

IN THE MATTER OF THE ARBITRATION BETWEEN
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International Brotherhood of Teamsters, Local 792,
Union

and

Johnson Brothers Liquor Company

Employer.

OPINION AND AWARD

Grievance of IBT, Local 792
(Vacation Scheduling)

FMCS Case No. 06-03856

ARBITRATOR:

Janice K. Frankman,
Attorney at Law

DATE OF AWARD:

June 13, 2007

HEARING SITE:

Steven C. Miller, Attorney at Law
1935 West County Road B-2
Conference Room
Roseville MN 55113

HEARING DATE:

March 21, 2007

RECORD CLOSED:

April 26, 2007

REPRESENTING THE UNION:

Bill Reynolds, Business Agent
Teamsters Local 792
3001 University Avenue SE
Minneapolis MN 55414

REPRESENTING THE EMPLOYER:

Steven C. Miller, Attorney at Law
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JURISDICTION

The hearing in this matter was held on March 21, 2007. The Arbitrator was selected to serve pursuant to the parties' collective bargaining agreement and the procedures of FMCS. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties submitted post-hearing briefs which were received on April 26, 2007, when the record closed and the matter was taken under advisement. By letter dated April 27, 2007, Counsel for the Company objected to a document submitted by the Union with its closing Brief. The Arbitrator responded to the letter on April 30, 2007, agreeing with the Company that the document represented new evidence which could not be properly received into this record and that it, therefore, would not be considered in issuing this Award.

ISSUE

The Arbitrator believes the following is an accurate statement of the issue:

Whether the Company violated the parties' Collective Bargaining Agreement when it failed to provide an opportunity for employees to bid for vacation during closed holiday weeks and, if so, what is the remedy?

BACKGROUND AND SUMMARY OF THE EVIDENCE

Johnson Brothers Liquor Company is a liquor wholesaler which operates a day and a night shift. In 2006, the Company restructured its operation apparently eliminating the job classification "Production Worker". Following retirement of four day shift warehouse workers in June, 2006, one night warehouse worker was moved to the day shift. The Company has not hired replacements for the retirees. This Grievance was filed in April, 2006, after bargaining unit members received a Vacation Scheduling Memo for the 2006-2007 vacation year. Three day warehouse bargaining unit members complained that the Company was refusing to allow vacation bidding for 'closed weeks' citing the CBA and past practice in support of their grievance.

Vacation years begin in late May of each year. Management reviews the past year's experience and business projections for the coming year in determining vacation scheduling parameters. Prior to the 2000-2001 vacation year, all short holiday weeks were closed for vacation bidding. In the 2000-2001 vacation year, the annual Vacation Scheduling Memo from management permitted one person per classification to bid for vacation during shaded weeks. Thereafter, until the 2006-2007 vacation year, shaded weeks were closed with a proviso that one employee may be granted vacation during closed weeks by master seniority. Gordon King, 2006 retiree and Mike Marchio, senior bargaining unit employee testified that since 2000, they had been allowed to take short holiday weeks as vacation; that no one who wanted to take off during those weeks was denied; and that the proviso applied to each job classification not to the bargaining unit as a whole.

Company Exhibit 4 reports the closed week calendars for vacation years beginning in May, 2004, 2005 and 2006. It reflects that Mr. King took vacation weeks and/or individual holiday week days off in each vacation year. Mr Marchio took individual holiday week days off only in the 2004-2005 year. Four others took a full week in one of the vacation years, and seven others took individual days or parts of days. In each of the vacation years, there were closed weeks when more than one employee took vacation.

Company Exhibit 3, taken from Company records, is a chart which reports short holiday weeks for vacation years beginning with the 2001-2002 year. The color-coded chart reports that until 2006-2007, the short holiday weeks were restricted for vacation bidding to one bargaining unit member. In 2006-2007, short holiday weeks were closed to all employees and three weeks, beginning in late November, 2006, previously restricted to one per company, were opened to one per job classification to permit more employees to go hunting.

Company management, meeting in early 2006, concluded that “closed” or “shaded” weeks, previously available for vacation bid to one bargaining unit member with management permission, would be closed without exception. Management’s March 17, 2006, Memo to the employees provided scheduling parameters for the two job classifications and addressed “Closed and restricted weeks” as follows:

Job Classification

Criteria

Delivery Drivers

Maximum of three (3) employees allowed off per week. Shaded weeks on official calendar are closed.

Day Warehouse

Maximum of three (3) employees allowed off per week. Shaded weeks on official calendar are closed.

Closed and restricted weeks

- Due to overwhelming volume and the increased customer service required during short holiday weeks we are blocking these weeks for vacation requests.
- The non-holiday weeks between 11-13-06 and 12-15-06 will be restricted to one person in each classification.

Union Exhibit 1

The CBA permits and sets parameters for the use of ratio, seasonal and vacation replacement employees. It details holidays and how they are compensated, and at Article 32, Section 91, it provides for vacation scheduling:

The vacation schedule must be posted not later than March 15 and the employees by shift allowed fifteen (15) days to bid for their vacation in

accordance with their seniority. Each shift, i.e., delivery, day warehouse, and production, will bid independently.

Joint Exhibit 1, page 42

Article 23, Sections 63-71 of the Agreement set out management rights:

Sec. 63. The Employer shall have the right; to determine the size of the working force and the number of employees required either temporarily or permanently in any job or department.

* * *

Sec. 66. The Employer shall have the right to determine the work to be done by any job and to add additional jobs; the right to determine and alter the means and methods of performing the work, and to adopt new and/or different procedures

* * *

Sec. 69. The Employer shall have the right to expand, consolidate, move, reduce, alter, modify, change, combine, transfer, assign, lease or cease any job, department, or operations of service.

Sec. 70. The Employer shall have the right to determine reasonable job loads, production standards, schedules of production, and methods, process and means of production.

Sec. 71. Provided, however, the exercise of these management rights described in this Article, shall not be inconsistent with any of the specific provisions of this Collective Bargaining Agreement.

Joint Exhibit 1, pages 27 and 28

The CBA became effective on March 1, 2003, for a five year term. Article 3 addresses past practice issues and resolution of disagreements which may arise during the term of the Contract:

Sec. 4. This Agreement supersedes all prior agreements and the wages, hours of work, and conditions of employment. If the Union or Company alleges a 'past practice' that was not discussed during negotiations, the parties will meet to discuss whether, in fact, such a practice exists and whether the 'past practice' should continue. If the parties cannot settle the issue, either party may seek to resolve the issue through the provisions of the grievance arbitration clause.

The parties agreed at the bargaining table that past practices existed, and the Union sought to retain this past practice provision in the Contract. There is no evidence of discussion of vacation scheduling during their contract negotiations.

POSITION OF THE UNION

The Union argues that this Grievance should be sustained based upon past practice. It asserts that since 2000, the Company has permitted one employee per job classification to take vacation on closed weeks based upon seniority and management permission. It argues that until the Company announced in its 2006-2007 scheduling memo that short holiday week vacations would be blocked for everyone without exception, any employee who wanted to take vacation during a blocked holiday week was permitted to take it.

The Union argues that the Company did not base its decision on proper business reasons. Instead, it argues that it has refused bidding for vacation during short holiday weeks when it has the ability to hire seasonal and vacation replacement workers. It suggests that money is at the root of the changes which have been made, pointing to failure of the Company to hire to replace four day warehouse workers who retired in June, 2006. It points to changes in the work force through retirement and attrition and reorganization of the work of the bargaining unit which has resulted in increased workloads. It acknowledges that short holiday weeks are always very busy and often require overtime work. Nonetheless, the Union argues that the Company cannot properly abolish well-established past practice. It seeks an award which requires the Company to permit bidding, by seniority within each job classification, for vacation time during closed short holiday weeks.

POSITION OF THE COMPANY

The Company argues that there is no established past practice for vacation scheduling which it must honor and, moreover, the Management Rights provisions of the CBA support the changes in work organization and vacation scheduling which it made in 2006 for the 2006-2007 vacation year.

The Company points to short holiday week attendance records for the vacation years 2004 through January, 2007, and its color-coded chart depicting the vacation scheduling parameters set by management for the vacation years beginning in June, 2001. It disputes the Union's argument that there is established past practice which permits one employee per job classification to bid for vacation during short holiday weeks. It acknowledges its Memos for the vacation years 2000-2007 and points to language in each of the vacation years beginning in 2001 through 2005 which provided that management may approve one employee for short holiday week vacation time, not one per job classification.

In response to Union arguments, the Company asserts that it is not required to hire temporary workers to cover vacations and notes that temporary workers are not

able to perform the work of bargaining unit members. It points to increased opportunity in 2006-2007 for bargaining unit members to take vacation during hunting season in late November and early December.

The Company seeks an award which denies the Grievance.

OPINION AND FINDINGS

It is appropriate to deny this Grievance. The Union has not demonstrated that there is a well-established and mutually recognized past practice which permits one bargaining unit member per job classification to bid for vacation during shaded or blocked weeks. In fact this record reflects that since 2001, the Company's written Vacation Schedule Memos have provided that shaded weeks including short holiday weeks are closed with a proviso that one bargaining unit member may be permitted to take vacation during closed weeks. The Company's attendance records reflect that notwithstanding plain language setting forth and restricting the bidding parameters for short holiday weeks, several individuals have been permitted to take vacation during them. In fact, such vacation time has been permitted during the current vacation year about which the Union complains.

There is nothing in this record which suggests that the Company has violated any provision of the parties' CBA or exercised management rights, expressly provided in the CBA, in an improper manner. Management witnesses testified that their decision to remove the proviso was based upon increasing difficulty in conducting business during short holiday weeks, following failed attempts to address the various reasons that short holiday weeks are difficult. Management has no obligation to hire vacation temporaries to permit bargaining unit members to take vacation during peak periods. No argument has been made and there is no evidence that management has improperly re-organized the Company or has required bargaining unit members to work in violation of their Agreement. Nor has an argument been made that it is not within management prerogative to permit vacation time on a case by case basis within a vacation year.

The Company properly points to the Arbitrator's limited jurisdiction set out at Article 21, Section 59 of the CBA. In this case the management rights provisions clearly support the Company's right to once again alter its vacation scheduling parameters. Finally, the practice which the Union seeks, in effect, to incorporate in the parties' Agreement was very short-lived at the time of negotiation of the current Contract. The issue now is one properly left for bargaining for the next contract term.

AWARD

The Grievance is denied.

Dated: June 14, 2007

Janice K. Frankman, Attorney at Law
Arbitrator