice does not represent the mutual assent necessary to revive such a practice.

Quite simply, one party cannot unilaterally re-establish an expired past practice. At most, the Union's repudiation of the June 24, 2004 agreement wipes the slate clean and leaves the parties with no practice that informs the terms of the parties' written agreement.

### **The Instant Grievance**

Under the circumstances of this grievance, the Employer claims that it retained Beasley during the two layoffs in spite of his higher sequencing number because it needed his skills as a mixer. The Union, in contrast, argues that Beasley was observed working in a custodial capacity for which his alleged mixing abilities were irrelevant.

Ultimately, the Union cannot make out a violation of the parties' agreement under either scenario for the following reasons. First, the express language of the parties' collective

bargaining agreement does not limit the Employer's discretion in determining the order of layoffs among employees with same-day seniority. Second, any past practice requiring the Employer to make layoffs among employees with same day seniority on the basis of sequencing numbers was abrogated by the parties' June 24, 2004 letter agreement. This agreement gave the Employer full discretion in selecting among employees with same day-seniority so long as the basis for selection was not discriminatory. Third, even though the Union objected to the validity and the substance of the June 24 agreement during the 2008 negotiations, that alleged repudiation cannot unilaterally revive the parties' pre-existing practice. Accordingly, the Employer did not violate the agreement or past practice in its layoff actions.

#### **AWARD**

The grievance is denied.

Dated: October 28, 2011

  
Stephen F. Befort  
Arbitrator