BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | : | |
| J.W. HEWITT MACHINE COMPANY | : | Case 36 |
| and | : | No. 44830 A-4721 |
| INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 1855 | : | |

Appearances: Previant, Go
the Union.
DiRenzo and Bomier, Attorneys at Law, by Mr. Howard T. Healy, P.O.Box 788 Neenah, Wisconsin 54957-0788, appearing on behalf of the Company.

ARBITRATION AWARD

J.W.Hewitt Machine Company, hereinafter referred to as the Company, and the International Association of Machinists and Aerospace Workers, Lodge No. 1855, hereinafter referred to as the Union, are parties to a collective bargaining agreement, effective May 1, 1988 to April 30, 1991, which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the distribution of overtime. A hearing on the matter was held in Neenah, Wisconsin on February 6, 1991. Post-hearing arguments were received by the undersigned by April 1, 1991. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUES:

During the course of the hearing the parties were unable to agree on the framing of the issues and agreed to leave framing of the issues to the Arbitrator. The undersigned frames the issues as follows:

1. "Is the grievance arbitrable?"

   If yes,

2. "Did the Company violate the collective bargaining agreement when it established as a condition for volunteering to work Sunday overtime that employes also work Saturday overtime?"

If yes,

3. "What is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS:

. . .

**ARTICLE II**
**Hours of Work and Overtime**

. . .

**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 employes 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 provisions 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 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 at the request of the employee required to perform overtime work, after the employee has worked two (2) hours beyond his scheduled shift.

. . .

**ARTICLE XVII**
**Grievances**

**Section 1.** Should any differences arise between the Company and the employees or the Union, either individually or collectively, as to the meaning or application of any provision of this contract, then an earnest effort shall be made to settle such differences at the earliest possible time by the use of the following procedure:

A. The employee or employees, together with the Union Steward in the department where the grievance occurred, shall discuss the matter with the foreman in charge within three (3) days of the grievance and attempt to settle the grievance.

B. If the procedure outlined above does not settle the matter, written notice of the grievance must

be filed with the Management within seven (7) working days describing the grievance. The Superintendent shall then attempt to settle the grievance within one (1) working day, if possible. If the grievance is settled, the Findings shall be returned to the Union. Grievances settled in this manner shall be signed by both parties and shall be final.

C. If the grievance has not been settled within two (2) working days, the matter shall be discussed with Management who will meet with the Union Shop Committee for that purpose. In the event the parties cannot agree after ten (10) working days, the International Representative of the Union, together with the Shop Chairman, will then attempt to settle the matter with Management.

If settlement cannot be reached with Management after seven (7) working days, then either party may refer the dispute to arbitration. The arbitrator shall be a member of the Wisconsin Employment Relations Board or a member of its own staff. The arbitrator shall meet with the parties as soon as possible and decide the dispute. The party filing the request for arbitration shall notify the arbitrator in writing at least three (3) days prior to the date set for hearing the nature of the dispute and the claim of the party seeking arbitration. The decision of the arbitrator shall be final and binding on both parties to this Agreement. In the event there is a charge for such services, each party shall bear one-half of the expenses of the services and expense of the arbitrator.

**Section 2.** The function of the arbitrator so appointed shall be to interpret and apply this Agreement. However, the arbitrator shall have no power to add to or subtract from, or to modify, extend or delete any of the terms of this Agreement, or any agreement made supplementary thereto, except by mutual consent of the Company and the Union.

**Section 3.** A general wage scale negotiated as a part of this Agreement shall not be considered a matter for grievance.

BACKGROUND:

The Company operates a plant in Neenah, Wisconsin. It is in the service business operating twenty-four (24) hours per day every day of the year. In order to meet the needs of customers the Company offers Saturday and Sunday overtime to employes. Employes receive time and one half their regular pay for working on Saturday and double time for working on Sunday. The Company is also required to make every reasonable effort to distribute overtime equally among qualified employes in the job titles for which overtime is to be performed. The Union and the Company regularly meet to discuss matters and at a meeting in February 16, 1989, they met to discuss overtime. At this meeting the Company informed the Union that it was aware employes were bragging that they declined to work on Saturday so that they would receive the double time paid for Sunday overtime. The Company informed the Union that it intended to implement a new policy whereby if an employe refused to work Saturday overtime the employe

would not be offered Sunday overtime. The Union informed the Company it believed such an approach to the offering of overtime violated the parties' collective bargaining agreement. Thereafter the Company directed its supervisors to implement the policy.

For the weekend of April 28, 1990, the Company offered overtime to Luke Rolf. Rolf declined to work Saturday because of a personal commitment. He was not allowed to work Sunday because he declined to work Saturday. On May 1, 1990, Rolf filed the instant grievance. On May 14, 1990, the grievance was denied by Rolf's supervisor. The grievance was appealed and on June 29, 1990, Vice-President of Manufacturing G.M. Poss sent the following grievance denial to Chief Steward Joe Wilfling:

> DATE: June 29, 1990
>
> MEMO TO: Joe Wilfling
>
> SUBJECT: Grievance Dated 5/1/90
>
> FROM: G.M. Poss
>
> In reference to subject grievance, it is the company's position that we are not in violation of our contractual agreement. We further contend that there is no validity to this grievance since there has not been a contract violation.
>
> It is the company's position that we have the right to manage our operations as outlined in Article XVI Section 1. The procedure in question is, if we asked for volunteers to work Saturday and none are available, we don't ask them to work Sunday unless no other employee are available on a volunteer basis or the work must be performed only on Sunday. The reason for this policy is to control cost to the customer, provide maximum time to complete jobs on time, prevent employees from only volunteering on Sunday and never on Saturday (1-1/2 vs 2 times earnings), and prevent disagreements between employees.
>
> The policy was started in February 1989, and in general, we have not encountered any major difficulties. It is our belief that in the majority of cases, it has benefitted all concerned and resolved any conflicts that occurred in the past.
>
> Based on the above, the grievance is denied. We further contend that the grievance is invalid based on timeliness and no contractual violations.
>
> We trust the above satisfactorily settles this grievance.

At an October 23, 1990, meeting between the parties the Union informed the Company it believed the matter could be resolved without going to arbitration. On November 5, 1990, Poss sent the following letter to Wilfling:

> November 5, 1990

Mr. Joe Wilfling
Hewitt Machine Company
Neenah, WI 54956

Subject: Grievance Dated 5/1/90

Reference: Shop Committee - Saturday & Sunday Overtime Assignment
4th Step

Dear Joe:

In response to our grievance meeting held on 10/23/90 regarding subject grievance, the union stated that they thought the grievance could be settled without going to arbitration. We responded to the grievance on 6/29/90 in writing. Since that date, we have not had any further response from the union committee until the grievance meeting was held on 10/23/90. I would like to add that my written response was requested by the union.

Based on the time frame from when we met with the committee and my written response, we had assumed the grievance was dropped. Apparently, the union feels grievances can remain open as long as they feel they would like them to be active. Since this is another case where the time limits have been exceeded without managements approval, we contend the grievance is no longer valid.

The grievance is denies (sic) based on the above. We further contend that our original response of 6/29/90 was accepted by the union because they did not process the grievance further after receiving my written response.

Sincerely,

Gerald M. Poss /s/
Gerald M. Poss
Vice President of Manufacturing

On November 19, 1990, a Request to Initiate Grievance Arbitration was received by the Wisconsin Employment Relations Commission.

UNION'S POSITION:

Addressing the Company's procedural arguments the Union contends neither defense raised by the Company concerning timeliness has any merit. The Union asserts it has the right to wait to file a grievance until a specific employe is affected by a policy. The Union also argues it is not required to immediately grieve the announcement of every new rule. The Union acknowledges it was made aware of the Company's intent in February, 1989. However, the Union contends no adverse effect of the policy took place until Rolf was denied an overtime opportunity. The Union points out the record demonstrates Rolf's

grievance was clearly filed within the three (3) days of that denial. The Union also argues that the announcement of the policy itself was not a breach of contract. Thus a grievance filed at the time of the announcement might well have been met with the argument that no one had been harmed and therefore the grievance was premature. The Union also argues it must wait until there is a specific application of the policy to avoid grieving a pure abstraction. The Union asserts that in February, 1989, the Company could of argued that the policy was reasonable and flexible and absent a specific application of the policy it is difficult to dispute such claims. The Union also points out that the Company never gave a general notice to employes that a new policy had been implemented. Nor did the Company instruct its supervisors to inform employes that Saturday overtime was a requirement to be eligible for Sunday work. The Union also points out that it was at the hearing itself that the Union first learned that the Company was not charging employes with refused hours for equalization purposes because of the new linking arrangement between weekend overtime days. The Union concludes it had no reason to grieve until employes were adversely affected and then it promptly grieved the matter.

The Union also claims the Company assertion that the grievance was not advanced to arbitration in a timely manner is a issue that has already been decided by a previous arbitration. The Union points out Arbitrator Raleigh Jones, on July 7, 1989, ruled that there is no limit on the number of days the Union must follow when appealing a grievance to the fourth step of the grievance procedure reasoning that if the matter is not settled within a certain number of days that then the Union may appeal to the next step. The Union argues the latter steps of the grievance procedure do not require Union action within a certain time frame as the initial steps of the procedure do. The Union concludes that given the Jones arbitration award the Company had no reason to assume the matter had been settled.

Turning to the merits of the instant matter the Union argues that the new policy of linking Saturday and Sunday overtime is unreasonable and violates the collective bargaining agreement's overtime scheme. The Union argues that the provisions of Article II require both the equalization of overtime and the offering of assignments in a specific order. Article II also provides for scheduled and unscheduled overtime, indicates Saturday and Sunday assignments are not to be linked together, and further states Sunday work shall be voluntary. The Union also points out the Company is limited by Article II in its right to make overtime mandatory to situations where there are no volunteers, when the work is on Saturday, and when fifty (50) percent or less of the bargaining unit is compelled to work on a weekend. The Union also argues that Article II, Sec. 3 and 4, clearly state that each instance of overtime shall not be dependent on any other instance.

The Union also argues the new rule linking Saturday and Sunday overtime defeats the parties' overtime scheme for several reasons. First, there is no guarantee the employes who are entitled to refuse overtime first (the employes in the applicable job title) will volunteer for both days. Second, the linking of assignments serves no legitimate equalization purpose and may serve to exaggerate discrepancies. Third, the Company does not count as a refusal employes who only refuse the Saturday work. The Union asserts this clearly is contrary to the parties' past practice of charging employes who refuse any overtime opportunity and such a change in working conditions must be done at the bargaining table. While the Union concedes the Company has the right to make reasonable work rules, the Union asserts this does not include the right to make rules that modify past practices or that conflict with contractual provisions.

The Union contends the contract specifies the only method the Company may use to require employes to work overtime. The Union argues the Company has in

effect conditioned Sunday overtime upon an employe's willingness to work Saturday overtime. The Union stresses that the Company does not have the right to make conditions over certain contract rights.

The Union also asserts the policy is unreasonable because it penalizes employes for denying Saturday overtime regardless of the reason why they refused the overtime. The Union argues that Rolf had a reason for refusing the Saturday overtime. This reason was plausible and was not challenged by the Company. However he was still denied Sunday overtime. The Union points out that the collective bargaining agreement in Article II, Sec. 2(D), allows employes with good reasons to be excused from scheduled overtime.

The Union concludes the policy implemented by the Company is unreasonable. The Union would have the undersigned sustain the grievance, direct the Company to cease the policy linking Saturday and Sunday overtime and order the Company to make Rolf whole by directing the Company to offer Rolf the next available Sunday overtime opportunity.

COMPANY'S POSITION:

The Company contends the Union failed to process the grievance from step three to step four of the grievance procedure within a reasonable amount of time. The Company acknowledges that in a previous decision, an Arbitrator held that the time frame taken by the Union in filing for arbitration, sixteen (16) working days and twenty nine (29) calendar days, complied with the literal requirements of the collective bargaining agreement. However, the Company asserts Arbitrator Jones did not address the question of reasonableness. The Company argues that there is a general rule among arbitrators that even if an agreement does not contain time limits, a reasonable time is inferred by the establishment of a grievance procedure. Herein the Union failed to move the grievance for four (4) months. The Company argues this inaction represents an acceptance of the Company's last position. The Company concludes a period of four (4) months delay is an unreasonable amount of time and therefore the grievance should be found to be untimely.

The Company also contends the Union acquiesced in the overtime policy and therefore it has risen to the status of a past practice. The Company points out the Union president acknowledged in his testimony at the hearing that the matter was discussed on February 16, 1989. Yet no objection to the practice was raised until May, 1990. Thus the policy had been in existence for fourteen (14) months prior to the filing of the grievance. The Company asserts that during this time frame it had been consistently followed by the Company.

The Company argues that employes do not have specific claims to overtime. However some employes want to control when they work overtime and taunt other employes for working at time and one-half while they received double-time for performing the same work. The Company also argues that there is no requirement in the collective bargaining agreement which requires the Company to assign Saturday or Sunday overtime on the basis of seniority, the Company is only required to make sure overtime is distributed equally and on a quarterly basis. This distribution is based upon opportunities to work and refusals count as time worked for the purposes of equalization. The Company stresses that employes who decline to work Saturdays and therefore are not offered Sunday work will receive their fair share of overtime opportunities during the quarter. The Company claims the current policy is nothing more than a refinement of the past practice of the parties regarding overtime assignments, rationally based to allow the Company to continue to maintain seven (7) day coverage. Further, the Company claims employes are not treated unfairly. Even though they are not offered the Sunday overtime they are entitled to receive equal overtime opportunities in the quarter. However, the Company asserts they

are not entitled to specific Sunday overtime.

The Company concludes that absent a contractual requirement that employes be assigned specific overtime or proof that the policy fails to equalize overtime on a quarterly basis, the Company's policy does not violate the collective bargaining agreement. The Company also notes that no employe has alleged that they failed to receive overtime opportunities. The Company also notes that should the undersigned conclude the Company violated the collective bargaining agreement the remedy is limited to a non-pay option by Article II, Sec. 2(a).

The Company would have the undersigned deny the grievance.

DISCUSSION:

The undersigned will first address the procedural questions raised by the Company. The undersigned finds no merit in the claim that the grievance is untimely because the Union was aware of the policy as early as February 16, 1989, yet no grievance was filed until May 1, 1990. The record demonstrates the Chief Steward, Joe Wilfling, informed the Company at that meeting he felt the policy violated the collective bargaining agreement. Further, there was no written notice of its implementation to employes. While the record does demonstrate the Company verbally directed it's supervisors to implement the policy, it was not until Rolf raised the issue when he was denied a Sunday overtime opportunity that the Union was aware of the adverse impact of the policy on alleged employe rights. Thus the undersigned concurs with the Union's argument that until an employe is adversely affected by an employer action there is no grievance.

Turning to the Company's timeliness issue concerning the reasonableness of the Union's delay in initiating grievance arbitration the record demonstrates the Union was sent a written response on June 29, 1990. The matter was next raised on October 23, 1990, at which the Company contended it felt the matter had been resolved based upon its written response. While the undersigned would agree that such a delay is unusual, there is no evidence the Company's defense of its actions has been prejudiced. The undersigned notes here that the arbitration award cited by both parties concludes the parties' collective bargaining agreement is silent concerning a time frame within which the Union must move a matter to arbitration. Thus the Company has raised the question of whether a reasonableness standard should be applied. While the undersigned would agree that the Union must move the matter to arbitration within a reasonable amount of time, the undersigned also notes the collective bargaining agreement does not permit the undersigned to add to its provisions. The undersigned therefore finds that the addition of a reasonableness standard to the provisions of the steps of the grievance procedure could be construed as an addition to the collective bargaining. Particularly as herein where there is no evidence the delay in processing the matter to arbitration has prejudiced the Company's defense of it actions. Thus, the undersigned concludes the grievance is properly before the Arbitrator and will rule on the merits of the issue. The undersigned stresses here that had the Company demonstrated that the Union's failure to move the instant matter to arbitration had in some manner adversely effected its ability to defend its actions the undersigned would of reached a different conclusion.

Turning to the merits of the instant matter the record demonstrates that the Company unilaterally changed the method in which overtime is offered to employes. The Company presented no evidence which would demonstrate it was unable to get employes to volunteer to work Saturday overtime. There is also no evidence that the equalization of overtime has been changed by the Company's actions. Furthermore, there is no evidence that the policy linking Saturday

and Sunday overtime is the result of some business necessity, e.g. the Company was unable to meet under the previous method. The undersigned notes here that Article II, Sec. 2(D), permits the Company to excuse employes from scheduled overtime for "good cause". However, as the Union has pointed out, employes who decline Saturday overtime even when it may be for "good cause" are still denied the opportunity to work Sunday overtime.

Prior to the enactment of the Company's policy concerning Saturday and Sunday overtime employes could volunteer for either day or both. The Company does not dispute that this was the practice between the parties. The record also demonstrates that when the issue was raised with the Union on February 16, 1989, the Union did not agree with the change. The Company then unilaterally implemented the change. The undersigned finds that the method in which voluntary overtime was offered to employes prior to February 16, 1989, constituted a past practice. This practice was based upon the parties interpretation of the collective bargaining agreement, both parties being fully aware of how the method operated. Because it was a mutually agreed upon practice it was binding on both parties. When the company determined to implement the change in policy without the Union's approval the Company violated the parties mutually agreed-upon method for offering voluntary weekend overtime.

The undersigned has noted above the Company operates a twenty-four (24) hour, seven (7) days per week service facility. Thus there are needs the Company must meet in order to satisfy its customers demands. However there is nothing in the record which would demonstrate that it is necessary in all instances to have the same employe who works the Saturday overtime be the same employe who works the Sunday overtime. Nor is there any evidence in the record which would demonstrate that the Company has been unable to get sufficient volunteers for Saturday overtime. Absent a business necessity which would mandate a change in the way overtime is offered to employes the undersigned concludes the change in policy implemented by the Company violated the parties' collective bargaining agreement.

Based upon the above and foregoing, and the arguments, evidence and testimony presented by the parties, the undersigned concludes the Company violated the collective bargaining agreement when it implemented a policy linking Saturday overtime to Sunday overtime. The Company is directed to cease and desist this policy and ordered to return to the practice in existence prior to February 16, 1989. In view of the Union's requested relief for employe Rolf and, as pointed out by the Company, Article II, Sec. 2(A), the Company is also directed to offer Rolf the next available Sunday overtime opportunity. The grievance is sustained.

AWARD

1. The grievance is arbitrable.

2. The Company violated the collective bargaining agreement when it placed as a condition of working Sunday overtime that employes work Saturday overtime.

3. The Company is directed to cease its practice of linking Saturday and Sunday overtime. The Company is also directed to make Luke Rolf whole by offering him the next available Sunday overtime.

Dated at Madison, Wisconsin this 10th day of September, 1991.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator