

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

J.W. PETERS & SONS, INC.

Case 10
No. 51076
A-5235

Appearances:

Mr. Howard G. Lotharius, Representative, Teamsters Local Union No. 43, 1624 Yout Street, Racine, Wisconsin 53404, for the Union.

Mr. Steve McCloskey, Vice President of Manufacturing, and Mr. Richard Lewis, Human Resources Manager, J.W. Peters & Sons, Inc., 34212 West Market Street, Box 160, Burlington, Wisconsin 53105, for the Company.

ARBITRATION AWARD

Teamsters Local Union No. 43, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint an agency arbitrator to hear and decide the instant dispute between the Union and J.W. Peters & Sons, Inc. of Burlington, Wisconsin, hereinafter the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement^{1/}. The Company subsequently concurred in the request and the undersigned, William K. Strycker, Commissioner, was designated to arbitrate the dispute. A hearing was held before the undersigned on July 26, 1994 in Burlington, Wisconsin. The hearing was not transcribed and the parties submitted oral arguments at the close of the case. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

Issue:

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

The Union would state the issue as follows:

Was the contract violated when the Company called employes in

1/ The parties agreed to waive the thirty day time limit for the issuance of an award.

based upon seniority rather than the weekend sign-up sheet?

If so, what is the remedy?

The Company would state the issue as follows:

Was the contract violated when the Company used the snow-removal crew based upon past practice?

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

Did the Company violate the parties' collective bargaining agreement when it used the snow-removal crew to perform overtime on Sunday, February 13, 1994?

If so, what is the remedy?

Contract Provisions:

The following provisions of the parties' Prestressed Yard Agreement, June 1, 1992 - May 31, 1995, are cited:

...

ARTICLE 5
HOURS OF WORK

Section 1. Work Week. (a) The work week is to consist of forty (40) hours, Monday through Friday, and the standard work day shall be eight (8) hours per day.

Section 2. Overtime. One and one-half (1-1/2) times the straight time hourly rate shall be paid for all work performed in excess of eight (8) hours in any one day and for all work in excess of forty (40) hours in any one week. A maintenance crew may be scheduled on a Tuesday through Saturday straight time week. There shall be no pyramiding of overtime.

Section 3. Sunday and Holiday Work. Double the straight time hourly rate shall be paid for all work performed during the calendar day of Sunday and for shifts commencing for work on the holidays established under Article 24.

. . .

ARTICLE 6
OVERTIME

Section 1. All employees who are working at the end of the eight hour shift shall continue to work regardless of seniority if required by the Company for an additional two (2) hours, except in cases of proven emergency employee (sic) may be released by his supervisor. In no event may an employee leave their job without permission from the Company.

In the event work is available beyond ten (10) hours on a shift, the available work will be offered to the available senior employees in the yard provided they are qualified to perform the work.

In the event the available senior employee refuses the available overtime, the Company shall force from the available employees at the bottom of the seniority list provided they are qualified to do the available work.

In no case shall the Company be required to work with any crew composed of more than 50% of the employees in the crew having less than 90 working days seniority with the Company.

Section 2. For premium day overtime the Company shall post a proposed Saturday work schedule for an entire 30 day period which will be updated each Thursday by noon, if possible. Seniority shall be from the top to the bottom and the 50% requirement shall be in force. When additional employees are required for a premium day they shall be notified by noon on Friday or the day prior to the premium day. Any employee who has completed his shift and left the premises prior to noon on the date prior to premium days, such employee shall be obligated to notify the Company before leaving the premises of a place where they may

be located if premium day overtime becomes available (the employee is obligated to notify the employer of his whereabouts).

In case premium day overtime becomes available after employees have left the premises notice to these employees shall be by telephone with the Steward present (or a unit member in his absence) on paid time as a witness. If the employee does not answer the telephone the Company may proceed to the next employee to make the assignment. Employees who are not in attendance all hours on regular scheduled work days during the current work week are not entitled to premium day overtime work.

In the event employees are not in attendance all hours on regular scheduled work days during the current week as a result of absence due to attending a funeral of a member of their immediate family (parents, spouse, children, brother, sister, parents in-law, brother in-law, sister in-law, grandchild, grandparents, grandparents in-law), jury duty, premium day overtime shall be available to these employees. Employees taking vacation and wanting to be available for premium day overtime shall notify the Company in writing before leaving for vacation.

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ARTICLE 7 MANAGEMENT RIGHTS

The employer shall have the right to manage the business and direct the work forces, to assign employees to work; to determine the number of employees required; to plan, direct and control operations and production schedules; to control raw materials, semi-manufactured and finished parts which may be incorporated in the products manufactured at the locations determined by the employer; to introduce new or improved methods, tools, equipment or facilities, and to continue to establish, modify and enforce reasonable rules and regulations; and shall have such other normal and inherent rights of management as are not limited by this Agreement.

The Company retains the right to hire, suspend, discharge, demote, discipline for just cause, transfer and the right to relieve employees from duty because of lack of work provided that in the

exercise of these rights the Company will not violate any of the terms of this Agreement.

. . .

ARTICLE 14 OTHER AGREEMENTS

The employer agrees not to enter into any agreement or contract with his employees, individually or collectively, which in any way conflicts with the terms and provisions of the agreement. Any such agreement shall be null and void.

. . .

Background:

The Company, located in Burlington, Wisconsin, manufactures prestressed concrete components used in building high-rise parking structures. The Company has serviced contractors in the greater Chicago, Milwaukee and Madison corridors for over 50 years. The Company employs approximately 200 individuals and has three separate agreements with Teamsters Local 43. These agreements include an over-the-road contract, a sand and gravel contract and the instant prestressed yard contract.

Article 6 Overtime of the prestressed yard agreement identifies two types of overtime. Section 1 identifies how overtime is assigned during the week when work extends beyond an eight-hour shift. Employees working at the end of an eight-hour shift continue working regardless of seniority for an additional two hours. If work is available beyond ten hours on a shift, the available work is offered to available qualified employees, based upon seniority. Section 2 of the overtime article identifies premium day overtime as that which occurs outside of the normal work week. In order to qualify for premium day work, employees must sign a list indicating their desire and availability to work. In filling premium day overtime openings, the Company uses the list and offers opportunities on a seniority basis. The premium day overtime list is posted in lunch rooms. When possible, employees are provided notice of the assignment prior to the conclusion of their normal shift. If this is not possible, the Company is required to contact the employee by telephone with the union steward present. If the employee does not answer the telephone the Company may proceed to the next employee to make the assignment. Employees who sign the list are obligated to work on the days they so indicate. Except for specifically identified reasons, premium day overtime is only available for employees who work all scheduled hours during the week preceding the premium day overtime opportunity. The 1989 - 1992 contract provided that the Company, at its option, could assign premium day overtime to individuals who had not worked all scheduled

hours in the work week immediately preceding the premium day overtime. During the bargaining over the 1992-95 agreement, the Company's option to assign premium day overtime to employees who had not worked a complete week was eliminated.

The Company has maintained in practice a snow-removal crew list for many years. The maintenance supervisor develops the list each October by contacting senior qualified employees until the number needed is reached. Sand and gravel employees have the first opportunity with prestressed employees filling remaining needs. Generally the maintenance supervisor will include two extra individuals on the list to ensure that staffing needs are met. Members of the crew must be qualified to run equipment such as skid loaders and front end loaders. The 1993 - 1994 snow removal crew included two sand and gravel employees and the following prestressed yard employees: D. Boulden; William J. Spiegelhoff; H. Koenen; N. Daniels; S. Thuemmler; D. Umnus; William E. Spiegelhoff. J. Baumeister told maintenance supervisor, Wally Schenk, that he was not interested in serving on the snow removal crew when the list was compiled in October of 1993. Steward Tim Wagner, a nine-year employee, testified that he was unaware of the snow removal list.

Burlington, Wisconsin was hit by a significant snowfall over the weekend of February 12th and 13th, 1994. The Company determined that the snow needed to be removed on Sunday so that regular production would be uninterrupted on Monday, February 14, 1994. On Sunday morning, February 13, 1994, maintenance supervisor Schenk reported to the Company offices and began contacting snow removal crew members to report to work. He made these calls without a union representative present. The following employees from the snow removal crew worked eight hours, at their double time rate, removing snow: D. Boulden; W. J. Spiegelhoff; H. Koenen; N. Daniels and D. Umnus. These employees did not sign the premium day overtime list but did work all hours during the preceding week. On Monday, February 14, 1994, Steward Tim Wagner identified his concern to yard supervisor Gary Willingham that the five most senior employees who signed the premium day overtime list for Sunday and worked all hours in the preceding week were not called. These employees were T. Wagner, G. Bengtsson, P. Wagner, D. Koenig, K. Jahns.

When the matter was not resolved, a grievance was filed on February 15, 1994 asserting that the Company had violated the contract by using employees who had not signed the premium day overtime list. The grievance was denied by the Company thus leading to the instant proceeding.

Positions of the Parties:

Union:

The Union argues that the overtime contract language has changed recently. In the 1989-92 agreement, employees who had signed the premium day overtime list but did not complete

a full work week, could be assigned premium day overtime at the Company's option. The current agreement, 1992-95, eliminates the Company's option of assigning premium day overtime to individuals who have not completed a full work week prior to the premium day opportunity. The Union also argues that premium day overtime assignments are based upon the sign-up list. Employees must indicate whether they are interested in working Saturday or Sunday overtime prior to the opportunity. Individuals who do not sign the list are not eligible for premium day overtime. Individuals who do sign the list are obligated to work the premium day overtime if it is offered. The Company is obligated to select qualified individuals based upon seniority from those who sign the list. Steward Wagner, with nine years of service, and Business Representative Lotharius, were unaware of the list. While the Company argues that this is a past practice, the Union contends that in order for it to be a past practice it must be known to and accepted by the Union. The Union does not object to the use of the snow removal list for overtime opportunities that occur during the regular work week. In fact, had this snow removal opportunity occurred during the workweek, the Union would not have filed a grievance. In response to the Company argument that the premium day overtime list is only used for production overtime, the Union asserts that there is no such distinction within the labor agreement. The Union points to a time the premium day overtime list was used to select employees when a form needed to be repaired on a Sunday. The Union requests that the five most senior qualified employees identified in the grievance be paid double time for eight (8) hours, which is the time the five employees on the snow removal crew worked.

Company:

The Company contends that the premium day overtime list is only used for scheduled production work. Snow removal or events that could be considered "Acts of God" are not subject to the list. The Company further argues that there is a long-standing past practice of using the snow removal crew to remove snow. The Company asserts that the practice was known by the Union and the employees in general. The Company has regularly requested snow removal volunteers in October. The Maintenance Supervisor then calls in members of the volunteer snow removal crew by seniority when the need arises. Members of that crew need to be qualified equipment operators. Since the Company has not deviated from this practice, the grievance should be denied.

Discussion:

The issue to be decided in this case is whether the employer violated the collective bargaining agreement by using the snow removal crew to work overtime on Sunday, February 13, 1994. It is a recognized principle of contract interpretation for arbitrators to enforce the clear and unequivocal meaning of contract language. To do otherwise would usurp the role of the labor

organization and employer^{2/}. Article 6, Overtime, Section 1 identifies how overtime is to be assigned at the end of eight hour shifts on regularly scheduled work days. Section 2 addresses how premium day overtime is to be assigned. While the Company seemed to dispute that there was a requirement to use the premium day overtime list for a Sunday, it is clear to the undersigned that, under the terms of the contract, days other than regularly scheduled work days that would result in overtime payment are, by definition, premium days and therefore subject to those overtime provisions of the contract.

The Company argues that the premium day overtime list is used for scheduled production overtime, not snow removal or emergency "Act of God" occurrences. This argument must be rejected. The contract does not restrict these provisions to scheduled production overtime. Further, the contract does not provide for alternate means of assigning overtime because of snow removal or emergencies caused by "Acts of God". As there are no clauses identifying various types of overtime, the contract language as written must be interpreted as applying to all overtime that is performed by the unit. While it is clear that the vast majority of the overtime work performed under this contract is for production, Tim Wagner, Steward, testified without challenge that the premium day list was used when a form needed to be repaired on a Sunday, which was not production work.

It should be noted that individuals who sign the premium day overtime list are agreeing to accept offered overtime. Failing to accept and work overtime subjects the employe to disciplinary action. This strict requirement to work offered overtime or be subject to discipline helps insure that the Company will be able to respond to production needs as well as emergencies.

The Company also argues that it has a long-standing past practice of using the snow removal crew rather than the premium day overtime list. While arbitrators will use past practice to establish the intent of ambiguous language, unwritten practices can not be used to contradict a clear contract provision^{3/}. Although I have found the overtime language to be clear and unambiguous, some discussion of the Company's past practice argument is warranted. For many years, the snow removal crew list has been developed in October by soliciting qualified volunteers based upon seniority. When the need arises, individuals on the crew are offered snow removal opportunities based upon seniority. Much of the work performed by the crew is done on an overtime basis so that production is not negatively impacted. The Union acknowledged^{4/} at the hearing, the practice supports, and it is clear to the undersigned that the use of the crew for overtime opportunities that occur during normal work days does not violate the contract. The

2/ Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA 1985), p.348-349.

3/ Ibid at p.454.

4/ Both Business Representative Lotharius and Steward Wagner testified that using the snow removal crew for non-premium day, overtime did not violate the contract.

dispute is therefore narrowed to the use of the snow removal crew for premium day overtime.

In determining whether a practice is binding on the parties as an implied term of the agreement arbitrators consider whether the practice was (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^{5/}. while it is recognized that the snow removal crew has been used extensively to remove snow on an overtime basis during the workweek, no specific evidence was submitted supporting that snow removal by the crew occurred on premium days. The only evidence regarding non-production work being performed on premium days was the form repair instance, which was assigned by use of the premium day overtime list. Even if the contract language had been found to be ambiguous, the alleged practice of assigning premium day overtime to the snow removal crew without signing the list would not be binding based upon the above considerations and the record.

The Union argues that the change in the 1992 - 1995 contract requiring employes to work all hours on regularly scheduled work days during the current week, in order to qualify for premium day overtime, supports its position. The 1989 - 1992 contract provided that the Company could, but was not required to, select employes who had not worked the entire week for premium day overtime. The record supports that all of the employes on the snow removal crew, as well as the grievants, had worked the entire week before and would have been eligible for premium day overtime had they signed the list. The undersigned, therefore, concludes that the contract change has no bearing in this case.

Evidence did not establish that the grievants were not qualified to perform the snow removal work. Steward Wagner provided un rebutted testimony that the grievants were qualified to operate the equipment necessary to perform the work. Based upon the record, I conclude that the grievants were qualified to perform the snow removal duties.

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

AWARD

1. The grievance is sustained. The Company violated Article 6, Overtime, Section 2 by assigning premium day overtime to employes who had not signed the premium day overtime list.

2. The Company shall make the five affected grievants whole for all losses incurred as

5/ How Arbitration Works, at p.439.

a result of its violation.

3. I will retain jurisdiction for thirty (30) days solely with respect to the calculation of the remedy herein.

Dated at Madison, Wisconsin this 20th day of October, 1994.

By William K. Strycker /s/
William K. Strycker, Arbitrator