BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
PRODUCT MINIATURE COMPANY, INC.	Case 4 No. 48326 A-5005
and	
MACHINISTS DISTRICT NO. 10	

Appearances:
Lindner & Marsack, S.C., by Mr. Dennis G. Lindner, on behalf of the Compan
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. John J

ARBITRATION AWARD

The above-entitled parties, herein the Company and Union, are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Pewaukee, Wisconsin, on January 15, 1993. The hearing was transcribed and the parties thereafter filed briefs which were received by February 23, 1993.

Based upon the entire record, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the Company violate Section 11.4 of the contract through the use of temporary employes and, if so, what is the appropriate remedy?

DISCUSSION

The Company's Pewaukee, Wisconsin, facility manufactures industrial-type parts for industrial customers, as well as various point-of-purchase displays for its customers' special promotions and sales campaigns which constitute about sixty (60) percent of its business. Some of these latter customers do not give the Company much lead time to produce a given promotional item, thereby requiring the Company to hire temporary employes for special production runs. In addition, the Company's business fortunes are directly tied to the national economy with business generally picking up when times are good and declining when times are bad. Its workforce thereby fluctuates widely, ranging from about 110 full-time employes in 1991 to 153 in 1992.

The composition of the Company's workforce has been a major issue in past collective bargaining negotiations, with the Company trying to maximize its flexibility in hiring temporary employes and with the Union generally opposing these efforts.

Thus, and in order to alleviate the problems caused by regular employes who did not want to work overtime, the parties agreed to the following language for their 1979-1980 and 1980-1982 contracts:

> In times of emergency, the Company can, with mutual agreement with the Union, call in help from outside agencies. These agency people are not to be considered as employees of the Company nor part of the bargaining unit. Emergencies shall be defined as when employees

> are not available for work or not enough employees to do the available work.

In the 1983 negotiations, the Company proposed the following provision which sought to broaden the circumstances under which temporary employes could be hired:

> Emergency shall be defined as when the regular employee force is not available for an increased temporary workload, or temporary absences caused by LOA (leave of absence), worker's compensation cases or vacations.

The Company ultimately dropped this proposal, as the parties agreed to language stating:

> **11.4** In times of emergency the Company can call in help from outside temporary services only if there are a minimum of ninety (90) full-time regular employees working. These agency people are not to be considered as employees of the Company, nor part of the bargaining unit. The Company shall notify the Shop Committee prior to bringing in outside temporary help as stated above.
>
> Such employee(s) from temporary services shall do the following:
>
> 1. Only go to assembly and no other classification, unless mutually agreed to with the Union;
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> 2. They shall not work overtime when regular senior employees are available from any class;
>
> 3. All regular laid off employees are called back to work before temporary service employees are called in to work;
>
> 4. There shall be no third shift for temporary service employees unless agreed to with the Union.

This marked the first time that a floor was established for regular employes and it represented the first time that specific details were established for using temporary employes. This is the same language found in Section 11.4 of the present contract.

In the 1985 negotiations, the Company unsuccessfully sought to delete paragraph 4 of this language and proposed language permitting the use of temporary employes in "any department", for "vacations, leaves of absences or shortages." In the 1987 negotiations, the Company unsuccessfully proposed language permitting the use of temporary employes when eighty-five (85) regular full-time employes were employed.

In the 1992 negotiations, the Union unsuccessfully sought contract language providing "Any temporary service employee who works sixty (60) days or longer, as agreed to between the Company and the Union, shall become a member of the Union and have seniority as of their first day of work."

The Union filed the present grievance on August 20, 1992, stating that the Company should "not call in temporary service people for any shift as we do not have an emergency. Fill all open positions with new hires." The Company replied that its hire of temporary employes was proper because it "reserves the

right to determine when an 'emergency' situation requires call in temporary services."

In support of the grievance, the Union primarily argues that the Company over the years has been unsuccessful in trying to obtain "from the Union the broadest possible terms to allow it to use temporary help with as few restrictions as possible"; that the Company has violated the contract in at least three (3) respects; and that the Company violates the contract whenever it uses temporary employes for anything other than emergencies. As a remedy, the Union does not seek any back pay, but only a prospective declaration delineating under what circumstances temporary employes can be hired.

The Company, in turn, maintains that "by consistent long-standing past practice, the term 'emergency' under Section 11.4 was clearly considered to apply to peak production scenarios related to advertising-related production products" and that, "emergency" must be defined in the same way as provided for in the 1978-1980 contract - i.e., "when employees are not available for work or not enough employees to do the available work." The Company further asserts that it properly used temporary employes here to fill in for the five (5) molding employes who were on leave and/or vacation, and that all five injection molding machines would have been out of production if it did not call in temporary employes.

The issue presented for resolution here is somewhat unusual because both parties agree that I should define the word "emergency", irrespective of the particular facts giving rise to the grievance so that they can better determine what are their respective rights and obligations.

Any such definition must recognize that fluctuating business needs make it impossible to always know ahead of time just how many employes are needed to handle whatever promotional point-of-purchase display business comes through the door. But at the same time, any such definition must take cognizance of the Union's legitimate concern that temporary employes not be used to circumvent the contract and the Company's concomitant obligation to hire a regular complement of employes. That is why the Union objected to the Company's claim in the 1992 negotiations that it was free to use temporary employes whenever it needed a "warm body".

Trying to determine the contours of such a dividing line is no easy task, as the parties themselves well know through their fifteen (15) years of bargaining over the issue. Nevertheless, a few broad principles should apply in determining when temporary employes must be hired.

One is that the parties cannot obtain in arbitration what they were unable to obtain in negotiations. As a result, it is inappropriate to expand the definition of "emergency" to cover "temporary workload, or temporary absences caused by LOA (leave of absence), worker's compensation cases or vacations", as the Company was unsuccessful in securing that language in 1983. The same is true of the Company's unsuccessful efforts in 1985 to delete paragraph 4, Section 11.4, and in 1987 to drop the floor from ninety (90) to eighty-five (85) regular employes. By the same token, it is wrong to place a sixty (60) day limit on the use of temporary employes since the Union was unable to obtain such a limit in the 1992 negotiations.

Two, the resolution of this issue must include a date certain beyond which temporary employes cannot be retained so that the parties themselves know what the score is. In this regard, the Company's brief states that the Company "would not object to a ninety-day limitation recommended by the Arbitrator. . .", provided that there are at least ninety (90) regular full-time employes employed at that time. Accordingly, and because such a proposal is otherwise fair, I find that the Company -- subject to the other limitations of Section 11.4 -- can hire temporary employes for up to ninety (90) days but no longer

than that, unless the Union expressly agrees to a longer duration in a given situation.

Three, it must be recognized that emergencies can occur within the regular employe complement itself, such as happened here when five (5) employes were absent in the molding department on the same shift for several months in 1992 because of vacations and leaves of absences. When that happens, it simply is too impractical for the Company to hire regular employes for such a short period of time and to then lay them off. The word "emergency" therefore must allow for such contingencies. For while the Company was unsuccessful in negotiations in obtaining blanket language enabling it to always use temporary employes for "temporary absences caused by LOA (leave of absence), worker's compensation cases or vacations", the kind of situation in the molding department was much narrower than that because the Company has clearly demonstrated that its normal production process otherwise would have been interrupted by so many absences because there was no one else to operate the presses.

The Company therefore can hire temporary employes to fill in for a group of regular employes on an emergency basis as it did here, but only when it is able to clearly establish that such hires are needed to maintain its normal operations and only when those hires are subject to the provisions of Section 11.4, including the ninety (90) day limitation just noted above. 1/ Moreover, and in order to ensure that bargaining unit work is not being needlessly eroded, the Company is precluded from using temporary employes for this purpose until after it offers such work to its regular employes on an overtime basis. 2/ In that way, bargaining unit members will be able to determine themselves whether they want to perform such work; if they do not, they should not have any complaint if it is subsequently performed by workers who are bargaining unit.

Lastly, resolution of this issue must include proper notification to the Union regarding the hiring of any temporary employes. Section 11.4 already contains language to this effect by providing, "The Company shall notify the Shop Committee prior to bringing in outside temporary help as stated above." The record here shows that this has been a problem in the past because the Company has not always told the Union on a timely basis how many temporary employes have been brought in. In order to avoid that problem in the future, the Company henceforth shall inform the Union as soon as possible, but no later than forty-eight (48) hours after they actually start working, of the names of all temporary employes, how long they are expected to work, and the specific jobs on which they are working. Furthermore, if the Company hires temporary employes for an emergency as it did here, the Company - in addition to following the above requirements - shall also provide the Union with full details as to why it believes an emergency exists and why temporary employes must be hired.

In light of the above, it therefore is my

AWARD

1. That the Company did not violate Section 11.4 of the contract when

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1/ In this connection, plant manager Bill Ford testified that the Company, as a matter of policy, would only use temporary employes when there was a group of employes absent representing a serious labor shortage that could not be covered by reasonable overtime. He also stated that it was not the Company's policy to use temporary employes whenever an employe has a vacation or leave of absence. All this is why an emergency, by definition, must encompass a group of absent employes.

2/ This does not prevent the Company from hiring summer employes as in the past.

it used temporary employes under the facts of this case.

2. That the Company can use temporary employes under the circumstances and conditions set forth above.

3. That to resolve any questions which may arise over application of this Award, I shall retain jurisdiction for at least thirty days.

Dated at Madison, Wisconsin this 7th day of June, 1993.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator