BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 7815, UNITED PAPERWORKERS
INTERNATIONAL UNION, AFL-CIO, CLC

and

FWD CORPORATION

Case 58
No. 52451
A-5349

Appearances:

Mr. Donald O. Schaeuble, International Representative, UPIU Region X, AFL-CIO, CLC, appearing on behalf of the Union.

Foley & Lardner, Attorneys at Law, by Mr. George D. Cunningham, appearing on behalf of the Employer.

ARBITRATION AWARD

Local 7815, United Paperworkers International Union, AFL-CIO, CLC, hereinafter referred to as the Union, and FWD Corporation, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the Employer, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Clintonville, Wisconsin on June 15, 1995. The hearing was not transcribed and the parties filed post-hearing briefs which were received on July 3, 1995.

BACKGROUND:

The basic facts underlying this case are not in dispute. The normal work hours set forth in Article II, paragraph (9) are 7:30 a.m. to 4:00 p.m. For as far back as employes can recall, when overtime was required, employes were permitted to come in early and work overtime prior to the start of the regular shift and overtime was commonly scheduled to begin at 5:00 a.m. on Saturdays and Sundays. In early 1995, the Employer changed this policy and required all overtime be scheduled at the end of the shift except where the use of equipment necessitated overtime before the shift. This change was confirmed in a memo dated March 1, 1995, to all supervisors by Kathy Leete, Industrial Relations Manager, which stated:

> To be competitive in this business we need to cut any unneccesary (sic) and extra costs out of our vehicles we can. Maintaining a schedule with as little overtime as possible is one way to hold costs down. Realizing that in some cases overtime must be worked to meet the schedule, the following will apply:
>
> All work that must be scheduled to be performed on overtime Monday through Friday, will be scheduled at the end of the normal work shift. (EXAMPLE; If 2 hours overtime are required they would be worked from 4:00 p.m. to 6:00 p.m.)
>
> All work that must be scheduled to be performed on overtime on Saturday or Sunday, will be scheduled in accordance with the normal work hours listed in the Labor Agreement. Work would begin at 7:30 a.m. those days. If more than 4 hours work is required there will be a lunch hour observed from Noon to 12:30 p.m. with work convening thereafter. Breaks will be observed at the same times as Monday through Friday.

On February 7, 1995, the Union filed a grievance asserting that the Employer violated the contract by discontinuing the longstanding past practice of employes working overtime prior to the start of their regular shift. The grievance was denied and appealed to the instant arbitration.

Issue:

The parties stipulated to the following:

> Did the Company violate the labor agreement when it changed the normal scheduling of overtime for some employes from the beginning of the shift to the end of the shift?
>
> If so, what is the appropriate remedy?

Pertinent Contractual Provisions:

> (14) All employees except boiler attendants, shall be paid one and one-half (1 /2) times the average hourly earnings for all time worked in excess of eight (8) hours in one (1) day, forty (40) hours in one (1) week, or for work done on Saturday. Boiler attendants will be paid one and one-half (1 1/2) times the average hourly earnings for work in excess of eight (8) hours in one (1) day, and forty (40) hours in one (1) week.

. . .

(113) The Company shall have exclusive supervision of the work, and the direction and disposition of its employees, to meet the needs of its business in the efficient conduct and operation of its plant, subject to the provisions of this Contract.

. . .

(119) It is mutually agreed that the foregoing Agreement is complete and shall supersede all previous Agreements between the Company and the Union or any other Union and shall be effective from October 1, 1992, to September 30, 1995, and shall continue from year to year thereafter unless written notice listing the changes desired is given by either party at least sixty (60) days prior to the expiration of the Agreement.

It is further understood that the application of this Agreement is governed solely by its contents and established past practices.

Union's Position:

The Union contends that the practice of allowing employes to perform overtime work prior to the regular starting time has been a long standing past practice. It claims that this has been a benefit to employes as well as to the Employer. It observes that the Employer explicitly requested employes to start their shifts early when overtime was involved as trucks had to be completed and it was in the Employer's interest that they be done at the start of the shift.

It submits that the Employer changed the practice because it had to concede on an earlier grievance over employes being allowed to take a 1/2 day of vacation and still work overtime. It urges that this too was a long standing past practice and the Union was able to show that there was an agreement to allow this past practice. It maintains that this did not sit well with the Employer so it no longer allowed employes to work overtime prior to their shifts, thereby eliminating the overtime and 1/2 day vacation situation. The Union argues that the Employer created this past practice and it has continued for years. It asserts that if the Employer wanted to change the past practice, it should do so in negotiations. It requests that the Employer be directed to reinstate the past practice of allowing the employes to have the option, when there is overtime, to work overtime before or after their shift.

Employer's Position:

The Employer contends that the alleged "past practice" asserted by the Union is nothing more than the way the Employer has chosen to schedule overtime in the past. It argues that under the management rights clause and accepted arbitral principles, it can change its scheduling methodology for the good of the business and the workforce. It observes that there is no specific contract language requiring overtime be scheduled before a shift. It points out that the Union admits the Employer has the exclusive right to determine whether or not any overtime will be scheduled at all. It claims that it logically follows that the Employer has the exclusive right to schedule the times when overtime is needed. The Employer insists that no uniform scheduling system was ever put in place and some worked before the shift because supervisors "allowed" it, others worked late and some, not at all. It alleges that there were no discussions between the parties that ever suggested that scheduling overtime was locked in stone and could not be changed. The Employer urges rejection of the Union's argument that the Employer never sought to eliminate pre-shift overtime in contract negotiations because the Employer did not have to negotiate to achieve what it already has.

The Employer contends that it had legitimate business reasons to eliminate pre-shift overtime because it adds extra expense to the product; pre-shift overtime creates a sense that overtime is routine and acceptable; absenteeism creates a genuine risk that no or little productive work will get done until other employes fill in; supervision and support is unavailable until the regular starting time; and post-shift scheduling allows a more accurate determination of the need for overtime. The Employer observes that the change has been effective in that overtime has been reduced and production has not fallen behind. The Employer points out that no employe has been required to work overtime; employes can refuse overtime; overtime is distributed according to the contract and is paid at the premium rate, thus no one has been disadvantaged. The Employer stresses that it is impossible to reconcile the Union's two positions; that the Employer has the right to decide to work no overtime at all and that the Employer is obligated to work overtime at some particular time.

The Employer relies on a number of arbitration decisions that overtime scheduling is a management right and that deciding when overtime is to be worked is up to management. It also points out that nothing in the agreement restricts the right of management to schedule overtime. It maintains that there is no past practice, and even if there were, it could be changed because it evolved simply as a result of the unilateral exercise of an established management right.

The Employer claims that the Union's reference to a resolution of a prior case is irrelevant because one party's use of a settlement against the other is counterproductive to the resolution of future disputes and should be given very little, if any, weight. The prior case, according to the Employer, involved a completely different scheduling issue, working overtime and taking a half day of vacation on the same day. It insists that the Union was able to document a prior agreement to continue their vacation/overtime scheduling and the Employer accepted the Union's position. It asks that the instant grievance be denied.

Discussion:

The resolution of the instant dispute depends on past practice. Both parties have cited many arbitration decisions on past practice with the Union's cases in support of its claim that this past practice is binding and the Employer's cases supporting its position that it is not. Thus, the issue here is whether the past practice of allowing pre-shift overtime is a binding past practice which must be maintained under Section (119) of the contract. The undersigned is persuaded that it is not. Scheduling of work, except as limited by the contract, is generally conceded to be a fundamental right of management. Section (113) provides that the Employer has the exclusive supervision of the work. A corollary to the right to schedule work is the right to determine whether or not overtime work will be scheduled. The Union concedes that the Employer has this right but asserts that when the Employer decides that overtime work is required, the past practice allows employes the option of working it pre-shift. Some "past practices" are binding and others are not. It is unnecessary to review all the cases cited by the parties. The Employer has cited the most persuasive case on this matter, namely Ford Motor Co., 19 LA 237 (Shulman, 1952), wherein the arbitrator made the distinction between a binding past practice and a non-binding past practice as follows:

> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion. The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character.

In Mallinckrodt Chemical Works, 38 LA 267 (Hilpert, 1961), the arbitrator held that a twenty year practice of scheduling pre-shift overtime could be changed. The arbitrator stated:

> IV. But, in the judgment of the Chairman, the matter, which is here before us, is to be viewed, as the Company contends, as **an overtime matter**; and it has already been several times held,

> by this Chairman, alone, that the Company may determine, in its sole discretion, whether or not to schedule overtime (Cases Nos. 60-51-M and 61-79-M). And there is no provision in the parties' agreement -- or, at least none to which the Union directed our attention -- which prevents the Company from scheduling, as it did in Building No. 7 for many years, "pre-shift" overtime, so-to-speak, or from dispensing therewith if and when, in the Company's judgment, such overtime is no longer "required," or "necessary."

Here, there is no express contractual provision on the scheduling of overtime and the Employer's past practice of allowing employes to choose to work pre-shift overtime was an exercise of management discretion and was the particular way that the Employer decided to schedule overtime and it could, in its discretion, decide to schedule it in a different manner. In short, how the Employer exercised its rights did not bind it to always exercise it the same way. It was the present way, not the prescribed way of scheduling overtime. The Employer was free to schedule overtime pre-shift or post-shift and how it did it in the past did not create a binding past practice. Inasmuch as allowing employes to work overtime prior to the start of the shift was not a binding past practice, the Employer's change to only post shift overtime in early 1995 did not violate the contract.

It should also be noted that the change from pre-shift to post-shift overtime need not interfere with the opportunity to work overtime. If overtime is required post-shift or for that matter, pre-shift, employes can still choose to work it or decline it. The employes still have the opportunity to work overtime offered by the Employer. The Union has argued that overtime has been eliminated but the Employer is free to decide whether there should be overtime worked and it could decide that none should be and that would be its right. It appears that the workforce has become more efficient because full crews and support staff are available post-shift so less overtime is necessary, but this just means that greater efficiencies have reduced overtime opportunities and this does not violate the contract.

The Union has asserted that the Employer changed its overtime scheduling policy because it had to concede on an earlier grievance that allowed employes to take a half day vacation and still work overtime. The evidence failed to demonstrate that the employes cannot take a half day vacation and still work overtime on the same day, even after the change in practice eliminating pre-shift overtime. The opportunity may be less but the settlement of the grievance remains the same and the evidence fails to prove that the Employer made the change in overtime scheduling because of the former half day vacation/overtime grievance.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Employer did not violate the collective bargaining agreement when it changed the normal scheduling of overtime for some employes from the beginning of the shift to the end of the shift, and therefore the grievance is denied.

Dated at Madison, Wisconsin this 15th day of August, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator