BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

WISCONSIN TRUSS, INC.

Case 5
No. 53057
A-5397

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Naomi E. Soldon, on behalf of General Teamsters Union Local 662.
Mr. Barry Bohman, Assistant Manager, on behalf of Wisconsin Truss, Inc.

ARBITRATION AWARD

General Teamsters Union Local 662, 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 Wisconsin Truss, Inc., 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 Christopher Honeyman, of the Commission's staff, was designated to arbitrate in the dispute. Due to Arbitrator Honeyman's unavailability, the undersigned, David E. Shaw, of the Commission's staff, was substituted as the arbitrator. A hearing was held before the undersigned on December 13, 1995 in Cornell, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by January 31, 1996. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the substantive issue. The Union would frame the issue as follows:

> *Whether the Company violated the collective bargaining agreement by removing the Grievants from their preferred shifts? If so, what is an appropriate remedy?*

The Company would frame the issue as being:

> *Does the Contract give the Union bargaining members the right to say that shift preference is contractual in all situations without*

management having the right to run the Company as it sees financially and efficiently correct?

The parties agreed that the Arbitrator would frame the issue to be decided. The Arbitrator concludes that the issue to be decided may be stated as follows:

Did the Company violate the parties' Labor Agreement when it removed the Grievants, Pake and Helland, from their preferred shift (third shift)? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1995-1997 Agreement are cited:

ARTICLE II
RIGHTS OF THE PARTIES

. . .

Section 6.

The Employer shall have all of the authority customarily and traditionally exercised by management except as that authority is limited by expressed or specific language in the provisions of this Agreement. Nothing in the Agreement shall be construed to impair the right of the Employer to conduct any or all aspects of its business in any and all particulars, except as expressly and specifically modified within the terms and provisions of this Working Agreement. Among other things which are not affected by this Agreement, except as may be limited hereinafter, are the increase and decrease of the workforce as dictated by operational requirements, the schedule of hours, shifts, and overtime for Employees, groups, or departments, and the maintenance of an efficient and properly disciplined workforce (and the formulation and enforcement of reasonable rules for that purpose). The foregoing management prerogatives will be undertaken and exercised by the Employer as necessitated by the requirements of the operations and the conduct of sound business principles as determined by the Employer.

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ARTICLE III
NON-DISCRIMINATION/HARASSMENT

Section 1.

The Employer and the Union are not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify Employees in any way to deprive any individual Employee of employment opportunities because of race, color, religion, sex, national origin, handicap or disability or engage in any other discriminatory acts prohibited by law.

Section 2.

The parties agree to cooperate in assuring that the rights of all Employees are protected and specifically that each and every Employee is provided a workplace free from illegal discrimination and/or harassment. Any Employee who feels their rights are being violated is encouraged to immediately notify management personnel to allow for an early, fair, and complete investigation to occur. In case of perceived alleged sexual harassment, an Employee, at his or her option, may bypass his or her immediate supervisor by bringing the complaint directly to upper level management.

Harassment consists of, without limitation by enumeration, unwelcome conduct, whether verbal, physical or visual, that is based upon a person's class status, such as sex, sexual orientation, color, race, ancestry, religion, national origin, age, disability, marital status, veteran status, citizenship status, or other group status. Harassing conduct further includes conduct that affects tangible job benefits, that interferes unreasonably with an individual's work performance, or that creates an intimidating, hostile or offensive working environment.

. . .

All Employees and Management are responsible for helping to avoid harassment. Employees who have experienced

or witnessed harassment, are to notify the Plant Manager immediately. In addition, Employees who are involved in sexual harassment or participate in creating a hostile work environment will also be subject to summary discipline up to and including discharge.

Section 3.

There will be no discrimination against any individual(s) for exercising their rights under Federal and State labor laws or any rights provided under this Agreement.

. . .

Section 4.

Any alleged denial of the aforesaid opportunities in violation of this Article may be submitted to the grievance procedure.

. . .

ARTICLE XV
DISCIPLINE OR DISCHARGE

Section 1.

The maintenance of discipline is a responsibility of management. Therefore, the right to discipline (including discharge) Employees shall remain with the Employer. The Employer agrees no Employee will be disciplined or discharged without just cause.

Section 2.

It shall be the exclusive right of the Employer to terminate a probationary Employee for any reason whatsoever, without his having any recourse to any provision of this Agreement.

Section 3.

Should any non-probationary Employee be given a disciplinary notice that is in effect a final warning, wherein further

violation of Employer policy could lead to termination of employment under the progressive discipline process, the Union will be given written notice of such action.

Section 4.

Depending on the seriousness of the incident and except for extenuating circumstances, the following procedure for disciplinary action involving suspension or discharge will be observed:

a.) A warning notice will be given the Employee. The notice may be verbal or written. If verbal, the supervisor must make a written notation of the warning in the Employee's file within two (2) weeks and advise the Employee.

b.) The warning period shall be one (1) year. In the event that a like or similar incident occurs within such notice period, the Employee may be suspended or terminated or such other action taken as the Employer determines appropriate. No warning notice need be given to an Employee before discharge or suspension if the cause of discharge or suspension is gross misconduct; dishonesty; theft; drunkenness; drinking on the job; sale, use or possession of illegal drugs; gross insubordination; or physical harm to person or property.

c.) The Employee may appeal the exercise of discipline be it suspension, discharge or demotion pursuant to the grievance and arbitration procedures of this Agreement.

. . .

ARTICLE XVII
ENTIRE MEMORANDUM OF AGREEMENT

The parties acknowledge that during the negotiations which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. This Agreement constitutes the entire Agreement between the parties

and supersedes all previous communications, representatives or agreements either verbal or written between the parties. Therefore, the Company and the Union, for the life of this Agreement, each waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement. If a law is changed that makes a change in this contract necessary, the parties will negotiate with respect to such change.

. . .

ARTICLE XXIV
SENIORITY SHIFT PREFERENCES

Qualified Employees will be allowed to express their preference for shift in accordance with their Seniority. The Employer will give due consideration to the Employee's request in determining staffing. Due consideration shall mean that, other things being equal, Seniority shall control in selection of Employees. Among "other things" to be considered by Employer are the Employer's need for adequate staffing on each shift and compatibility of the crew on the shift.

BACKGROUND

The Company operates a truss manufacturing plant in Cornell, Wisconsin and the Union is the recognized exclusive bargaining representative of the Company's production and maintenance workers at the plant. The existing Article XXIV, Seniority Shift Preferences, was first negotiated into the parties' 1993 agreement.

The grievants, Pake and Helland, had expressed their preference for the third shift and had subsequently been awarded that shift, which they were working in July of 1995.

Pake, who had started with the Company in July of 1991, had at one time held a Foreman position with the Company, but at the time of the grievance, in July of 1995, was working as a production worker. Helland had been with the Company since June of 1993 and was a production worker on the third shift at the time of the grievance. The Foreman on the third shift at the time of the grievance was James Karasch, who had first started with the Company in April of 1994. The position of "Foreman" is in the bargaining unit.

According to Karasch, he was constantly having conflicts with Pake and Helland, and

eventually on July 20, 1995 reported the problems to the Company's Plant Manager, James VerHulst. Karasch reported to VerHulst that Helland had come up to him and put his (Helland's) finger in Karasch's face and angrily swore at him and threatened him and told Karasch that he was not going to babysit him, and not to come to him for any reason. Karasch also reported that at one time, Helland had thrown his hammer and boards and cursed. Karasch also reported that Pake had reported to work a couple of times with alcohol on his breath, and that he (Karasch) had confronted him about it. Pake had allegedly responded that the Company could not dictate to him what he could do on his off time. Karasch indicated he felt that drinking affected Pake's ability to do his work and his behavior. Karasch also reported that he had got a flat tire on his vehicle and found a new nail in his tire that was of the same type used by the Company. Karasch indicated he had checked his parking area and found no nails. VerHulst had been aware of the problems for some time before Karasch came to him on July 20. In response to those problems between Pake and Helland and Karasch, VerHulst transferred the Grievants off of the third shift on July 21, 1995. The Grievants immediately filed the grievances challenging their removal from their preferred third shift. Other than the involuntary transfer off the third shift, no further action was taken against the Grievants by the Company.

In the first week of November of 1995, the Company went to a two-shift operation, day shift and night shift, and Karasch became the Foreman on the day shift. Pake had been awarded a Forklift Operator position on October 31, 1995, on the day shift.

The parties were unable to resolve the disputes and proceeded to arbitration on the grievances before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that the language of Article XXIV is clear and prohibits the Company from unilaterally removing employes from their shifts, and that even if the language is found to be ambiguous, bargaining history, the Hall grievance settlement, and past practice indicate the shift preference language limits the Company's ability to make unilateral transfers.

The Company placed a new Working Foreman, Karasch, on third shift. Apparently Karasch did not work well with the Grievants and the Company unilaterally placed Pake on first shift and Helland on second shift in violation of the Agreement. The Company concedes that it never disciplined the Grievants for the incidents that Karasch reported to management or for anything, other than removing them from their preferred shifts. That unilateral removal violated the Grievants' seniority rights and constituted discipline without just cause.

The Company's contention that because it may consider the "compatibility of the crew on the shift" it can remove an employe from the shift for interpersonal reasons, is erroneous in light

of Union Business Agent Mike Thoms' uncontroverted testimony that the term "compatibility" in that provision refers to employe classifications, and not employe interpersonal relationships. In negotiating the language the parties agreed to protect the Company's need to have the proper crew makeup, and never discussed or agreed to allow the Company's perception of interpersonal compatibility to infringe on the employe's right to maintain a shift by seniority. The parties' negotiations for the 1994-1995 Agreement also establishes that the term "compatibility" in Article XXIV refers only to the classification of employes. In those negotiations, the Company proposed to change the provisions so that it would have the right to transfer first-shift employes to the third shift because it felt that it would improve production and efficiency. By proposing the language, the Company indicated that it knew it did not have the right to make such unilateral changes. The Company's proposed change was rejected and the language remained the same. The Union also cites the settlement of a prior grievance of Hall, which protested the Company's failure to post available shifts for selection by seniority. In settling the grievance, the Company acknowledged that employes have the right to select shifts by seniority. The Union also alleges past practice supports its interpretation. Plant Manager VerHulst testified that the Company had removed employes from their shifts in the past, but has not done so since the parties had agreed to protect shift preference by adding Article XXIV into the Agreement.

The Union also cites a number of awards as indicating that management's right to transfer is limited by the contractual rights of employes and notes that the parties' Agreement provides that the management rights clause is explicitly limited:

> The Employer shall have all of the authority customarily and traditionally exercised by management except as that authority is limited by expressed (sic) or specific language in the provisions of this Agreement. . . .

Article XXIV provides that, "Qualified Employees will be allowed to express their preference for shift in accordance with their Seniority." Nothing in the Agreement permits the Company to unilaterally transfer employes from a preferred shift and the transfer of the Grievants violated their seniority rights to express shift preferences.

Article XV provides for a just cause standard and progressive discipline as contractual rights granted to employes. The transfers also denied the Grievants their rights to just cause and progressive discipline. The Union cites a number of arbitration awards for the principle that a transfer is not a proper exercise of the right to discipline employes. Besides violating the system of progressive discipline, transferring employes extends the penalty for the infraction. The Union cites awards for the proposition that a transfer without a prior warning constitutes an abuse of discretion and that a transfer as discipline constitutes a permanent punishment not contemplated by disciplinary provisions of collective bargaining agreements. It is an indeterminate sentence going far beyond the penalty warranted by the infraction committed. Citing, Connecticut Chemical Research Corp., 30 LA 505; Firestone Tire and Rubber Co., 74 LA 565; and Allegheny Ludlum

Steel Corp., 26 LA 546. The Union asserts that there was no just cause for discipline in this case. The Company never warned the Grievants that they could be disciplined for their behavior, despite the explicit provision for progressive discipline in the Agreement. Moreover, removal from the preferred shift is too harsh of a penalty given the Grievants' otherwise spotless records.

The Union also asserts that transfer is inappropriate discipline because it operates on an entirely different presumption than corrective or progressive discipline. A transfer is related to competence and qualifications, while discipline is related to rule infractions. Citing Machine Products Co., Inc., 26 LA 245. The transfer presumes that the employe is incapable of performing the job and that the only remedy is removal, while progressive discipline is designed to be corrective and rehabilitative. Transfer is only justifiable when management can establish that the employe is incapable of performing the assigned work. Job performance problems or improper attitudes should be treated by corrective action via progressive discipline, rather than permanent removal. Citing, Thompson Brothers Book Manufacturing Co., 55 LA 69. There is no dispute that the Grievants were capable of performing the work of their positions on the third shift. The Company instead asserts that the Grievants' interpersonal relationships warranted their removal. The Grievants have not been disciplined for anything, and the Company bypassed its contractual progressive discipline policy and punished the Grievants with transfers, which ought to be reserved for employes incapable of performing the work. Thus, the Union requests that the Grievants be returned to the preferred shifts and made whole.

Company

The Company questions whether the Union has tried to interfere with the Company's right to maintain an efficient operation of the business and create a workplace which is free of intimidating, hostile or offensive working conditions. The Company first argues that in Article III, Section 2, Non-Discrimination/Harassment, the parties have agreed to cooperate in assuring that the rights of all employes are protected, specifically that each and every employe is provided a workplace free from illegal discrimination and/or harassment. That provision also defines harassment as being conduct that affects tangible job benefits, that interferes unreasonably with an individual's work performance, or that creates an intimidating, hostile or offensive working environment. Karasch testified that the Grievants were creating an intimidating and offensive work environment by refusing to do as he asked, by telling him that he is the Foreman and that he can figure it out, and by recruiting others on the shift to do the same. Pake had been a Foreman for four years and he could have shared his experience with the new foreman.

Secondly, Article XXIV, Seniority/Shift Preferences, provides that employes are allowed to express their preference for a shift in accordance with seniority. There are a number of conditions that the Company will look at before granting such a request. First, the Company gives due consideration to the request, meaning, other things being equal, seniority shall control. In this case, other things are not equal. Karasch is a Shift Foreman, whereas the Grievants are classified as Production Workers. Other things to be considered by the Company are its needs for adequate

staffing on each shift and the compatibility of the crew on the shift. These considerations are not met either, since Karasch, Pake and Helland showed that they could not work together on the shift.

The Company also asserts that, contrary to the Union's argument that the Company disciplined Pake and Helland, the Company's response to the shift preference grievance stated that the reason they were removed off their preferred shift is due to the Company's responsibility to maintain a harmonious work environment free from quarrelsome confrontations.

The Company concludes that rather than having violated the Agreement by removing Pake and Helland off their preferred shift, the record shows that the Company in fact followed the Contract with regard to shift preference and with regard to the non-discrimination/harassment policy in the Agreement.

DISCUSSION

The Company relies upon Article III, Non-Discrimination/Harassment, and Article XXIV, Seniority/Shift Preferences, in asserting that it acted within its rights in transferring the Grievants off of the third shift. Article III, Section 2, of the Agreement defines "harassment" as follows:

> **Harassment consists of, without limitation by enumeration, unwelcome conduct, whether verbal, physical or visual, that is based upon a person's class status, such as sex, sexual orientation, color, race, ancestry, religion, national origin, age, disability, marital status, veteran status, citizenship status, or other group status. Harassing conduct further includes conduct that affects tangible job benefits, that interferes unreasonably with an individual's work performance, or that creates an intimidating, hostile or offensive working environment.**
>
> . . .
>
> **All Employees and Management are responsible for helping to avoid harassment. Employees who have experienced or witnessed harassment, are to notify the Plant Manager immediately. In addition, Employees who are involved in sexual harassment or participate in creating a hostile work environment will also be subject to summary discipline up to and including discharge.**

The unrebutted testimony of Karasch is that he was harassed by the Grievants. The

behavior he testified they engaged in falls within the definition of "harassing conduct" described above in Article III, Section 2, of the Agreement. That provision also provides that employes who participate in creating a hostile work environment "will be subject to summary discipline up to and including discharge." Thus, based upon Karasch's testimony, it appears that the Company may have had a basis for disciplining the Grievants; however, it chose not to impose discipline per se, and transferred the Grievants to other shifts.

The Arbitrator recognizes that involuntary transfer is not a usual disciplinary measure, and would agree with the Union that it would be inappropriate as discipline where it flies in the face of an express contractual right to select a shift by seniority, absent clear language authorizing such action. That is not the situation in this case. Article XXIV, Seniority/Shift Preferences, places conditions on the employe's right to select a shift by seniority. Some of those conditions are specified and some are not. The two express conditions on the right to select a shift by seniority are the "need for adequate staffing on each shift and the compatibility of the crew on the shift." The Union's Business Agent, Thoms, and the Company's Plant Manager, VerHulst, both present when the present language of Article XXIV was negotiated, testified as to the parties' intent as to the meaning of "adequate staffing" and "compatibility of the crew". Thoms testified that those terms were meant to ensure that there will be the necessary number and classifications of employes on a shift to do the available work. VerHulst testified that "adequate staffing" addressed those concerns and that "compatibility of the crew" addressed the ability of crews to work together and get along with each other.

Standing alone, the testimony of Thoms and VerHulst is offsetting, and therefore inconclusive; however, VerHulst's version is supported by the ordinary meaning of the term "compatibility". In interpreting contract language, the words are given their ordinary and popularly accepted meaning, absent evidence the parties intended the words be given some special meaning. 1/ More to the point, "Arbitrators have often ruled that in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern." 2/ The Arbitrator's Webster's New World Dictionary (Second College Ed.), defines the term "compatible" as follows:

> **1.** Capable of living together harmoniously or getting along well together; in agreement; congruous; **2.** that can be mixed without reacting chemically or interfering with one another's action: said of drugs, insecticides, etc.; **3.** *Bot.* that can be cross-fertilized or grafted readily; **4.** *TV* designating of a system of color transmission that produces satisfactory black and white pictures on a standard

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1/ Elkouri and Elkouri, How Arbitration Works, (Third Ed.) p. 305.

2/ Ibid., at p. 307.

monochrome receiver. . .

(p. 289)

As can be seen from the above definition, the Company's interpretation of "compatibility" is consistent with the relevant dictionary definitions of that term. That interpretation is further supported by the parties' inclusion of the condition that there be "adequate staffing on each shift." The Union's interpretation gives a very narrow meaning to the term "adequate staffing" restricting its application to only the number of employes. It is only by applying such a narrow application to those terms, that the Union's interpretation of "compatibility" would make sense. The Union's interpretation is too strained.

Beyond the application of the express conditions on the exercise of seniority in Article XXIV, that provision also states:

> "Due consideration shall mean that, other things being equal, seniority shall control in selection of employees. Among other things to be considered by Employer. . .

As the Company points out, adequate staffing and compatibility of the crew are not the exclusive conditions limiting the exercise of seniority to select a preferred shift, they are "among" the "other things" the Company may consider. That wording is broad enough to permit the Company to take action to avoid or eliminate harassment of an employe by another employe(s) in order to comply with its responsibilities under Article III, as long as that action is reasonable and taken in good faith. 3/ There is no evidence in this case that the Company transferred the Grievants off third shift for any reason other than to eliminate the harassment of Karasch by the Grievants.

It is concluded that the Company acted within its rights under Article XXIV of the Agreement, and did not violate the Grievant's contractual rights when it removed them from their preferred shift. Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned issues the following

AWARD

3/ The evidence the Union submitted as to the Company's unsuccessful attempt in their last negotiations to obtain language that would have allowed it to move employes to shifts as it saw fit in order to get a better balance of production shows only that the Company does not have such broad discretion that it may ignore seniority on the basis of its perception of who are more productive workers. Similarly, the settlement of the Hall grievance indicates that the present language does not permit the Company to exercise unfettered discretion in placing employes on shifts.

The grievances of Pake and Helland are denied.

Dated at Madison, Wisconsin, this 18th day of June, 1996.

By _____
David E. Shaw, Arbitrator