

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of the Arbitration Between:

AUBUCHON DISTRIBUTION, INC.

and

TEAMSTERS LOCAL 170

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Case No.: ARB-17-6171

Arbitrator:

Sara J. Skibski, Esq.

Appearances:


John Collins, Esq. - Representing Aubuchon Distribution, Inc.

Gregory Benoit, Esq. - Representing Teamsters Local 170

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues and, having studied and weighed the evidence presented, conclude as follows:

AWARD

Aubuchon Distribution, Inc. did not violate the provisions of Article 15, Section 2 of the parties' collective bargaining agreement when it closed its distribution center and eliminated union work. The grievance is denied.


Sara J. Skibski, Esq.
Arbitrator
April 5, 2019

INTRODUCTION

The Teamsters Local 170 (Union), seeking to resolve a dispute with the Aubuchon Distribution, Inc. (Company), filed a Petition to Initiate Grievance Arbitration on August 15, 2017 with the Department of Labor Relations (DLR), which docketed the matter as ARB-17-6171. Under the provisions of M.G.L. Chapter 23, Section 9P, the DLR appointed Sara J. Skibski, Esq. to act as a single neutral arbitrator with the full power of the DLR. The undersigned Arbitrator conducted a two day hearing at the Aubuchon Distribution Plant in Westminister, Massachusetts on April 23, 2018 and at the Teamsters Hall in Worcester, Massachusetts on April 24, 2018. At the hearing, both parties had the opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses. On June 15, 2018, the parties filed post-hearing briefs. After careful review of the record evidence, and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

THE ISSUE

The parties were unable to agree on a stipulated issue. The proposed issue before the arbitrator is:

The Union proposed:

Whether Aubuchon Hardware violated Article 15 of the Collective Bargaining Agreement or any other applicable articles, and if so, what shall be the remedy?

The Company proposed:

Whether Aubuchon Hardware violated Article 15 of its Collective Bargaining Agreement with Teamsters, Local 170, on August 2nd, 2017, when it did not negotiate

with the third parties to assume obligation of the Company under the contract, and if so, what shall be the remedy?

Issue:

As the parties were unable to agree on a stipulated issue, I find the appropriate issue to be:

1. Did the Company violate Article 15, Section 2 of its collective bargaining agreement with the Teamsters, Local 170 by outsourcing all of its work to a third party which did not assume the obligations of the Company under the collective bargaining agreement?
2. If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' collective bargaining agreement (Contract) contains the following relevant provisions:

ARTICLE 15, Item 2. Labor-Management Cooperation

Section 1. The Company has informed the Union that, in order to respond to a dynamic competitive environment and business considerations unrelated to the terms and conditions of employing bargaining unit personnel, the Company must retain the flexibility to make business decisions with respect to the methods and means of its operations. Specifically, the Company has advised the Union of the possibility that it may decide to reduce or discontinue operation of its own warehousing and/or shipping operation and engage a third party to supply goods to its stores. Accordingly, the parties confirm and agree that nothing in this Agreement shall preclude or otherwise restrict the Company from exercising such flexibility, including at any time using Orgill or a similar company to supply any or all of the goods needed by some or all of its existing stores or any stores acquired in the future, nor does the Agreement preclude or otherwise restrict the Company from having any or all of its needed goods shipped directly from manufacturers or suppliers to any or all of its existing or newly acquired stores.

Section 2. Any full-time non-probationary bargaining unit employee with Aubuchon on the attached list whose job is lost as a result of outsourcing shall receive a payment in exchange for a full release of claims, and will no longer have any recall rights, as follows:

- \$10,000.00 if the layoff occurs on or before November 7, 2017; or
- \$5,000.00 if the layoff occurs after November 7, 2017.

If at any time the Company outsources all of its work, or if the obligations of the Company in this Agreement are assigned to or otherwise contracted to an entity that operates with the Company's assets or equipment, the third party will assume the obligations of the Company under this Contract. If the Company outsources all of its work covered under this Contract, the Company must give sixty (60) calendar days' notice prior to commencing such total outsourcing and agrees to bargain in good faith with the union on the impact of proposed changes.

FACTS

The Company owns and services approximately 105 hardware stores throughout six states, including Massachusetts. The Company is a family-owned business, supervised by a Board of Directors and administered by William E. Aubuchon, President and Chief Executive Officer, Jeffrey Aubuchon, Chief Financial Officer, and Charles Aubuchon, Vice-President and Manager of Distribution Operations.

Prior to August of 2017, the Company owned and operated a warehouse in Westminister, Massachusetts (Distribution Center). The Union is the exclusive bargaining representative for approximately 60 of the shippers, receivers, drivers and helpers employed by the Company to work in the distribution center.¹ The Union and the Company are subject to a collective bargaining agreement, effective June 7, 2016 through June 6, 2019.

Prior to August of 2017, approximately 80% of products sold by the Company in its hardware stores were filtered through the distribution center. In the distribution center, Union members received products from trucks and placed the products into bins, shelves and storage compartments. When a hardware store placed an order,

¹ The Company also employed approximately 40 non-union employees in the distribution center.

Union members selected products and brought them to the loading dock to be placed in delivery trucks. Drivers then transported the products to the Company's hardware store.

The remaining 20% of products sold by the Company in its hardware stores were not filtered through the distribution center. Historically, the Company purchased a number of products directly from manufacturers, such as Benjamin Moore and Northeast STHIL, who delivered products directly to the Company's hardware stores. The Company also purchased a number of products from the wholesale distributors Orgill and Emery-Waterhouse.² Orgill and Emery-Waterhouse purchase large quantities and varieties of products from manufacturers and store the products in their warehouses. When a client places an order, Orgill and Emery-Waterhouse select the products from their inventory and ship the products directly to their client's stores. Once the products are shipped, Orgill and Emery-Waterhouse send the client an invoice and the client pays for the products received.³ When a wholesale distributor or manufacturer sells products to clients, it is not industry practice for them to assume the obligations of a union contract for services.

Bargaining History

In April of 2016, the Union and the Company entered into negotiations for a successor contract. Prior to the start of negotiations, the Company informed the Union that it had concerns over the continued operation of the distribution center, in that operations were not meeting industry demand. The Union and the Company's previous

² Emery-Waterhouse was recently purchased by ACE, but is referred to herein as Emery-Waterhouse.

³ Emery-Waterhouse has a practice of affixing the logo of a client onto its products prior to delivery if the client regularly purchases a high volume of products.

collective bargaining agreement contained a no-layoff provision which prohibited the Company from completely contracting out the distribution center's operations prior to the expiration of the contract, June 6, 2016.⁴ In successor negotiations, the Company informed the Union that it was exploring three primary options: 1) continue to run the distribution center and make improvements and enhancements; 2) using a third-party logistics company (3PL) to manage the distribution center or to manage distribution for the Company with the Company's inventory at another site; or 3) close the distribution center and get out of the warehousing and trucking business, by having goods delivered directly to the stores (ie. an expanded use of Orgill).⁵

In response, the Union proposed work preservation language. Specifically, the Union proposed language which prohibited the Company from subcontracting, transferring, leasing, assigning, or conveying Union work to another plant, person, entity or non-unit employee. In collective bargaining, the Union sought language which ensured that if the Company contracted with a 3PL to oversee the distribution center, the 3PL would assume the obligations of the contract and Union members would retain their employment.⁶ In addition, the Union was concerned about a runaway shop, where the Company moves its distribution operations to a different location. The Union wanted to ensure that if the Company moved its distribution operations to another facility that

⁴ This provision was incorporated through a Memorandum of Agreement, executed on May 9, 2014.

⁵ During negotiations, the Company met with several 3PL's to learn about the services they offered. A 3PL is a company that oversees a businesses' inventory and provides logistical and transportation services for a fee.

⁶ All of the 3PL's that the Company met with refused to assume the obligations of the Contract. In September of 2016, Charlie Aubuchon informed the Union that the Company was no longer going to pursue working with a 3PL.

operated with the Company's assets and equipment, the contract would be honored and employees would be offered the opportunity to follow the work.

In a lengthy negotiation session on October 21, 2016, the Company and Union reached a tentative agreement. The tentative agreement addressed the issues of wages, health care contributions and pension contributions, among other things. However, shortly thereafter, the Company's Board of Directors rejected the tentative agreement. As a result, the parties continued negotiations on the remaining contested issue, language in Article 15 regarding the Company's rights and obligations in contracting out work. The parties' previous collective bargaining agreement was set to expire on November 6, 2016.⁷ On November 4, 2016, the Company forwarded the Union its last and best offer, and the Union scheduled a ratification vote for November 5, 2016.

In November of 2016, the Company hired a new security service, which advised the Company to have employees return their keys and clean out their lockers in anticipation of the ratification vote. On November 5, 2016, the Union voted not to ratify the Company's last and best offer. Subsequently, the Union informed the Company that it had obtained strike authorization from its members. On November 7, 2016, when Union representatives arrived at the distribution center, they believed the Company's security service denied them entry. As a result, the Union engaged in a job action, where Union members held strike signs, and subsequently, lockout signs. The job

⁷ The contract was extended for a period of time, from June 6, 2016 to November 6, 2016.

action continued for the period of November 7, 2016 through approximately November 18, 2016.⁸

Shortly thereafter, the parties continued negotiations and participated in mediation to attempt to reach an agreement on a successor collective bargaining agreement. By November of 2016, the Company and Union agreed to the following language in Section 1 of Article 15, regarding the Company's flexibility to make changes to distribution center operations:

Section 1. The Company has informed the Union that, in order to respond to a dynamic competitive environment and business considerations unrelated to the terms and conditions of employing bargaining unit personnel, the Company must retain the flexibility to make business decisions with respect to the methods and means of its operations. Specifically, the Company has advised the Union of the possibility that it may decide to reduce or discontinue operation of its own warehousing and/or shipping operation and engage a third party to supply goods to its stores. Accordingly, the parties confirm and agree that nothing in this Agreement shall preclude or otherwise restrict the Company from exercising such flexibility, including at any time using Orgill or a similar company to supply any or all of the goods needed by some or all of its existing stores or any stores acquired in the future, nor does the Agreement preclude or otherwise restrict the Company from having any or all of its needed goods shipped directly from manufacturers or suppliers to any or all of its existing or newly acquired stores.

Further, the Company and the Union agreed to the following language in the first paragraph of Article 15, Section 2, which established a severance payment for layoffs resulting from outsourcing:

Section 2. Any full-time non-probationary bargaining unit employee with Aubuchon on the attached list whose job is lost as a result of outsourcing shall receive a payment in exchange for a full release of claims, and will no longer have any recall rights, as follows:

- \$10,000.00 if the layoff occurs on or before November 7, 2017; or
- \$5,000.00 if the layoff occurs after November 7, 2017.

⁸ The Company denies that union members were ever locked out of the distribution center. I need not determine whether the job action of November 7, 2016 constituted a strike or a lock out in order to decide the present issue of contract interpretation.

In November of 2016, the Company's attorney, Jack Collins (Collins), and the Union's attorney, David Officer (Officer), were charged with working together to compose language that encompassed the Union and the Company's agreement on the second paragraph of Section 2 in Article 15. Initially, both Collins and Officer agreed that if the Company contracted to an entity that operates with the Company's assets or equipment, the entity, referred to in the collective bargaining agreement as the third party, will assume the obligations of the Company under the contract. However, a dispute remained as to the effect of the Company outsourcing all of its work. Collins first proposed language stating that if the Company were to outsource all of its work, it agreed to provide the Union sixty calendar days' notice and bargain in good faith on the impact of the changes. In response, Officer proposed language which would require a third party to assume the obligations under the contract if the Company outsourced any of its work. Ultimately, the parties agreed on the following language in the second paragraph of Section 2, Article 15:

If at any time the Company outsources all of its work, or if the obligations of the Company in this Agreement are assigned to or otherwise contracted to an entity that operates with the Company's assets or equipment, the third party will assume the obligations of the Company under this Contract. If the Company outsources all of its work covered under this Contract, the Company must give sixty (60) calendar days' notice prior to commencing such total outsourcing and agrees to bargain in good faith with the union on the impact of proposed changes.

On November 18, 2016, the parties reached a tentative agreement, and the new collective bargaining agreement was approved by the Board of Directors and ratified by the Union.

Closure of Distribution Plant

On August 2, 2017, the Company informed the Union of its decision to close the distribution center. In this letter, the Company provided the Union 60 days' notice and offered to bargain in good faith with the Union on the impacts of the decision. On August 3, 2017, the Union sent the Company a demand to impact bargain in accordance with the second paragraph of Section 2, Article 15. The Company and the Union participated in approximately three impact bargaining sessions.

As a result of the closure, the Company closed the distribution center, laid off Union and non-union employees, and sold all furnishings and machinery. The Company no longer purchases inventory for its warehouse, but arranges to have all of its products shipped directly from manufacturers and wholesale distributors to its hardware stores. As a result of the closure, approximately 80% of products sold in the Company's hardware stores are shipped directly from Orgill and Emery-Waterhouse to the hardware stores. The remaining 20% of products sold in the Company's hardware stores are shipped directly from manufacturers to the hardware stores. The Company does not have a written contract for distribution services with Orgill, Emery-Waterhouse or the manufacturers, but rather buys products based on a purchase order and invoice arrangement. Orgill, Emery-Waterhouse and the manufacturers that supply products to the Company's hardware stores did not assume the obligations of the collective bargaining agreement.

On August 2, 2017, the Union filed a grievance alleging that the Company violated Article 15 and all other applicable articles of the contract, and refused to negotiate with the third parties to assume the obligations under the contract. On or

about August 11, 2017, the Company denied the grievance. On or about August 15, 2017, the Union filed a petition with the DLR to initiate grievance arbitration.

POSITIONS OF THE PARTIES

THE UNION

The Union alleges that the Company violated Article 15 of the collective bargaining agreement by failing to require the third parties which took over the Company's distribution operations to assume the obligations of the contract. The language of Section 2 in Article 15 provides for two separate circumstances under which the Company was required to have a third party assume the obligations of the contract.

In the present circumstance, the Company violated the second paragraph of Section 2 in Article 15, which requires "if at any time the Company outsources all of its work...the third party will assume the obligations of the Company under the contract." The Union argues that the Company clearly outsourced all of its work. The Union acknowledges that the Company intended to explore other options for the operation of its distribution center. During contract negotiations, the Union shared its concerns with the Company regarding outsourcing and demanded work preservation language to preserve Union jobs. At the close of contract negotiations, the parties ultimately agreed to language which included the Company's desire for outsourcing flexibility and assured the Union that members' jobs were preserved. The Union argues that the reference to "third party" in Section 2 of Article 15 is not limited to a 3PL, but rather applies any third party, including a wholesale distributor such as Orgill and Emery-Waterhouse. The fact

that Orgill and Emery-Waterhouse refused to assume the obligations under the contract does not excuse the Company from its obligations under the contract.

For the above stated reasons, the Union argues that the appropriate remedy is to require the Company comply with Section 2 of Article 15 by requiring Orgill and Emery-Waterhouse to assume the obligations under the contract, or making the affected employees whole through the payment of wages and benefits that they are entitled to.

THE EMPLOYER

The Company argues that the language of Article 15 is ambiguous, and thus the arbitrator should determine what the parties intended based on what was communicated during contract negotiations. When Collins and Officers worked to write the language of Section 2 in Article 15, they were charged to write language that reflected what the parties had already agreed to during contract negotiations.

The Company argues that Section 1 was explicitly drafted to provide the Company flexibility to have any or all of its goods shipped directly from manufacturers or suppliers to its stores. The previous collective bargaining agreement included a clear and concise no-layoff provision. The Union's interpretation of Article 15 has the effect of creating no-layoff provision, absent the express agreement of the parties.

During negotiations, the Union communicated to the Company that its primary concern was protection against a runaway shop, where the Company would have another entity operate its warehouse in another location. The purpose of the second paragraph of Section 2 in Article 15 was to prevent the Company from evading its contractual obligations by contracting with a 3PL to run its distribution center. Although the Company had informed the Union that it no longer intended to use a 3PL prior to the

conclusion of negotiations, the Company had no objection to including the language because it had no plans to hire a 3PL. The Company offered to bargain the impact of the final layoffs with the Union, but the Union refused to engage in meaningful conversations.

The Company argues that it did not outsource all of its work formerly performed by Union members. The parties agree that Union work consists of unloading merchandise purchased by the Company from delivery trucks, placing the merchandise into the warehouse, picking orders, placing the goods on Company trucks and delivering the products to the hardware stores. The language of the collective bargaining agreement allows the Company to eliminate the Union work in its entirety, as long as it provides the Union notice and an opportunity to bargain to agreement or impasse. The Company argues that since the closure of its distribution center, it has eliminated its distribution business and no third party is performing Union work. The Company has no warehousing or trucks, does not purchase inventory for storage in a warehouse, and has no one transporting products owned by the Company to its hardware stores. Rather, the hardware stores purchase products directly from distributors and manufacturers in the same manner that the Company has done in the past, but to a greater degree. Further, the Company gradually increased the percentage of goods supplied directly from manufacturers and suppliers to hardware stores throughout 2016. As a result, the Company laid-off Union members and paid them severance in accordance with Article 15. The Union did not file a grievance as the layoffs occurred through 2016 and 2017.

For the above stated reasons, the Company argues that the grievance should be denied.

OPINION

The issue presented in this case is: did the Company violate Article 15, Section 2 of its collective bargaining agreement with the Teamsters, Local 170 by outsourcing all of its work to a third party which did not assume the obligations of the Company under the contract? And, if so, what shall be the remedy? The language at issue is the second paragraph of Section 2, Article 15, which reads:

If at any time the Company outsources all of its work, or if the obligations of the Company in this Agreement are assigned to or otherwise contracted to an entity that operates with the Company's assets or equipment, the third party will assume the obligations of the Company under this Contract.

This language creates two conditions under which the third party must assume the obligations of the contract. The parties do not dispute that this language requires a third party to assume the obligations of the collective bargaining agreement should the Company assign or contract the Union work to an entity that operates with the Company's assets or equipment. The Union does not allege that the Company violated this portion of the language at issue.

Rather, the Union alleges that the Company violated the contract by "outsourc[ing] all of its work" to a third party that did not assume the obligations of the contract. I find that the phrase "outsources all of its work" as used in the second paragraph of Section 2, Article 15 is vague, unclear, and susceptible to multiple interpretations. Therefore, I may look to the intent of the parties in crafting the language to ascertain its meaning.

In collective bargaining, the Company's primary concern was to codify language which provided the Company the flexibility to close the distribution center and get out of the distribution business, or to contract with a 3PL to manage the distribution center with the Company's inventory. In early November of 2016, the Union agreed to the Company's proposed language in Section 1 of Article 15. The language in Section 1 does not refer to the relocation, contracting, or assignment of Union work to another entity. Instead, this language solely addresses the Company's consideration of discontinuing the operations of the distribution center and procuring products directly from manufacturers and wholesale distributors. The fact that the parties agreed to this language prior to an agreement on Section 2 of Article 15 indicates a meeting of the minds with respect to the Company's flexibility to exercise its management rights as described.

In contrast, Section 2 of Article was added in response to the Union's concerns that the Company intended to contract with a 3PL to oversee its distribution center operations or establish what is referred to as a runaway shop, moving its distribution operations to another location. This is consistent with the Union's position in collective bargaining. The Union sought language for the purpose of preserving work and job opportunities for its members that specifically prohibited the Company from subcontracting, transferring, leasing, assigning or conveying Union work to another plant, person, or non-unit employee. Further, the Union insisted, and the Company agreed, to language in Section 2 of Article 15 which applies should another entity operate with the Company's assets or equipment. The Union's witnesses at the hearing testified that the purpose of Article 15 was to ensure that if a third party was brought in

to run the distribution operations for the Company, that members would be allowed to follow the work by transitioning to a new facility and retaining employment. On this basis, the phrase "outsources all of its work" in Section 2 of Article 15, applies to the circumstance where another entity performs work historically performed by Union members.

In light of this interpretation, I do not find that the Company violated Section 2 of Article 15 by outsourcing all of its work to a third party that did not assume the obligations of the contract. The facts indicate that in August of 2017, the Company closed the distribution center, sold its equipment, and laid-off both Union and non-union employees. In order to supply its hardware stores, the Company increased the volume of products that it ordered directly from manufacturers or wholesale distributors.⁹ The companies of Orgill and Emery-Waterhouse are two of the hundreds of manufacturers from which the Company orders its products to be shipped directly to its hardware stores.

The Union has the burden of proof to demonstrate that another entity is performing the Union work. At the hearing, Union witnesses testified that Union work included receiving Company products from trucks, storing the products in the warehouse, selecting the products to fulfill orders, and delivering the orders to the Company's hardware stores. The Union argues the assumption that someone, namely Orgill and Emery-Waterhouse, must be performing Union work because the Company's hardware stores are stocked with products. However, the Union did not present any specific evidence as to what Union work was being performed by whom or in what

⁹ The Company had purchased products from these wholesale distributors for several years prior to the closure of the distribution plant.

location. In this regard, the Union has failed to present sufficient evidence to demonstrate that another entity is performing Union work.

Further, I credit the Company's argument that there is a marked difference between the work historically performed in the distribution center by Union members and the services provided by Orgill and Emery-Waterhouse. The products processed by Union members in the distribution center were purchased and owned by the Company and within the Company's control. In comparison, as a wholesale distributor, Orgill and Emery-Waterhouse purchase large quantities of products from various manufacturers and store these products in their own warehouses. Employees of Orgill and Emery-Waterhouse receive, store, select orders, and deliver items to client's stores.

Nevertheless, the Company does not have ownership or control over the inventory stored by Orgill or Emery-Waterhouse in their warehouses until the products are stocked in the Company's hardware stores. When a hardware store requires restocking of products, it sends an order to the wholesale distributor or manufacturer, who then ships the product to the hardware store and issues the Company an invoice for payment. There is no indication that the Company's conduct in procuring products from Orgill and Emery-Waterhouse is any different than their procurement of products from manufacturers, such as Benjamin Moore and Northeast STIHL.¹⁰ Because the Company has no ownership or control over the inventory warehoused by its manufacturers and wholesale distributors, I cannot conclude that the Company's manufacturers or wholesale distributors are performing Union work.

¹⁰ The Union does not allege that the manufacturers who supply products directly to the Company's hardware stores are performing Union work.

The Company substantiated that the Union work was effectively eliminated when the distribution center was closed. Witnesses for the Company testified that the Company does not own a warehouse operation in another location and has not contracted with a 3PL, or other entity, to perform the function of sorting, storing, or delivering inventory under its ownership or control. Further, the Company has not contracted with another entity to perform the work previously performed by Union members.

Furthermore, the Union offered no evidence to show that the Company agreed that Orgill or Emery-Waterhouse would assume the obligations of the contract. In collective bargaining, the Company sought, and the Union agreed to, language in Section 1 of Article 15 which gave the Company flexibility to eliminate its distribution business and procure products directly from manufacturers and wholesale distributors, such as Orgill. While the Company agreed that Section 2 of Article 15 required a 3PL to assume the obligations of the Contract, there is no evidence to indicate an agreement between the parties that this provision created a similar obligation for the wholesale distributors, Orgill and Emery-Waterhouse. Further, the Union's proposed application of Section 2 in Article 15 would effectively contradict the agreed upon terms in Section 1. The Company substantiated that it is not industry practice for manufacturers and wholesale distributors to assume the obligations of union contracts. As a result, the Company would be unable to exercise the management rights expressly reserved in Section 1 of Article 15.

The effect of the Company's actions was ultimately a reduction in force and elimination of Union work. Therefore, I do not find that the Company's conduct violated

the second paragraph of Section 2 of Article 15. Furthermore, the evidence indicates that the Union demanded impact bargaining over the elimination of Union work and that the parties participated in three sessions. I have no other evidence before me to indicate that the Company did not fulfill its contractual duty to bargain the impacts of the lay-offs to resolution or impasse.

AWARD

Aubuchon Distribution, Inc. did not violate the provisions of Article 15, Section 2 of the parties' collective bargaining agreement when it closed its distribution center and eliminated Union work. The grievance is denied.


Sara J. Skibski, Esq.

Arbitrator

April 5, 2019