BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | |
| GENERAL TEAMSTERS UNION LOCAL 662 | |
| | Case 2 No. 45788 A-4791 |
| and | |
| FOOD SERVICES OF AMERICA | |

Appearances:
Ms. Christel Jorgensen, Business Agent, appearing on behalf of the Union.
Mr. Gary Kumpula, Director of Operations, appearing on behalf of the Compan

ARBITRATION AWARD

The Company and Union above are parties to a 1989-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the workweek grievance of Philip Morrow.

The undersigned was appointed and held a hearing on August 14, 1991 in Eau Claire, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on August 28, 1991.

STIPULATED ISSUES:

1. Did the Employer violate the labor agreement when he failed to offer 40 hours of work to the grievant, Phil Morrow, starting the week of March 17, 1991?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

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ARTICLE 7

MAINTENANCE OF STANDARDS

Section a. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions put into effect during the term of this and prior Agreements with Local 662, shall become minimum standards for all employees covered by this Agreement unless otherwise mutually agreed.

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ARTICLE 11

PAID-FOR TIME AND REPORTING PAY

Section a. Employees shall receive full pay for all time spent in the service of the Employer.

There shall be no split shifts.

When called to report for work, employees shall be guaranteed a minimum of four (4) hours pay.

Section b. The regular work week for all regular full time employees shall be an offer of work of forty (40) hours per week, including holiday weeks, for each work week Monday through Saturday. (Part time employees shall not be scheduled Monday through Friday where such scheduling results in a full time employee working Saturday. The Employer shall attempt to schedule the work week for regular employees Monday through Friday, when possible).

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DISCUSSION:

The facts are largely undisputed. The contract language in Article 11 has been part of the Agreement for many years, during which time ownership of the Company has changed hands several times. The parties agree that no one presently employed by the Company is familiar with the history of that provision's original negotiations. Over many years, employes of the Company have had sufficient driving runs that they have often arrived at 40 hours work in as little as three days. In the Spring of 1991, however, the Company put the grievant, along with a number of employes, on a reduced workweek. The grievant, since then, has normally had driving runs Monday through Wednesday, and then either Thursday or Friday. The grievant is second-lowest on the seniority list, and the parties stipulated that the seniority order of offers of work is not in issue here. The grievant works out of the Company's Oshkosh terminal rather than the main Eau Claire warehouse.

The grievant testified that he has had some five-day weeks since March, 1991, because he filled in for other employes who had sick leave or days off. Prior to the grievance, he testified, he worked five-day weeks, and there were over 40 hours consistently for employes generally. The grievant testified that since the four-day week was instituted he has not been offered additional work to makeup the 40 hours, and has not been offered the Sunday night shuttle to Eau Claire. He testified that Keith Dashlett, a supervisor of the Company, told him that if he didn't drop the grievance he would have to take the Sunday night shuttle. The grievant testified that he told Gary Kumpula that if he had to take the shuttle he would take it. There is no dispute if any employe is offered hours and turns them down, the hours count as if they were accepted.

Other employes were also put on the four day workweek, but did not grieve.

The Union argues that employes not working out of Eau Claire are subject to the same terms of the collective bargaining agreement as employes working at the Company's main warehouse, ever since August 1989. The Union points to a fact stipulation that it has been a long-standing practice that employes are offered additional work at the Eau Claire facility if their driving hours were less than eight hours per day or 40 hours per week and the drivers have the option to decline the offer of work. The Union argues that the grievant must be offered 40 hours of work per week, and that backpay should be ordered for

all weeks during which the grievant worked less than 40 hours.

The Company argues that the grievant was in fact offered the Sunday night shuttle to Eau Claire and that he turned down this work. In addition, the Company argues that the contract does not guarantee 40 hours' work, and that it is obvious that employes generally do not interpret Article 11, Section (b.) as a guarantee, because the issue has never come up before in the many years that this clause has been in the contract. The Company, in its brief, states that it is still willing to offer the grievant the Sunday night shuttle as additional work.

I note first that the Company's contention that the grievant was previously offered the Sunday night shuttle is not supported by any testimony in the record, as the grievant was the only witness to testify. While the Company has put itself on record in its brief reiterating an offer of the Sunday night shuttle to the grievant, I do not find that relevant to the issue before me, because I find that the grievance must be denied on other grounds and because the only record evidence as to the Sunday shuttle is to the effect that it was not previously offered as such.

The Union is arguing, in effect, that the provisions of Article 11, Section b. constitute a guaranteed workweek for all employes, including those not regularly working out of the Eau Claire terminal. While there is no evidence in the record to suggest that employes not working out of Eau Claire are to be treated any differently than other employes [at least since August 1989], the fact that the issue of a guaranteed workweek has never arisen before does not constitute the kind of clear, mutually understood and binding past practice which would cause an ambiguity in the agreement to be resolved in the Union's favor. The evidence, instead, suggests to me that the issue did not arise simply because there is no recorded instance when the Company did not have sufficient work that all employes could obtain the 40 hour "regular" offer without dispute.

The stipulation referred to in the Union's brief can also be read in the same light; if there is sufficient work available that many employes are reaching 40 hours in the first three days of work, it is both in the Company's and the employe's interest to offer the next available work to an employe whose particular assignment might otherwise total less than 40 hours. But this presumes the continuation of normal conditions; and in those circumstances the reference to a "regular" workweek in Article 11 has an accepted meaning. Similarly, the maintenance of standards clause would operate to preserve a clear past practice benefiting the grievant; but the evidence does not establish that there was any prior period in which there was the kind of general shortage of work which triggered this situation. The previous history thus proves neither the Employer's nor the Union's case.

At the same time, it is clear that the parties are not disputing whether the layoff clause was correctly applied. Indeed, if the Company were compelled to lay off junior employes rather than reduce the workweek, the grievant would very likely be adversely affected, since he is second-lowest in seniority.

The case therefore turns squarely on whether or not the language of Article 11, Section b. constitutes a guaranteed workweek. Neither party cites any arbitral precedent in support of its argument, but upon review of the published decisions I am convinced that arbitrators generally have taken a disapproving view of the argument that a "regular" workweek constitutes a guarantee. In Triangle Conduit and Cable Company, 1/ Arbitrator Howard Gamser

1/ 33 LA 610, 613.

determined that a contract provision specifying that "the regular hours of work shall be 8 hours per day, 40 hours per week, Monday through Friday each week inclusive" did not prevent the Company from reducing senior employes along with others to a shortened workweek: "Such a provision, when found in the form set forth herein, cannot be regarded as a guarantee of employment for all or any group of employees for any specific number of hours per day or days per week. A guarantee of this type, because it is a departure from general practice, is customarily accompanied by specific language to that affect." Arbitrator Gamser stated, in support of this view, that the language is not deprived of meaning by this conclusion, because it is designed for other purposes - to regularize employment and to furnish the norms from which overtime premiums are calculated. The contract language in question here is similar to that in the Triangle case, and I have not found any arbitral view to the contrary (i.e. to the effect that "regular" means "guaranteed.")

The thrust of Arbitrator Gamser's view is mirrored in a New York Herald Tribune 2/ award by Arbitrator David L. Cole, stating that very clear language is required for a guaranteed wage. 3/ In addition, I note that the persons who originally negotiated this language, long gone though they may be, were apparently capable of using the word "guaranteed" when they meant "guaranteed", as in section (a) of Article 11. This implies that they recognized that the word "regular" would mean something less.

While arbitrators have differed over the question of whether employers violate layoff-by-seniority provisions when instituting a shortened workweek as an alternative to outright layoffs of junior employes, I note that this issue is not present here, both because the parties stipulated that the seniority order of offers of work was not in issue, and because of the grievant's low seniority. I therefore conclude that the grievance does not have merit, because I am not persuaded that Article 11, Section b. constitutes a guarantee of 40 hours offer of work.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Company did not violate the collective bargaining agreement by failing to offer Philip Morrow 40 hours work in each week after March 17, 1991.

2. The grievance is denied.

Dated at Madison, Wisconsin this 16th day of October, 1991.

By _____
Christopher Honeyman, Arbitrator

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2/ 36 LA 753, 761.

3/ See also other cases cited at page 522 of Elkouri, F and Elkouri, E.A., How Arbitration Works, 4th Ed., BNA 1985.