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LABOR RELATIONS REPORTER

Labor Arbitration Reports

124 Lab. Arb. Rep. (BNA) 1351

In re B&K CORPORATION [Sterling Heights, Mich.] and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 455, UNIT 13

Grievance No. 340906

January 31, 2008

**HEADNOTES: WORKING CONDITIONS**

[\*\*1H] Transportation (124.20) (24.352)

Employer did not violate collective-bargaining contract when it instituted policy under which it had option of providing transportation to work site, such as with company-provided van, despite contention that there was past practice of reimbursing employees for using own vehicles, where employer's business changed and it began to bring employees to customer's work sites to assemble [\*1352] systems, and prior use of personal vehicles does not entitle employees to choose own vehicles regardless of distance to job site, work crew size, or cost savings involved in group transportation.

**CLASSIFICATION-NUMBER:** 124.20, 24.352

**COUNSEL:** Appearances: For the employer--John C. Cashen, attorney. For the union--Dave Tanney, international representative; Ava Barbour, associate general counsel.

**JUDGES:** Arbitrator: William P. Daniel

**OPINION-BY:** DANIEL, Arbitrator.

**OPINION:**

**Facts**

In its early years the company operated as a tool and die shop and evolved to be a fabricator of transmission test stands. Individual service employees would be sent to test stands at customer locations within the local geographic area. The scope of the company's operations expanded in recent years to assembly systems that were designed and constructed on the floor of its Saginaw Plant and, since 2003, the Fenton Plant. Such systems were then disassembled and shipped to customer locations. At the customer's site its work force would reassemble the systems under supervision of the company's employees. Few company service employees or installers were assigned under this arrangement.

In very recent times the company's business underwent further evolution. A Vandyke Project at a Ford Plant in

Sterling Heights, Michigan, bypassed any assembly at the company's plant and instead a turn key contract was entered into. Complete, integrated manufacturing systems for automatic transmissions, from design and engineering to construction, was to be undertaken at this customer's site. Such system is considerably larger and more complex than previous products and involves a dedicated area of the customer's plant of considerable dimension for use by the company in fulfilling the contract. According to company witness Orendach this is simply a preview of many such jobs to follow. Such operation requires the company to have a number of bargaining unit members and engineers assigned to work at the site at one time. The company has, over past years, had occasion to send employees to local sites, but also out of state, to attend to some aspects of installation or service. This instance represents a departure with many more employees involved in a total construction assembly and installation project.

Pertinent contract language in the Management Rights Clause, Article 1 and Service Work Mileage, Section 13A.2 of the Appendix A, have remained in effect over the years with identical language since at least 1982, and throughout the period of the company's business evolution and operational changes.

The Management Rights Clause provides traditional discretion to manage the business and to make policies to maintain efficiency and effective operations consistent with specific terms of the collective bargaining agreement. Appendix A, Section 13A.2-Mileage provides:

When using their own personal vehicle to travel to the site of the service, the employee receives a mileage rate as established and published by the US Internal Revenue Service for that year on January 1.

Note: Employee assumes all risk when using his own transportation. Company will furnish all transportation.

Over the years, until the current Vandyke job, employees, sent on local calls, frequently drove their own vehicle. On other occasions of out-of-state work sites air travel was provided for transportation of employees. Evidence indicated that smaller installation projects, such as the Magna job in Syracuse, New York, initially involved such air transportation, which was revised to a truck rental for employees to drive transporting materials which were needed at that site. A Trenton, Michigan job with a small number of employees overseeing installation of a system resulted in each employee driving separately because they were working in different areas on different shifts; group travel wasn't deemed feasible. The Nissan job in Tennessee considered shifts that were worked duration and expediency in choosing between flying or driving from time to time. There was presented in the hearing no instance where any disputes arose between employees and the company over the mode of transportation that was requested, directed or authorized.

At the hearing a number of current service employees, some of considerable seniority, testified that the practice had always been for the service employees to make the decision [\*1353] whether to use their own vehicle for domestic service calls, with reimbursement for mileage, or to request the company provide an individual with a vehicle. Four individuals testified that they personally always made the decision whether they would drive their own vehicles, or not, and the company accepted that. Kelly and Nicol testified that they and others, on occasion, chose to drive their own cars to far-away jobs involving installation at company plants in New York and Tennessee. Nicol testified that when he was a non-bargaining unit supervisor, in the late 90's, he never required employees to use a particular means of transportation as opposed to their own vehicle.

CEO Orendach explained that the company always maintained its right to choose the means by which employees were to travel, taking into consideration each particular job and the unique aspects and customer needs. A number of variables had to be considered, he explained that when all factors are equal, without any effect on customer needs or substantial cost, if an employee wishes to drive, the company has usually been accommodating in the past. He insisted that the Management Rights Clause protects the employer's right to choose in this regard and that in the unique new projects, such as the Vandyke Project where many employees are involved, commuting together makes sense in several respects--assuring all employees arrive safely and at the same time, are given an opportunity in the process of traveling to discuss and define aspects of the work assignment and substantially reduce the costs involved of reimbursing individual drivers.

He put much emphasis on the provision, in Appendix A, that "company will furnish all transportation." Union witnesses emphasize another aspect of that same language as demonstrating an intent to allow employees to make the choice of the means of transportation recognizing personal vehicle use provided the employee is willing to accept "all risks."

Chief Financial Officer, Kurt Kuck, testified to his responsibilities in that position over his long tenure, and his involvement in contract negotiations. He noted that when most of the company's work was local the issue of employee transportation was of minor concern, since single employees were involved, distances were short and the expense was minimal. He emphasized that the company always maintained the right to make the final decision in regard to the use of personal vehicles, but often would act to accommodate employee's personal wishes. He did not recognize that the employees had any overriding choice in the matter.

Kuck authored certain travel guidelines which were effective May 1, 2001, covering all employees of the company, unionized and not. This was an effort to give specific direction to individuals and to produce a documented system of accountability. He testified that changing factors necessitated the new guidelines in 2007, such as the opening of a new plant in Fenton, large scale installations at customer sites and more employees sent on crews away from the plant. He put considerable emphasis on the company's responsibility to provide transportation and its right to choose the mode of transportation. In the case of the Vandyke job it was the decision of the company that the use of the shuttle transporting an entire crew of employees was more efficient and effective both in a work sense and a cost sense than permitting individual employees to drive their own vehicles.

Kuck testified that the first draft of the new policy was issued April 30, 2007, and it was provided to the union as a clarification of the former policy so as to include installation work; the company was interested in getting input and reaction from the union. The union's position as expressed to the company, was, that employees had the right to decide the mode of transportation to a job site. A second draft was prepared and submitted to the union on June 29, and the final version on July 1, 2007, it emphasized the employer's position that it had the right to choose the mode of transportation.

The Domestic Business Travel Guidelines effective May 1, 2001, which was not grieved, provided in pertinent parts:

B&K Corporation recognizes its employees as its most valuable and vital asset. By the nature of its business, B&K requires many of its employees to make business trips to and from customer plants, vendor locations and other business associate sites.

B&K promotes safe travel and adequate and comfortable accommodations for its employees. B&K is also expected by its employees, customers, and Board of Directors to be fair and cost effective in administering its business travel policy. [\*1354]

\* \* \*

These Travel Guidelines can be changed from time to time at the full discretion of B&K Corporation and its officers and will be in accordance with the current labor agreement for bargaining unit employees.

\* \* \*

The introduction to the July 1, 2007, Installation and Service Support at Customer Facilities Policy reiterated:

B&K Corporation promotes safe travel that is to be cost effective, fair and consistent throughout the organization. As B&K's business volume has expanded into more systems work with increased installation requirements has expanded into more systems work with increased installation requirements for its customers, this policy is to clarify paid travel and expense reimbursements for Hourly Paid Employees and Salaried Paid plus Overtime Employees.

\* \* \*

I.B Paid work time and mileage, if using a personal vehicle, will be calculated based on the distance to the customer facility from the assigned B&K facility. If the employee's home is closer to the customer facility than the assigned B&K facility, the employee can drive directly to the customer facility, if pre-approved by the employee's supervisor. In those instances the employee will be paid for actual travel time and, if using a personal vehicle, actual miles driven.

II. The company has the responsibility to provide transportation for an employee traveling on behalf of the company. The mode of transportation will be determined by the company.

a. When multiple employees . . . are assigned to the same customer facility the company may rent or purchase a vehicle to provide the transportation . . . when such transportation is provided, the employee . . . is expected to use that transportation unless approval is received from the appropriate supervision/management. If the employee does not use the company directed transportation, any travel costs incurred by the employee . . . will not be reimbursed by the company.

b. The company chooses the form of transportation and may elect to permit an employee to use another option, in special circumstances, when multiple people will be traveling to the same destination. When a special circumstance may arise, that would require an employee to not use the form of transportation chosen by the company, employees may request to provide their own transportation to the job site. In the event that a special circumstance is permitted, travel time and/or mileage reimbursement will be determined based on the shortest distance to the job site from the individual's home or the assigned B&K facility. No reimbursement for mileage already driven.

III. If an employee is assigned and reports to the assigned B&K facility and is required to travel that day to the customer facility, the employee's travel time and mileage, if using his/her personal vehicle (and not receiving a car allowance), will be paid by the company from the assigned B&K facility. . . .

IV. If the business location the employee is traveling to is beyond a distance of 80 miles from the employee's assigned place of work or the employee's personal residence whichever is less, and the duration of the assignment is expected to last more than one day, then the employee shall stay in overnight accommodations near the place where the business is conducted rather than driving back and forth to home each day. In certain circumstances, the employee may have practical reasons for not being able to stay overnight even though the 80 mile distance applies. In these cases the employee should explain the reason why it is not practical to stay overnight and get pre-approval from the Department Manager.

The revised policy goes on to state that "the company has the responsibility to provide transportation for an employee traveling on behalf of the company. The mode of transportation will be determined by the company."

The union filed a grievance shortly after the April, 2007, draft of this policy was communicated. It contended that the policy was in violation of the labor agreement citing Appendix A, Section 13, A-2, and asserting a past practice and recognition of such right to drive personal vehicles.

The employer's response was that the contract language cited did not establish the employee's right to use personal vehicles, but that such was recognized as within the discretion of the employer exercising its management rights.

### **Pertinent Contract Provisions**

*Article 1, Management's Rights*

*Article 2, Expressed Waiver*

[\*1355]

Nothing in this agreement shall be construed to limit or impair the right of the Company to exercise its own discretion on all of the following matters whatever may be the effect upon employment, when it its sole discretion it may determine it advisable to do any or all of the following. To manage its business generally;

\* \* \*

To maintain order and efficiency in its plants and operation;

\* \* \*

to make such reasonable rules and regulations not in conflict with this agreement as it may from time to time deem best for the purposes of maintaining order, safety and/or effective operation of its plants.

\* \* \*

The foregoing enumeration of management's rights shall not be deemed to exclude other rights of management not specifically set forth, the Company therefore retaining all rights not otherwise specifically restricted by this agreement.

Management shall have all other rights and prerogatives including those exercised unilaterally in the past subject only to the expressed restrictions, if any, on such rights as are provided in this Agreement.

The exercise by the Company of any of the foregoing rights shall not alter any of the specific provisions of this Agreement, nor shall they be used to discriminate against any member of the union or of the bargaining unit.

The parties acknowledge that during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject matter with respect to collective bargaining, and the understanding arrived at after the exercise of that right is set forth in this agreement. Express provisions of this contract for its duration therefore constitute the complete and total contract between the Company and the Union with respect to pay, wages, hours of work and other conditions of employment.

\* \* \*

Appendix A, Section 13(A)(2). Serviceperson's Schedule, Domestic (USA and Canada):

Mileage.

When using their own personal vehicle to travel to the site of the service, the employee receives the mileage rate as established and published by the US Internal Revenue Service for that year on January 1st.

Note: Employee assumes all risks when using his own transportation. Company will furnish all transportation.

### **Positions of the Parties**

#### *UNION:*

The contract bars the company from unilaterally instituting the new travel policy. It does not have the right to dictate an employee's mode of transportation on domestic service calls. Past practice clearly demonstrates how the parties have interpreted this long standing language in the contract.

The union's interpretation of the Mileage Clause is consistent with principals of contract interpretation and other provisions of the contract support this reading.

Recent changes in the company's method of doing business does not justify unilateral changes in the contract.

The arbitrator should grant the grievance and order the company to immediately begin paying mileage reimbursement at the rates established in Appendix A and to cease requiring bargaining unit Service Employees to accept only modes of transportation dictated by the company and in particular to use the company shuttle to the Vandyke Plant Project. Moreover, it is requested that all unit members who should have been reimbursed for mileage incurred driving personal vehicles to be made whole.

**EMPLOYER:**

The company has retained rights under the Management Rights Clause of the contract to do exactly what it has done in this instance. This right includes the choice of transportation of employees to job sites. Past practice demonstrates that this is exactly how the contract language has been interpreted and applied over the years and that while the company has allowed employees to drive their own vehicles, change of circumstance and particular new factors may be taken into consideration by the company and travel policies adjusted accordingly.

Change circumstances such as the Vandyke Project require such for efficient operation. The changes which have been directed by the company are not inconsistent with the contract. The union has acquiesced and waived any right of complaint or objection by the acceptance of the initial policy in 2001, reserving the right to the company to make all travel arrangements. This issue is of vital importance to the company recognizing its right and need [\*1356] to compete for business such as the current project and to control cost.

For the reasons stated the grievance should be dismissed.

**Issue**

Did the company violate the collective bargaining agreement by the unilateral institution of a new travel policy?

**Opinion**

The arbitrator is a creature of the contract between the parties and has only that authority and jurisdiction granted him. When the contract is clear and unambiguous it is his obligation to apply and enforce its terms. It is only where there is some uncertainty or ambiguity that the arbitrator may look elsewhere in the contract or in the dealings between the parties so as to discern the intent of the agreement.

The arbitrator is obliged to recognize certain inherent rights of management to operate the business and make such decisions as are necessary to do so in an efficient and effective manner including making cost savings decisions. This contract specifically recognizes such rights and delineates them. In doing so it constitutes a recognition by the union of the employer's legitimate concern in this respect and the fact that such is of mutual significance to the parties.

It clearly is not the intent of the parties in construing management rights to deny to the employees any favorable terms and conditions of employment which are beneficial. Where there is clear conflict with terms of the collective bargaining contract, management's right must give way. The exercise of management rights must be done in a fair and reasonable manner and not arbitrarily to the detriment of employee rights and interests. It is particularly noted that the company accepts this obligation when in its travel policy of 2001, and 2007, it announced its goal was not only to be cost effective, but also, to be "fair." To the arbitrator that language strongly confirms a commitment to take into consideration and attempt to accommodate the personal interests of employees to the extent that such is not detrimental to the business operation.

Past practice is a point raised by each party to advance its own interpretation of the contract language in issue. The language of Appendix A, Section 13, regarding mileage might have been better expressed and more specific or detailed. The union points to the language of "when using their own personal vehicle" as recognizing an employee right to

choose the mode of transportation and an acceptance by the company in its obligation to reimburse. To the union the obligation of an employee who opts to drive his own vehicle to assume "all risks" confirms this arrangement. However, the company points out that this is in conflict with the final comment on the subject that it "will furnish all transportation" as recognizing its absolute discretion in this regard.

The policy is issued by the company in 2001, and 2007, adds support to both interpretations. The policy of 2001, which was unilaterally instituted and not grieved, asserted that the company retained the right, in its full discretion, to change the travel guidelines. While on the other hand asserting a determination "to be fair." In the 2007, version it again confirmed its intent "to be fair," but was concerned with costs. Words such as "if using a personal vehicle" seems to anticipate such occasions allowing some choice based upon distance to be traveled by an employee while continuing to insist generally on a discretionary right to choose the mode of transportation.

The 2007, policy recognizes circumstances in which an employee might expect to be approved to use a personal vehicle, or that special circumstances might require the company to respect the employee's wishes in that respect. Certainly such "special circumstances" or employee's preference would not be mentioned unless the company intended to respond to such situations fairly. An example of such special treatment which might be expected cites short travel distances of 80 miles from home where "the employee may have practical reasons" to drive and use a personal vehicle.

What comes out of a review of the contract language and the policies is the intent of the company to adapt travel guidelines to changing operational needs and the evolution of its business and servicing its customers. What is also reflected is an intent to do so in a fair manner and to address and accommodate certain special employee interests of a practical and personal nature.

Past practice is generally recognized by arbitrators as not being a substitute for specific contract language. It is accepted where there [\*1357] is an absence altogether of an attempt in the contract by the parties to address a particular subject, but that is not the instant case. Here the parties have recognized, in various places, the need of providing the means of transportation by which employees will go to job sites, and whose right or responsibility it is to do that. The language used presents a conflicting reference to employee use of personal vehicles versus the company right to choose the mode of transportation. It could then be said to be somewhat ambiguous. Where such ambiguities arise it is not necessary for the arbitrator to simply throw up his hands and say it is an impossible task to decide the intent of the parties. At such point reference may be made to other provisions in the contract including management rights and also how the parties have dealt with the matter over a period of time. These past dealings are not reviewed for the purpose of establishing a new contract provision, but rather, to aid in the interpretation of what is already in the contract. It is, as has been observed by other arbitrators, a method by which flesh is put on bare bones consistent with the evident purpose of the parties.

It has been opined by arbitrators that for a past practice or a past defining of intent there must be a consistent and continuing method of dealing with a particular subject, well established in fact and circumstance, recognized by the parties and accepted as binding as though specifically written into the contract. Anything less than that raises concern as to whether the parties intend to be mutually bound or whether such simply has been adopted as a matter of convenience. Often such merely reflects the employer's way of doing something it finds preferable to some alternative. In many cases the fact that something is done a particular way over a period of time may be just a "happenstance" chosen as a preferred method without an intent of establishing an obligation to repeat the application in every future instance.

Particular past dealings put forward to define the purpose of language which has continued over a long period of time must, in review, take into consideration the origins of the language, changing circumstances of the operation and differing standards of efficiency or cost effectiveness that arise as a company's particular product, service or method of operation evolves over time and is affected by the vagaries of competitive business and the market place.

Go to Headnotes [\*\*1R] Considering the arguments of the parties, as advanced in briefs, and by exhibits in this matter, the evolution of the company's business--particularly the change from in plant assembly, transportation and

reassembly--to a non-site system as now shown in the Vandyke project, the meaning and intent of Appendix A is found to be more consistent with the position of the employer.

The company, over a long period of time where work was done outside the plant by individual employees or small groups in localized work sites, by permitting personal vehicle use did not intend to give up its discretion to chose the manner by which employees would be transported. Such use of a personal vehicle occurred where the interest of the employer and the interest of the employee were not in conflict and in fact such personal vehicle use, in many instances, was in the employer's interest. This was often done in consideration of personal factors, such as the need to return home nightly when reasonably close to home, and to have the ability, when necessary, to leave the job site for personal reasons. Differential in costs in such instances was not a determining factor because often the work crew was either a single employee or workers on different shifts at different locations within the customer's work site. In other words, it does not appear that the factors which exist as to the Vandyke project have in the past been of any significance to the employer. Permitting employees to use personal vehicles in the past has not established such a past interpretation of the contract as to entitle them to make such a choice on future occasions regardless of distance to the job site, work crew size or cost savings involved in group transportation etc.

It is the arbitrator's determination that the past application of the provision establishes only a intent of the employer to be "fair" and to take into consideration special circumstances and to recognize individual employee personal concerns and, to the extent that such do not substantially conflict with efficient, cost effective operational needs and requirements to attempt some accommodation. n1

n1 The arbitrator can anticipate circumstances such as an employee whose wife is anticipating the imminent birth of a child wishing to be able to leave a job site and being able to return home by means of his personal vehicle. Other special circumstances that come to mind may be the serious health situation of a family member, particularly a child or the need to be able to return home for some significant event or crisis.

The union has the obligation, in this case, to prove by a preponderance of the evidence that the employer's travel guidelines, constitute a violation of the contract and in particular a denial of established rights of unit members. The arbitrator finds that the employer has the right, by contract, to chose the method by which employees are transported to off-premises job sites, and that employees have not been given the overriding right to choose the method of transportation such as by personal vehicles.

In summary it is found that the employer has a discretionary right to choose the manner of transportation of employees to job sites. The employees do not have an overriding right to choose to use their personal vehicles for travel purposes. Upon appropriate application reasonable accommodation must be made, by the employer.

In the instant case of the Vandyke project, it is found that the employer has a the right to choose a common mode of transportation by van of the work crew. It is not shown that any individual employee had any overriding need for use of a personal vehicle. To the extent that the employer, pending the determination of this grievance, permitted employees to use their vehicles and the employees chose in doing so to incur any expense such is not subject to reimbursement by the employer.

## **AWARD**

The grievance is denied. The union has failed to prove, by a preponderance of the evidence, that the employer has

violated the contract by exercise of its management right to determine the mode of transportation of employees to off premises customer job sites.

**LOAD-DATE:** 04/11/2008