BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
TEAMSTERS UNION LOCAL NO. 695	:	Case 15 No. 46562 A-4859
and	:	
WIS-PAK OF WATERTOWN, INC.	:	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, by Mr. John J. Brennan, appearing on behalf of the Union.

Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Mr. Dennis G. Lindner, appearing on behalf of the Employer.

ARBITRATION AWARD

Teamsters Local Union No. 695, hereafter the Union, and Wis-Pak of Watertown, Incorporated, hereafter the Employer or Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On December 26, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on March 3, 1992, in Watertown, Wisconsin. The hearing was not transcribed and, following the receipt of posthearing argument, the record was closed on April 21, 1992.

ISSUE:

The parties have stipulated to the following statement of the issue:

> Did the Company violate the Agreement by failing to offer rework overtime opportunities by plant-wide seniority?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 13 - OVERTIME

* * *

> 13.7 Overtime opportunity will first be offered by low overtime among employees performing the same primary job on the same shift. In the absence of volunteers, the overtime will be offered by seniority to qualified employees within the department on the shift. In the absence of volunteers, the work shall be assigned to the junior employees performing the primary

job on that shift. The recognized departments are: Production, Technical Services, Warehouse and Maintenance.

Unscheduled weekend overtime work, not associated with planned weekend production, which involves specialized clean-up, will be offered by low overtime to employees in the utility classification (primary job). In the absence of qualified volunteers, the overtime will be offered to other qualified production department employees by seniority. In the absence of qualified volunteers, the work will be assigned to the junior employees in the utility classification. If there are not enough employees available in this class-ification to perform the required work, any remaining overtime will be assigned to the junior qualified production employees.

Unscheduled weekend overtime work opportunity, not associated with planned weekend production, which involves non-specialized tasks, will be posted in accord with 13.8. The overtime will be offered to employees who sign the posting or authorize their assent if not immediately available through their steward on a plant-wide seniority basis. In the absence of volunteers, the junior employees in the plant will be assigned the work. The application of this paragraph shall not be subject to Section 13.9.

* * *

BACKGROUND

On September 10, 1991, a spindle on a seamer malfunctioned causing leakage in approximately ten per-cent of the filled cans. As a result of this malfunction, it became necessary to assign rework duties to employes, which rework involved the visual inspection of the cans, the removal of the defective cans, the destruction of the defective cans and the repackaging of the undamaged cans. Overtime opportunities which resulted from this rework were offered to senior Production Department employes by shift. This overtime work was performed on September 10, 11, 12, and 13.

During the week of September 9, 1991, fourteen employes in the Technical Services Department filed grievances alleging that the Employer violated Article 13.7 of the collective bargaining agreement when it failed to offer the rework overtime to employes on the basis of plant-wide seniority. The Employer denied that it had committed any contract violation. Thereafter, the grievances were properly processed through the steps of the grievance arbitration procedure and submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Union

In the past, rework has generally been divided into two categories, i.e., rework which is performed during regular work hours as part of the production employes' job duties and rework performed as overtime. In the latter category, all employes performing the work, regardless of classification, are paid the same "general labor" rate and paid an overtime premium. Management has considered every instance of overtime rework to be "non-specialized" work which could be performed by any employe. The only exception to this being the operator who runs the line while sorting and replacement is done.

The grievance settlement of May 15, 1990, mandates that overtime be offered on a plant-wide seniority basis when such overtime involves weekday overtime work opportunities of a nonplanned nature. In January, 1991, the Employer appropriately followed this settlement agreement when it offered rework overtime on a plant-wide seniority basis. Contrary to the assertion of the Employer, its conduct in January, 1991 was not a mistake.

The Employer argues that the settlement agreement of May 15, 1990, is not applicable since it applied only to situations where there was "time permitting." The Employer's claim that the September, 1991 incident involved an emergency situation is rebutted by the fact that this work was done over a period of three days. The Employer's claim is also rebutted by the fact that managerial personnel had the time to discuss the proper assignment of overtime among themselves and had time to call in the chief steward to allegedly get his opinion on the matter. The claim of emergency is also inconsistent with the incident of January, 1991, in which the Employer offered overtime work on the basis of plant seniority on the same day that the need for the overtime occurred.

The Employer argues that it had the tacit approval of the Union to assign overtime the way it did, since it asked the Union's Chief Steward for his opinion on the assignment of overtime and the Chief Steward did not object to the Employer's decision. Steward's duties are delineated in Article 13.5 of the collective bargaining agreement. It is not the Chief Steward's job to determine for the Employer the appropriate means of assigning overtime.

If the Employer had time to call in the Chief Steward, certainly it had time to telephone the responsible Business Agent who did have authority to interpret the agreement. This they failed to do. Moreover, the Employer

ignored the opinion of the former Chief Steward who expressly told the Employer that it was a violation of the Agreement to assign overtime only to production employes.

The rework in dispute was nonspecialized in nature, occurred during the week, and the persons who performed the overtime were paid a general labor overtime premium. Thus, the rework in dispute was similar, in all material respects, to the rework involved in the May, 1990 and January, 1991, incidents, which rework was recognized by the Employer to be available to employes on the basis of plant-wide seniority.

The Employer claims that the first paragraph of Article 13.7 applies to daily work and the second two paragraphs apply only to weekend work. The Union witnesses who were present at the contract negotiations do not recall such a distinction.

The Employer provided evidence of previous situations where plant-wide seniority was not followed. In every situation provided by the Employer, the rework was done on straight time, not overtime, and thus Article 13.7 would not have come into play.

The Employer has made a commitment to assign weekday overtime by plant-wide seniority, without regard to department, where it was nonspecialized work, and the general labor premium rate would be paid. In September, 1991, the Employer violated this commitment. Accordingly, the Employer should be required to make the fourteen grievants whole for the violation of the Agreement.

Employer

The Employer employs bargaining unit employes in four recognized departments, i.e., Production, Technical Services, Warehouse and Maintenance. On almost a daily basis, Production Department employes perform rework functions during their regular work shifts. Generally, the rework involves a small amount of product and relatively few Production Departments. At other times, the rework involves substantial product quantities as well as many production employes. Dennis Degner, a Lab Technician on the first shift, and a Union witness, admitted that Technical Services Department employes are not normally assigned to rework.

As the testimony of Facility Manager David Carroll establishes, considerable time and effort was expended by the parties in the negotiation of the new overtime language contained in Article 13.7. Paragraph Two of Article 13.7 deals specifically with unscheduled weekend work, not associated with planned weekend production, which involves specialized clean-up. Paragraph Three of Article 13.7 deals specifically with unscheduled weekend overtime opportunity, not associated with planned weekend production, which involves nonspecialized tasks. Only weekend work not associated with planned weekend production was to be offered and assigned on a plant-wide seniority basis. Weekend rework performed in conjunction with planned weekend production was the work of the Production Department.

On Monday, September 9, 1991, Production Manager Lehmann determined that he was faced with an emergency situation which had to be timely rectified in order to prevent further spoilage. Facility Manager Carroll and Production Manager Lehmann determined that the assignment of overtime was governed by the generic language in the first paragraph of Article 13.7.

Before assigning any rework overtime, Employer representatives met with the Union's Chief Steward and explained their intent to assign overtime by shift to senior employes in the Production Department. Although Grulke was invited to respond and state his position, he did not object to the Employer's decision to assign the overtime to production employes. By his silence, Grulke acquiesced to the Employer's position. Despite the Union's assertion to the contrary, Degner's opinion is not relevant in that Degner no longer functions as Chief Steward and was not a member of the Union's negotiating team when the issue of overtime was renegotiated

The argument that straight time rework during the workweek is the work of Production Department employes, but that rework overtime performed during the week is required to be assigned on the plant-wide seniority basis defies logic and transcends the bounds of reasonable inference. It is not a coincidence that all 14 grievances were filed by employes in the Technical Services Department. Degner is really arguing that senior employes in the Technical Services Department should have priority over Junior Production Department employes.

The grievance settlement of May 15, 1990 arose out of a grievance alleging that on April 26, 1990, second shift production employes were asked to volunteer to do rework rather than the Employer offering rework overtime to senior Lab Technicians in the Technical Services Department. Employer representatives Carroll and Lehmann, who were present during the grievance settlement discussion, understood that, in the future, where time permitted, overtime would be assigned in accordance with Paragraph Three of the newly negotiated Article 13.7. The clear import being that, in the absence of planned production, weekend rework overtime is to be posted and offered to employes on a plant-wide seniority basis regardless of job classification, department or shift. When weekend production is scheduled and nonspecialized tasks such as rework are performed, such overtime is not posted for plant-wide seniority but is assigned pursuant to the generic overtime language set forth in the first paragraph of Article 13.7. Carroll and Lehmann credibly testified, without Union contradiction, that weekend rework associated with planned weekend production was handled by Production Department employes.

Carroll and Lehmann reasonably understood that "time not permitting" applied to daily rework overtime. The only rational intent and purpose of the second half of the grievance settlement was that daily rework overtime will be offered to senior Production Department employes by shift, just as was done in this matter. Any ambiguity in the settlement agreement must be resolved against Union Business Agent Ashworth who drafted it.

The Employer's position is consistent with the overtime notification requirement set forth under Article 13.8. Further, if weekend rework overtime associated with scheduled production was properly performed by Production Department employes without Union contradiction or objection, reasoned analysis would dictate that it makes even more sense that daily rework overtime associated with scheduled production would be assigned to Production Department employes.

Having no rational argument to pursue, the Union relies on one solitary incident of past practice to support its position that daily rework overtime should be assigned on a plant-wide seniority basis. As the Employer's

witnesses established, the January 1991 rework assignment on the basis of plant-wide seniority was a mistake. The Union cannot rely up a single mistake to establish a past practice. Especially where, as here, the mistake is clearly contrary to the intent of Article 13.7, as well as the prior grievance settlement as understood by Carroll and Lehmann. The grievances must be denied and dismissed.

DISCUSSION:

The issue to be determined herein is whether the Employer violated the collective bargaining agreement by not offering the disputed overtime work to employes on a plant-wide seniority basis. Each of the parties relies upon the language of Article 13.7, which language was added to the parties agreement during the most recent contract negotiations.

Giving effect to the plain language of Article 13.7, the undersigned concludes that Paragraph One governs the assignment of overtime work which involves "primary jobs". Giving effect to the plain language of Paragraphs Two and Three of Article 13.7, the undersigned concludes that each Paragraph governs the assignment of weekend overtime.

The parties agree that the overtime work in dispute does not involve a "primary job," but rather involves "generic rework", i.e., non-specialized rework which can be performed by any employe, regardless of classification. 1/ The parties also agree that the disputed overtime work occurred on a weekday, rather than a weekend.

Since the overtime work at issue did not involve a "primary job" and did not occur on a weekend, the assignment of such work falls outside the provisions of Article 13.7. That is, Article 13.7, on its face, is silent with respect to the assignment of the disputed overtime work. The undersigned turns to the evidence of the negotiation history of Article 13.7 to determine whether such evidence demonstrates a mutual understanding with respect to the assignment of the disputed overtime work.

According to Joe Ashworth, the Union's Business Agent and bargaining representative, when the parties negotiated Article 13.7, they did not discuss "generic daily overtime" because the Employer had indicated that, as much as

1/ The parties agree that the overtime rate for performing such rework is based upon the general laborer rate, rather than the employe's classification rate.

possible, daily overtime would be eliminated. In later testimony, Ashworth recalled that the Employer had stated that there would not be any daily overtime.

Dave Carroll, the Employer's Plant Manager and bargaining representative, did not claim that the parties discussed "generic daily overtime" when the parties negotiated Article 13.7, but did deny that the Employer told the Union that there would not be any daily overtime. According to Carroll, the Employer told the Union that daily overtime would be reduced.

Crediting the earlier testimony of Ashworth, which is consistent with that of Carroll, the undersigned rejects the Union's assertion that, during the negotiation of Article 13.7, the Employer told the Union that there would not be any daily overtime. The undersigned is persuaded that, when the parties negotiated Article 13.7, the Employer advised the Union that daily overtime would be reduced as much as possible.

According to Carroll, Paragraph One of Article 13.7 applies to daily overtime; Paragraph Two applies to specialized weekend work; and Paragraph Three applies to non-specialized weekend tasks, such as rework, except when the rework is done in conjunction with planned production.

Ashworth denies that the parties had any discussions regarding limiting Paragraph One of Article 13.7 to daily overtime. According to Ashworth, when the parties negotiated Paragraph One, they were discussing primary jobs and when the parties negotiated Paragraph Three, they were discussing generic work, i.e., work which could be performed by any employe.

While it is evident that Ashworth and Carroll do not interpret all of the provisions of Article 13.7 in the same manner, it is not evident that either advised the other of his interpretation of the language. The evidence of negotiation history fails to demonstrate that the parties mutually intended Article 13.7 to be given any construction other than that which is reflected in the plain language of the Article. The undersigned turns to the evidence of the parties conduct following the negotiation of Article 13.7 to determine whether such conduct demonstrates a mutual understanding with respect to the assignment of the overtime work in dispute.

On April 26, 1990, second shift production employes were asked to volunteer to stay over to perform rework on an overtime basis. When David Ninmann, a second-shift Lab Technician, asked to be allowed to perform this overtime, his supervisor denied the request. On May 3, 1990, David Ninmann filed a grievance, which stated as follows:

> ARTICLE 13.7: Overtime opportunity among employees in the same classification will be divided as equally as possible provided the employee is qualified. Overtime opportunity shall include all available hours, whether mandatory or voluntary. And whether inside or outside the employee's classification, that the employee is qualified for.
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> GRIEVANCE: On April 26th 1990, 2nd shift Production employees were asked to volunteer to do re-work. I asked Mark Falkenstein if I could stay over to do re-work. He said no, that it was not my classification according to the new contract. The new contract does not take effect until June 1st 1990. Under the current contract I feel I should have been able to do re-work that night when other employees with more overtime

> hours were allowed to work. Re-work is not a classification but a secondary responsibility off (sic) all employees when asked. Example, Lab Tech doing re-work on 5-3-90 2nd shift.
>
> REMEDY: 4 hours overtime pay at time and a half.

On May 15, 1990, the parties resolved the Ninmann grievance. The settlement agreement is contained in the section of the grievance entitled DISPOSITION OF GRIEVANCE BY UNION AND EMPLOYER and states as follows:

> Future situations of a similar nature will be treated - time permitting, as 13.7 3rd paragraph - time not permitting will be treated as senior shift.

The language of the settlement agreement was drafted by Ashworth.

The Union ratified the existing collective bargaining agreement on April 21, 1990. By its terms, the collective bargaining agreement was effective June 1, 1990. The Ninmann grievance arose during the term of the prior collective bargaining agreement and relied upon language which had been deleted from the existing collective bargaining agreement. Given the fact that Article 13.7 of the prior agreement contained only one paragraph, it is evident that the reference to "13.7 third paragraph", is a reference to the newly created Article 13.7 and that the parties intended the settlement agreement to be effective during the term of the 1990-1993 collective bargaining agreement.

The language of the May 15, 1990 settlement agreement is ambiguous. When construing ambiguous language, it is appropriate for an arbitrator to consider evidence of the discussions which lead to the creation of the language.

Carroll, who was present at the time that the parties entered into the settlement of May 15, 1990, stated that he understood the phrase "time permitting" to be a reference to weekend overtime and the phrase "time not permitting" to be a reference to daily overtime. Carroll does not claim, and the record does not demonstrate, that Carroll or any other Employer representative, communicated this understanding to Ashworth, or to any other Union representative, at the time that the parties entered into the settlement of May 15, 1990. As Carroll stated at hearing, he assumed that "time permitting" was a reference to daily overtime. Neither Carroll's testimony, nor any other record evidence, demonstrates that the parties mutually understood the

phrase "time permitting" to be a reference to daily overtime, nor does it demonstrate that the parties mutually understood the phrase "time not permitting" to be a reference to weekend overtime.

As the Employer argues, one may construe ambiguous language against the party which drafted the language. However, the party advocating such a construction must proffer a reasonable construction of the ambiguous language. The record does not provide a reasonable basis to construe the phrase "time permitting" to be a reference to daily overtime. Nor does the record provide a reasonable basis to construe the phrase "time not permitting" to be a reference to weekend overtime.

As Ashworth stated at hearing, the grievance which gave rise to the settlement of May 15, 1990 involved daily, i.e., weekday, overtime and not weekend overtime. Since the settlement agreement expressly refers to "Future situations of a similar nature" and the evidence fails to demonstrate that weekend overtime was a topic of discussion when the parties entered into the settlement of May 15, 1990, the undersigned is satisfied that the May 15, 1990 settlement agreement sets forth a procedure for assigning daily overtime.

While the language of the settlement agreement of May 15, 1990 is ambiguous, it is not so ambiguous as to defy a reasonable construction. Construing the language of the settlement agreement as a whole, the undersigned is persuaded that, when the parties entered into the settlement agreement of May 15, 1990, they mutually agreed to a procedure for assigning daily overtime which involved generic rework, i.e., rework which does not involve the primary job of the employe. The undersigned is further persuaded that the phrases "time permitting" and "time not permitting" are references to the time needed to obtain coverage for this overtime. Since Article 13.7 establishes a procedure for assigning overtime on the basis of plant-wide seniority, the undersigned is satisfied that the portion of the settlement agreement which states "time permitting, as 13.7 3rd paragraph" requires the Employer to assign daily overtime involving generic rework on the basis of plant-wide seniority when the Employer has time to make such an assignment.

As discussed above, the overtime work in dispute is daily overtime involving generic rework. As also discussed above, the assignment of such overtime is governed by the provisions of the settlement agreement of May 15, 1990. Under the terms of this settlement agreement, the Employer is required to offer the disputed overtime work to employes on the basis of plant-wide seniority if "time permitted".

The Employer argues that it is more time consuming to obtain overtime coverage by plant-wide seniority than to obtain such coverage by departmental seniority. The Employer further argues that the present case involved an emergency and, thus, time did not permit the Employer to offer the overtime work on the basis of plant-wide seniority.

In January of 1991, the Employer assigned daily overtime which involved generic rework on the basis of plant-wide seniority. According to Production Manager Lehmann, this assignment involved all three shifts and the assignment was made on the same day that the need for the rework occurred. It is not evident that any generic rework overtime was assigned between January of 1991 and the September, 1991 incident which gave rise to the instant grievance.

In the present case, the seamer malfunction occurred on September 10, 1991 and the overtime work was performed on September 10, 11, 12 and 13, 1991.

2/ As the Union argues, the Employer met with its management people and the Chief Steward prior to assigning the overtime in dispute.

While alleging an emergency, the Employer's witnesses did not offer any testimony as to amount of time which elapsed from the time that they noticed that the seamer had produced a defective container and the time that they began the overtime rework. The evidence of the January, 1991 incident demonstrates that the Employer requires less than a day's notice to assign overtime work on the basis of plant-wide seniority. Given this evidence, as well as the evidence of the meetings which occurred prior to the assignment of the disputed overtime, the undersigned rejects the Employer's assertion that the Employer did not have time to assign the disputed overtime work on the basis of plant-wide seniority.

While the dispute may have been avoided if the Union's Chief Steward had told the Employer that he disagreed with the Employer's decision to offer the disputed overtime work to production employes, the Chief Steward was not contractually obligated to agree or disagree with the Employer. Contrary to the argument of the Employer, the undersigned does not consider the Chief Steward's silence to be evidence that the Union acquiesced to the Employer's decision to assign the disputed overtime to production employes. Nor does the Chief Steward's conduct otherwise preclude the Union from asserting its position herein.

As the Employer argues, the Union does contend that generic rework which is performed by Production Department employes during their regular work hours is part of the Production Department employes normal work duties, but that rework which is performed on overtime is required to be assigned on the basis of plant-wide seniority basis. While the Employer maintains that such a contention defies logic and transcends the bounds of reasonable inference, the undersigned disagrees. Since the rework in dispute is generic work which can be performed by all classifications of employes, it is not illogical for the Union to want all classifications to have the opportunity to perform the overtime. Nor, given the generic nature of the overtime, is it illogical that the Union would want the overtime to be offered on the basis of plant-wide seniority, rather than departmental, seniority.

2/ There was some confusion as to the exact date of the malfunction and the dates of the overtime. The Grievances which were filed in the matter support the conclusion that the malfunction occurred on September 10, 1991 and that overtime work was available on September 10, 11, 12 and 13. Lehmann stated that the overtime was worked on September 11, 12 and 13, but agreed that the incident could have occurred on September 10.

According to Lehmann, the overtime assignment in January, 1991, occurred while he was away from the plant. Lehmann maintains that, when he returned to the plant, he advised his supervisors, including the supervisor who had assigned the overtime on the basis of plant-wide seniority, that the assignment was a mistake and that daily rework overtime was to be assigned to the Production Department by shift and seniority. Lehmann does not claim, and the record does not establish, that Lehmann advised the Union that the Employer had made a mistake. Nor is it evident that the Union understood that, in the future, the Employer intended to restrict daily rework overtime to production employes.

The January, 1991 assignment of daily overtime is consistent with the requirements of the parties' settlement agreement of May 15, 1990. While it is evident that the Company considered the January, 1991 assignment to be a mistake, the record does not demonstrate that the Union agreed that the assignment was a mistake. The evidence of the January, 1991, assignment of daily overtime does not demonstrate that the parties mutually intended the May 15, 1990 settlement agreement to be given any construction other than that given herein.

For the reasons discussed above, the undersigned concludes that the Employer violated the parties' collective bargaining agreement as embodied by the settlement agreement of May 15, 1990, when it limited the overtime work in dispute to production employes and did not offer this work on the basis of plant-wide seniority. As the Union argues, the record demonstrates that each of the fourteen Grievants has more plant-wide seniority than production employes who were offered the overtime work which is the subject of this grievance. The appropriate remedy in this matter is to order the Employer to make the Grievants whole for all wages and benefits lost as a result of the Employer's failure to offer the Grievant's the opportunity to perform the overtime work which is the subject of this grievance.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer violated the Agreement by failing to offer rework overtime opportunities on September 10, 11, 12 and 13, 1991 by plant-wide seniority.

2. In remedy of this violation, the Employer is to immediately make the Grievants whole for all wages and benefits lost as a result of the Employer's failure to offer the Grievants the opportunity to perform the overtime work which is in dispute herein.

3. The Arbitrator will retain jurisdiction for at least forty-five (45) days from the date of this Award for the sole purpose of resolving any issues as to the application of the remedy.

Dated at Madison, Wisconsin this 3rd day of July, 1992.

By _____
Coleen A. Burns, Arbitrator