

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
:
KEWAUNEE ENGINEERING CORPORATION :
:
and : Case 17
: No. 44707
: A-4707
INTERNATIONAL BROTHERHOOD OF :
BOILERMAKERS, IRON SHIPBUILDERS, :
BLACKSMITHS, FORGERS AND :
HELPERS, LODGE NO. 487 :
:

Appearances:

Mr. Howard L. Cole, International Representative, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge No. 487, 2400 East Devon Street, Suite 218, Des Plaines, Illinois 60018, on behalf of the Local Union.
Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, 333 Main Street, Suite 600, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, on behalf of the Employer.

ARBITRATION AWARD

According to the terms of the 1988-91 collective bargaining agreement between International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge No. 487 (hereafter the Union) and Kewaunee Engineering Corporation (hereafter the Employer or Company), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the proper pay rate for third shift employes during the period from July 30 through August 18, 1990. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was held in Kewaunee, Wisconsin on January 3, 1991, and a stenographic transcript of the proceedings was made. The transcript was received by January 23, 1991. The Union chose to make a closing statement at the hearing in lieu of filing a written brief. The Employer's counsel filed a written brief on February 25, 1991 which was thereafter exchanged by the undersigned.

ISSUES:

The parties were unable to stipulate to the issues herein, but they agreed to allow the undersigned to frame the issues in this case. Based upon the relevant evidence and argument, I find that the issues herein shall be as follows:

- 1) Was the grievance timely filed?
- 2) Did the Company violate the collective bargaining agreement when it paid third shift employes at a time-and-one-half rate for the last two hours of the ten-hour work days which were scheduled during the period, July 30 through August 18, 1990?
- 3) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

OVERTIME
ARTICLE V

Section 1. Work performed in excess of eight (8) hours on any regular established work day, or work performed outside of the regular hours or shift shall be paid for at the rate of one and one-half (1-1/2) times the employee's regular established hourly rate.
All work performed in excess of twelve (12) hours shall be paid for at two (2) times the employee's regular established hourly rate.
Section 2. Work performed on Saturday shall be paid for at the rate of one and one-half (1-1/2) times the employee's regular established hourly rate up to sixteen (16) hours, double time shall be paid thereafter.
Section 3. All work performed on Sundays or legal holidays shall be overtime and paid for at two (2) times the employee's regular established hourly rate.

Section 4. Section 1, 2 and 3 regarding overtime pay does not apply to the truck drivers classification or employees loaned into that classification. Employees on the truck drivers classification and employees loaned into that classification shall be paid on the basis of forty (40) hours straight time, and all overtime shall be paid for at the rate of one and one-half (1-1/2) times the employee's regular established hourly rate.

Section 5. Employees shall be expected to work Saturday overtime when requested and shall be notified by the end of the shifts on the preceding Thursday. Notification to employees for overtime work shall be made through the foremen and the Committee be informed as soon as possible. All overtime shall be distributed as impartially as possible. The Company shall maintain a current list showing the amount of overtime hours each employee has worked for review by the Union Committee. Overtime shall be performed by either the employee(s) who normally works on the job or the employee who is replacing that employee off the temporary posting board. If neither employee is available to perform the overtime, it shall be distributed as equally and impartially as possible among the employees: (a) within their department, (b) under each foreman's jurisdiction. If additional help is needed to perform the overtime it shall be distributed as equally and impartially as possible from the plant seniority roster. To be eligible for Saturday overtime an employee must have been assigned to the department or the foreman five (5) days prior to the day the overtime is worked. All employees accepting Saturday overtime are expected to work their full shift. Employees absent or on vacation Thursday or Friday only and who wish to work on Saturday, providing work is scheduled, must notify the Personnel Office (or Superintendent) within two (2) hours after the start of their shift as to their availability for Saturday work and receive verbal authorization to report for the full Saturday shift. The Company will not call employees who are absent for any reason. Employees absent must call in and request information on overtime scheduled and receive authorization to report to work on that Saturday. Should only the first shift be scheduled to work, employees from the first, second and third shift will divide the shift hours equally, such as 4 hours or 5 hours per shift. Employees declining overtime work shall be considered as having worked that period for overtime distribution purposes only providing they have been notified as outlined above. When an employee is asked to work daily overtime (either prior to shift or end of shift) if he refuses the overtime he shall be charged those hours as though he worked provided he was asked during the first four (4) hours of the shift which immediately precedes the overtime. The Company will post on the bulletin board accumulative overtime hours for all employees on the first Monday of each month. Probationary employees shall have their overtime hours placed equal to the employee in the classification who has the most number of overtime hours worked, excluding all truck drivers. A meeting between the Union Committee and the Company to review the distribution of overtime shall be held as often as necessary.

Section 6. Probationary employees will not be entitled to overtime work unless all employees in the work classification on his shift are scheduled to work.

HOURS OF EMPLOYMENT ARTICLE VI

Section 1. The regular established work day shall start at 7:00 a.m., and this starting time shall be recognized as the beginning of the twenty-four (24) hour day, and the second and third shift worked within this twenty-four (24) hour period shall be considered as belonging to that day. The starting time for the second and third shift shall follow immediately the ending of the first and second shift respectively. Hours may be changed by agreement between the Company and the Union Committee.

When an employee(s) works a nine (9) or ten (10) hour shift, the starting time for those first shift employees shall be 6:00 a.m. and 5:00 a.m. respectively. The second and third shifts shall follow the end of the first and second shifts respectively. Also, by mutual agreement between the Union Committee and the Company, the third shift shall begin their normal work week on Sunday nights (at the regular time) and end their regular work week at the end of the regular Thursday night shift.

- (a) There shall be a thirty (30) minute lunch period from 12:00 noon to 12:30 p.m. on employee's time during the first shift.
- (b) A lunch period of twenty (20) minutes shall be established near the mid-period of the second shift on employee's time.
- (c) When there are three shifts working, lunch period for the second and third shifts to be arranged by agreement between the Company and the Union Committee.

Section 2. The regularly established work day shall consist of eight (8) hours per day with a thirty (30) minute lunch period on the employees' time. The regularly established work week shall consist of five (5) regularly established work days, Monday to Friday, inclusive, of forty (40) hours; however, when a holiday occurs within a work week the work days and hours shall be decreased by the holiday or holidays.

Section 3. Employees will be considered called in to work for the standard work week. When accident, stress of weather, or similar reasons make it necessary to discontinue work, such time as has been actually worked will be paid; employees discontinuing for personal reasons shall be paid only for the time worked.

SHIFTS ARTICLE VII

Section 1. Shift work shall be permitted in all classifications. A minimum of two consecutive work days must be worked to constitute a shift outside of the regular established work day.

Section 2. Employees working on shifts established outside of the regular established work day shall be paid a premium of twenty-five cents (25 cents) per hour for the second shift and twenty-five centers (25 cents) per hour for the third shift.

Section 3. Employees required to change shifts shall receive not less than twenty-four (24) hour (sic) notice of the change of shift. Should any change be made without notification of the change, overtime at the established rate shall be paid for the first changed shift; except if employee requests a change of shift due to personal or health reasons and it is granted immediately.

Section 4. Transfers from one shift to another will be by seniority when openings are available. To be eligible for a transfer an employee must have filed a transfer request form which is available at the Personnel Office. If a transfer is denied the Company will advise the Union Committee and employee in writing the reason for such denial.

Section 5. When the plant is working all three shifts and it is necessary that one or more of the shifts work less than eight (8) hours they shall receive eight hours pay plus the shift premium for eight hours.

. . .

GRIEVANCE PROCEDURE ARTICLE X

Section 1. The Union shall have a Grievance Committee of not less than three (3) members and not more than five (5) members. The Company shall recognize this Committee for the purpose of disposing of grievances. It is further agreed that a business representative of the Union shall have the privilege of

becoming a part of the Union Committee at all times for the purpose of assisting in the disposal of grievances or administration or application of this agreement.

Section 2. Either party to this Agreement shall have access to the grievance procedure provided herein for the settlement of any disputes that may arise. All grievances shall be disposed of as expeditiously as possible.

Step 1. Any employee or group of employees, with or without the Union Steward and/or the Grievance Committee, subject to this Agreement, having any complaint with their work or feeling they have been unjustly dealt with, or that any of the provisions of this Agreement have been violated shall discuss the matter with their foreman and attempt to resolve the issue. If a settlement cannot be worked out in three (3) working days, it shall proceed to Step 2.

Step 2. If the matter is not resolved in the first step, the employee, with the Union Steward and/or the Grievance Committee, shall meet with the foreman and the Personnel Manager to attempt to resolve the matter. If the matter cannot be resolved, the grievance shall be reduced to writing and submitted to the Plant Superintendent and/or the General Manager and/or the Personnel Manager within five (5) working days. The grievance shall be drafted on the official grievance form, dated and signed by a Union representative and a management representative. The purpose of executing this grievance form shall be to establish a starting date for the beginning of arbitration. Unless arbitration is started within forty (40) days of the established date on the above-mentioned form, all rights to arbitration will be waived. If the matter is not settled at Step 2, it shall proceed to Step 3.

Step 3. If the matter is not resolved at Step 2, the Grievance Committee shall meet within five (5) working days of the date of the grievance or the date of the intent to dispute a discharge (Section 6) with the Plant Superintendent and/or the General Manager and/or the Personnel Manager. A reply shall be given to the Grievance Committee within three (3) working days of their last meeting. In the event the grievance is not settled, it shall proceed to Step 4.

Step 4. Either party shall have the right to submit said grievance to arbitration in the manner provided for in Section 3 if the aggrieved party should so desire.

Section 3. Grievances submitted to arbitration shall be referred to an impartial arbitrator. The arbitrator shall not have the power to add or to subtract from or to modify any terms of this agreement or any agreement supplemental hereto. The decision of the arbitrator shall be final and binding on both parties.

Section 4. In cases requiring arbitration, the services of the Wisconsin State Employment Relations Board shall be used.

. . .

BACKGROUND:

The parties' 1985-1988 collective bargaining agreement contained language in Article VI which is relevant here and which is different from that currently contained in the effective agreement, as follows:

HOURS OF EMPLOYMENT
ARTICLE VI

Section 1. The regular established work day shall start at 7:00 A.M., and this starting time shall be recognized as the beginning of the twenty-four (24) hour day, and the second and third shifts worked within this twenty-four (24) hour period shall be considered as belonging to that day. The starting time for the second and third shift shall follow immediately the ending of the first and second shift respectively. Hours may be changed by agreement between the Company and the Union.

When an entire classification works a nine (9) or ten (10) hour shift, the starting time for the first shift shall be 6:00 A.M. This starting time may be changed by mutual agreement between the Company and the Union. The second and third shift shall follow immediately the ending of the first and second shift respectively.

. . .

During negotiations leading to the effective agreement, the Company proposed to change the language of Article VI as it appears currently. It is undisputed that the purpose for the Company's proposal was to keep employees from leaving work before the end of their regular eight-hour shifts on days when they had been assigned to work overtime for one or more hours before the start of their regular shifts. It had been the Company's practice to pay employees at the beginning of an overtime shift for extra hours they would work that day before the start of their regular shifts. As a result of this practice, some employees had been leaving work some time after receiving their overtime pay (at the beginning of their work day) but before the end of their regular eight-hour shifts so as to receive the equivalent of eight or more hours pay at straight time for the day. These actions had caused workload problems for the Company and created inequities regarding the treatment of various shift employees. It is significant that no discussions were had regarding what if any affect this change in the language of Article VI would have on other areas of the agreement and/or the parties' relationship.

FACTS:

The Company is a metal fabricating firm which performs "job shop" work for a variety of customers. The Company and the Union have had a collective bargaining relationship for many years. In early July 1990, several of the Company's customers had requested that the Company expedite its work so that these customers could ship their products overseas quickly for delivery. As a result, work had backed up in the machine shop starting in early July 1990. Therefore, the Company decided to put on a third eight (8) hour shift in addition to the two eight (8) hour shifts the Company had been operating prior to July of 1990. 1/

However, after putting on a third shift, work began piling up again in the machine shop and Plant Manager Paul Anderson and General Manager John Schaefer decided that in order to avoid having to sub-contract out the work to other suppliers, the Company would have to begin working overtime on the three shifts then running. Having made the decision to work overtime, Paul Anderson held a series of meetings 2/ with Union officials and with various shift workers. The first meeting was held on July 12th, according to the Company (on July 19th according to Union President Jim Lutzen). Those present were Anderson, Schaefer, Lutzen and Machine Shop Foreman Nemecek. At this meeting, Anderson explained that the Company had decided to work three 10-hour shifts temporarily until the backed-up workload was alleviated. Anderson used a chart to show when each shift would begin and when straight time and overtime would be paid on each shift. Anderson put the following information on the charts he used at the July 12 meeting:

1st	5 A.M. - 3:30 P.M. (overtime 1:30 P.M. - 3:30 P.M.)
2nd	3:30 P.M. - 1:50 P.M. (sic) (overtime 11:50 P.M. - 1:50 A.M.)
3rd	11:50 P.M. - 9 A.M. (overtime 7 A.M. - 9 A.M.)

At this first meeting, questions were raised regarding the starting time for the third 10-hour shift and which machine shop employees would work on which machines during the shift overlap periods on each ten-hour shift. Union President Lutzen raised the latter question. However, Lutzen did not object to the Company's decision to change to three 10-hour shifts. Rather, Lutzen stated that he told Anderson that it would be better for the Company to return to a two shift operation, running both shifts twelve-hours each. Anderson

-
- 1/ The normal shift start times for a two shift operation are 7 a.m. and 3:30 p.m. according to the terms of the effective labor agreement. Normally, also, if a third eight-hour shift is added, it has started at 11:50 p.m.
 - 2/ There is a dispute regarding when these meetings actually occurred but there is no dispute regarding the number of meetings conducted or what was said during those meetings.

stated that he felt that such an approach would not get enough work out. 3/ Anderson told Lutzen that the Company needed more work produced and the only way to get it done was to work three 10-hour shifts. Anderson asked Lutzen if Lutzen believed that the Company would be violating the contract by changing to three 10-hour shifts. Lutzen admittedly responded that as long as the Company paid the proper "pay periods," no contract violation would occur. 4/ At this first meeting no one asserted or claimed that the Company's proposed overtime pay had been improperly calculated.

Lutzen stated that this was his first and last discussion with the Company on this subject in the month of July. The next week, Lutzen stated, he left for a conference at U.W. - Madison's "School for Workers" which met from July 23 to 27, 1990.

The Company asserted that the next meetings it held regarding its wish to change temporarily to three 10-hour shifts were on July 17th and 18th with affected shift employees. Anderson again demonstrated when the shifts would begin and end and when straight time and overtime would be paid by using charts upon which he wrote this information. He told third shift employees at one of these meetings that if they all agreed to it, the third shift could begin at 9:50 P.M., rather than 11:50 P.M., as proposed by the Company, so that the third shift could end at 7 A.M. rather than 9 A.M. At these meetings, Anderson also attempted to and succeeded in gaining the employees' agreement regarding which employees would work the five boring machines in the machine shop at various times during the three shifts. 5/ Again no objections were raised to the Company's method of calculating overtime pay of the 10-hour shifts.

The last meeting held by the Company was on July 26, according to Paul Anderson who stated that this meeting was held so that third shift employees could exercise their option to start at 9:50 P.M. rather than 11:50 P.M. These employees did not chose to start work at this earlier time. Union Representatives Ebert and Brezinski were present at this July 26th meeting and they asked Anderson to wait to institute the three 10-hour shifts until after Monday, July 30th, when Union President Lutzen would return to work and the Union's Committee could meet regarding what to do about this matter. Anderson refused to wait and said so. Ebert then stated that so long as the Company acted according to the contract, it would be all right to go to three 10-hour shifts.

On July 30, the next business day, the Company began working three shifts, 10-hours each day. It is undisputed that the Company has never operated three 10-hour shifts prior to its doing so in July and August 1990. Also, there is no dispute that in the past, the Company has subcontracted its work, when necessary, to other suppliers, without Union complaint.

FACTS REGARDING THE TIMELINESS ISSUE:

Regarding the filing of the instant grievance, the following facts are of record. The Grievant, Mr. Brezinski, a Union Steward, stated that he was one of the five employees who transferred to the third shift when it began. Brezinski stated that he worked only four 10-hour overtime shifts from July 30 through August 8th because he was ill and not at work during the week of August 8th until August 13th. The first paycheck that was issued after the start of the three 10-hour shifts was issued on August 8th. After receipt of their August 8th checks and Brezinski's return to work after his illness, third shift employees began complaining to Brezinski about their pay. On August 16th Brezinski received his first full paycheck following the establishment of the 10-hour shifts. The Company stopped working three 10-hour shifts on August 18th.

The evidence of record indicated that the instant grievance was filed verbally on August 28, and that it was denied in writing on August 29. Notably, the Company's response of August 29 went to the merits and it did not directly object to the grievance on the grounds of timeliness, although this response challenged the remedy sought by the Union, stating that the Union had not previously requested premium pay for the third shift. In addition, in its written response to the grievance (dated October 2 and 9) the Company agreed to extend the next filing deadline for 10 days and the Company did not raise a

-
- 3/ Also, Anderson explained at the instant hearing that it had been his experience that employees who worked more than 10 hours per shift for three to five shifts in a row lost productivity and had safety problems.
 - 4/ From the context of his testimony it is clear that Lutzen was referring to pay rates when he used the term, "pay periods."
 - 5/ The employees had agreed that the employe working on overtime would remain on his regular machine until his overtime was over while the employe on the next shift would work on an off machine and take over on his normal machine after the other employe on overtime ceased work.

timeliness defense therein. The Company's next written response to the grievance, dated October 17th, responded to the merits of the grievance and did not directly object to the grievance on the basis of timeliness, but stated:

. . . The grievance should have been filed at a time when the Company could have changed the schedule, not after the schedule was completed. . . .

The Company directly raised the timeliness issue at the instant hearing. Union witnesses at the hearing indicated that they did not believe there was a grievance to be filed until the Company told the Union Committee on August 29th that the Company would not pay the Union's request for overtime.

POSITIONS OF THE PARTIES

Union:

The Union chose not to file a brief herein. In its opening statement, the Union argued that the Employer had "arbitrarily" decided to change to a three shift operation because the Union never agreed to change the contractually set hours of work. In fact, the Union pointed out, Union Committeeman Ebert requested that Plant Manager Paul Anderson wait at least one day before beginning the 10-hour shifts so that the Union Committee could meet but Anderson refused.

The Union also asserted that Anderson's interpretation of the contract language was wrong - that the Company could not create three 10-hour overlapping shifts under the current contract language. The Union also noted that the Company has never before operated on three 10-hour shifts and that such an operational approach was never raised in negotiations between the parties. Thus, the Union contended that what the Company could not negotiate into the effective agreement, it "stole" mid-term of that 1988-91 agreement. The Union asserted that were the undersigned to rule in favor of the Company here, the contract language which addresses hours of work would become worthless.

In its closing statement, the Union essentially repeated the above arguments and added the following. In regard to the timeliness issue, the Union asserted that until August 29th, Union representatives were led to believe that the Company was going to pay their claims for overtime on the third shift. Not until August 29th did the Company deny the Union's claims and thereafter, the instant grievance was filed promptly. The fact that Union President Lutzen was out of town at the end of July and the fact that Anderson had refused to wait until he returned to work and the Union Committee could meet to decide what the Union's position would be regarding the change to ten-hour shifts, the Union implicitly argued, amounted to unusual circumstances. Thus, the Union contended, in fairness, the grievance should be ruled timely and that it should be sustained. The Union therefore sought a remedy in the alternative, as follows:

- 1) 13 workdays, four hours per day, paid at 1/2 time pay, for five employes on the third shift;
- OR
- 2) 13 workdays, seven hours per day, paid at straight time for five employes on the third shift.

Company:

The Company chose to file a brief in this case. Therein, the Company emphasized that from the beginning of July 1990, the Company gave the Union and its employes complete information regarding its intentions and the affect of a Company decision to go to three 10-hour shifts. Company representatives repeatedly met with employes and the Union, they wrote down and graphed the work hours and pay rates involved and the shift hours involved at each meeting, and they asked on at least two occasions whether the Union believed that what the Company intended to do would violate the agreement. At no time, the Company urged, did any employe or Union representative state that what the Company had described would violate the agreement. It was not until employes had received two paychecks under the ten-hour workday schedule and some 12 days had passed after the Company had ceased scheduling three 10-hour shifts, that the Union raised its claim for additional pay for third shift employes. The Company asserted, therefore, that the instant grievance was untimely filed under any interpretation of the facts herein.

On the merits, assuming the undersigned reached the merits, the Company asserted that the Union's claims for pay for the hours between 11:50 P.M. and 1:50 A.M. and 5 A.M. to 9 A.M. have no basis in logic, in contract or in past

practice. In this regard, the Company noted that Article VI, Section 1 acknowledges the Company's right to schedule ten-hour shifts and to run a three shift operation. Therefore, the Company urged, the parties must have intended to permit instances where shifts would overlap. The Company therefore urged that the language of Article VI cannot be superimposed on the language of Article V -- each of these Articles should remain separate and distinct with their own purpose and application, in the Company's view.

Because Article V controls overtime and requires payment of time and one-half rates for all hours worked in excess of eight hours per day or work outside of regular hours or shifts, the Company paid employes on all shifts two hours at time and one-half for each ten-hour day worked. The Company noted that the contract contains no language which requires the payment of overtime on a day in which an employe works less than an eight-hour shift (with exceptions such as holidays and weekend work or work done when all hours exceed 40 in a week).

The Company asserted that to order either remedy the Union seeks here would penalize the Company for its legitimate attempt to meet production demands without subcontracting. In the circumstances of this case especially given the Union's repeated statements, prior to the filing of the grievance, that no contract violation would occur by the Company's acts, the Company urged that it would be unfair for the undersigned to order backpay. The Company asserted that it could have done nothing to cure or prevent any alleged contract violation before or while it allegedly occurred because the Union failed to properly protest the Company's acts.

The Company contended that the results sought by the Union here are ludicrous. Under the Union's analysis, three hours and ten minutes of the ten-hour third shift would be regular hours to be paid at straight time while the remainder of the third shift would have to be paid at overtime rates. The Company asserted that conceivably, such an analysis could be used later by the Union to claim overtime rates for anyone whose counterpart on another shift is held over to work overtime even though the former employe is working only an eight-hour shift. Also, the Company claimed, a decision in favor of the Union here could be used by the Union to get a minimum eight hours' pay guarantee on a third shift even when an employe is scheduled to work less. The Company observed that the recent change in the language of Article VI contained in the effective agreement was accomplished to cure a similarly illogical outcome whereby an employe could work eight hours of a ten-hour shift, leave work two hours early and still receive nine hours' pay. Therefore, the Company sought the dismissal and denial of this grievance in its entirety.

DISCUSSION

With regard to the issue of timeliness, based upon the facts of record, I conclude that in these circumstances, the grievance was timely filed. The facts indicated that in July 1990, there was confusion within the Union regarding the official position the Union would take on the Company's announced intention to establish a three (10-hour) shift operation. The Company was aware of this confusion and yet it went ahead and established the three shift operation as it had planned. In addition, the Grievant, Brezinski, was ill during the first full week of work following the implementation of the ten-hour shifts and he did not receive a paycheck that included overtime from the ten-hour shifts he had worked until August 16th.

The situation led to further confusion. The Company and the Union had had several meetings to try to work out an agreement to change to three 10-hour shifts. Although the Union had raised no specific objections to the Company's plans, the Union had indicated that the Company's establishment of the three shift operation would be all right so long as the Company lived up to the labor agreement. Thus, the Union's position caused the Company to believe that its actions would be approved by the Union. The Company also refused to wait until Union President Lutzen returned from his conference so that the Union Committee could formulate its official position before the Company implemented the three shift operation.

In addition, in its answers to the grievance, the Company generally addressed the merits of the grievance throughout the grievance procedure. At one point in that process, the Company granted the Union an extension of time. Not until the hearing herein did the Company specifically object to the grievance on the grounds of timeliness. Thus, the evidence on this point tends to show that both the Union and the Company believed they were in agreement regarding the change to a three operation so long as the Company followed the agreement. It was not until the end of August 1990, that it became clear to third shift employes that the Company had not followed the contract and (in their view) that employes had been injured by the Company's acts. At this point, a grievance was actively pursued. In all of these circumstances and in light of the fact that the Company did not raise its timeliness defense until

the instant hearing, I conclude that the grievance was timely filed. 6/

I turn now to the merits of this case. The effective labor agreement contains an overtime clause (Article V) which defines overtime as work in excess of eight hours or work performed outside of regular shift hours. This language in the agreement demonstrates that the parties agreed that no matter where the overtime hours are worked, either before or after the employee's regular eight-hour shift, hours worked beyond eight shall be paid at time and one-half. Article VI, Section 2 also states that the length of the normal work day ". . . shall consist of eight (8) hours per day with a thirty (30) minute lunch period on the employees' time," and it states that the normal work week "shall consist of five (5) regularly established work days, Monday to Friday, inclusive, of forty (40) hours . . ." This language further supports the concept that at this Company overtime should be paid beyond eight hours on a work day.

In addition, the newly amended language of Article VI, Section 2, paragraph two assumes that an employee may properly be assigned to work a nine or ten-hour shift by the Company and that when this occurs, the starting times for first shift employees will be automatically change to 6:00 a.m. and 5:00 a.m., respectively, for such nine and ten-hour shifts. Article VI also states that in such circumstances the second and third shifts on such nine or ten-hour shift days will "follow the end of the first and second shifts respectively." This language allows for overtime to be worked before regular shift hours begin on the first shift and provides for certainty regarding when the second and third shifts should begin.

It is significant in my view that the parties amended the language of Article VI, Section 1, paragraph two to remove references to an "entire classification" and replace this with a reference to "employee(s)" working a nine or ten-hour shift, to add a reference allowing the starting times for the second and third shifts of a nine or ten-hour days to start at 6:00 a.m. or 5:00 a.m. respectively, to remove (from old Article VI) the requirement that the parties must mutually agree to any starting time other than 6:00 a.m. for such extended work days and to remove the word "immediately" from the following sentence of the old Article VI: "The second and third shifts shall follow (immediately) the end of the first and second shifts respectively."

In my view, the deletion of the word "immediately" allows shift overlap. Furthermore, because the Company here started the first shift at 5:00 a.m. it, in fact, followed the amended language of Article VI so that mutual agreement of the parties was not necessary for its decision to start first shift at 5:00 a.m. Also, the Company then scheduled the second and third shifts to start at their regular start times. Thus, in this case, the second and third shifts did follow the first shift. I find no violation of Article VI on these facts.

The fact that the first and second shifts then overlapped upon the third shift does not require a conclusion, as argued by the Union, that the hours of overlap must be paid at time and one-half to third shift employees because these overlap hours are "hours performed outside of regular shift hours" (Article V).

I do not believe that the parties could have envisioned or intended such an unusual result based upon the evidence here.

Admittedly, when the parties moved to amend Article VI they did not discuss or consider the specific facts which led up to the filing of the instant grievance. But the problem they addressed by their amendment has bearing upon the instant dispute. The Company had been concerned about employees leaving work on scheduled nine or ten-hour work days, after they received their overtime pay for hours worked before the start of their regular shifts but before the end of the scheduled nine or ten-hour shift. By amending Article VI, the parties intended to cure this problem. Thus, the amendment of Article VI clearly shows that the parties intended thereby to re-affirm the principles of Article V - that employees should be entitled to overtime pay only after working their normal work day (8 hours) and the scheduled extra hours (hours beyond 8-hours) on the particular shift. The Company also followed Article V by its acts here.

The remedy the Union seeks would result in third shift employees receiving either four hours' overtime pay or seven hours' premium pay for each ten-hour shift worked. Such an unusual result would have to be supported by clear contract language relating to overtime and premium pay. No such language exists in this agreement. Indeed, such a result would directly conflict with the clear language of Article V. Based upon all the relevant evidence and argument here, because Article V controls here and because no violation of

6/ See, e.g., Kimberly-Clark Corp., Fullerton Mill, 83-1 ARB para. 8221 (Weiss, 1983); Southwest Ohio Regional Transit Authority, 80-2 ARB para. 8432 (Ipavec, 1980); Nicholson File Company, 70-2 ARB para. 8446 (Larkin, 1970); Verson Allsteel Press Company, 66 LA 643 (Blum, 1976).

Articles VI or V by the Company has occurred, I issue the following

AWARD

The grievance was timely filed.

The Company did not violate the collective bargaining agreement when it paid third shift employes at a time and one-half rate for the last two hours of the ten-hour work days which were scheduled during the period July 30 through August 18, 1990. 7/

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of May, 1991.

By _____
Sharon Gallagher Dobish, Arbitrator

7/ It is significant that a permanent change of shift is not before me. The shift change here was for a limited period of time and for a limited purpose. This decision is not intended to address what result might occur were the shift change a permanent one.