

## BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

J.W. PETERS & SONS, INC.,  
A CRETEX COMPANIES INC. AFFILIATE

and

TEAMSTERS LOCAL UNION #43

Grievance dated 2-12-96  
regarding pay for bed checking  
Case 12  
No. 54073  
A-5483

Grievance dated 2-20-96  
regarding pay for stud welding  
Case 13  
No. 54074  
A-5484

### Appearances:

Mr. Robert Baxter, Business Agent, 1624 Yout Street, Racine, WI 53404, appearing on behalf of the Union

Mr. Steve McCloskey, Business Consultant, McCloskey & Associates, 3809 Vandan Road, Minnetonka, MN 55345, appearing on behalf of the Company.

### ARBITRATION AWARD

The Union requested that the Wisconsin Employment Relations Commission designate an arbitrator to hear and decide a dispute concerning the above-noted grievances, arising under the parties' 1995-99 Prestressed Yard Agreement (Agreement). The Commission designated the undersigned Marshall L. Gratz as the Arbitrator.

The grievances were heard by the Arbitrator at the Company's yard office in Burlington, Wisconsin, on July 12, 1996. The proceedings were not transcribed, however, the parties agreed that the Arbitrator could maintain a cassette tape recording of the testimony and arguments for the Arbitrator's exclusive use in award preparation.

The parties summed up their positions by letters the later of which was received by fax by the Arbitrator on July 19, 1996, marking the close of the hearing.

### ISSUES

At the hearing, the parties authorized the Arbitrator to decide issues that the Arbitrator finds it appropriate to describe as follows:

1. Are bargaining unit employees who received training and certification as stud welders entitled to the General - Regular Rate plus 50 cents?

2. Are bargaining unit employees entitled to the General - Regular Rate plus 50 cents when they perform bed checking work?

### PORTIONS OF THE AGREEMENT

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 10  
GRIEVANCE AND ARBITRATION

. . .

Section 6. Following written request for arbitration, the employer and the local union shall attempt to select a single arbitrator acceptable to both parties. If the parties cannot agree upon an arbitrator within five (5) working days after the written request for arbitration is delivered to the employer, then either the local union or the employer may request the Wisconsin Employment Relations Commission to arbitrate the matter.

Section 7. If the grievance involves a standard on a job or a determination as to whether or not an employee is qualified for a job, then the list of arbitrators submitted shall be qualified as an independent industrial engineer or in the instruction or training of persons for the job in question. This arbitrator shall be from within a one hundred (100) miles radius of the yard.

. . .

Section 8. The arbitrator shall render his decision within thirty (30) calendar days of the closing of the hearing. The Joint Committee or the arbitrator shall have no authority or power to add to, subtract from or modify any of the terms of this Agreement. The decision of the arbitrator or Joint Committee shall be final and binding on both parties.

. . .

## APPENDIX "A"

### RATES OF PAY AND SHIFT DIFFERENTIALS

#### RATES OF PAY

Effective June 1, 1995, the 85 most senior employees shall receive general regular rate.

<u>Classifications</u>	. . .	6/1/96 . . .
Working Foreman - Batch Plant Operator		\$13.10 . . .
General - Regular Rate		\$12.60 . . .
Certified Welder plus		\$ .50 . . .
Second Tier Employees		\$ 9.95 . . .

. . .

### MEMORANDUM TO AGREEMENT

. . .

Lead foreman is a person directing a crew and will be paid \$1.00 per hour over the rate when the employee is acting in that capacity.

## BACKGROUND

The Company manufactures structural prestressed concrete. Its facilities include a yard located in Burlington, Wisconsin. The bargaining unit represented by the Union is described in the Agreement as "all production and maintenance employees at the Company's yard in the counties of Kenosha, Racine and Walworth, Wisconsin, except office and clerical employees, draftsmen, engineering employees, tool and supply control clerks, watchmen, guards, quality control employees, and supervisors as defined by the act." The Union and Company have been parties to a series of collective bargaining agreements, including the Agreement which covers June 1, 1995 -

May 31, 1999.

At the hearing, the Arbitrator received into evidence various exhibits and heard testimony from witnesses called by each of the parties. The Union presented testimony by Company Plant Manager Bob Ortscheid, Chief Steward and bargaining unit employee Tim Wagner, and bargaining unit employee Dan Gresham. The Company presented testimony by Ortscheid, Human Resources Manager Dick Lewis, Dan Galley of TRW Nelson Stud Welding, and Chief Draftsman Bill Winkelman. The Union recalled Lewis and Wagner to present rebuttal evidence. The parties had a full opportunity to present whatever relevant evidence they had and to cross examine one another's witnesses during the course of the hearing.

The Arbitrator has considered all of the facts and circumstances reflected in the evidence presented as well as the arguments submitted at the hearing and in the briefs. No effort is made here to describe all of the evidence and arguments presented. Some general background facts are noted below and the key points on which the Arbitrator relies for the outcomes he has reached are set forth in the DISCUSSION, below.

It is undisputedly the Company's existing policy to pay the contractual Working Foreman - Batch Plant Operator rate (which is 50 cents higher than the General-Regular Rate) for certain jobs besides the Batch Plant Operator. The additional jobs besides Batch Plant Operator for which that rate has been paid for some time and is being paid currently are field welder (who receives the certified welder premium on top of the special skills premium), re-bar bender and sand blaster. The Working Foreman - Batch Plant Operator rate is paid in these additional situations regardless of whether the employee's base wage rate is first or second tier.

The dispute in this case is about whether that same rate treatment should apply for bed checking and/or for those the Company selected to be trained and certified to perform stud welding.

The Company's special skills/working foreman pay policy is referred to in the underlined portion of a Company policy statement sent to Wagner and all production supervisors in 1994, which reads as follows:

RE-STATEMENT REGARDING POLICY  
ON  
LEAD FOREMAN AND SPECIAL SKILLS PAY

BED: LEAD FOREMAN-ONLY ONE ON A PRODUCTION  
BED. THEREFORE ONLY ONE PERSON WILL RECEIVE  
THE \$1.00 OVER BASE RATE ON A PARTICULAR  
PRODUCTION BED.

OTHER LEAD FOREMEN AS PREVIOUSLY  
DESIGNATED-\$1.00 OVER BASE RATE.

SPECIAL SKILLS-INDIVIDUALS AS DISCUSSED  
PREVIOUSLY WILL RECEIVE \$.50 OVER BASE RATE.

IF A PERSON IS NOT OPERATING AS A LEAD FOREMAN,  
THAT PERSON WILL THEN RECEIVE BASE RATE.

IF NOT A LEAD FOREMAN ON A SATURDAY--YOU  
RECEIVE BASE RATE.

ON SATURDAYS THAT THE WEEKLY LEAD FOREMAN IS  
NOT PRESENT, THE NEXT SENIORITY LEAD FOREMAN  
CAPABLE OF PERFORMING THE SPECIFIC  
TASK/ASSIGNMENT WILL ASSUME RESPONSIBILITY.

THERE ARE NO OTHER CATEGORIES OR IN BETWEEN  
SITUATIONS.

WE HOPE THIS CLEARS UP ANY UNCERTAINTY.

The Company agreed at the hearing that that policy has been in effect at all material times and is enforceable by the Arbitrator in this proceeding.

Eligibility criteria for special skills/working foreman pay are also referred to in the underlined portion, below, of the Company's May 17, 1995 faxed final economic offer leading to the 1995-99 Agreement:

Lead foreman will continue to receive \$1.00 as long as he is directing a crew.

Foreman. A person working alone in a position chosen by management as a position that requires leadership.

The Company's special skills pay policy originated many years ago when the Company found itself having difficulty retaining employees with certain special skills including but not limited to leadership at the worksite. By all accounts, the policy grew up as a practice. The jobs to which it applied were called "a working foreman" or "AWF", which was also later referred to as "special skills" to differentiate it from the Lead Foreman job and rate which are not at issue in this case.

However, the parties were unable to inform the Arbitrator whether the field welder, rebar bender, sand blaster came to be entitled to the special skills/working foreman pay by unilateral Company action, or by Company request and Union approval, or by Union proposal and Company approval.

### POSITION OF THE UNION

It is undisputed that the Company has paid and continues to pay for "special skills" at the contractual Working Foreman - Batch Plant Operator rate. In its 1995 final offer, the Company agreed that that additional pay was payable to persons "working alone in a position chosen by management as a position that requires leadership."

It is a violation of the Agreement wage schedule, the Company's written policy and the Company's faxed final offer for the Company to refuse to pay that premium for bed checking and to those who were trained and certified as stud welders.

The Company has chosen to make bargaining unit personnel responsible for checking the shapes and measurements of the bed for accuracy before concrete is poured. That was previously work performed only by the foreman and by non-unit quality assurance/quality control personnel.

It is responsible work that is also currently performed by the foreman. An employee who checks the work of the foreman is performing the work of the foreman and is entitled to be paid the working foreman rate. The Company's right to assign work does not give it the right to transfer integral components of higher wage job duties to lower wage earners without paying those employees the higher negotiated rate. The Union is not attempting to negotiate a new rate or to have the Arbitrator establish a new rate. Rather the Union is asking that the Arbitrator require the Company to pay the rate the parties agreed was applicable to special skills situations.

Similarly, the Company chose to provide stud welding training to Company-selected bargaining unit personnel and to permit only employees who attended that training to perform stud welding work thereafter. Ortscheid then told Wagner that stud welding was a "special skill." The employees performing stud welding functions are working alone in a position chosen by management as a position that requires leadership. Only two laborers perform the stud welding function at any one time. They work independently of each other, must read blue prints, and have no direct supervision. In the latter regard, the evidence shows the stud welders speak with the foreman or supervisor only when there is something out of the ordinary being assigned to them. The Company should therefore be required to pay for the special stud welder skill at the existing special skill rate.

The Arbitrator should therefore order the Company to pay stud welders Nick Daniels and Willard Edwards 50 cents per hour above the general regular base rate for all hours worked since they completed the Company-provided training and were certified as stud welders, i.e., since

January 20, 1996. The Arbitrator should also order the Company to pay all affected employees the difference between the rate they were paid and the working foreman rate for all time worked performing bed checking work.

#### POSITION OF THE EMPLOYER

Under Article 7, the Company retains all rights not limited by the Agreement. It has the right to train employees to perform stud welding better, to assign stud welding only to those of its employees it considers qualified to perform that work, and to assign bargaining unit employees

to perform bed checking as a part of their general duties, without being required to pay the special skills premium for any of that work. Neither the Agreement, nor the Company policy, nor the Company final offer relied on by the Union provides otherwise.

Past practice has always been that special skills pay was and is a negotiated item, but assignments are made by the Company. The Company's final offer and written policy require Company agreement to expand the group of jobs to which the special skills rate has historically been applied.

The Arbitrator is without authority to expand that group so as to establish new premium pay jobs without the Company's agreement because, under Article 10 Sec. 8, the Arbitrator is without authority to change, modify or delete from the Agreement.

Furthermore, it was the Union that requested WERC arbitration in this matter, not the Company. However, Article 10, Sec. 7 provides for arbitration by an industrial engineer where, as here, there is a claim involving a standard on a job. The Arbitrator would have to improperly disregard and, in effect, delete that provision to rule in the Union's favor in this case.

Accordingly, both grievances should be denied in all respects.

## DISCUSSION

The language of the Agreement provides only "Working Foreman - Batch Plant Operator" as its specification of who is entitled to that rate which is 50 cents above the General - Regular Rate.

The underlined language of the Company's final offer, above, did not find its way into the body of the Agreement. The Arbitrator nonetheless finds it appropriate to consider that language in attempting to interpret the meaning of the words "Working Foreman - Batch Plant Operator" in the rate Appendix. Upon close review, that final offer language makes the [working] foreman rate applicable to persons working in a "position" that has been "chosen by management as a position that requires leadership," and then only if the employee is "working alone" in such a position. (emphasis added by the Arbitrator).

The Company's written policy on the subject also contains language limiting the eligibility for "Special Skills" pay to "individuals as discussed previously." That language is also consistent with the idea that the Company has some choice in the matter of whether a category of individuals will or will not be included among those entitled to Special Skills pay.

While the Company unqualifiedly asserts in its brief "that special skills pay was and is a negotiated item," the evidence developed at the hearing on that subject was not so clear. Indeed, as noted above, the parties were unable at the hearing to inform the Arbitrator whether the field welder, rebar bender, sand blaster came to be entitled to the special skills/working foreman pay by



unilateral Company action, or by Company request and Union approval, or by Union proposal and Company approval. Given the lack of record evidence on that important question, the Arbitrator does not find it appropriate in this case to broadly rule on whether the Company can ever be required to pay special skills pay for a position it has neither historically recognized nor specifically agreed should receive that pay.

Whatever the answer to that broader question might be, however, it is clear from the evidence presented in this case that there is no persuasive basis on which to grant the instant grievances.

In this case the Union has failed to show that the employees involved in these grievances were either "a person working alone in a position chosen by management as a position that requires leadership" or that they were performing work sufficiently similar to that for which the Company pays the special skills rate that it would be an abuse of management's rights for the Company to refuse to pay the same premium for it.

As the Union accurately asserts, bed checking involves somewhat greater responsibility than many other tasks performed by Laborers at their base rates. It is also a responsibility newly assigned by the Company to bargaining unit personnel in February of 1996 when the Company somewhat reduced the level of Quality Assurance/Quality Control performed by non-unit personnel and left the responsibility for checking the accuracy of the foreman's measurements to another member of the bed crew.

However, bed checking does not appear to be a function that is performed by a person working "in a position chosen by management as a position that requires leadership." On the contrary, Wagner testified that, as lead foreman, he routinely offers the bed checking responsibility to his crew by seniority and imposes it on the least senior if no more senior employee accepts it. Thus, Wagner testified, he has had a recently-hired 19-year old doing his bed checking for a period of weeks.

A function that can routinely be assigned to a newly-hired and inexperienced employee is not persuasively comparable with the other jobs for which the special skills rate is paid. Nor is it one that can fairly be said to have been "chosen by management as a position that requires leadership."

Stud welding is a function that laborers have historically performed as a part of their jobs without the special skills rate. The Union is correct when it notes that the Company chose to select and specially train a limited group of bargaining unit employees on how to stud weld; that the Company chose to permit only the employees so trained to perform that work in the future; and that the Plant Manager agreed with Wagner that stud welding is a "special skill."

However, the group training provided by the Company took just four hours, and Galley,

who provided the training, testified that the basics of stud welding could be provided to a single trainee in 20 minutes. The training improved the trainees' performance of what had been a part of the Laborer's job for many years. The Company's insistence that only employees with that training be allowed to perform that work in the future has been persuasively explained as a measure intended to assure quality and to avoid unnecessary exposure to liability; the Company's insistence in that regard did not meaningfully increase the difficulty or responsibility associated with doing the stud welding. Nor did it reflect a Company choice of individuals for "a position that requires leadership." Moreover, all things considered, the evidence does not persuasively establish that stud welding is comparable to the other functions for which special skills pay has historically been provided.

When Ortscheid agreed that stud welding was a "special skill," the record establishes that he was not thereby agreeing that the Company would provide additional pay to employees so trained when they performed stud welding work. On the contrary, the evidence shows that the Company made it clear to Union representatives prior to the training that the Company did not intend to pay a higher rate to those receiving the stud welding training, though it did not rule out the possibility that the Company might view the matter of additional pay differently at some unspecified time in the future. Thus, if anything, the Company put the Union on notice that the Company did not consider itself bound to pay the Special Skills rate to the employees who were to be trained by Galley.

For all of the foregoing reasons, the Arbitrator has denied both of the grievances. The Arbitrator finds it unnecessary to consider the merits of the Company's arguments based on Art. 10, Sec. 7.

#### DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the ISSUES noted above that

1. Bargaining unit employees who received training and certification as stud welders are not entitled to the General - Regular Rate plus 50 cents.
2. Bargaining unit employees are not entitled to the General - Regular Rate plus 50 cents when they perform bed checking work.
3. The subject grievances are denied.

Dated at Shorewood, Wisconsin this 29th day of July, 1996.

By Marshall L. Gratz /s/  
Marshall L. Gratz, Arbitrator