BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION LOCAL 205 and CRESTWOOD BAKERY	Work Hardening Grievances of Karla Larscheidt, Sherri Ermi and Michael Burzelic WERC Case 2 No. 41664 A-4400

Appearances:

Mr. James Miller, Financial Secretary and Business Agent, 7139 West Greenfield Avenue, West Allis, Wisconsin 53214, appearing on behalf of the Union.

Mr. David Croysdale, Michael, Best & Friedrich, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4286, appearing on behalf of the Company.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission, at the request of the parties, designated the undersigned Arbitrator to hear and determine the above-noted dispute pursuant to the grievance arbitration provisions of the parties' 1988-1991 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held in Brookfield, Wisconsin on April 7, 1989. At the hearing, the parties agreed to waive for this case the contractual provisions for an arbitration board, for arbitrator selection through FMCS procedures, and regarding the time for hearing and time for issuance of decision by the arbitrator.

Following distribution of transcript, briefing was completed on June 5, 1989, at which time the hearing was closed and the matter fully submitted.

ISSUES

At the hearing, the parties stipulated to the following issues:

1. Did the Company violate Article XXI, Section 3 of the Agreement when it paid the Grievants as it did during the periods they were on work hardening duty?
2. If so, what shall the remedy be?

The parties further agreed that Michael Burzelic, Sherri Ermi and Karla Larscheidt are the Grievants referred to in the STIPULATED ISSUES.

PERTINENT PORTIONS OF AGREEMENT

ARTICLE IV

HOURS AND PREMIUMS

. . .

Section 11. An employee who works on a higher-rated job shall receive the higher rate for all hours worked on that job provided that an employee who works on a higher-rated job for four (4) hours or more on a shift shall be paid the higher rate for the entire shift. An employee who works on a lower-rated job shall continue to receive his regular rate while working on the lower-rated job.

ARTICLE XXI

. . .

Section 3. The Employer shall have the authority to require, as a condition of employment that an associate on worker's compensation or disability will return to work hardening duty within his medical restrictions at the higher of the rate of the job performed or 90% of his regular rate until all medical restrictions are removed. Associates medically limited to eight hours per day shall not be subject to this rate adjustment. The Employer may use associates on work hardening duty for temporary vacancies and, with consent of the Union, prior to filling a posted permanent vacancy.

BACKGROUND

The Company operates a bakery in Milwaukee, Wisconsin and is a wholly owned division of Godfrey Co. The Union represents the Company's production, shipping, receiving, cleaning and maintenance department employes. The parties have had a series of collective bargaining agreements including their most recent May 1, 1988 through April 30, 1991 Agreement.

The instant dispute concerns the work hardening provision of the Agreement which was initially included in the parties' most recent round of bargaining. Since the implementation of that provision, there have been a number of employes to whom it has been applied. In each case, the

employe has been assigned and performed work within his/her medical limitation. In all but the case of Andy Lazarro and of the Grievants involved herein, the employe on work hardening was paid the rate of the job performed rather than 90% of the employe's regular rate until all medical restrictions were removed. In some cases the job performed was at the employe's regular rate and in other cases it was at a lower rate but higher than 90% of the employe's regular rate. Tr. 44-45. Baker Andy Lazaro's restrictions were very limiting such that he was assigned very light work on unconventional hours. The work he performed included some duties normally performed by Bakers but also other duties which, although they could have been assigned to Bakers, were normally performed by lower-rated employes.

In the cases giving rise to this arbitration, each of the three Grievants was returned to work following a Worker's Compensation injury and before all medical restrictions prescribed by their medical professionals were removed. Each performed work that was within his/her prescribed medical restrictions. Each was paid 90% of his/her regular rate. And each claims to have been entitled to 100% of his/her regular rate on the grounds that the job performed was his/her regular job.

POSITION OF THE UNION

Article XXI(3) requires the Company to pay employes working on work hardening the greater of the "rate of the job performed" or 90% of their classified rate of pay. Here the Company required each of the Grievants to perform work within his/her own job classification and for which others in the classification were being paid 100% of their regular rate. Each Grievant was required to work as a part of the regular job crew and none was replaced by another employe as they had been when the Grievants were absent on Worker's Compensation. Despite having thus performed their regular jobs, the Company paid each of them only 90% of the rate of the job they performed thus violating Art. XXI(3).

It is acknowledged that Karla Larscheidt and Sherri Ermi did not perform some tasks that were within their job classification but were beyond their medical restrictions. However all of the work that each of them performed was well within the general tasks they would normally have been assigned. Indeed, Sherri Ermi did the same job tasks during work hardening as she did before she went on worker's compensation. The disputed language surely does not allow the Company to penalize these employes by 10% of their wages solely because they were not able to perform duties that the Company might have but did not in fact need them to perform.

The Company's stated purpose for proposing to include work hardening language in the agreement for the first time in the negotiations leading to the Agreement was to permit the Company to reduce its Worker's Compensation insurance costs by bringing employes back to work to perform work within medical restrictions. The language gives the Company sole discretion to bring an employe back to work under the provision or not. The interpretation urged

by the Company herein would allow it, at its discretion, to reduce both its Worker's Compensation insurance costs and its direct compensation costs. The Company's interpretation should therefore be rejected because it fails to resolve the ambiguous meaning of "job performed" against the party that drafted the disputed language; because it produces a harsh and unreasonable result; because it would penalize or take a forfeiture from employes without the requisite showing that such was unmistakably intended by the parties; and because the bargaining history evidence shows that the type of work performed by the individual was critical to determining the wage to be paid. Since the Grievants were performing most of their normal job duties, they should not be paid what the Agreement provides they would have been paid if they were able only to do little or none of their normal job duties, as was the case with Andy Lazarro. Moreover, unlike Andy Lazaro's situation, the accommodations made to the Grievants' medical limitations did not significantly disrupt their departments or require their replacement by other employes.

The interpretation proposed herein by the Union, on the other hand, would have an employe paid his or her full rate of pay where, as here, they are assigned only tasks associated within their own job and perform all tasks given them.

The Company misplaces reliance on four denied and unappealed grievances concerning pay for work out of classification under Art. IV(3). Those grievances involved a different Agreement provision than that at issue herein, and in each the employe sought a rate higher than his regular rate unlike the instant Grievants who are seeking to be paid at their regular rate of pay. Each of the four grievants in those instances performed duties consisting only in small part of the higher rated job, whereas all of the work performed by the Grievants is within their own classification.

By way of remedy, the Arbitrator should order the Company to make the Grievants whole by paying them the 10% difference between their full pay and what they were paid, plus fair interest.

POSITION OF THE COMPANY

The evidence shows that the Grievants were subject to medical restrictions that prevented them from performing certain of their job duties. Larscheidt was able to clean the bun machines, wipe mixers and tables but was not able to do cabinet or sink work. Ermi was not able to work in a pan pouring room, push cabinets or help out at the sink lifting mixing bowls but could do white mixer work. Burzelic did painting work but was unable to perform greasing or use his left arm.

Because the Grievants' medical restrictions prevented them from performing the full duties of the job, the Company properly determined that each should receive 90% rather than 100% of his/her regular rate.

The purpose of the newly-negotiated work hardening provision is to establish a reasonable procedure for disabled employes to return to work while still recovering from a disability. The underlying premise is that the Company would provide a specially-designed work opportunity within the employe's medical restrictions at a modified rate of pay. Contrary to those purposes and the parties' prior practice, the Union seeks the full rate of pay for employes who performed only a limited number of the job duties the employe was previously able to perform.

The meaning of the term "job" as used in the Agreement has become well established in practice. The evidence shows that in each of four instances in which grievances sought a higher rate of pay for performing a higher paying "job" under Art. IV(11), the Union did not appeal the Company's rationale that the employe must do the entire job--and not just part of it--to be deemed performing that higher paying job. Company testimony (at tr. 73) established that it has been the Company's longstanding and uniform general policy that the employe does not ". . . get the rate for the higher paying job unless you've done the entire job or you can do the entire job."

Absent evidence of a different intended usage, "job" in Article XXI(3) should be interpreted the same way. The bargaining history evidence reveals that there was no substantial discussion regarding the meaning of the term "job". On the other hand, the very language agreed upon in Article XXI(3) reveals the parties' intent that something less than the employe's normal rate was intended while working under the work hardening program. Specifically the phrase, ". . . until all medical restrictions are removed" shows that an employe's rate is to be adjusted upward when the medical restrictions are removed. Common sense also supports the notion that the Grievants would receive a lower rate of pay when working with significant medical restrictions that made them able to perform only part of their duties than they are entitled to receive when they are able to perform all of the duties of their job.

Thus, Andy Lazaro was deemed by both parties to be properly paid only at 90% of his Baker's rate because he returned to work with significant medical restrictions and performed and was able to perform work which consisted of only part of the duties of his job. It is undisputed that Lazarro performed duties regularly performed by Bakers, such as dough knot tying and duties normally performed by lower-rated jobs. It is also undisputed that it is common practice for Bakers to perform duties in lower-rated jobs as well as duties regularly assigned to Bakers.

The Arbitrator must reject the Union's contention that since certain employes are given regular work assignments consisting of less than the full duties of the job and receive the full rate of the job, the Grievants should be paid the full rate of the job despite their inability to perform all the duties. The evidence shows that the employes referred to by the Union are not entitled to their regular work assignments by contract but rather receive them as a matter of management discretion. Even though an employe may regularly perform a certain assignment, that employe--unlike the Grievants in these cases--is available and able to perform other duties of the job when and if called upon. Unavailability to do a portion of a job when and if needed

deprives the employer of a valuable service for which he is paying when he pays the full rate. When this service is missing, it is appropriate and the contract so provides that only 90% of the rate will be paid.

For all of those reasons, ISSUE 1 should be answered, "no".

DISCUSSION

This case turns on whether the "job performed" by the Grievants, within the meaning of Art. XXI(3), was their regular job or something else.

The work hardening language in the context of its bargaining history establishes to the Arbitrator's satisfaction that if the work hardening employe is performing his/her regular job despite the existence of medical limitations, the employe is entitled to the rate of that "job performed." The Company's initial proposal would have authorized the Company to return employes on Worker's Compensation to perform work within their medical restrictions at 80% of their regular rate until all medical restrictions were removed, i.e., without regard to the rate otherwise payable for the job performed. The Union resisted that proposal until the language was modified to provide, among other things that the rate of pay for employes on work hardening would be "at the higher of the rate of the job performed or 90% of his regular rate" until all medical restrictions are removed. That language change recognizes the possibility that an employe might be able, despite being assigned work within medical restrictions to perform a job with a rate in excess of 90% of the employe's regular rate. If that is so, there is no reason why that job would necessarily be other than the employe's regular job. While the phrase "until all medical restrictions are removed" could have monetary significance only where the job performed is lower-rated than the employe's regular job, that phrase does not, in the Arbitrator's opinion, manifest an agreement that the only jobs that could be performed by employes on work hardening must be different from and lower-rated than the employe's regular job.

The question remains, as noted above, whether the job performed by any of the Grievants was their regular job. The evidence concerning bargaining table discussion of the meaning of "job performed" is rather sketchy. Union witness Ron Matera recalled that during the bargaining Company representatives cited picking shells off nuts or cutting cherries or putting cherries on stolen or papering pans as the sort of work for which the 90% rate would apply, and that they stated that when an employe performed a job in his own or some other department he would receive the rate for that job. His notes confirmed that a discussion on that general subject had occurred at the April 14 meeting (the second of three meetings at which the work hardening language was discussed). However, the note indicated only that "if anybody comes back to work from Worker's Compensation, if they do the roll panning job, you get the rate of that job." Union witness Kurt Schmidt could recall only that the Company's representatives said they would pay people 90% of the rate or pay them the rate of the job that they were on and that if they could not

perform their own job or another job in their own or another department, the Company would create a job for them, including, if necessary, monitoring smoking or working in the office. The Company's notes, while more comprehensive and complete, contain primarily the basic positions taken by the parties with little of the stated rationale or commentary. While the Company's notes do not contain a parallel reference to that in Matera's, the Arbitrator does conclude from that that Matera's note was not indicative of what was in fact discussed.

The bargaining table discussions as described by the Union witnesses do not reliably support the Union's contention that the work hardening language was intended to pay the full rate for an employe's regular job whenever the employe performs all of the work assigned to him, and all of that work is within his job classification, and the work performed constitutes most of the functions of a job such that a replacement is no longer needed and the operation of the department is not adversely affected. Nor does the bargaining history reliably support the Company's contention that an employe on work hardening would not be performing a job so as to be entitled to the rate for that job unless the employe was able to perform all potentially assignable duties to that job even if some of those duties would not reasonably likely be assigned or performed during the period in question.

Common sense and the pattern of grievance denials requiring an employe to perform all parts of a job in order to be entitled to the rate for that job under Art. IV(ll) and its predecessors do combine to suggest that the Union could and should reasonably have anticipated that under work hardening an employe would have to perform the same duties that would have been required of him or her in the absence of medical restrictions to be entitled to the rate for that work. For, prior to the inclusion of work hardening language, the Company had not permitted employes subject to medical restrictions to return to work under any circumstances, or hence to receive pay in excess of Worker's Compensation until all medical restrictions were removed. This conclusion does not lead to results that are harsh or of a forfeiture nature. The work hardening language itself is the source of the rate payable to employes on work hardening. Requiring employes to perform all of the duties they would in fact have been required to perform had they not been subject to medical restrictions imposes neither a forfeiture nor a harsh and implicitly unintended result.

However, neither common sense nor the pattern of grievance denials would have put the Union on reasonable notice that the Company intended its work hardening language to require further that the employe be medically able to perform duties of his job classification that he would not in fact have been called upon to perform during the period in question. Common sense does not suggest that a work hardening employe who is returned to work and performs <u>all</u> of the duties he or she would have performed had he/she been free of medical restrictions will nonetheless be paid 10% less because of medical restrictions that in no way interfered with the employe performing the work he or she would otherwise have performed. Nor do the grievance denials or any other bargaining table discussion make it sufficiently clear to have fairly put the Union on notice that such was the Company's intended application of the term "job performed".

Especially so under work hardening language which expressly focuses on what job was in fact "performed" during the period in question, not on what job might or might not have been performed in other circumstances.

Accordingly, where, as here, the work hardening employe claims to have performed his/her own regular job, the Arbitrator interprets "job performed" in the context of the work hardening language to condition entitlement to 100% of the employe's regular rate of pay on the employe performing all of the duties that he or she would reasonably likely have performed in doing that job had he/she not been on work hardening during the period in question.

In applying that interpretation, it is of no particular consequence that the employe performs all duties that are in fact assigned because the work hardening language itself forecloses the Company from assigning work that exceeds the employe's medical restrictions.

Applying the above-noted interpretation to the cases at hand, the Arbitrator concludes that Larscheidt was unable to perform sink work or the cabinet work duties which she testified she would ordinarily have been assigned on approximately one shift in every five. Thus, although some others in her classification would not ordinarily have been assigned sinks or cabinets work, that work comprised one fifth of the duties of Larscheidt's regular job as she had been performing it prior to her injury. Thus, whether or not the Department replaced her or was adversely affected by her inability to perform the duties she ordinarily would have performed, Larscheidt cannot be said to have performed her regular job during the time she was subject to those limitations.

The same is true of Burzelic. It is undisputed that he was unable to do greasing and that greasing was ordinarily a part of his third shift Maintenance Helper's duties. That the greasing was in fact left unperformed or that it could perhaps have been performed by someone else without adversely affecting Department operations is not determinative as to what job Burzelic performed. Because the evidence shows that he was not able to perform a duty which would otherwise ordinarily have been assigned to him, he cannot be said to have performed his regular job during the time he was subject to his medical limitations.

Sherri Ermi's situation is different, however. Although she had significant medical restrictions which were in some respects more limiting than Larscheidt's, the evidence--limited as it was--revealed that she was nonetheless able to perform the white mixer work which she was ordinarily assigned to her on a "permanent" basis. There is no evidence indicating that Ermi was unable to perform any aspect of white mixer work. While Ermi's "permanent" assignment was shown to be a product of management discretion and subject to change in the discretion of the Company, it nonetheless constituted all of the duties of the job that Ermi was regularly performing, basically without exception during her regular hours of work before her injury. Although Ermi has done cabinet work outside her normal work hours on occasion the evidence establishes that she is not ordinarily called upon to do so in the performance of her regular

Cleaning job.

The evidence also establishes that Ermi, like Larscheidt, would not have been able to perform the cabinet or sink work functions that are performed on a "permanent" basis by some of the Cleaning employes and on a rotation basis by others in that classification. The Company is correct, therefore, in asserting that if unusual circumstances requiring the assignment of more Cleaning employes to Cabinets or sink work arose while Ermi was on work hardening, the Company could call on any and all of the Cleaning employes to perform that work but could not call upon Ermi because of her medical restrictions. However, the evidence does not establish that any such unusual circumstances arose while Ermi was on work hardening or that they are reasonably likely to arise from time to time. For that reason, the Arbitrator finds Ermi's inability to perform types of Cleaning work, that she is not ordinarily or reasonably likely to be called upon to perform as a part of her regular job, does not warrant the conclusion that the job she performed was something other than her regular Cleaning job. Instead, she was, in the circumstances of this case and for purposes of the work hardening language, performing her regular Cleaning job and hence entitled to 100% of the rate for that job.

Accordingly, the claims of Larscheidt and Burzelic have been rejected and the claim of Ermi has been sustained.

By way of remedy, the Arbitrator has ordered that Ermi be paid the 10% difference between what she was paid and what she would have been paid had she been paid at the Cleaning job rate.

The Union's further request for interest on the awarded backpay is rejected because there is no contract language or other evidence of any kind suggesting that the parties mutually understand/expect that such a remedy is to be a part of back pay awards issued pursuant to the Agreement.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that

1. The Company did not violate Article XXI, Section 3 of the Agreement when it paid Grievants Larscheidt and Burzelic as it did during the periods they were on work hardening duty.

2. The Company did violate Article XXI, Section 3 of the Agreement when it paid Grievant Ermi as it did during the period she was on work hardening duty.

3. As the remedy for the violation noted in 2., above, the Company shall immediately pay to Ermi an amount of money equal to the 10% difference between what she was paid and what she would have been paid had she been paid at the Cleaning rate for the period she was on work hardening.

4. Except as noted in 3., above, the Union's requests for relief in this matter, including the request for interest on backpay are denied.

Dated at Shorewood, Wisconsin this 9th day of September 1989.

By _____
Marshall L. Gratz, Arbitrator

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