

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

KEWAUNEE ENGINEERING CORPORATION

and

LODGE NO. 487, INTERNATIONAL
BROTHERHOOD OF BOILERMAKERS, IRON
SHIPBUILDERS, BLACKSMITHS, FORGERS AND
HELPERS, AFL-CIO

Case 20
No. 47637
A-4941

Appearances:

Mr. James Lutzen, President, Lodge No. 487, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, appearing for the Union.

Godfrey & Kahn, Attorneys at Law, by Mr. Dennis W. Rader, appearing for the Employer.

ARBITRATION AWARD

Lodge No. 487, International Brotherhood of Boilermakers, Iron Ship-builders, Blacksmiths, Forgers and Helpers, AFL-CIO, herein the Union, pursuant to the terms of its collective bargaining agreement with Kewaunee Engineering Corporation, herein the Company, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The Company concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Kewaunee, Wisconsin, on October 15, 1992. A stenographic transcript of the hearing was received on October 29, 1992. The parties completed the filing of post-hearing briefs on December 17, 1992.

ISSUE:

The parties were unable to stipulate to the wording of the issues and agreed that the undersigned would frame the issues in his award.

The Union did not present a statement of its wording of the issue, but the grievance alleges that the Company violated the contract by allowing two third shift employees to work one-half hour into the first shift.

The Company presented two issues: Is the grievance arbitrable? If so, did the Company violate the contract when it asked two employees on the third shift to work an additional thirty minutes to complete work on a project on May 17, 1992? 1/

The undersigned believes the following to be an accurate statement of the issues:

Is the grievance arbitrable? If so, did the Company violate the contract when two third shift employees worked from midnight to 7:30 a.m. on May 17, 1992?

RELEVANT CONTRACTUAL PROVISIONS:

**OVERTIME
ARTICLE VI**

. . .

Section 5.

a.) 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 will be made through the Supervisor, and the Union Committee be informed as soon as possible. All overtime shall be distributed as impartially as possible. As much as is practical, work known in advance to required overtime, will be assigned to qualified employees in the department, or under a Supervisor's jurisdiction, with the lowest overtime hours. The Company shall maintain a current list showing the amount of overtime hours each employee has worked for review by the Union Committee.

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c.) The following rules shall apply for errors in the selection sequence: (1) When the wrong employee is selected to work overtime, (regular engaged employee bypassed) the Company to make employee whole; (2) When

1/ Unless otherwise specified, all other dates herein refer to 1992.

departmental crew is scheduled to work and an employee is bypassed, the Company to make employee whole; (3) When a dispute arises as to how many employees are working across shifts and the Company and Union agree employee(s) were missed they will be afforded equivalent overtime opportunity within five (5) work days of the end of the scheduled overtime; (4) When a regular engaged employee(s) is not asked to work and less than a full crew is scheduled and no other employee did the work the employee(s) will be afforded equivalent overtime opportunity within five (5) days of the end of the scheduled overtime; (5) When a qualified employee with a lesser overtime hour total is bypassed he will be given overtime opportunity preference for future overtime.

. . .

e.) Should only first shift be scheduled to work, employees from the first, second and third shift will divide the shift hours equally, such as four hours or five 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, and he refuses the overtime, he shall be charged those hours as though he worked, provided he was asked during the first four hours of the shift which immediately precedes the overtime.

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HOURS OF EMPLOYMENT ARTICLE VII

Section 1. The regular established work day shall start at 7:00 a.m., and his 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 hours of work for the regularly established work day are: First shift 7:00 a.m. to 3:30 p.m.; Second shift 3:30 p.m. to 12:00 midnight; Third shift 12:00 midnight to 7:00 a.m. The third shift shall begin their work week on Sunday nights at 12:00 midnight, and end their work week at the end of the regular Thursday night shift, and Article VI, Section 3 shall not pertain to that agreement. Hours may be changed by agreement between the Company and the Union Committee.

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GRIEVANCE PROCEDURE

ARTICLE XI

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 handling grievances. It is further agreed that a 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 handling of grievances or administration or application of this agreement. Stewards and Grievance Committee members may leave their work area without loss of time. Such time will be devoted to the prompt handling of contractual business. Before leaving their job, employee(s) shall first inform their Supervisor.

Section 2. Step 1. Any employee, or group of employees, with or without the Union representation, shall discuss the issue with their Supervisor, and attempt to resolve the issue. Such issue is to be presented to the Supervisor within five (5) working days from when an employee gained knowledge of the problem. 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 and Union Representative shall meet with the Supervisor to attempt to resolve the matter. If the matter cannot be resolved, the grievance shall be reduced to writing and submitted to the Supervisor within five (5) working days. A grievance shall be drafted on the official grievance form, dated and signed by a Union representative and the Supervisor. The written response from the Supervisor must be returned to the Union representative within three (3) working days.

Step 3. If the matter is not resolved at Step 2, the Grievance Committee shall meet within seven (7) working days of the date of the grievance or the date of the intent to dispute a discharge (Section 6) with the Supervisor, Plant Manager and/or the General Manager and 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.

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BACKGROUND:

In May of 1992, the Company was building a prototype unit, which it had not built previously, for a new customer. The unit was scheduled for shipping on Monday, May 18. On Friday, May 15, Jim Nemecek, the Company's Machine Shop Supervisor on the day shift, talked to the machine operators on the first and second shifts. The operators anticipated being able to finish the unit on Saturday. On Saturday evening, Nemecek again talked to the operators and to the night shift supervisor, at which point it appeared that about four more hours of work were

necessary to finish the machining of the unit. Nemecek then called in two third shift employes to begin work at midnight to finish the unit and left the plant about 6:00 p.m. When Nemecek returned to the plant at about 6:30 on Sunday morning, May 17, he found that the two employes were still working on the unit. Said employes advised Nemecek that they would not finish by 7:00 a.m. Nemecek asked the two employes if they would stay long enough to finish the machine work and to get the unit on the floor, so that the tow motor driver could move the unit. Three employes, a tow motor driver, a painter and a cleaner, were scheduled to start work at 7:00 a.m. on May 17. The two third shift employes agreed to finish the machine work, which they accomplished at 7:30 a.m.

The Company introduced copies of a number of employe timecards, approximately 30, as examples of situations where employes had worked overtime into the following shift hours. The amount of the overtime ranged from a quarter of an hour to one and one-half hours. The examples dated back to June of 1990. None of those situations were grieved by the Union.

POSITION OF THE UNION:

The Union does not believe that the manner in which the grievance was filed violated the grievance procedure. Elmer Kudick, Lodge Vice-President, wrote the grievance after discussing the situation with Nemecek on May 18.

The Union argues that the Company violated Section 1 of Article VII when third shift employes were allowed to work overtime during first shift hours from 7:00 to 7:30 a.m. on May 17. The Company should have offered the overtime from 7:00 to 7:30 a.m. to first shift employes.

The Union also contended, for the first time at the hearing, that the Company violated the contract by not dividing all of the overtime worked by the third shift employes, i.e., the hours from midnight to 7:30 a.m. on May 17, between all three shifts, as is required by Article VI, Section 5, Paragraphs b, c-step 2, and e.

As a remedy the Union requests "that the first and second shifts be made whole, such as eight and one-half hours of double time pay for two employes of the first shift and two employes of the second shift".

POSITION OF THE COMPANY:

When there is advance knowledge that overtime will be required, the Company abides by the contract by providing equitable overtime hours. In the instant case, the Company did not have any prior knowledge that an extra thirty minutes of overtime would be needed to complete the project. Section 5 (a) of Article VI clearly was meant to facilitate emergency approval of overtime

and to provide the Company with some flexibility in working overtime when necessary.

A past practice has been established under which employes are allowed to work overtime without adherence to overtime rules in cases where either the need for overtime was unknown in advance or the overtime was de minimis. There have been numerous examples of employes working into the hours of the following shift and no grievances were filed in any of those situations. Thus, the practice evidences a mutual understanding of the intent of the contract language.

The Union never told the Company, prior to the arbitration hearing, that it was requesting an equal division between all three shifts of all of the hours worked by the two third shift employes. Technically, such a division does not appear to be required by the contract because no first shift employes were scheduled to work. Further, that request is inappropriate because it was never discussed during the processing of the grievance.

The grievance was improperly filed. Only an employe or a group of employes can file a grievance at the first step. The Grievance Committee was formed to provide assistance to employes in filing grievances, rather than to file grievances. The Union is not a part of the grievance procedure until Step 2. The Grievance Committee is not a part of the grievance procedure until Step 3. The Union does not have an independent right to file a grievance at Step 1.

DISCUSSION:

Procedural Issue:

Step 1 of Section 2 of Article XI specifically states that "any employe, or group of employes, with or without the Union representation, shall discuss the issue with their Supervisor". Said language does not restrict the discussion to only those employes affected by the situation, as suggested by the Company. Rather, since the term "any employe" includes members of the Union Grievance Committee, those members may file a grievance. The Union has a direct interest in the application of the terms and conditions of the contract. Further, Step 1 permits Union involvement at said step.

Section 1 of Article XI specifies that the Company shall recognize the Grievance Committee for the purpose of handling grievances. The subsequent sentence appears to provide for a representative of the Union, who is not an employe of the Company, such as a full-time business agent, to assist the Grievance Committee in processing grievances, rather than restricting the Grievance Committee to assisting non-committee employes.

The undersigned is not persuaded that the grievance was improperly filed and, therefore,

he will proceed to a determination on the merits of the grievance.

Merits:

There is little doubt that the grievance was written because two third shift employees worked a half hour of overtime past 7:00 a.m., which time is the normal end time of the third shift and the normal start time for the first, or day, shift. If the two third shift employees had finished their work either before, or at, 7:00 a.m., it is doubtful that a grievance would have been filed. Such a conclusion is supported by the testimony of the Local Vice-President, Kudick, when he stated that the contract was violated when the third shift employees worked into the first shift hours and that one-half hour of overtime was in dispute. However, at the hearing the Union contended that the entire shift worked by the two third shift employees on May 17, i.e., midnight to 7:30 a.m., was in violation of the contract, so that there were eight and one-half hours of overtime pay at issue, rather than just one-half hour. The Company objected to the additional hours being part of the proceeding inasmuch as there had been no discussion of those hours by the parties prior to the hearing. If the Union had intended to litigate the eight and one-half hours rather than the one-half hour, it could have made such an intent clear at the time the grievance was filed. It is likely that the Union was aware on May 18 of the total hours that the third shift employees had worked on May 17. Thus, it is not plausible for the Union to argue that on May 21 (the date when it filed the written grievance) it was not aware which employees had worked overtime on May 17 and therefore it did not realize until later that all of the overtime worked by the two third shift employees should have been divided among employees from all three shifts. Such an argument is not persuasive. It is concluded that the Union Committee either knew, or should have known, almost immediately that the two third shift employees had worked a full shift, i.e., midnight to 7:00 a.m., on May 17 before working until 7:30 a.m. on said date. Accordingly, the Union should have made such a contention known to the Company at the time it began the grievance, rather than raising the argument for the first time at the arbitration hearing. However, since the parties are interested in a decision in the instant matter, the undersigned will provide such a decision.

It is concluded that the Company did not violate the contract when two third shift employees were asked to remain on the job for an additional thirty minutes on May 17. The Company had not scheduled any first shift employees to perform machining on the unit, because it had anticipated that the third shift employees would have the unit completed by the time the first shift employees arrived to move, clean and paint the unit. While the contract speaks to the distribution of overtime work and to the rate of pay for overtime work, there is no language prohibiting employees from working overtime during hours which extend into the normal hours of a different shift. It is true that the contract sets forth the hours of work for the first, second and third shifts on a regularly established work day. However, such a description does not mean there can be no deviation from said hours. Clearly the parties anticipated such a deviation since Section 1 of Article VI establishes a rate of pay for time worked in excess of 8 hours in a day. In a three shift

and 24 hour a day operation, any work in excess of eight hours in a given work day will extend into the regular hours of another shift. Furthermore, the exhibits introduced by the Company clearly establish a consistent and extensive history of similar incidents where employees have worked overtime on a given day and said overtime extended into the normal work hours of the succeeding shift. Said pattern included all three shifts. None of those incidents were grieved.

The fact the Company failed to anticipate that the two third shift employees would need to work an additional thirty minutes past the normal end of the third shift was not unreasonable. In fact, it was thought the two third shift employees would need to work only four hours to finish

machining the unit. Thus, the fact the third shift employees needed to work seven and one-half hours, instead of four, was unplanned and reasonably could not have been anticipated. The Company has the flexibility under the contract to deal with such an unplanned situation and to equalize overtime subsequent to the situation within a reasonable period of time. The undersigned now turns to the Union's allegation that the Company violated Article VI, Section 5 (e) of the contract when it had two third shift employees work from midnight to 7:00 a.m. on May 17. Said provision specifies that when only the first shift is scheduled to work overtime, then employees from all three shifts will divide the hours equally. Nowhere does that provision require the same division of overtime when only the second or third shift is scheduled to work. Neither did the Union present any evidence to show that the parties have a practice of dividing overtime among all three shifts when only the second or third shift is scheduled to work. Additionally, Nemecek's uncontradicted testimony was that it was anticipated that the two third shift employees would have to work only about 4 hours, not a whole shift, in order to finish the unit. Obviously, the Company had not planned to have the third shift employees work an entire shift. Consequently, the undersigned finds no basis in the record, either from the contract or from past practice, to support a conclusion that the Company violated the contract on May 17 when the two third shift employees worked from midnight to 7:00 a.m.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the grievance was properly filed; that the Company did not violate the contract when it had two third shift employees work an additional thirty minutes, i.e., from 7:00-7:30 a.m., on May 17, 1992 in order to finish machining a unit; that the Company did not violate the contract when it scheduled two third shift employees to finish machining the unit, even though it did not schedule any first or second shift employees to perform machining on May 17; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 24th day of February, 1993.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator