

BEFORE THE ARBITRATOR

:
In the Matter of the Arbitration :
of a Dispute Between :
:
INTERNATIONAL ASSOCIATION OF :
MACHINISTS AND AEROSPACE WORKERS :
LODGE NO. 1855 :
:
and : Case 33 :
: No. 42477 :
: A-4467 :
J. W. HEWITT MACHINE CO., INC. :
:

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by
Mr. Frederick Perillo, on behalf of the International Association of
Machinists and Aerospace Workers Lodge No. 1855.
DiRenzo and Bomier, Attorneys at Law, by Mr. Howard T. Healy, on behalf of
J. W. Hewitt Machine Co., Inc.

ARBITRATION AWARD

The above-captioned parties, herein the Union and the Company respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission Arbitrator. Pursuant thereto, I heard this matter on October 24, 1989 in Neenah, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on November 20, 1989.

ISSUES:

The parties stipulated to the following issues:

1. Did the Company violate the contract by refusing to pay the grievant, Michael Auger, reporting pay on January 22, 1989?
2. If so, what is the appropriate remedy?

BACKGROUND:

Michael Auger, hereinafter the grievant, was scheduled to work on Sunday, January 22, 1989, from 11:00 p.m. to 7:00 a.m., with another bargaining unit employe. The grievant was to perform overtime grinding work. The other employe was to perform machinist work. The Company has always scheduled at least two people to work on such projects.

On January 22, 1989, at about 10:00 a.m., the weekend supervisor, Steve Bruce, received a call from Wisconsin Tissue Mill regarding an emergency repair job on a fan shift. Bruce was unable to locate a machinist to perform the emergency service work; therefore, the employe who was scheduled to report at 11:00 p.m. and work with the grievant was contacted and called in early to perform the aforesaid emergency service work.

Bruce testified that he tried to call the grievant from the plant at around 3:00 or 4:00 p.m. to tell him that he was having difficulty getting another person to work with him (the grievant), and might have to cancel his shift. Bruce was unable to reach the grievant. Thereafter, Bruce went home and continued trying to contact the grievant without success. 1/ At 8:17 p.m. Bruce did reach an unidentified woman, and asked for Mike. The woman told Bruce that Mike had gone to the store, and would return in twenty minutes. Bruce left his phone number and a message to call Bruce, but no one returned the call. 2/ When Bruce did not receive the expected telephone call, he again called the grievant at 9:43 p.m. At that time he told the grievant: "Don't come into work, Charlie came in early, I cannot find anyone to work with you."

The grievant did not report to work on the date in question as originally scheduled. Instead, he filed a grievance dated February 8, 1989 wherein he claimed four hours of pay because the Company did not notify him of cancellation of his overtime shift pursuant to Article IV of the contract.

1/ The grievant testified that although he was away from his home from 1:30 p.m. to 6:00 p.m., he was home after 6:00 p.m. continuously. The grievant added that he took a nap when he returned home, but that his wife was around.

2/ Bruce had mistakenly called a Los Angeles, CA phone number (213-231-5213) which was similar to the grievant's phone number (414-233-5213).

Article IV has been in the parties' collective bargaining agreement for about twenty years without change or any grievances over same.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE II

Hours of Work and Overtime

Section 1.

- A. The regular work week shall consist of five (5) eight (8) hour days, Monday through Friday, inclusive. The regular workday for the first shift employees will normally begin at 7:00 a.m. at the employee's assigned department and plant and end at 3:00 p.m. with eighteen (18) minutes paid lunch time. When more than eight (8) hours are scheduled, the Company may schedule employees to begin the workday at 6:00 a.m. The second shift, if worked, shall immediately follow the first shift (3:00 p.m. to 11:00 p.m. when eight (8) hour shifts are scheduled). The regular workday for the second shift employees shall begin when the second shift starts; there shall also be an eighteen (18) minute paid lunch time for second shift employees. The third shift, if worked, shall immediately follow the 2nd shift (11:00 p.m. to 7:00 a.m.). The regular workday for the third shift shall begin when the third shift starts; there shall also be an eighteen (18) minute paid lunch time for 3rd shift employees. The Company will give the Union one week notice prior to implementation of 3rd shift. When it is necessary to schedule Saturday and Sunday work, and volunteers are unavailable, the Company may schedule up to 50% of the Bargaining Unit to perform Saturday and Sunday work for up to eight (8) hours, except that the same employees shall not be forced to work both Saturday and Sunday.
- B. The Company may schedule a nine (9) hour shift on a continuing basis Monday through Friday. Work in excess of nine (9) hours shall be worked as set forth in this Article. After five (5) consecutive weeks of a nine (9) hour schedule, employees will be allowed to work an eight (8) hour schedule during the sixth (6th) week; however, during such sixth (6th) week overtime will be worked as set forth in this Article. During the annual mill shut-down period, the Company may schedule ten (10) hours per day for thirteen (13) consecutive days.
- C. The Company may schedule the regular shift for the plant or department beginning at 6:00 a.m. to schedule overtime work or to allow employees to work overtime; however, in the sixth (6th) week when employees may elect to work only an eight (8) hour shift, if a first shift employee works overtime work during such sixth (6th) week, the work day for such first shift employee shall begin at 6:00 a.m. unless the second shift employees agree to begin the second shift at a time other than the normal starting time.

Section 2. The parties recognize that due to the nature of the service business and needs of customers that overtime work may be required from time to time; however, qualified employees within the same job title shall be utilized whenever possible as set forth in this Article.

- A. As provided below, the Company will make every reasonable effort to distribute overtime equally on a quarterly basis among qualified employees in the job titles to which they are assigned. If the Company fails to equalize overtime on a quarterly basis, employees who have not received overtime shall receive the next available overtime assignment. Any refusal of overtime will be considered as time worked for purposes of calculating equal distribution of overtime.
- B. Overtime shall be offered as follows (consistent with the provision of 2A):
- 1) To the individual performing the work.
 - 2) Within the applicable job title.
 - 3) To other qualified employees.

- C. When overtime is scheduled, employees shall be given reasonable notice, at least Thursday prior to the end of the shift prior to the scheduled overtime the following week, except in case of emergency service work.
- D. On occasion, when the Company has scheduled overtime work and an employee wishes to be excused for such overtime work for good cause, the Company agrees to give fair consideration to and to not unreasonably refuse to grant request to be excused from overtime work, or adjust the scheduled shift if work output and/or customer interest will not be jeopardized.
- E. When overtime is required and volunteers within an applicable job title are unavailable, the overtime work shall be assigned to the least senior employee within the job title in which overtime is required, to perform non-scheduled service work; however, an employee within the job title will be considered unqualified to perform such work if the employee has not performed the same or similar work within one (1) year prior to the scheduled overtime work. Sunday shall be voluntary.
 - 1. First shift employees shall not be required to work more than four (4) hours beyond their regular shift when eight (8) hours are scheduled, or three (3) hours beyond their regular shift when nine (9) hours are scheduled.
 - 2. Employees on second shift shall not be required to work beyond the scheduled starting time of the first shift on the following work day on regular work days or beyond seven a.m. (7:00 a.m.) on other days. The Company will attempt to secure volunteers to perform overtime work, after the employee has worked two (2) hours beyond his scheduled shift.

Section 3. Time and one-half shall be paid in each or any of the following instances, and each instance shall not be dependent on any other instance:

- A. All work performed in excess of eight (8) hours in any one working day.
- B. All time worked in excess of forty (40) hours (for which overtime has not previously been earned) in any week.
- C. All work performed up to and including nine (9) hours on Saturday.
- D. All work performed before or after the regular starting or quitting time of the scheduled shift.

Section 4. Double time shall be paid in any or each of the following instances, and each instance shall not depend on any other instance:

- A. All work performed on Sunday, except as provided under Section 5 of this Article.
- B. All hours worked in excess of ten (10) hours in any twenty-four (24) hour period, except that when eight (8) hours are scheduled during the sixth (6th) week, all hours worked in excess of nine (9) hours in any twenty-four (24) hour period.
- C. All hours worked in excess of nine (9) hours on Saturday.

Section 5. Triple time shall be paid for all work performed on Easter Sunday.

Section 6. For purposes of this Article II and any other applicable articles of this Agreement, time spent by an employee attending Union/Management authorized meetings during his scheduled shift will be considered to be time worked for purposes of shift hours and/or overtime premium applicable to his scheduled shift. Time spent in contract negotiations will be compensated for on a straight time day rate basis.

Section 7. The Company agrees to meet with the Union for

one-half hour on a monthly basis to discuss overtime.

ARTICLE IV
Call-In Time

Any employee reporting for work on his regular shift without the Company notifying him that there would be no work at least three (3) hours in advance of his scheduled starting time, shall receive a minimum of four (4) hours pay. If said lack of work is caused by power failure, explosion, destruction of premises or any act of God, the Company shall not be obligated to make such payments.

All employees shall report to work on their respectively designated shift unless notified by an authorized Company representative to the contrary at or before the close of the previous day's shift.

When an employee is called in for work on any day, he shall receive three (3) hours straight time call-in pay plus time worked. Except one (1) hour straight time call pay plus time worked shall be paid for call-in two (2) hours prior to a first shift employee's regularly scheduled shift or three (3) hours before or after a second shift employee's scheduled shift.

Call-in pay shall not apply in the following instances:

1. When the employee is in the building and is given the opportunity to commence work prior to his scheduled starting time.
2. When the employee is requested to extend his shift, but, for his convenience, is permitted instead to return at a mutually agreed later time.

ARTICLE XVI
General Conditions

Section 13. No employee shall enter the plant unless on his assigned shift or prior written permission is granted.

UNION'S POSITION:

The Union basically argues that the Company violated Article IV by failing to pay reporting pay to the grievant on the date in question.

In support thereof the Union maintains that the Company failed to contact the grievant three hours before the start of his shift as required by the agreement. Therefore, according to the Union, the Company owes the grievant "a minimum of four (4) hours pay" for not giving him timely notice that no work was available. The Union points out it is undisputed that the Company's reason for refusing to allow the grievant to work had nothing to do with any of the contractual exceptions to such pay; namely, power failure, explosion, destruction of premises or an act of God. The Union concludes that "under these facts, Auger is clearly is (sic) entitled to reporting pay under Article IV."

The Union rejects three defenses raised by the Company. The Union feels the first defense raised by the Company - that the grievant failed actually to report to work - is without merit because the Company "waived" the requirement that the grievant report by directing him not to do so. The Union cites two arbitration decisions - Creative Industries, 49 LA 140 (Gershenfeld 1967) and Shulton Inc., 43 LA 919 (Wildebush 1964) - in support of this proposition. The Union adds that if the Company's approach is accepted, the three (3) hour notice clause would never have effect - either because employees would receive actual notice and would never be eligible for reporting pay or else because employees would never receive any notice at all. The Union claims that only its interpretation gives meaning and effect to the entire clause "by depriving employees who fail to report without notice of a windfall, and by preserving the right of other employees who receive less than the contractually required three hour notice to demand either reporting pay, or that the Employer put them to work."

As to the second defense, the Union maintains it is clear that the Company did not make a good faith effort to notify the grievant. Assuming arguendo that the Company's efforts could be characterized as made in good faith, the Union still feels the Company's failure to provide notice or pay or the opportunity to work is a breach of contract citing the strict contract liability rule in Restatement (Second) of Contracts, Section 235, Comment b (1981).

Finally, the Union contends that the Company's claim there was "no work available" because there was no one available to work with the grievant is also without merit. In this regard the Union claims that the Company cannot "immunize a contract violation by references to a non-contractual and unilaterally imposed policy," of requiring more than one employee to be present at all times. In addition, the Union claims the Company was simply wrong about the presence of other employees on the Sunday night shift. The Union notes that there were several employees available to work with the grievant who did in fact work while the grievant was told to stay at home. The Union concludes that the Company's failure to make use of these employees is no defense to violating the contract.

For a remedy, the Union requests that the Arbitrator sustain the grievance, and award the grievant four (4) hours of pay at the Sunday overtime rate.

COMPANY'S POSITION:

The Company argues that Article IV, paragraph 1 only applies to "regular" shifts. The Company believes that other parts of the agreement; namely, Article II, Sections 1, A, 2, E, 1 and 2, support its interpretation of the aforesaid disputed contract provision in this manner. The Company also finds support for this proposition in the dictionary definition of the word "regular" contained in the Random House Dictionary. Since reporting pay liability is limited to regular shifts, and the grievant was scheduled to work an overtime shift, the Company concludes that it had no obligation to the grievant involving reporting pay.

Assuming arguendo that reporting pay applies to all shifts, the Company then argues that the grievant did not satisfy the contractual requirements of actually reporting for work and not receiving notice three hours in advance. In this regard the Company first maintains that it did not waive the reporting requirement when it told the grievant not to come in to work. In fact, the Company notes that nowhere in the contract is there support for this contention. To the contrary, the Company claims that the Union's position that pay is due whether or not an employe reports, is similar to claim for pay for time not worked such as a mistake in assigning overtime work. The Company points out that employes are not paid under Article II, Section 2, A for time not worked when a supervisor makes an overtime assignment mistake. Similarly, the Company argues that the contract also does not envision "on call pay" in this situation.

The Company also maintains that it acted reasonably both in its attempts to contact the grievant and in its belief that no other employes were available to work with the grievant.

The Company requests that the grievance be denied and the matter be dismissed.

DISCUSSION:

The parties stipulated that there are no procedural issues and that the instant dispute is properly before the Arbitrator for a final and binding decision on its merits.

At issue is whether the Company violated the agreement when it refused to pay the grievant reporting pay on the date in question. The parties did not offer any persuasive evidence concerning bargaining history or past practice which would assist the Arbitrator in resolving the aforesaid dispute.

The Company initially argues that because Article IV, paragraph 1 applies only to regular shifts and because the grievant was assigned to an overtime shift on the date in question the reporting pay provision does not apply. The Arbitrator agrees.

In this regard the Arbitrator notes that Article IV, paragraph 1 provides that "Any employee reporting for work on his regular shift without the Company notifying him that there would be no work . . ., shall receive a minimum of four (4) hours pay." (Emphasis Added) Although Article IV does not specifically define what is meant by the word "regular" other parts of the agreement support a finding that it refers to the employe's regular work shift. Article II is entitled Hours of Work and Overtime. Section 1, A refers to "the regular work week" and identifies it as five (5) eight (8) hour days, Monday through Friday, inclusive. The second sentence of that section also refers to "regular work day." The section goes on to set out three shifts, and defines the regular third shift as following the second shift, Monday through Friday.

The shift involved in this dispute is an overtime shift, scheduled for 11:00 p.m. on Sunday. It does not appear to be a "regular" work shift as that term is used in Article II, Section 1, A. There is no evidence that the aforesaid overtime shift was anything more than a one shot deal. The Union

offered no persuasive evidence that the grievant's overtime shift was "regular" in any sense of the word other than it was scheduled prior to the date in question.

The agreement contains further evidence that the aforesaid overtime shift is not considered a "regular" shift. In this regard the Arbitrator notes that the agreement treats Sunday work differently by limiting the Company's ability to schedule Saturday and Sunday work (Article II, Section 1, A - last sentence). Sunday overtime is also characterized as voluntary in Article II, Section 2, E.

Article II, Section 2, E, 1 also uses the term "regular shift." It is significant that Article II, Section 2, E, 1 provides that "first shift employees shall not be required to work more than four (4) hours beyond their regular shift when eight (8) hours are scheduled, or three (3) hours beyond their regular shift when nine (9) hours are scheduled." It is also noteworthy that Article II, Section 2, E, 2, provides that "employees on second shift shall not be required to work beyond the scheduled starting time of the first shift on the following work day on regular work days or beyond 7:00 a.m. on other days." (Emphasis Added)

Based on the foregoing the Arbitrator finds that Article II in its entirety establishes a clear difference between regular shifts on regular work days and shifts on other days.

A basic rule of contract interpretation provides that each word in a paragraph should be given its normal meaning and that the language in a particular section should be construed consistent with the use of the same language on other portions of the document. Elkouri and Elkouri, How Arbitration Works, 4th Ed., at 350-353 (1985). Applying that standard to the instant dispute, it is clear that Article IV, paragraph 1 was intended to provide for work situations where employees normally and regularly reported to work (Monday through Friday) on their designated shift.

An interpretation of the disputed contract language in this manner is supported by the ordinary and normal definition of the word "regular". The American Heritage Dictionary of the English language, New College Edition, (10th Ed. 1981) p. 1096 defines "regular" as: customary, usual, normal, occurring at fixed intervals. The record does not support a finding that the grievant's Sunday overtime shift at 11:00 p.m. was a "regular" shift as that term is commonly understood. It certainly is not a shift of the grievant that would recur at fixed or uniform intervals as would the third shift during the regular work week (Monday through Friday, 11:00 p.m. - 7:00 a.m.). The interpretation proposed by the Union would include all shifts without regard to whether or not the shift was "his regular shift." If the parties had intended that result they could have clearly so stated in the agreement.

Having determined that the aforesaid disputed contract provision does not apply in the instant case, the Arbitrator finds it unnecessary to make a decision regarding the other issues raised by the parties.

Based on all of the foregoing, and the record as a whole, the Arbitrator finds that the answer to the issue as stipulated to by the parties is NO, the Company did not violate the contract by refusing to pay the grievant, Michael Auger, reporting pay on January 22, 1989.

In light of the above, it is my

AWARD

That the grievance is denied and the matter dismissed.

Dated at Madison, Wisconsin this 19th day of December, 1989.

By _____
Dennis P. McGilligan, Arbitrator