BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL UNION NO. 695	Case 42 No. 49858 A-5133
and	
GATEWAY FOODS	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law
Rider, Bennett, Egan & Arundel, Attorneys at Law, by Mr. Mark W. Schneider and Mr. Dale L. Deitchler, on behalf of Gateway Foods.

ARBITRATION AWARD

Teamsters Local Union No. 695, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Gateway Foods of LaCrosse, Wisconsin, hereinafter the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Company subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on February 22, 1994 in LaCrosse, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by April 13, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues to be submitted to the Arbitrator and have agreed that the undersigned will frame the issues to be decided.

The Union would state the issues as follows:

1. Did the Company violate the provisions of Article 3.3 of the collective bargaining agreement when it did not pay employees time and a half for all hours worked after 32 hours in a calendar week and in which a holiday fell?

2. If so, what is the appropriate remedy?

The Company would state the issue as being:

> Did the Company violate the Agreement with respect to employees who worked on July 4, 1993, by not paying these employees overtime (time and a half) for hours worked during their work week in excess of 32 hours?

The undersigned concludes that the issues to be decided may be stated as follows:

> Did the Company violate Section 3.3 of the parties' Collective Bargaining Agreement when it did not pay employes who worked on July 4, 1993 time and one-half for all hours worked in excess of 32 hours in the calendar week in which July 4th fell?
>
> If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1992-1995 Agreement are cited:

ARTICLE 2 - CONDUCT OF THE BUSINESS

> 2.2 Company Authority. The conduct of the business, the management and supervision of all procedures and operation is vested exclusively in the Company. The selection and direction of all working forces is vested exclusively in the Company except as modified by this Agreement and any supplementary agreements that may hereafter be made.

. . .

ARTICLE 3 - HOURS AND OVERTIME

> 3.1 Work Week. For the purpose of establishing overtime provisions, the work week shall consist of either forty (40) hours per week divided into five (5) consecutive work days or four (4) ten (10) hour work days. Each standard work shift shall consist of eight (8) hours per shift during five (5) day work weeks or ten (10) hours per shift during four (4) day work weeks, and any other shift where the Company and Union agree to an alternate work week and/or work day. For purposes of this Collective Bargaining Agreement, a shift commencing at 10:45 p.m. on Sunday shall be deemed to be a Monday shift.
>
> The following shifts will be utilized at the inception of the contract with the understanding that the Company continues to have the right to determine shifts, shift days, and shift hours. All bids will be for a four month period. First, second, third and fourth shift hours shall remain the same at the inception of the contract. If shift starting times change more than one hour, they shall be rebid.
>
> 3.2 Overtime. All regular full-time employees shall be paid time and one-half (1-1/2) for all work performed in excess of forty (40) hours in any one (1) week or in excess of eight (8) hours in any one (1) day

during a work week consisting of five (5) eight (8) hour days or for all work performed in excess of ten (10) hours in any day during a work week consisting of four (4) ten (10) hour days. Time worked on holidays, as defined in Article 5 of this Agreement, shall be paid at two (2) times the employee's rate of pay. Regular full-time employees who work a four (4) day, ten (10) hour day, work week shall be paid at time and one-half (1-1/2) for all work performed on the fifth (5th) and sixth (6th) days of work. Such employees shall receive two (2) times their regular rate of pay for work performed on the seventh (7th) consecutive day of their work week.

. . .

3.3 Overtime During Holiday Weeks. Overtime at the rate of time and one-half (1-1/2) shall be paid for all work performed over thirty-two (32) hours in any calendar week in which one (1) holiday falls and over twenty-four (24) hours if two (2) holidays fall within that calendar week, except as provided in Section 3.2 with respect to work performed on a holiday, or as provided for employees working a shift of four (4) ten (10) hour work days.

3.4 There will be no duplicating or pyramiding of overtime pay and/or premium pay on any day or during any work week.

. . .

ARTICLE 5 - HOLIDAYS

5.1 Holiday Pay. All regular full-time employees on the seniority list as of the date of the holiday who are then working a shift consisting of five (5) eight (8) hour days shall receive eight (8) hours of straight-time pay, and all regular full-time employees on the seniority list as of the date of the holiday who are then working a shift of four (4) ten (10) hour days shall receive ten (10) hours straight-time pay for the following holidays on which no work is performed:

New Year's Day
Labor Day
Memorial Day
Thanksgiving Day
Fourth of July
Christmas Day
Employee's Personal Holidays (3)

. . .

5.2 If a holiday is celebrated on a non-scheduled work day, all regular full-time employees then working a shift consisting of five (5) eight (8) hour days shall receive an additional eight (8) hours pay at their regular shift rate in addition to the regular forty (40) hours. If a holiday is celebrated on a day which is a non-scheduled work day for those working four (4) ten (10) hour days, all regular full-time employees then working a shift consisting of four (4) ten (10) hour days shall receive an additional ten (10) hours pay at their regular shift rate in addition

to the regular forty (40) hours.

5.3 Eligibility. To be eligible for holiday pay, a regular full-time employee must work his or her full scheduled work day both before and after the holiday, except in case of illness verified by a doctor or other absence acceptable to the Company, and also must work the week of the holiday. Employees will not be ineligible for holiday pay if they are tardy up to one (1) hour on the day before or after the holiday.

5.4 Holiday Premium. All regular full-time employees who are required to work on a holiday, and qualify for holiday pay, shall be paid two times (2x) the employee's regular rate of pay.

. . .

ARTICLE 9 - GRIEVANCES, ARBITRATION AND STEWARDS CLAUSE

. . .

Step 4.

A. Arbitration. In the event either party is dissatisfied with the result of the above procedure, either party may appeal to the Wisconsin Employment Relations Commission for a final decision, and the parties agree that the decision of the Wisconsin Employment Relations Commission shall be final and binding. Appeal to the Wisconsin Employment Relations Commission shall be made within two (2) calendar weeks after the discussions have ended between the Employer and the Business Representative of the Union.

B. Powers of the Arbitrator.

1. It shall be the function of the Arbitrator to make a decision in cases of alleged violation of specific Articles and Sections of this Agreement.

2. He shall have no power to add to, subtract from, disregard, alter or modify any of the terms of this Agreement.

3. There shall be no appeal from an Arbitrator's decision. It shall be final and binding on the Union, its members, the employee or employees involved and the Company.

. . .

LETTER OF UNDERSTANDING

SHIFTS

	SUN	MON	TUES	WED	THUR	FRI	SAT
4th Shift	30ee's	30ee's			30ee's	30ee's	

5th Shift 15ee's15ee's15ee's15ee's

6th Shift 15ee's15ee's15ee's 15ee's

> The 4th, 5th and 6th shifts would each be four day, ten hour days. Shift times would be 6:45 a.m. - 4:45 p.m.
>
> . . .
>
> The Company shall continue to assign overtime consistent with past practice.

BACKGROUND

The Company is a wholesale grocery distributor located in LaCrosse, Wisconsin. The Union is the exclusive collective bargaining representative of certain employes of the Company employed in its dry grocery warehouse. The Company and the Union have a long-standing collective bargaining relationship.

During negotiations for the current Agreement both parties made proposals regarding the assignment and payment of overtime and those matters were discussed at the table. Sometime after the parties had reached agreement on the new contract, but before it was signed, a number of grievances arose regarding assignment to shifts and the assignment of overtime. In resolving those grievances, the parties agreed to a "Letter of Understanding" which they appended to the new Agreement. The last sentence of the Letter of Understanding states, "The Company shall continue to assign overtime consistent with past practice."

In February of 1993, the parties settled 18 pending overtime grievances. The settlement agreement read, in relevant part, as follows:

> This settlement agreement, dated the 18th day of February, 1993 by and between Gateway Foods, Inc. and Teamsters Local Union No. 695, sets forth the agreement of the parties settling the identified grievances as follows:
>
> 1. The Company shall continue to schedule non-shift overtime in accordance with the attached document.
>
> . . .
>
> 4. The Company shall continue its practice of paying employes double time for all hours worked on the seventh (7th) day of their work week.
>
> 5. The parties agree that this document is not meant to change or modify any other rights existing under the currently effective bargaining agreement between the parties.
>
> . . .

In 1993 the Fourth of July fell on a Sunday and a number of employes worked on that holiday and received double time for those hours. Employes who did not work on the Fourth of July received holiday pay for that day. Consistent with its long-standing practice, the Company did not pay time and one-half for hours worked in excess of 32 hours that week to those employes who

had worked on the Fourth of July.

The Company's practice with regard to paying time and one-half under Section 3.3 of the Agreement has been (1) that the holiday must fall within the employe's work week, as opposed to "calendar week", and (2) that even if the holiday falls within the employe's work week, if the employe works on the holiday and receives double time under Sections 3.2 and 5.4, the employe is not entitled to time and one-half for hours worked in excess of 32 hours for the work week. It is also the practice that holidays are considered unscheduled work days for the purpose of assigning overtime.

A grievance was filed on behalf of those employes who worked on July 4, 1993 and were not paid time and one-half for the hours worked in excess of 32 hours in that calendar week. This was the first time the Company's practice had been grieved. The parties attempted to resolve the dispute, but were unsuccessful and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the language of Article 3, Sec. 3.3, of the Agreement is clear and unambiguous and requires overtime pay for employes who work over 32 hours in any calendar week in which one holiday falls. The arbitrator may neither ignore clear cut language, nor legislate new language. Parties to a contract are charged with full knowledge of its provisions and the significance of its language. Citing, Elkouri and Elkouri, How Arbitration Works, (4th Ed. 1985) pp. 348-349.

The Company's assertion that the holiday must fall within the employe's work week is contrary to the intent and the plain language of Section 3.3, which requires only that the holiday fall within the same calendar week 1/ that an employe works where the employe works over 32 hours. That contractual right is not nullified if the employe works on the holiday and receives double time pay for those hours pursuant to Sections 3.2 and 5.4. While the Agreement must be construed as a whole, the Company cannot take requirements and wording from other provisions, such as Sections 3.2 and 5.2, and insert them into Section 3.3. Those provisions do not apply to the circumstances addressed in Section 3.3. Section 3.3 memorializes the parties' recognition that there is a difference between regular overtime pay and regular holiday pay, and the instant situation. The presumption in construing contract language is that where there is a conflict, specific language governs over general language. Section 3.3 specifically addresses this situation and the provisions of Section 3.2 or 5.2 should not be implied into Section 3.3.

Regarding the Company's assertion of a past practice, the Union contends that a practice cannot be used to modify the plain and unambiguous language of the Agreement. Citing, How Arbitration Works, supra, at p. 454. A corollary to that principle is that failure to grieve past violations does not waive a party's right to insist upon compliance at a later time. Citing arbitral precedent, the Union asserts that since the contract language is clear, there is no merit to the contention that the failure to grieve past violations amounts to acquiescence in the practice. In order to establish that a past practice exists, it must be shown to be: (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Citing, How Arbitration Works, supra, at p. 439. To be binding then, the practice must

1/ The Union cites Black's Law Dictionary, (5th Ed. 1979), defining calendar week as a block of seven days registered on the calendar beginning with Sunday and ending with Saturday.

be an agreed upon way of doing things, and that crucial element of agreement is missing in this case.

Next, the Union contends that neither the settlement agreement in February of 1993 on 18 pending grievances, nor the Letter of Understanding in the Agreement are dispositive of the issue in this case. The Letter of Understanding states that "the Company shall continue to assign overtime consistent with past practice." That language does not address an employe's right to overtime during a calendar week in which a holiday falls. Similarly, the settlement agreement on the 18 grievances does not speak to the issue in this case. Those grievances involved the issue of the assignment of overtime among shifts and whether the Company had to continue its practice of paying double time on the seventh day of an employe's work week. Neither the settlement agreement, nor the Letter of Understanding evince an intent by the parties not to follow Section 3.3 of the Agreement.

The Union requests that the grievance be sustained and that all employes who worked in excess of 32 hours during the calendar week of July 4, 1993, be paid the appropriate amount of back pay for the overtime hours worked.

Company

The Company takes the position that it did not violate the Agreement. It contends that since this is a contract interpretation issue, the Union, as the grieving party, has the burden of proving that the Company violated the Agreement. It further contends that the Union has not met its burden of proving a violation. Rather, the evidence is to the contrary.

The Letter of Understanding in the Agreement authorizes the Company to continue to pay overtime according to past practice. In this case, the established practice is that the Company pays time and one-half for hours worked in excess of 32 hours in the work week only when the employe has not worked on the holiday. The Company cites essentially the same standard for establishing a binding practice as that cited by the Union. However, the Company, citing arbitral precedent, contends that acceptance of the practice may be presumed where there is a long-standing and consistent practice and no grievance has ever been filed regarding the practice. Here, the testimony establishes that the practice of paying time and one-half for hours in excess of 32 hours in a work week only where the employe has not worked on the holiday has been consistent over more than 20 years. The practice continued through the last three contracts and the wording of Section 3.3 was not changed during that time, nor was a grievance filed regarding the practice, even though a 20 year employe and Union trustee who has served on the Union's bargaining committee, Loren Molling, worked under the practice during that time.

The Company contends that the Letter of Understanding authorizes the Company to continue the practice in stating that, "the Company shall continue to assign overtime consistent with past practice." The right to continue to assign overtime consistent with past practice carries with it the right to pay overtime consistent with past practice. Thus, the Company has an express contractual right to pay overtime in a manner consistent with its practice.

The Company also contends that its interpretation of Section 3.3 of the Agreement is consistent with the Agreement as a whole. Conversely, the Union's interpretation of Section 3.3 ignores not only the Letter of Understanding, but also the express prohibition in Section 3.4 of duplicating or pyramiding overtime, and the definition of overtime in Article 3 tying it to the work week, as opposed to "calendar" week. The Union's interpretation allows an employe to recover holiday overtime pay twice for overtime worked pertaining to the same holiday. Under the Company's interpretation there is no duplicating of overtime because an employe only receives overtime pay under Section 3.3 if he does not work on the holiday. That employe receives holiday pay under

Article 5 for the unworked holiday and overtime pay for the hours worked in excess of 32 work week hours. Further, Article 3 repeatedly ties overtime to "work week", rather than to "calendar week".

The Company further contends that, assuming arguendo, the Letter of Understanding does not expressly require the Company to continue its practice, any ambiguity in the Agreement regarding the payment of overtime in this situation is resolved by the Company's practice and the February, 1993, settlement of the 18 overtime grievances. In construing a labor agreement, the goal is to effectuate the intent of the parties. Where intent is unclear or ambiguous, arbitrators routinely rely on past practice and bargaining history to determine intent. Citing, How Arbitration Works, supra, Chapter 12. In this case, those two elements establish that the parties intended that the Company continue its practices regarding payment of overtime. The Company's practice is long-standing and no grievance had been filed before this regarding the practice. Further, negotiations regarding the settlement of 18 overtime grievances in February of 1993 clarified the parties' intent that the Company continue to pay overtime in accord with prior practice. The settlement agreement indicates the parties' intent to continue to follow the practices concerning the payment of overtime, even though the particular practice in issue, which favored the employes, was not in accord with the Agreement. Now the Union is attempting in this case to apply a strict construction of the Agreement in order to discontinue a long-standing practice that favors the Company. According to the Company, the Union is attempting to "have it both ways".

Lastly, the Company asserts that if the grievance is sustained, any relief must be prospective in nature. Citing arbitral precedent, the Company contends that a party attempting to vary a practice that has gone unchallenged for a long period of time cannot recover retroactive relief, as it must first give the other party notice of its intent to assert its rights. Also, in this case, the Union only grieved the July 4th holiday and it was only at hearing that the Union finally focused its interpretation of the issue. Since the Union did not give the Company prior notice of its intent to challenge the practice before grieving July 4th, and did not grieve subsequent holidays, any relief must be prospective only.

DISCUSSION

The Union relies on Section 3.3 of the Agreement, asserting that the language of that provision is clear and unambiguous. The undersigned agrees. That provision, in relevant part, reads as follows:

> 3.3 Overtime During Holiday Weeks. Overtime at the rate of time and one-half (1-1/2) shall be paid for all work performed over thirty-two (32) hours in any calendar week in which one (1) holiday falls. . ., except as provided in Section 3.2 with respect to work performed on a holiday, or as provided for employees working a shift of four (4) ten (10) hour work days.

Under that provision, an employe who normally works eight hours per day, Monday through Friday, but who worked on Sunday, July 4th, would receive double time for the hours worked on July 4th (per Sections 3.2 and 5.4) and, assuming he worked his regular hours Monday through Friday, time and one-half for the hours he worked on Friday of that calendar week.

Contrary to the Company's assertion, the use of the term "work week" in the other sections of Article 3 does not require a conclusion that the term must be implied into Section 3.3. Section 3.3 specifically applies to overtime

during holiday weeks and expressly references "calendar week". 2/ Further, such an interpretation is not in conflict with the prohibition in Section 3.4 against duplicating or pyramiding overtime pay or premium pay. Although the Union's arguments ignore that prohibition, Section 3.3 expressly excepts the hours worked on a holiday, as Sections 3.2 and 5.4 require that those hours be paid at double time. Therefore, those hours worked on a holiday are not considered in computing the number of hours worked in the calendar week in which the holiday falls for purposes of Section 3.3.

It is also noted that the Company's interpretation of Section 3.3, via its practice, renders the provision a nullity. In its brief, the Company described its practice as follows:

> The Company's long-standing practice is two-fold with respect to payment of time and a half under Article 3.3. First, the holiday must fall within the employee's work week -- not the calendar week -- for the employee to qualify for time and a half (Tr. 23-24). 4/ Second, even if the holiday falls within the employee's work week, if the employee works on the holiday (and receives double time in accordance with Articles 3.2 and 5.4 of the Agreement) the employee is not entitled to time and a half for hours worked in excess of 32 hours for the work week (Tr. 23-24).
>
> . . .
>
> 4/ An employee's work week begins with the employee's first scheduled work day (Jt. Ex. 1, Article 3.1; Letter of Understanding; Tr. 28). Thus, the first day of the employee's work week is the first scheduled day of work (Tr. 28).

(Company Brief, p. 4)

For the sake of discussion, the Arbitrator will use as an example an employe working the first shift, Monday through Friday. Under the Company's first criterion, that the holiday must fall within the employe's work week, Section 3.3 would not apply to holidays falling on a Sunday or Saturday. Under the second criterion, the employe is not eligible if he worked on the holiday. Therefore, under the Company's interpretation, an employe will only receive time and one-half pay under Section 3.3 where the holiday falls within the employe's work week, e.g., Monday, and he does not work on the holiday. In order to work in excess of 32 hours in his workweek then, he would have to work over eight hours on one or more of the remaining four days in his work week. Section 3.2 already provides for overtime pay at the rate of time and one-half for all work performed in excess of eight hours per day for employes who work a five-day, eight hours per day, work week. Essentially, under the Company's interpretation, Section 3.3 is superfluous. Parties are presumed to have intended all provisions to have meaning and effect and an interpretation that renders a provision meaningless is to be avoided.

Also, contrary to the Company's contention, neither the last sentence of the Letter of Understanding appended to the Agreement, nor the settlement agreement of the 18 grievances in February of 1993 addresses the issue in this case. The sentence from the Letter of Understanding relied on by the Company states, "The Company shall continue to assign overtime consistent with past practice." The Letter of Understanding for the most part sets forth shift schedules and how vacancies on shifts will be filled. The assignment of overtime relates to who will be working the overtime and how that is to be determined. That is a separate issue from how overtime is to be computed and paid. As to the settlement agreement, it specifically addresses payment for

2/ The term "calendar week" is clear and not subject to interpretation. Given its plain meaning it refers to a week as set forth on a calendar, i.e., seven consecutive days, Sunday through Saturday.

hours worked on the seventh day of an employe's work week and also states that "The parties agree that this document is not meant to change or modify any other right existing under the currently effective bargaining agreement between the parties." Hence, neither document, on its face, establishes agreement by the parties for the Company to continue its practice regarding the computation and payment of overtime during a calendar week in which a holiday falls.

While the Company's chagrin at the Union's grieving of its long-standing practice may be understandable, the clear language of Section 3.3 of the parties' Agreement must prevail. However, the Company's argument that, given the Union's failure to challenge the practice over the years, any relief ordered should be prospective in nature, has merit in this case. Contrary to the Union's assertions, its acquiescence may be inferred from its failure to protest the Company's practice over the years; a practice that spanned the negotiations of at least three agreements that contained the existing language of Section 3.3. The undersigned agrees with those arbitrators that have held that where a party sits on its rights, leading the other party to believe that its actions are concurred in, the former is precluded from enforcing its rights without first putting the latter party on notice of its intent to do so. 3/ In this case, there is nothing in the evidence to indicate that the Union disclosed any intent to enforce the rights under Section 3.3., contrary to the Company's practice, until it filed the instant grievance subsequent to July 4, 1993. While the filing, and subsequent processing of the grievance to arbitration is sufficient notice of the Union's intent in that regard, it is so only with regard to future violations.

Therefore, it is concluded that to the extent the Company failed to pay employes who worked on July 4, 1993 overtime at the rate of time and one-half for all hours worked in excess of 32 hours in the calendar week containing July 4, 1993, excluding from the computation those hours worked on the holiday itself (for which the employe is paid double time), the Company violated Section 3.3 of the Agreement. The remedy in this case is limited to such a finding of a violation and a finding that this grievance constitutes sufficient notice to the Company of the Union's intent to enforce Section 3.3 of the parties' Agreement.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

3/ See, e.g., Del Monte Corporation, 86 LA 134 (Arbitrator Davison, 1985). See also, How Arbitration Works, supra, discussion at pp. 399-400.

The grievance is sustained. As set forth above, the Company is deemed to be on notice of the Union's intent to enforce the rights contained in Section 3.3 Overtime During Holiday Weeks, of the parties' Agreement. There is no retroactive relief granted. 4/

Dated at Madison, Wisconsin this 30th day of June, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator

4/ It is noted that the instant matter concerns the July 4, 1993, holiday and that it is the only dispute submitted in this arbitration.