BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
EGGERS INDUSTRIES, INC.	Case 41 No. 49099 A-5060
and	
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2832	

Appearances:

Mr. Gary Milske, Personnel Manager, Eggers Industries, on behalf of the Employer.

Mr. Conrad Vogel, Assistant Business Representative, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Employer and the Union respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was designated by the Commission to hear the matter. Hearing was held on August 5, 1993, in Neenah, Wisconsin. A stenographic transcript of the proceedings was made and received on August 13, 1993. The parties completed their briefing schedule on September 22, 1993. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties at hearing stipulated to the following issue:

> Was the Employer correct in not asking Tom Eake to work overtime on December 1, 1992?
>
> If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE:

> ARTICLE FOUR - WAGES
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> . . .
>
> 4.9 It is recognized that from day to

day the needs of the business may require that overtime beyond the normal work schedule be

> worked by entire departments, or a few employees in certain departments. Department managers will first seek volunteers from within the department to fulfill such overtime requirements. If there are not enough volunteers to meet the overtime requirements, the department managers shall notify employees of such overtime assignments during the forenoon of the day involved. Overtime work shall first be assigned to the employee or employees who normally perform the work in question, and if such employee is unable to perform the assigned overtime work, then such overtime work will be assigned to the employee or employees with the most seniority in their department.

BACKGROUND:

The facts in the instant matter with a few exceptions are undisputed. Eggers, Industries, Neenah Division, is a Wisconsin corporation engaged in the manufacture of solid core architectural wood doors at its Neenah plant. The grievant Tom Eake and another employe, Mark Femili, were working the night shift on the Mann Russell machinery at the Neenah facility. This piece of equipment takes two employes to operate. Eake was not the person who normally operates the Mann Russell along with Femili. Eake is classified as Utility II and fills in for other employes on an as-needed basis. Another Utility I employe, Tim Jensen, was also working on the shift. Both Utility employes were substituting where needed.

Eake began the shift on the Mann Russell filling in for the assistant electronic operator on the night in question. Approximately five hours into the shift the Employer decided to run another piece of equipment, the Danckert, to cut door cores. Because Eake knew how to operate the Danckert and Jensen did not, Jensen was assigned to run the Mann Russell while Eake was switched to the Danckert. Jensen completed the shift on the Mann Russell.

A dispute exists as to exactly when the Employer determined that overtime on the Mann Russell would be necessary. The Employer argues that the decision was not made until after the 10:00 p.m. break. The Union asserts that prior to the 6:30 p.m. lunch break, the Employer knew that it would need overtime on the Mann Russell. Femili testified that he was asked to work overtime on the Mann Russell prior to the 6:30 p.m. lunch break. Will Hoerning, the second shift supervisor, testified that he had a discussion at about 3:00 p.m. in the plant superintendent's office

regarding whether or not overtime should be planned for the Mann Russell if enough materials had been cut on the Danckert to warrant such overtime. Hoerning stated that the actual call with respect to overtime was not made until after the 10:00 p.m. break. He asked Jensen, who was working on the Mann Russell by then, to work the overtime. Eake grieved the assignment of overtime to Jensen.

In its grievance response, the Employer noted the following:

> Mr. Eake worked on the Mann Russell for five (5) hours on December 1, 1992. At that time, Will Hoerning moved him to the Danckert to finish up the shift and put Tim Jensen on the Mann Russell. This move was necessary because Tim could not operate the Danckert. Since there was overtime required on the Mann Russell, Tim Jensen was asked to work it because he was the last one working on that job.
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> This is the first time I've ran [sic] into someone shifting jobs in the middle of a shift and losing overtime because of it. However, we often transfer people onto jobs for less than a shift and then have them work overtime over senior employees because they were working on that job. Based on this precedent we feel that the overtime was awarded properly.

The Employer admits that at the time it answered the grievance it was unaware of any previous instances where employes switched jobs in the middle of the shift and the overtime was awarded to the last person performing the job. At the hearing, it attempted to adduce evidence to this effect which it had discovered on the day of the hearing. Both the Union and the Employer admitted that this was the first instance of employes being switched in the middle of a shift and the award of the ensuing overtime resulting in a problem.

POSITIONS OF THE PARTIES:

Union

The Union asserts that any Employer contentions as to the existence of a past practice should be disregarded by the Arbitrator because of the Employer's grievance response and the fact that the Employer never informed the Union as to the existence of any of these alleged practices prior to the hearing.

It points out that the Employer asked the other employe who worked on the Mann Russell to work overtime prior to the 6:30 p.m. lunch break. Eake should have been asked to work overtime at that point too, in the Union's view. To permit the Employer to refuse him overtime penalizes the employe for having the job knowledge to perform a variety of jobs. According to the Union, "management could avoid giving the overtime to a particular individual merely by transferring him to another job prior to assigning the overtime."

If the contract had been followed, the Union asserts, overtime would have been assigned prior to the 6:30 p.m. lunch, and Eake would have been asked to work the overtime because he was working on the Mann Russell at that time. The Union requests the Arbitrator to consider the facts and make Eake whole for all losses.

Employer

According to the Employer, the Union must show that the Employer failed to assign the overtime to the employee who normally performs the work or to the employe with the most seniority. Neither Eake nor Jensen normally performs the job so they are not eligible for overtime on that basis. The Employer maintains that Hoerning did not determine that enough material would be cut on the Danckert to run the Mann Russell overtime until about 10:00 p.m. Only at that point was overtime found to be necessary.

The Employer stresses that Hoerning, Jensen, and employe Duane Sternhagen and the Union's own witness, Mark Femili, testified that the past practice has always been to offer any overtime to the employe performing the job at the end of the shift if the person who normally performs the job is not available. In this case, the person performing the job at the end of the shift was also the senior employe, Jensen.

Because the Union has been unable to show that the Employer has ever awarded overtime to an employe who does not normally perform the work, who only worked the first half of a shift, and was the junior employee, the arbitrator should find that the Employer did not violate the collective bargaining agreement.

DISCUSSION:

Any analysis of the allocation of overtime must begin with the applicable contract language. Article Four, Section 4.9 is relatively straightforward. It provides that the overtime shall first be assigned to the employe who normally performs the work in

question and if that employe is unable to perform the assigned overtime, the work shall be assigned to the employee with the most seniority in his/her department. This language directly addresses the instant situation. The employe who normally performs the work, i.e. operating the Mann Russell along with Femili, was not performing it that night. Neither Jensen or Eake normally perform the work. Jensen has more seniority than Eake. Assuming that no one with more seniority than Jensen was available to operate the Mann Russell overtime, the Employer's action comports with the dictates of Section 4.9.

Both parties acknowledge the existence of a past practice with respect to overtime allocation. The parties agree that, in the absence of the employe who normally performs the work, when another employe is assigned to a job, he will be assigned the overtime at the end of the shift. This practice, as it exists, is a modification of the last phrase of the last sentence of Section 4.9 because it does not comport with the contract language, inasmuch as Section 4.9 requires the most senior employe in the department to receive the overtime in such a situation.

Given the existence of such a practice, the dispute centers around what happens to overtime allocation when two or more employes who do not normally perform the work are assigned to the job during the same shift. The Employer maintains that the past practice extends to that situation. It claims that the last employe performing the work receives the overtime. The Union maintains that no such past practice exists, in this circumstance, pointing to the Employer's grievance response. The Union stresses that this is a case of first impression because the situation has never arisen previously to its knowledge.

The undersigned agrees that no past practice exists with respect to the fact situation presented nor does the acknowledged past practice address this issue. The Employer admits that it was not aware of any instances of similar overtime assignment prior to the date of the hearing and it has not proven that the Union was ever aware of such an extended practice. The Employer has been unable to demonstrate the existence of such a practice or the extension of the acknowledged practice to the events set forth herein.

Because the undersigned finds that no past practice exists which would modify Section 4.9 in situations where two or more employes who do not normally perform the job are working, Section 4.9, as written, applies. Any claim that Eake has to the work must be premised upon the existence of a past practice which somehow modifies the clear dictates of Section 4.9. Since there has been no showing that any extended practice existed, it must be concluded that Eake has no claim.

Section 4.9 succinctly provides that the most senior employe in the department is entitled to the overtime work when the employe who normally performs it is unable to do so. If Jensen is the most senior employe, the Employer did not err when it assigned the overtime to him. Under the express contract language, it is immaterial when, during the shift, the Employer assigned the overtime. Timing as to the decision to work overtime does not control who is to receive it. Section 4.9 dictates that the most senior employe in the department will receive it.

If the Union is not satisfied with the provision of Section of 4.9 as it relates to instances where two or more employes who do not normally perform the work are assigned within the same shift, it is free to bargain a modification of the language during the next negotiations. Accordingly, it is my decision and

AWARD

The Employer was correct in not asking Tom Eake to work overtime on December 1, 1992. It did not violate the parties collective bargaining agreement.

The grievance is denied and dismissed in its entirely.

Dated at Madison, Wisconsin this 21st day of October, 1993.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator