

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

NAVISTAR INTERNATIONAL
TRANSPORTATION CORPORATION

and

UNITED STEELWORKERS OF AMERICA
LOCAL 3740

Case 1
No. 43557
A-4593

Appearances:

Ms. Jeanette Strack Zeldin, on behalf of the Company.
Zubrensky, Padden, Graf and Maloney, by Mr. George F. Graf, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein the Company and Union, are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, I heard this matter on March 26, 1990, in Waukesha, Wisconsin. The hearing was not transcribed and both parties filed briefs which were received by May 1, 1990.

Based upon the entire record, I issue the following Award.

ISSUE

The parties have stipulated to the following issue:

Did the Company violate the contract by failing to pay grievant William Pike the proper amount of premium pay for working on April 16-17, 1989, and, if so, what is the appropriate remedy? 1/

1/ The parties at the hearing also agreed that the resolution of the instant grievance would govern other grievances relating to this same issue.

DISCUSSION

Grievant Pike, who works in the foundry, worked 40 hours during the week of April 10, 1989, 2/ during which time he worked his regular 5:00 a.m. - 1:30 p.m. shift. Pike reports to work earlier than first shift employees who report to work at 6:00 a.m. because the furnace must be ready by the time they come in.

Pike - scheduled to be off work on Saturday, April 15 and Sunday, April 16 - was scheduled to return to work on Monday, April 17 at 5:00 a.m., his usual starting time. The Company on Sunday, April 16 called Pike in for work between 6:00 a.m. - 10:45 a.m. and then called him back to work from 6:00 p.m. until 5:00 a.m. Monday, April 17. Pike chose not to work after 5:00 a.m. on April 17, no doubt feeling tired from having worked about 16 out of the last 24 hours. The Company paid Pike the double time rate for working between 6:00 a.m. and 10:45 a.m. and 6:00 p.m. to 9:00 p.m., and the regular rate for working the eight (8) hours after that. Pike filed the instant grievance on May 6 when he claimed that the Company should have paid him double time for working between 9:00 p.m., Sunday, April 16 to 5:00 a.m., Monday, April 17.

In support thereof, the Union primarily argues that Pike on April 16 was working on his second off-duty day and "he was entitled to double time for all hours worked" pursuant to Article XII of the contract which - with the exception of third shift employees - defines the work week as beginning on Mondays. Alternately, it argues that Pike was at least entitled to time and a half for the hours in question because he worked in excess of eight (8) hours within a 24 hour period on Sunday, April 16. The Union maintains that its position is supported by clear contract language, an April 9, 1986, side letter between the parties which carved out an exception to the regular work week language found in the contract, as well as several arbitrable principles -- i.e., that the intent of the parties in negotiating this language controls; that the agreement should be construed as a whole; that harsh, absurd, or nonsensical results should be avoided; that to express one item in a contract is to exclude another; and that a practice cannot be used to contradict clear and unambiguous contract language. As a remedy, the Union also seeks an affirmative order directing the Company to stop violating the contract by "continuing to apply its version of the 'Employee Work Week' section of the contract."

The Company, in turn, argues that its interpretation of the contract should be upheld because the contract and testimony at the hearing established that the regularly scheduled third shifts begin on Sunday evening and that, along with the work weeks of all other bargaining unit members, Pike's workweek also began at 9:00 p.m., Sunday, April 16, thus allowing the Company to pay him his regular rate for the eight hours worked thereafter. The Company also contends that a long-term past practice supports its position; that the Union's reliance on the "Green Book", the Company's internal personnel policy handbook, is misplaced; that the Union

2/ Unless otherwise noted, all dates herein refer to 1989.

has failed to cite any contract language supporting its position; that the grievant in fact did not suffer any damages; and that sustaining the grievance would unfairly impose another payment penalty on the Company.

The resolution of the issue herein turns on Article XII of the contract, entitled "Hours of Work, Overtime and Holidays", which provides in pertinent part:

Sect. 1

107: "'Overtime Pay' is the amount to be paid to an employe in excess of that earned at his regular hourly rate for work performed in excess of eight (8) hours in any workday."

108: "'Premium Pay' is the amount to be paid to an employe in excess of that earned at his regular hourly rate for work performed on the employe's first off-duty day, second off-duty day, on a holiday as designated in this Article and on a Sunday which is included within the employe's regular five day schedule of work on continuing operations."

. . .

110: "'Employee workweek' means a period of seven consecutive twenty-four (24) hour days commencing with the scheduled starting time of the regular first shift on Monday provided, however, where the regularly scheduled third shift begins on Sunday evening, the 'Employee Workweek' shall commence with the regularly scheduled starting time of the third shift on Sunday and provided that for employes whose regular job assignments commence daily prior to the starting time of the regular first shift or third shift on Sunday or Monday as applicable, such employe's workweek shall commence at the regular starting time of their job assignments."

111: "'Workday' for the purpose only of determining whether an employe has worked in excess of eight (8) hours in a day, shall mean a period of twenty-four (24) consecutive hours from the time an employe begins the shift in which the work is performed."

112: "'Day' for the purpose only of determining off-duty days, designated holidays and Sunday as used in this Article shall mean a period of twenty-four (24) consecutive hours"

commencing at the same hour each day as the beginning time of the employe's workweek."

113: "'First Off-Duty Day' for an employe on noncontinuous operations is the sixth day of his workweek."

. . .

115: "'Second Off-Duty Day' for an employe on noncontinuous operations is the seventh day of his workweek."

. . .

Section 4 of the same Article goes on to provide:

Sect. 4

124: "(a) Time and One-Half Pay

In addition to his hourly earnings, an employe will be paid at the rate of one-half (1/2) his regular rate of pay for work performed:

- (1) In excess of eight (8) hours in any workday.
- (2) On his first off-duty day in each workweek.
- (3) On a Sunday which is included within his regular five (5) day schedule of work on continuous operations."

125: "(b) Double Time Pay

In addition to his hourly earnings, an employe will be paid at the rate of his regular rate of pay for work performed:

- (1) On his second off-duty day in each workweek.
- (2) On any of the designated holidays in this Article."

. . .

128: "The regular starting time of the first shift is 6:00 a.m., second shift and third shift hours will be considered to

include all hours between

2:00 p.m. and 6:00 a.m., for employes working on continuous eight-hour shifts.

2:30 p.m. and 6:00 a.m., for employes working on shifts having a half-hour lunch period.

. . .

The starting point in understanding this language is Paragraph 110 which generally defines the workweek as "commencing with the scheduled starting time of the regular first shift on Monday. . ." and which Paragraph 128 defines as being 6:00 a.m. This designation of when a workweek starts, of course, is one of the most important provisions in any collective bargaining agreement because it delineates for management when its operations are to begin and it likewise dictates for employes when they must report to work. Both employers and employes therefore have very strong interests in carefully defining and establishing the parameters of a regular workweek.

Here, the parties have created two (2) exceptions to their agreement that the workweek starts on Monday at 6:00 a.m.: (1) third shift employes who are to report on Sundays at 9:00 p.m. and whose special status was agreed to in an April 9, 1986, side letter between the parties; and (2), those employes, like Pike, who report to work at 5:00 a.m. to help prepare for the daily production shift which begins at 6:00 a.m., and whose workweek therefore starts at the beginning of their Monday shifts. Those are the only exceptions to the Monday workweek requirement provided for in Paragraph 110, or any other place in the contract for that matter.

That being so, there simply is no contractual language authorizing the Company to alter the regularly scheduled Monday workweek under any other circumstances. As a result, any work performed outside the workweek defined in Paragraph 110 must be paid the premium rate, particularly since Paragraphs 113 and 115 peg an employe's first and second off-duty days to the sixth and seventh days of his workweek. 3/ Here, since Sunday, April 16 was Pike's "Second Off-Duty Day" under Paragraph 115, he was entitled to Double Time Pay under Paragraph 125 (b) which mandates same "on his second off-duty day in each workweek."

As a result, the Company is required to pay Pike an additional eight (8) hours pay at his regular rate for the work he performed between 9:00 p.m., Sunday, April 16 to 5:00 a.m.,

3/ The only basis for ruling otherwise is the Company's claim that it has always paid employes the way that it paid Pike here. However, given the fact that the Company failed to identify any specific instances of where that occurred, there is no basis for finding any past practice to that effect.

Monday, April 17, so that he will be paid the double time rate for that work.

Consistent with this opinion, the Company is also hereby directed in the future to follow the Monday workweek requirement provided for in Paragraph 110 and it will pay employees premium pay for working outside that work week, one which for the reasons noted above, starts on Monday for most employees.

In light of the foregoing, it is my

AWARD

1. That the Company violated the contract by failing to pay grievant William Pike the proper amount of premium pay for working on April 16-17, 1989.
2. That to rectify said contractual violation, it should take the remedial action noted above.

Dated at Madison, Wisconsin this 23rd day of May, 1990.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator