

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 7
 TEAMSTERS LOCAL UNION NO. 43 : No. 45661
 : A-4776
 and :
 J.W. PETERS & SONS, INC. :
 :

Appearances:

Mr. George T. Mueller, Secretary-Treasurer, Teamsters Local Union No. 43,
 on behalf of the Union.
Mr. Richard Lewis, Human Resources Manager, J.W. Peters & Sons, Inc., on behalf of the

ARBITRATION AWARD

Teamsters Local Union No. 43, hereinafter the Union, and J.W. Peters & Sons, Inc., hereinafter the Company, jointly requested that the Commission designate a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The undersigned was subsequently designated to arbitrate in the dispute. A hearing was held before the undersigned on July 19, 1991 in Burlington, Wisconsin. There was no stenographic transcript made of the hearing and the parties presented oral argument at the close of the hearing. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE:

The parties were unable to agree on a statement of the issue. The Union would state the issue as follows:

On voluntary premium day overtime, does the employe have the right to set his starting time?

The Company did not offer a statement of the issue, but takes the position that seniority governs whether an employe will get the work, not when the employe will start work.

Upon reviewing the parties' characterizations of the dispute, the undersigned concludes that the issue to be decided may be stated as follows:

Did the Company violate the parties' Labor Agreement when it did not permit the Grievant, Bob Friend, to exercise his seniority so as to come in at the earlier starting time for voluntary premium day overtime on December 22, 1990? If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

The following provisions of the parties' 1989-92 Labor Agreement are cited:

ARTICLE 6

1/ The parties agreed to waive the thirty-day time limit for issuance of an award.

OVERTIME

. . .

Section 2. For premium day overtime the Company shall post a list on Thursday by noon if possible. Seniority shall be from the top to the bottom and the 50% requirement shall be in force. When additional employees are required for a premium day they shall be notified by noon on Friday or the day prior to the premium day. Any employee who has completed his shift and left the premises prior to noon on the date prior to premium days, such employee shall be obligated to notify the Company before leaving the premises of a place where they may be located if premium day overtime becomes available (the employee is obligated to notify the employer of his whereabouts).

In case premium day overtime becomes available after employees have left the premises notice to the employees shall be by telephone with the steward present (or a unit member in his absence) on paid time as a witness. If the employee does not answer the telephone the Company may proceed to the next employee to make the assignment. Employees who are not in attendance all scheduled work days during the current work week are not entitled to premium day overtime work, but may be assigned said work at the option of the Company in accordance with the requirements of this paragraph.

In the event employees are not in attendance all regular scheduled work days during the current week as a result of absence due to attending a funeral of a member of their immediate family (parents, spouse, children, brother, sister, parents-in-law, brother-in-law, sister-in-law, grandchild, grandparents), illness or jury duty premium day overtime shall be available to these employees. Employees taking vacation and wanting to be available for premium day overtime shall notify the Company in writing before leaving for vacation.

. . .

ARTICLE 7
MANAGEMENT RIGHTS

The employer shall have the right to manage the business and direct the work forces, to assign employees to work; to determine the number of employees required; to plan, direct and control operations and production schedules; to control raw materials, semi-manufactured and finished parts which may be incorporated in the products manufactured at the locations determined by the employer; to introduce new or improved methods, tools, equipment or facilities, and to continue to establish, modify and enforce reasonable rules and regulations; and shall have such other normal and inherent rights of management as are not limited by this Agreement.

The Company retains the right to hire, suspend, discharge, demote, discipline for just cause, transfer and the right to relieve employees from duty because of lack of work provided that in the exercise of these rights the Company will not violate any of the terms of this Agreement.

BACKGROUND:

The facts alleged in the grievance are not in dispute. The Grievant, Bob Friend, had signed up for premium day overtime for December 22, 1990 and two employees with less seniority were able to come in to start work earlier than the Grievant that day. Friend grieved that he was not permitted to exercise his seniority to pick the earlier starting time. Friend normally started work at 7:00 a.m., Monday through Friday.

The parties were unable to resolve the grievance and proceeded to arbitration of their dispute before the undersigned.

POSITIONS OF THE PARTIES:

Union:

The Union asserts that there has been a practice of allowing employees to pick from the established starting times by seniority for voluntary premium day overtime. This is supported by Union Exhibits 1 through 3, indicating employees have been able to pick their starting time by seniority and the Company even settled a grievance on the point. The Union alleges the practice developed because employees were working 60-70 hours per week and the earlier starting times meant the employee could finish work earlier. As the earlier starting times on the premium days were more desirable, the employees were allowed to exercise their seniority in picking their starting time on those days. In investigating this grievance the Union asserts it learned that the Company has at times been favoring certain employees who have special skills and ability. As a remedy, the Union requests that on voluntary premium days employees be allowed to select starting times by seniority, giving due consideration to skill and ability.

Company:

The Company asserts that Article 6, Sec. 2, of the Agreement deals with allowing seniority to govern whether an employe will get the voluntary premium day overtime, and does not provide that an employe has the right to select his own starting time. The employe volunteers to work and the Company, when using a partial work force, must have the right to say when and where he will work. Article 7, Management Rights, in the Agreement, also gives the Company the right to direct the work force, assign employes, and determine the number of employes needed. With regard to Union Exhibits 1 and 2, the Company argues that those statements only show that the Company has asked employes if they would come in at a certain time and that it did not order them to in those instances. The Company feels this grievance deals with an employe claiming he has the right to pick his own starting time.

DISCUSSION:

The Union made clear at hearing that it is not contending an employe can set his own starting time, rather it is contending that for voluntary premium days employes may pick by seniority from the starting times established by the Company as long as they have the necessary skill and ability to do the work. Conversely, the Company is contending that the work is offered on a seniority basis per Article 6, Sec. 2, but that the Company retains the right to assign the employe to a starting time.

The Company is correct that Article 6, Sec. 2 of the Agreement does not expressly address the employe's starting time for voluntary premium day overtime, however the Union has asserted the existence of a past practice of allowing employes to select their starting time by seniority on such days. The evidence offered in support of the alleged practice is the statements of two employes indicating that they were permitted to exercise their seniority and select their starting time for December 22, 1990, one selecting the time his supervisor asked him to report and the other selecting a later starting time. The Union also offered a copy of a letter of February 1, 1988 to the Union's representative, Mueller, from a local steward indicating that in settling a similar grievance the Company had agreed to offer the earlier start times on Saturday sign up days (a voluntary premium day) by seniority in the future. The Company offered no evidence to refute the letter. The letter predates the parties' present Agreement and would indicate that the practice was in existence at the time this Agreement was negotiated. Contrary to the Company's contention that the statements of the employes regarding December 22 only establish that the Company at times asks employes if they will come in at a certain time, the statements indicate that the employes felt they could choose on the basis of seniority, the one indicating he had in fact chosen to come in at a later starting time.

From the foregoing, it is concluded that a practice has existed of which both management and the Union were aware, which has been followed for the most part, and which has spanned the terms of two agreements. For those reasons, it is deemed to be a binding past practice. On that basis, it is concluded that the Company violated the practice, and thus the Agreement when it did not permit the Grievant the opportunity to exercise his seniority in selecting a starting time on December 22, 1990 from those available, i.e., those starting times set by the Company for that day.

Based upon the above and foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The Company is directed to follow the practice as described above. 2/

Dated at Madison, Wisconsin this 1st day of November, 1991.

By David E. Shaw /s/
David E. Shaw, Arbitrator

2/ It is noted that the Union recognizes that the right to select from the available starting times is qualified by the Company's right to have the employes with the necessary skills and ability on the job.