AN ARBITRATION

BETWEEN

TEAMSTERS LOCAL UNION NO. 455
(The Union)

and

BREAKTHRU BEVERAGE COLORADO
(The Company)

GRIEVANCE NO. 160374

BEFORE

HARRY N. MACLEAN
INDEPENDENT ARBITRATOR

Appearances:
For the Union: Richard Rosenblatt, Rosenblatt & Gosch
For the Company: Gregory Peters, Seaton, Peters & Renew

I. INTRODUCTION

This matter involves a grievance filed by the Union alleging a violation of Article 31 of the collective bargaining agreement (CBA). The matter was heard on February 26, 2019, at the offices of the Union in Denver, Colorado. Both parties were provided the opportunity to present testimonial and documentary evidence, and all witnesses testified under oath as administered by the Arbitrator. A stenographic record of the proceedings was made. Briefs were submitted on April 15, 2019.

The parties did not agree on a statement of the issue. The Union proposed the following issue: Whether or not the Employer is violating Article 31 by its use of temporary employees to assist on the trucks? If so, what is the remedy? The Company proposed the following issue in its brief: Did the Company violate the Parties’ 2016-2021 CBA when it failed to assign helper work to the
bargaining unit members? If so, what is the remedy? The Arbitrator adopts the issue as stated by the Union.

The Company also raised an arbitrability issue: Was the grievance timely filed?

II. FACTS

The Union alleges that the Company violated Article 31 by its unfettered use of temporary employees to assist in loading and unloading trucks during the period between January 16 and November 14. Article 31 states in part:

It is recognized that, in order to operate efficiently, the Employer shall have the right to recruit and employee temporary and casual help from any source. Temporary employees are defined as personnel retained on an as needed basis, with no set schedule of work, through a third party temporary employment agency. Temporary employees may be used from November 15 through January 15. Additionally, temporary employees may be used at other times throughout the year to cover absences and other emergency situations as determined by the Employer. Such temporary employees are not placed onto the Employer's payroll, do not participate in any of the Employer's benefit plans, are not represented by the Union, are not subject to the terms of this Agreement, and have no obligation to remit union dues.

The Company offered contracts between the parties dating back to 1977. The use of temporary employees appears in the contract in the 1982-1985 CBA. It contained the following paragraph:

It is understood and agreed that the Company will be allowed to employee only four (4) temporary or casual laborers at any given time during the period of January 1 through September 30 of each year, except in emergency situations. This limitation shall not apply to the Transportation Department.

This language, which in effect gave the Company the right to use temporary employees at their discretion, remained unchanged in the 1985-88 CBA, the 1988-92 agreement, and the 1992-96 agreement. In the 1996-2001 CBA, the language was changed to read:

It is understood and agreed that the Employer will be allowed to employ only four (4) temporary or casual laborers on any given shift during the period January 1 through October 14 of each year except to cover employees' absences or other emergency situations as determined by the Employer. This limitation shall not apply to the Transportation Department at any time, nor to any other Department from October 15 through December 31.

In the 2016 contract, the last sentence of the paragraph exempting the transportation from the use of temporary workers was deleted. Thus, the use of temporary employees was subject to the
limitations of the paragraph, which meant that from January 16 through November 14 they could be used to assist on trucks only to “cover absences and other emergency situations as determined by the Employer.”

Anthony Aragon is a delivery driver for the Company and a union steward. Mr. Aragon identified several delivery control sheets which designate which driver was to drive which route using which truck. It also designates if there is an assistant or helper on the route. If there is only the driver, the driver drives the truck to the various stops and unloads the product from the truck. If a second person is on the truck, that person participates in the same work: unloading and stacking the product. The two workers split this work roughly 50-50. If it is a local route, approximately 85% of the work is unloading and stacking product and 15% is driving the truck. On the more distant routes, more time would be spent driving and less unloading.

Mr. Aragon identified delivery control sheets showing that on two routes both employees on the truck were full-time employees. On another route, a temporary employee was driving and the full-time employee was the helper. On a third route, the driver was a full-time employee and the helper was a temp. On two other routes, the temporary workers was the driver and the full-time employee was the helper.

A control sheet for February 8, 2019, showed several drivers assisting and temporary employees driving. On February 22, 2019, the control sheet showed one driver assisting and a temporary employees driving. Mr. Aragon testified that this is a regular practice. As a driver, he had been assigned to work as the helper assistant.

The Union called Chris Benedict, the human resources manager, to identify a document used in FMLA cases which shows the drivers' duties as including lifting cases of liquor weighing between 45 and 65 lbs and kegs weighing between 100 and 165 pounds.

Brian Heimerl is a union business agent assigned to represent the bargaining unit at the Company. He testified that in the negotiations for the current CBA the Union offered a proposal to delete Article 31 and create a new job classification of driver helper, loader/unloader. The Company did not accept the proposal. Mr. Heimerl identified a company proposal which removed the exemption from the restriction on the use of temporary employees for the transportation department and restricted the number of casual employees to 25% of the total workforce. The Union withdrew the proposal for a new classification and the company proposal was adopted by the parties.
Mr. Heimerl identified a series of grievances that the Union has filed over alleged violations of Article 31. On August 2, 2016, the Union filed a grievance seeking to have casuals hired as full-time employees and temporary employees as casual employees. On March 29, 2017, the Union filed a grievance alleging that, "Temporary drivers are not being hired in a timely fashion, but running routes as a full time employee." The Company's second step answer stated it would decide whether to keep the people as temps or hire them as employees in thirty days. On June 21, 2017, the Union filed a grievance alleging that temporary drivers were not being hired in a timely fashion and that the Company was still using "Ready Men as drivers helpers all through the year—slow and busy times." The second step answer stated that the Company would not use Ready Men. On February 27, 2018, the Union grieved the fact that the Company was using temporary drivers to run union routes. The grievance asked that all temporary drivers be hired as casuals. This grievance was not appealed to arbitration.

On cross-examination, company counsel led Mr. Heimerl through the CBAs beginning in 1977 and up to the current one to establish the fact that in none of them was there a classification of helper and neither was there a definition of bargaining unit work. Mr. Heimerl identified emails between himself and human resources personnel in which Mr. Heimerl requested information on the use of temporary employees as helpers on routes. The Company position was that the work was not union work and that there was not a helper classification and therefore the information would not be provided. In one email, Mr. Heimerl agreed that driver helpers are not in the CBA, but he also stressed that their usage was governed by Article 31 of the CBA and that the Company was allowed to use them only from November 15 through January 15.

John Johnson is the vice president of operations for the Company. He testified that since 1997 the Company has used a company called Ready Men to perform the helper function on trucks. He testified that the Company uses a driver to perform the helper function when a new employee is being trained for the driver position. If there is a drop in volume, the Company will use drivers as helpers rather than call in Ready Men. The Company uses temporaries almost every day.

Regarding the grievance on the use of Ready Men, Mr. Johnson did not agree with the union not to use Ready Men, but merely wrote down the union's position in the second step answer. There was no resolution of the grievance. Regarding the grievance on the hiring of more drivers, he wrote that the Company would make a decision in thirty days. The question mark after the words "thirty days" indicated he was concerned about the time frame.
On cross-examination, Mr. Johnson stated that he would not assign work to drivers that was not bargaining unit work. Loading, unloading and delivering product is part of the drivers' daily duties. If there is a helper on the truck, both the driver and the helper load and unload the truck, and on most local routes that would constituted the majority of their work. Mr. Johnson agreed that full-time and casual employees were used to perform the helper functions and that in his opinion this meant they were doing bargaining unit work. He also testified that on routes where there in not a temporary employee, the driver performs the helper function, which is bargaining unit work.

Erick Systma is the company vice president for labor relations and Midwest human resources. Mr. Systma participated in the negotiations for the 2016 CBA, and he identified a proposal from the Union as well as his handwritten notes. In its proposal, the Union sought to strike Article 31 and add the new classification of “Drivers Helper.” The Company did not agree to this proposal and it was later withdrawn by the Union.

Regarding Article 31, the Union was concerned about the use and the quality of temporary employees and issues regarding the rights of casuals. In the new Article 31 language the Company did not give up any of its rights regarding the use of temporary workers to perform helper work.

On cross-examination, Mr. Systma testified that the opening position of the Union was to get rid of the temporary language in Article 31 and use full-timers and casuals to do the helper work, including the establishment of a new helper classification. Although Article 31 was retained, it was amended to severely limit the use of temporary employees during the non-busy season.

III. ANALYSIS AND CONCLUSION
A. Arbitrability. The first issue to be decided is whether or not the grievance is arbitrable. The Company points out that the CBA requires the grievance to be brought to the attention of the grieving employee’s supervisor “within three (3) working days (seventy-two) hours after the occurrence of the act out of which the grievance arose.” If the supervisor’s response is unsatisfactory, the employee must present the grievance to one of the Company’s officers within three (3) working days. The Company argues that the critical date in this case is April 22, 2016, the date the CBA was adopted by the parties. Since the grievance in this case was not filed until June 1, 2018, the grievance is more than two years too late.
The Union argues first that the timeliness issue is not before the Arbitrator because the Company did not raise it prior to arbitration. The Company relies on substantial precedent in support of its position that a party who does not raise the timeliness argument until arbitration has effectively waived that defense. *Multipackaging Solutions*, 129 LA 1152, 1156 (Jacobs 2011). In *Triangle Construction*, 120 LA 559 (2004), Arbitrator Sergent wrote: “Well considered arbitration decisions decided by some of the leading arbitrators in the field have determined that the timeliness defense is one which must be raised and preserved by the Company and one that may not be raised for the first time at the hearing itself.”

The Arbitrator agrees with the reasoning of Arbitrator Wolf in *Ardoc, Inc.*, 107 LA 326, 330, (1997), when he writes that, “It is particularly unfair to raise the issue of timeliness for the first time at the arbitration hearing when the parties are present with all their witnesses…” and that of Arbitrator Kaufman in *Food Employers Council, Inc.*, 87 LA 54 (1986) when he writes, “It is not too much to expect that an objection based on untimeliness will itself be timely, lest a party prepare for and incur the expenses of arbitration in anticipation that a dispute will be determined on the merits.”

While the Arbitrator agrees that in the absence of extenuating circumstances timeliness issues are untimely themselves if raised for the first time at the arbitration hearing, the Arbitrator would also note that even if the issue had been raised in a timely fashion it would not be sustained because the conduct complained of in this instance is one of a continuing nature. The essence of the grievance is that the Company has failed to abide by the language of Article 31 which as amended in the 2016 CBA no longer excludes the transportation department from the restrictions on the use of temporary workers. There is no dispute that the Company uses temporary workers to load and unload trucks on a daily basis, which would make it a continuing violation. Every day the Company uses temporary workers in violation of the restrictions constitutes a new violation of Article 31. The concept of a continuing violation is widely accepted in arbitration case law. Elkouri and Elkouri, *HOW ARBITRATION WORKS* at p.5-30 (BNA 8th Ed); *Cannelton Industries*, 91 LA 744, 746 (Volz, 1988); *Lycoming Div.*, 43 LA 765 (Kunlun, 1964).

The Company also challenges the arbitrability of the grievance on the grounds that the written grievance does not include the issue the Union raised at the hearing. The grievance is not well fashioned and might not use the precise language as argued by the Union; however, when one reviews the language of the grievance and the entire record it is quite clear that the parties
understood that the Union was grieving the use of temporary employees as helpers on the
delivery routes.

B. The Merits. The substantive issue as determined by the Arbitrator is: Whether or not the
Employer is violating Article 31 by its use of temporary employees to assist on the trucks? If so,
what is the remedy?

The language subject to interpretation in this grievance is in the language of Article 31 as
amended in the 2016 CBA:

Temporary employees are defined as personnel retained on an as needed basis,
with no set schedule of work, through a third party temporary employment
agency. Temporary employees may be used from November 15 through January
15. Additionally, temporary employees may be used at other times throughout the
year to cover absences and other emergency situations as determined by the
Employer. Such temporary employees are not placed onto the Employer’s payroll,
do not participate in any of the Employer’s benefit plans, are not represented by
the Union, are not subject to the terms of this Agreement, and have no obligation
to remit union dues. (Emphasis added).

By any reading, this language is on its face clear and unambiguous. Temporary employees
can be used from January 16 through November 14 “to cover absences and other emergency
situations.” That this language is now meant to apply to the use of temporary workers in the
transportation department is made crystal clear by the fact that in the 2016 CBA the parties
removed the language which had for the past forty years excluded the transportation department
from the limitation on the use of temporary employees. The effect of the removal of this
exclusionary language made the limitation on the use of temporaries specifically applicable to
the transportation department.

It is a well-worn axiom in contract interpretation that clear and unambiguous language must be
applied as written. OmniBank Parker Road, v. Employers Ins, of Wasau, 961 F.2d 1521 (10th Cir.
1992). It is the duty of the arbitrator to enforce the rights and obligations upon which the parties
have agreed. Western Union Tel. Co. v. American Communications Ass’n, 299 N.Y. 177, 86
N.E.2d 162 (1949). Many cases hold that in instances where the language is clear and
unambiguous the Arbitrator has no authority to go outside the language itself for assistance in
interpreting it. Elkouri and Elkouri, supra, Ch. 9-2.B.
Nonetheless, the Company has set forth several reasons why the above language should not be applied to the use of temporary helpers, each one of which will be addressed in turn by the Arbitrator.

(1) Bargaining unit work. The Company spent a great deal of time establishing that in forty years of CBAs the classification "helper" was not used and that the CBAs did not contain any definition of bargaining unit work. The latter is not unusual; in many contracts the work to be performed by bargaining unit members is not defined, but is either assumed by the parties or established by practice. The Company's argument appears to be that if the "helper function" is not bargaining unit work to begin with, then the Union is in no position to complain about not having bargaining unit members perform it now. Certainly, this is true; however, the evidence clearly establishes that the work in question—loading and unloading—is in fact bargaining unit work. First of all, Mr. Johnson, vice president of operations, unequivocally testified that such work is bargaining unit work. He testified that drivers, who are bargaining unit members, perform this work on every route. When the driver is alone, which is the case on most routes, the driver performs all of this work. When a second person is along, both the driver and the helper perform the work. Mr. Johnson also testified that he would never assign driver to perform non-bargaining unit work. On some occasions, drivers themselves perform the helper work while the temporary employee drives. The fact that there is no classification for the helper performing this work does not mean that the work the helper is performing is not bargaining unit work. Under the previous language, the Union was simply precluded from claiming the helper work as bargaining unit work because it had agreed that it could not object to temporary employees performing it.

(2) Past practice. The Company argues that under all previous CBAs the Company assigned temporary employees to perform the helper function without objection by the Union. This evidence was not contested. However, this does not establish a binding past practice. The underlying premise of the establishment of a past practice is that the language being interpreted and applied must be the same as the language relied on during the period of the alleged past practice.

Here, as noted, the language was modified in a substantial manner in the 2016 contract. In the previous contracts, the transportation department was specifically excluded from the limitations on the use of temporary employees. The Company was free to use temporary employees in the
transportation department regardless of the time of year and regardless of whether there was a need because of an absence or an emergency. Indeed, a past practice was established under this language. But the removal of the exemption of the department from these limitations terminates the past practice. The new language now stands on its own and must be interpreted only by its very terms. Since the adoption of the new language, the Union has repeatedly objected to or grieved the use of temporary employees on the trucks, although in some cases the form of the grievance was not to the use of the temporary employees but rather to the failure of the Company to hire casuals or full-time employees to perform the work. The purpose of the objection was the same: under the new language only bargaining unit employees could perform the helper work, other than in the specified conditions.

(3) Expansion of the bargaining unit. The Company points to the fact that the Union's proposal in the 2016 CBA negotiations sought to establish a new classification of "helper." The Union later withdrew its proposal and it is now, the Company argues, trying to accomplish in arbitration what it was unable to gain in negotiation. This argument does not stand up to scrutiny. While the Union's proposal was in fact to expand the bargaining unit, the proposal was offered in conjunction with a proposal to abolish Article 31 and provide more rights for casuals. The result of this proposal, if accepted, would most likely have been to require the Company to assign the helper work to casuals or hire additional employees as bargaining unit members to perform the work. True, the Union withdrew the proposal, but it did so only when the Company proposed and the Union accepted the language deleting the exemption of the transportation department from the limitations on the use of temporaries. Since the evidence was undisputed that the Company used temporary employees on a daily basis, this would require either the hiring of additional employees or the use of as helpers. Thus, the goal of bringing the helper work within the bargaining unit would be accomplished by the new language, but simply by a different path.

Indeed, if the Company's position were accepted, the deletion of the exemption from the limitations on the use of temporary employees in Article 31 of the 2016 contract would be of no force and effect. The Company would be free to use temporary employees in the transportation department just as it had prior to the exclusion of the transportation department from the limitations on using temporary workers. One must presume that the parties meant something when they deleted the exemption, and the clear reading of the provision as it reads now is that
from January 16 to November 14 the Company can use temporary employees in the transportation department only to cover absences or in emergency situations.

C. Remedy. The first prong of the remedy is to direct the Company to cease using temporary employees in the helper function on trucks from January 16 to November 14 of the calendar year unless required by absence or emergency.

Additionally, the Company is directed make whole those employees injured by the violations of the contract. This remedy cannot extend prior to the three days prior to the filing of the grievance. As to the employees to be compensated, that evidence was not presented to the Arbitrator. Since the violation occurred on a daily basis, it would appear that the injured employees would be the casuals, who were not guaranteed daily work hours.

IV. AWARD

The grievance is sustained. The Company is directed to cease using temporary employees in the helper function on trucks from January 16 to November 14 unless their use is due to an absence or an emergency. The Company is also directed to compensate on a daily basis the employee or employees who were denied hours of work due to the use of temporary employees in violation of Article 31.

The Arbitrator retains jurisdiction of this matter for the sole purpose of resolving any disputes over the implementation of the remedy ordered herein, should any arise.


Harry N. MacLean