BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 1086	No. 48623	Case 6 A-5025
and		
ADVANCE CAST STONE COMPANY		

Appearances:
Mr. Thomas N. Klein, Business Manager, appearing on behalf of the Union.
Mr. Matt Garni, Representative, appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1991-93 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 overtime grievance of the Union, referring to December 24, 1992.

The undersigned was appointed, and held a hearing on April 2, 1993, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made; the Union filed a brief, and the record was closed on May 18, 1993.

STIPULATED ISSUES:

1. Did the Company violate the collective bargaining agreement by not awarding overtime on December 24, 1992 by seniority?

2. Did the Company violate the collective bargaining agreement by giving bargaining unit work on December 24, 1992 to a supervisor?

3. If (1) or (2) is answered yes, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE X - SENIORITY

. . .

Section 10.7. One (1) son of Erhard Garni may perform work covered by this Agreement during school vacation periods without regard to seniority.

. . .

ARTICLE XIX - HOURS OF WORK

Section 19.6. Supervisor. No supervisor shall be assigned to perform unit work at any time, unless in case of emergency or for the purpose of training or

instructing.

Section 19.7. Saturday Work Notification. When employees are required to perform work on Saturdays, they shall be notified no later than Friday at 10:00 a.m. (except in emergency situations) and sign up prior to noon. If an employee is not notified by said time, he may refuse Saturday work.

Section 19.8. Overtime Work. The Employer shall give the employees reasonable notice when required to work overtime, other than the regular shift.

DISCUSSION:

The facts are not significantly disputed. The Company is in the business of fabricating cast concrete panels for the construction industry, including a substantial amount of custom work. In the Fall and early Winter of 1992, the Company enjoyed a healthy business climate, and all employes were working substantial amounts of overtime. But while about Thanksgiving the Company had posted a notice requiring employes to work a minimum of 12 hours per day or until all work was completed for that day, in addition to a minimum of six hours on Saturday, it is undisputed that a degree of flexibility had been allowed. In practice, the witnesses agreed that employes who considered themselves done for the day often would depart, and on a number of instances employes would not make themselves available for this quantity of overtime, without penalty from the Company.

On December 23, 1992 Company owner Erhard Garni posted an announcement that the Company's Christmas party for all employes would be held at 2:00 p.m. During that day, a crew was working on a critical piece of material which needed to be put in place the following week at its Chicago site. Because of this and other work, the party was moved back to 4:00 p.m. in order to get in as much work as possible. During most of the day, Matt Garni, who was responsible for deciding whether overtime would be worked, was out of the area on other business. Shortly before 3:00 p.m. Matt Garni returned to Random Lake. Time sheets filed as an exhibit by the Company show that some employes left the site about 3:00 p.m., not all of whom later appeared at the party. Shortly after 3:00 p.m., Matt Garni determined that overtime would be worked on the following day (Christmas Eve). Previously, the assumption had been that the plant would not be in operation that day, and Garni testified that he assumed that many employes would not want to work. Garni testified further that at the party his father circulated the news that overtime was available for the following day, and that about 20 people were present. Garni stated that the Company would have been happy to get as many workers as were prepared to show up for work on December 24, 1992.

It is undisputed that a number of employes did appear for work on December 24, but that several senior employes had not heard the announcement (because they were not at the party), were not otherwise notified of the availability of overtime, and did not appear. There is no dispute that normally overtime is offered by seniority, and that for the past three years the usual method has been by Matt Garni posting a notice that overtime is available, and employes putting an X next to their names on a seniority list next to the notice. Matt Garni decides how many employes are needed, and then draws a line under the last name needed. In this instance, steward Allan Retzlaff testified that he felt Matt Garni still had time to post a notice on December 23, because as he was leaving, about 3:00 p.m. another employe asked him whether there was overtime, and the following week, the same employe told

him that right afterwards he had gone into Matt Garni's office, asked about work and Matt Garni had told him "yeah, we're working tomorrow." At least one employe, Regan Schmidt, testified that he would have worked if he had known that there was such work available; without objection from the Company, Tom Klein identified Roger Ardisana (unavailable to testify because of surgery) as also having stated that he would have worked on the day in question if he had known about the work.

There is also no dispute that Matt Garni did production work on December 24, mixing the concrete to be used in the panel in question. Garni testified that he had expected that the five employes working on that panel would not have it set up in time to do the casting that day, but that at 10:00 a.m., one of the employes called out that "this thing is ready to go". Matt Garni had his son with him, and Erhard Garni agreed to take the boy away so that Matt could mix the concrete involved. Garni testified that Ardisana was not capable of mixing concrete at the time because he was not trained for that until later, but admitted that Keith and Roger Meyer were qualified to mix concrete and were not working on that day. The mixing took approximately four hours, but around noon four employes left while Matt Garni continued to work.

Matt Garni testified that he was entitled to work under Article 10.7 because Andrew Garni, who normally takes advantage of that clause, was not working that day since he was on vacation. Matt Garni also testified that in his view the work did not violate Section 19.6 of the Agreement, because this work did constitute an emergency in view of the schedule and the potential cost of not getting the work done on that day. Garni testified that the controlling factors were that a sealer had to be applied a minimum of three days after pouring the concrete, and that if the panel was cast on Thursday, Tuesday of the following week would be the earliest day that the concrete could be sealed and shipped. Garni testified that the Company was responsible for the cost of a crane, at $9,500 a month, which was waiting in Chicago for this particular panel, and that the longer the crane was held the higher the cost would be to the Company.

The Union contends that the Company failed to notify properly all employes concerning the overtime work available for December 24. The Union argues that if the Employer had either posted a notice, even at the late hour of the day, or made some attempt to telephone the employes by seniority, the Union would have been satisfied that the Company's obligations were met. The Union argues that asking employes at the Christmas party was not proper notification, and notes that two junior employes worked while several senior employes did not. With respect to the bargaining unit work performed by Matt Garni, the Union argues that Garni had ample time to at least try to call the employee who normally does the mixing of concrete, and the situation therefore did not constitute an emergency. The Union further argues that with respect to Article 10.7, that article was designed to allow a son of Erhard Garni to work during school vacations, implying that the son in question would be a student. The Union points out that Matt Garni is a supervisor of the Company who does not take School vacations.

In reviewing the slightly chaotic circumstances in which the work in question was done, I find that Article 19.6 allows the Company sufficient flexibility that the contract was not violated. Essentially, I conclude from this record that the Company acted in good faith and that it made a reasonable attempt to secure the senior employes within the unusual circumstances of this case. In particular, I note that experience had apparently shown that a number of employes did not wish to work beyond the normal quitting time on December 23, and indeed that several of those who subsequently expressed a wish to have been called for overtime did not specifically ask management for such work, or even stay until the Company's extended quitting time of 4:00 p.m. The records

of telephone calls made from Matt Garni's car demonstrate that he did not return to the plant until shortly before some of those employes left, and it is clear that the decision to work the following day was made at the last minute. Given the expectation - reasonable based on the evidence presented - that few employes would wish to work on Christmas Eve, this constitutes both evidence of good faith and an exception to normal posting expectations. Under normal circumstances, oral notice given casually at a party would not be sufficient within these parties' past practice. But under these circumstances, it was not an unreasonable response to conditions, and I do not therefore find it to constitute a violation of the implied seniority provisions of the Agreement.

A similar conclusion attaches to Matt Garni's work the following day. I find it unnecessary to address the question of whether Article 10.7 of the Agreement would allow Matt Garni to perform such work. It is clear that on its face there are two ways to read this clause; it could refer to any son of Erhard Garni, or to a particular designated son without being instantly transferrable to another (Erhard Garni has three sons, one of whom apparently never works for the Company). But with respect to Article 19.6, the unrebutted testimony of Matt Garni demonstrates that he was surprised at the efficiency with which the crew prepared the panel in question, and had not anticipated being able to pour the concrete on that day. This kind of sudden opportunity, with its inherent prospect of saving the Company some expensive crane time, is the flip side of the economic coin from the usual definition of an "emergency", in which it becomes mandatory to do something at the last minute and under unusual circumstances in order to avoid an unforeseen expense. But the economic motivations are the same, and the flexibility allowed the Company under Article 19.6 therefore appears to apply in this instance also. Simply put, the Company was presented with an opportunity at the last minute which would have delayed an entire crew if Matt Garni had then gone to call in another employe, not present at the plant, to come to work in a period when many other employes had already expressed a disinclination to work. Under these unusual circumstances, I do not find Article 19.6 to be violated. That, of course, does not mean that
a violation of Article 19.6 would not be created if the Company were to act the same way under less unusual circumstances.

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 not awarding overtime on December 24, 1992 by seniority.

2. That the Company did not violate the collective bargaining agreement by giving bargaining unit work on December 24, 1992 to a supervisor.

3. That the grievance is denied.

Dated at Madison, Wisconsin this 23rd day of June, 1993.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator