

IN RE ARBITRATION BETWEEN:

IBEW #292

and

FMS CORPORATION

DECISION AND AWARD OF ARBITRATOR

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IBEW #292

and

FMS Corporation.

DECISION AND AWARD OF ARBITRATOR
Plant Access grievance

APPEARANCES:

FOR THE UNION:

Brendan Cummins, Miler, O'Brien and Cummins,
Peter Lindahl, Financial Secretary and Business Rep.

FOR THE EMPLOYER:

Greg Peters, Seaton, Peters and Revnew
Marie Bronson, HR Director
Greg Sweet, owner of FMS Corp.
John Sweet, owner of FMS Corp.

PRELIMINARY STATEMENT

The hearing in the matter was held on November 11, 2011 at 7300 Metro Blvd. Edina, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on December 9, 2011 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated January 1, 2010 through December 31, 2011. The grievance procedure is contained at Article IV. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES

1. See issue statement agreed to by the Union at hearing.

RELEVANT CONTRACT PROVISIONS

ARTICLE I, SECTION 1.2 TERMINATION

Either party desiring to change or terminate this Agreement must notify the other in writing at least sixty (60) days prior to December 31, 2011, or any anniversary date.

ARTICLE III, SECTION 3.4 BUSINESS REPRESENTATIVE

CITE THIS The Union shall have access to the plant, when necessary, by signing into the visitor log.

ARTICLE IV SECTION 4.1 GRIEVANCES

All differences disputes and grievances that may arise between the Union and the Employer relative to the interpretation or the adherence to the terms of this Agreement shall be taken up as follows: ***

ARTICLE IV SECTION 4.4

All differences as hereinbefore referred to, which are not satisfactorily disposed of through the established channels of grievance procedure, shall be referred to either party to arbitration for settlement. *** The decision of the arbitrator shall be final and binding on all parties and shall be limited to the interpretation of, or adherence to, this contract.

UNION'S POSITION

The Union took the position that the Employer violated the clear terms of Article 3.4 set forth above when it refused to allow Union President Lindale and a Union official to the plant on March 11, 2011. In support of this position the Union made the following contentions:

1. The Union asserted that the contract language is clear and unambiguous and mandates that the Union "shall" have access to the plant when it, not the Employer deems it necessary. The Union further asserted that to adopt the Company's interpretation and allow the Employer to determine when it was necessary for a Union representative to enter the plant to conduct Union business would be to effectively negate the language and render it meaningless.

2. The Union noted that the Business Representative, Mr. Lindahl, was granted access to the plant on March 10, 2011 after signing into the visitor register, as required, and after meeting with Greg Sweet, one of the owners. The Union pointed out that the e-mail, sent only minutes after the Union Representative entered the Plant from Mr. John Sweet was inaccurate and asserted that the Employer had full knowledge of the Union's presence and of the nature of the visit.

3. The Union further asserted that the Employer's witness even acknowledged that the contact does not contain any language requiring the Union to call before coming or to state why it is there or who they wish to meet with during their visit.

4. With respect to the visit of March 11, 2011, the Union noted that the Employer refused to allow access to the plant and granted only access to the conference room, which is to in the plant. The Union did not wish to use the conference room as it was not private enough to conduct the business with the member it needed to meet with.

5. The Union asserted that the NLRB's decision is not binding nor of any evidentiary value. There as no hearing nor formal findings by the Board and the Board is governed by a very different set of standards. Here the question is whether there was a violation of the labor agreement not whether there was an unfair labor practice.

6. The Union representative appeared at the plant on March 11, 2011 in part to quell fears and dispel rumors regarding the then very recent ratification vote, which had occurred on March 8, 2011. There were also several other members that had issues and the Union representative to needed to meet with that employee on a matter that might have led to discipline. To inform the Employer of why they were coming could well have compromised that employee's confidentiality and even potentially jeopardized any future grievance.

7. The Union also pointed out that the language of Section 3.4 was changed during the negotiations for the 2005-087 and has remained the same ever since.

8. The language of Section 3.4 in prior agreement provided as follows: the Union CHECK THIS AND SEE WHAT IT SAYS. The Union asserted that this change in language must imply a substantial change in meaning. While the Union was required under the prior language to "apply" with the Employer and did so by calling ahead and notifying the Employer when it was coming and why, the language now contains no such requirement. As noted above, the Employer witness acknowledged that and admitted that the language does not require anything further than signing in to the visitor log.

9. The essence of the Union's claim is that the language is clear and unambiguous and requires only signing in. While the previous Business Agent called the Employer as a matter of courtesy but was under no obligation to do so under the current language. There was thus no binding practice nor any change in the labor agreement. The Employer should have allowed access to the plant on March 11, 2011.

The Union seeks an award ordering the Employer to comply with the provisions of Article 3.4 to allow Union access to the plant pursuant to that provision and to cease and desist from requiring the Union to call ahead and make appointments in order to gain access to the plant

EMPLOYER'S POSITION:

The Employer took the position that there was no contract violation here and that the Employer gets to determine when it is necessary for the Union to gain access to the plant. In support of this the Employer made the following contentions:

1. The Employer had a very different interpretation of the language of Section 3.4 and asserted that the clause "when necessary" means that the Employer, not the Union gets to determine when the Union needs to come to the plant. The Employer further asserted that it, not the Union has a private property interest in the plant and an economic interest in assuring that production is not interrupted or disrupted by the Union's presence.

2. The Employer pointed to the long history whereby the Union representative before Mr. Lindahl took over would call before he appeared and informed the company why he was there. He further took steps not to disrupt the plant's operations and to be courteous when he did.

3. The Employer further asserted that the current Union representative has abused the privilege and has on occasion bypassed the security desk and wander around the plant without management's knowledge or permission. When this occurred once before the prior Union Agent, he was told to stop and he did. The Employer asserted that the current leaders of the Union have not heeded this warning and have gamed this language to create problems rather than to try to solve them.

4. The Employer noted that when the representative appeared on March 10, 2011 company representatives escorted him and that the Employer simply decided that the Union needed to be in the plant that day. On March 11, 2011, the Employer determined that the Union did not need to be in the plant that day since it had been there only the day before.

5. The Employer questioned the legitimacy of the March 11th visit and asserted that it appeared to them that the Union was again gaming them and setting up a grievance that day by repeatedly asking if they were being denied access to the plant. The Employer pointed to several instances, including one in which Mr. Lindahl entered the plant very early in the morning, failed to sign in and wandered around the plant interrupting employees and disrupting the operations in general.

6. The Employer argued that under no circumstances does the Union have nay right to enter the plant without the Employer's knowledge or consent or to bother employees' during work time. The Employer was simply enforcing its understanding of the contract language and making sure that Mr. Lindahl, who has a history of contravening the language, did not enter the plant to create trouble or disrupt things.

The Employer seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

FMS is a powder coated metal parts manufacturer based in Bloomington, Minnesota. FMS and the Union have a long history and bargaining relationship that was relatively good and respectful but which has apparently soured in recent years. Clearly, the relationship was strained considerably after the protracted and acrimonious recent negotiation for the current labor agreement. It is not necessary to go into the details of this but it was apparent that at about the time this grievance arose there was a contract ratification vote and a considerable dispute between the parties about whether the ratification vote was even valid and whether they in fact had a contract. That was not resolved until recently following an arbitral award.

The determination in that matter is not strictly germane but does provide a backdrop to what was going on between the parties and the “buzz.” As Mr. Lindahl put it, in the plant at about the time this grievance arose. Having said that, this matter is limited to the Union’s request to gain access to the plant on March 11, 2011 and is thus limited to the facts that gave rise to this grievance.

The operative facts were largely undisputed. Mr. Lindahl appeared on the morning of March 10, 2011 and signed into the visitor log as required by the contract. He spoke with Mr. Greg Sweet that day and was allowed access to the plant that day. In what was something of a miscommunication, Mr. John Sweet sent an e-mail within minutes of that visit indicating that the Union representatives had entered the plant without permission and that they were not to be allowed in without the express consent of management. It was clear that the Union did speak with one of the owners that day but that this was not communicated to the other owner, who had sent the e-mail, and that the first statement about the Union entering the plant without permission was in error.

During subsequent discussion about this the Union was told by several different Company representatives that the contract language gave the Employer the sole and exclusive right to determine when it was necessary for the Union to enter the plant. That assertion will be discussed below but frankly is not what the language says nor is it what it means.

The Union representatives returned to the plant on March 11, 2011 and were met by John Sweet and told that they would be refused access to the plant that day. They asked the Union why they were there and were told only that they were there on “Union business” without any further details. The Union representatives were then told that they would be allowed to meet with whichever employees they wanted but that the Employer would get those employees and escort them to the conference room. The Union indicated that this was unacceptable to them and left. This grievance ensued.

MEANING OF THE LANGUAGE OF SECTION 3.4

There was no dispute that the language of Section 3.4 was inserted into the contract for the first time in the 2005-07 contract. Prior to that the prior language was different and read as follows:

CITE OLDER LANGUAGE

The evidence in this matter shows that the parties changed this language to the current version of Section 3.4 and that this language has remained unchanged in the labor agreement ever since. The Employer characterized this as a minor textual change. One of the most basic tenets in contract interpretation though is that the words of a labor agreement have meaning. Concomitantly, so too does a change in the language strongly imply that there is a change of that meaning. The evidence showed that under the prior language there was some expectation that the Union contact the Employer and “apply” to gain entry to the plant. It was also clear that what that meant was that the Union was to do precisely what the Employer said it needs to do now – call before coming.

The obvious fact though is that the language changed and with it came a change in the meaning and in the obligations required by it. The clear and unambiguous language of the current language requires that the Union *shall* have access to the plant. (Emphasis added.) Nothing could be clearer than that – the Union shall have access to the plant. There is no limitation on that for time or circumstances other than signing the visitor log.

The Company’s argument that the phrase “when necessary” somehow gives it the right to determine what the Union is to enter the plant was clever indeed but was not at all supported by the language of the agreement. When the language is read as a whole it is abundantly clear that the phrase “when necessary” applies to when the Union deems it necessary to gain access to the plant to conduct whatever Union related business the Union deems necessary.

Frankly there was considerable merit to the Union's claim that to adopt the Employer's interpretation would in effect be to render the entire clause meaningless. Giving the Employer the right to determine when it was necessary for Union representatives to gain access to the plant to conduct Union business is not only patently contrary to the plain meaning of the clause but would negate the clause itself.

Further, there is no requirement that the Union tell the Employer why it is there beyond that it is there to conduct Union business with its members. The Employer argued that a stranger would not be allowed access to the plant and wander around without being told to leave. That is of course true enough but a total stranger does not a valid labor agreement with the Employer specifically allowing it access to the plant as a matter of negotiated contact between consenting parties. Accordingly, the language does not require this as a condition of entry to the plant either.¹

Certainly though the language does not give the Union the right to disrupt operations or to gain access to any particular employee while the employee is working. The Employer retains a right to require that the employees do their jobs without interference from the Union. While the contact clause gives the Union a right to gain access to the plant it does not give it the right to gain access to any particular employee irrespective of what that employee is doing at the time.

The Employer referenced prior instances where the Union representatives attempted to gain access by circumventing the visitor log or sneaking in a side door to avoid detection by management. Certainly this is not condoned nor allowed by the clear terms of the language. The Union must sign in at the visitor log. Any further requirements or limitations must be negotiated by the parties and cannot be added or amended by the arbitrator here.

¹ Employer witnesses acknowledged as much at the hearing and admitted that the requirements of calling ahead and describing why the Union is there are not the agreement. Much of the Employer's concern has to do with the demeanor of the current Business representative. This issue is well beyond the power of any arbitrator to fix. What the parties are essentially asking is that people be more courteous about these requests and not show up unannounced and expect to gain access to the plant. While it would certainly be better to establish and maintain a good working relationship, which is the basis of any good labor agreement, such cannot be dictated or mandated here. All that can be done is to interpret the language of the labor agreement these parties have negotiated for themselves and hope that people can act like adults when administering it.

Finally, there was some discussion about the use of conference and training rooms. There was some, but not much, evidence regarding the physical layout of the facility. No pictures or other schematic drawings were provided and the arbitrator's understanding of the facility was based on the verbal descriptions given by various witnesses at the hearing. The main operation is on a lower level where the actual plant operations are conducted. There is also a lunchroom and break room there. There is a training room on an upper level as well as a conference room where the offices are. The Employer has allowed use of the conference rooms in the past where appropriate. There is no contractual requirement for that since the language says only the "plant." This interpretation was consistent with Mr. Lindahl's testimony who acknowledged that the language refers only to the plant and not the office or the training or conference room.

There is no requirement to gain access to this but the parties can, and probably should, discuss when and under what circumstances it might be appropriate to use that room versus meeting with employees in some other setting. As noted above, the role of arbitrator is not to dictate how the parties should treat each other in the future but rather is limited to interpretation of the contract language. Hopefully, those discussions will lead to a better relationship than has been the case in the past.

THE EVENTS OF MARCH 11, 2011

Turning now to the instant grievance, it should be reiterated that this decision is limited to these facts. The parties spent considerable time at the hearing discussing prior instances and what the Union's motivations for entry were. Those prior instances are not involved in this grievance and like any future application of this language, cannot be decided at this point. This grievance is about the facts of March 11, 2011, consistent with the interpretation of the language set forth above.

As discussed above, Mr. Lindahl appeared on March 10, 2011 and was granted access to the plant that day without incident. Clearly there was some miscommunication and the e-mail that was sent that day by John Sweet contained some factual errors.

This fact did not control the result – the contract language does. As determined above, the contract language gives the Union the right to enter the plant, when it deems it necessary. It was clear that Mr. Lindahl appeared on March 11, 2011 and signed into the log as required by the language. He was denied access to the plant in violation of the agreement and the grievance to that extent must be sustained.

The Employer again relied heavily on the withdrawal of the Union’s ULP charge before the NLRB. Such a “finding,” to the extent it can be called that, has no binding effect here. First, it was a withdrawal of a charge, not a specific set of findings that might have some evidentiary value. Second, the standards before the Board in determining what a ULP has occurred are quite different than those impacting a grievance arbitration over the interpretation of disputed contract language. Thus, the NLRB’s determinations did not provide any support for the Employer’s claims here. This decision is based on the clear contract language and its plain meaning as set forth above.

There is no specific remedy to be made at this point other than to reiterate the interpretation of the language with the limitations on it as set forth above. To reiterate, Section 3.4 does not give the Employer the right to determine when it is necessary for the Union to gain access to the plant to conduct Union business. Neither does it require that the Union give any prior notice or any specific reasons for why it is there. However, the language of Section 3.4 does give the Union the right to interrupt operations or to grant access to any particular employee while that employee is working. On these facts, the Employer violated Section 3.4 and is ordered to cease and desist from denying access to the plant as long as the other stated requirement of signing into the visitor log have been satisfied.

AWARD

The grievance is SUSTAINED as set forth above.

Dated: December 16, 2011

IBEW 292 and FMS plant access AWARD.doc

Jeffrey W. Jacobs, arbitrator