BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between BADGER LODGE 1406, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 121, AFL-CIO and RAYOVAC CORPORATION	Case 166 No. 53785 A-5445

Appearances:

Mr. Dan Hilbert, Business Representative, appearing on behalf of the Union.

Brennan, Steil, Basting & MacDougall, S.C., Attorneys at Law, by Mr. Dennis M. White, appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to a request by Badger Lodge 1406, International Association of Machinists and Aerospace Workers, District 121, AFL-CIO, herein the Union, and the subsequent concurrence by Rayovac Corporation, herein the Company, the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on March 15, 1996, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on May 7, 1996, at Madison, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on June 4, 1996.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated at hearing to the following:

1. Did the Company violate the contract when it cancelled the third shift on Tuesday, July 4, 1995?

2. If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

General Background

The Company operates a three shift production schedule making heavy duty and alkaline AA batteries at its plant located on Winnebago Street in Madison, Wisconsin. Two different unions represent employes at the plant. The United Auto Workers (UAW) represents the production employes, while the Union (IAM) represents the tool room and maintenance employes. The plant employs about 250 employes.

Background About the Third Shift

The third shift usually runs from about 10:30 p.m. to 6:30 a.m. There are approximately 15 - 20 production employes on the third shift. There are only two (2) machinist employes on the third shift, Joe Haas and Robert Archibald.

The Company has had limited experience with a third shift and had only been running it for a few months before the events in question. The Company previously discontinued the third shift and then restarted it in early 1995.

The Company has previously temporarily shut down the third shift on various occasions. It has shut the shift down due to bad weather, a bomb scare, lack of work and lack of attendance. On occasion, it has also shut down only half the shift or has sent production people home early.

Frank Graeber, the Employe Relations Manager for the Company's Madison plant, testified for the Company that since only one department runs on third shift, the absence of only a few people can shut down the entire shift. He opined that the absence of two paper line operators, who run the battery cells, would shut down production or the absence of two caper washers could shut down production. Graeber stated that the third shift traditionally has an attendance problem and that there has been "lots of discipline for poor attendance on the third shift."

Joe Haas, a maintenance worker, testified for the Union that he left work on one occasion when production people were sent home due to attendance problems. He also stated that on an occasion when he was the only mechanic on duty he remained at work even though the production people were sent home because "there was maintenance work to be done." Haas admitted that the entire shift (maintenance and production) has been cancelled on two previous occasions in the past, that he has received warnings due to attendance problems and that he thought it was fair for the Company to be concerned about attendance on the third shift.

The start of the normal work week for the third shift is actually Sunday night, running into Monday morning. A normal five-day work week for the third shift then ends on Thursday night, running into Friday morning. The "weekend" then starts Friday night. If overtime is worked on Friday night, it is the equivalent of Saturday work for the first shift.

Background About Third Shift Bumping/Overtime Rights

The Union has a seniority provision in Article XIX, Section 11 of the contract which provides that senior machinists have first choice for weekend overtime. As a result, both Haas and Archibald have been bumped from Friday night overtime and both have complained to John Geiger, Union Committee Chairperson about this bumping. The UAW does not have the same bumping or overtime provision for weekend work that the IAM has.

Haas admitted that, as a result of being bumped, there have been weeks when he has not worked any more hours nor earned any more money than he earned the week of July 2, 1995, the week in question.

Events in the Week of July 2, 1995

The Company did not want to start up the third shift on July 4, 1995, because of concerns over attendance, plant efficiency and safety. The Company feared that attendance on the third shift would be poor, due to the day's festivities, and that employes who did show up might not be fit for duty, again because of the holiday festivities and the use of alcohol. The Company also believed that the third shift employes would want the holiday off, in part because the UAW employes had proposed such time off at the Easter holiday.

Accordingly, in mid-June, 1995, the Company approached both the Union and the UAW with a proposal to change the start of the work week to Monday night. One result of this action would be that work on Friday night would not be "weekend work," so that Haas and Archibald could have the work without being bumped off that night. Geiger admitted that the proposal would benefit Haas and Archibald.

The UAW accepted the proposal. The Union Bargaining Committee submitted the proposal to its members "to determine the memberships feeling towards this proposal." However, the Union members voted down the proposal.

As a result of the votes, the Company changed the start of the work week for UAW members, but not for Union members. With the Union, the Company maintained its usual work week, but the Company cancelled the third shift on Wednesday, July 4, 1995, for both the UAW and the Union bargaining units. The Company also paid time and one half for work on Friday -

Saturday that week.

Through bidding, both Haas and Archibald were able to work both Friday and Saturday and thus earned overtime in the week.

Both Haas and Archibald have shown up for work on other holidays, and Haas testified that he wanted to work the night of July 4, 1995. Haas admitted that he drank alcohol on July 4, but only because he knew he was not scheduled to work.

Haas testified that his supervisor, Carl Swanson, told him that he (Swanson) was pushing hard to cancel the July 4 third shift because he had a softball tournament and would not be in shape to work. Graeber, who participated in the decision to cancel the shift, said that Swanson's name was never mentioned in the decision-making process and that supervisors' wishes had no bearing on the decision. Graeber added that Swanson's softball tournament was not a reason given to him in support of the decision to cancel the third shift on July 4.

Geiger admitted that safety and productivity are legitimate concerns of management.

The Union ultimately filed a "revised grievance" over the matter stating that the third shift was cancelled on July 4, 1995, for reasons that were not legitimate and asking that any injured parties be made whole. Said grievance was properly processed through the steps of the grievance procedure to arbitration before the undersigned as noted above.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE V - HOURS OF WORK AND OVERTIME

SECTION 1 - STANDARD WORK WEEK AND WORK DAY. MONDAY THROUGH FRIDAY SHALL CONSTITUTE A NORMAL WORK WEEK. FORTY (40) HOURS SHALL CONSTITUTE A WEEK'S WORK, AND EIGHT (8) CONSECUTIVE HOURS OF WORK (EXCLUSIVE OF LUNCH PERIOD) SHALL CONSTITUTE A NORMAL WORK DAY.

ARTICLE XII - GENERAL PROVISIONS

SECTION 1 - COOPERATION. IT IS AGREED THAT THE UNION, THROUGH ITS NATIONAL ORGANIZATION AND ITS LOCAL OFFICERS, COMMITTEES AND EMPLOYEES COVERED BY THIS CONTRACT WILL COOPERATE WITH THE MANAGEMENT IN SEEING THAT

THE WORKMANSHIP OF EMPLOYEES COVERED BY THIS CONTRACT ON PRODUCTS OF THE COMPANY OR ON OTHER TASKS IS BROUGHT TO AND MAINTAINED AT AN EXCEPTIONALLY HIGH LEVEL TO THE END THAT A HIGH DEGREE OF OPERATING EFFICIENCY SHALL BE REACHED AND MAINTAINED AND TO INSURE UNIFORM HIGH QUALITY PRODUCTS.

SECTION 2 - MANAGEMENT RIGHTS. THE MANAGEMENT OF THE PLANT AND DIRECTION OF THE WORKING FORCES, INCLUDING THE RIGHT TO HIRE, TO DISTRIBUTE OVERTIME, SUSPEND OR DISCHARGE FOR PROPER CAUSE, AND THE RIGHT TO TRANSFER OR RELIEVE EMPLOYEES FROM DUTY BECAUSE OF LACK OF WORK, OR FOR OTHER LEGITIMATE REASONS, IS VESTED EXCLUSIVELY IN THE COMPANY. BUT THIS PROVISION SHALL BE CONSTRUED TO HARMONIZE AND NOT TO NULLIFY ANY OTHER PROVISIONS OF THIS AGREEMENT.

IN THE PRACTICAL APPLICATION OF THIS CONTRACT TO THE EVERYDAY ACTIVITY OF THE PLANT IT WILL BE NECESSARY FOR THE FOREMAN AND THE REST OF THE MANAGEMENT TO MAKE MANY INTERPRETATIONS OF THIS CONTRACT. FOR THE SUCCESSFUL CONDUCT OF THIS BUSINESS IT IS IMPERATIVE AND AGREED THAT IF ANY EMPLOYEE DISAGREES WITH ANY INTERPRETATION MADE, THAT HE/SHE WILL FOLLOW OUT INSTRUCTIONS OF HIS/HER SUPERVISOR AND TAKE UP THE MATTER AS OUTLINED UNDER ARTICLE XIII. IT IS AGREED THAT FAILURE TO FOLLOW OUT INSTRUCTIONS OF HIS/HER SUPERVISOR CONSTITUTES CAUSE FOR DISCIPLINE INCLUDING DISCHARGE.

THIS SECTION SHALL BE SUBJECT TO THE GRIEVANCE AND ARBITRATION PROVISIONS.

ARTICLE XIV - ARBITRATION

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SECTION 2 - JURISDICTION OF ARBITRATOR

A. SUCH ARBITRATOR SHALL HAVE NO POWER OR JURISDICTION TO CHANGE, ADD TO, OR SUBTRACT FROM THE TERMS OF THIS AGREEMENT. THE ARBITRATOR SHALL EXPRESSLY CONFINE HIMSELF TO THE PRECISE ISSUES SUBMITTED FOR ARBITRATION AND SHALL HAVE NO AUTHORITY TO DETERMINE ANY OTHER ISSUES NOT SO SUBMITTED TO HIM, OR TO SUBMIT OBSERVATIONS OR DECLARATIONS OF OPINION WHICH ARE NOT DIRECTLY ESSENTIAL IN REACHING THE DETERMINATION. THE ARBITRATOR SHALL ISSUE A DECISION WITHIN NINETY (90) CALENDAR DAYS AFTER SUBMISSION OF FINAL BRIEFS.

UNION'S POSITION:

The Union basically argues that the Company violated Article XII, Section 2 which provides that the Company has the right to relieve employes from duty because of lack of work, or for other legitimate reasons claiming that there was plenty of work on the date in question and that the reasons for cancelling the third shift on July 4 were not legitimate reasons.

The Union concedes that the Company has sent employes home or cancelled shifts in the past due to weather conditions, bomb scares or lack of work. The Union notes that it has not grieved these instances because they were for legitimate reasons. However, the Union argues the reasons given by the Company in the instant case are not supported by the record. In this regard, the Union argues, contrary to the Company, that there has been no problem with bargaining unit employes' attendance on the third shift; that there has been no issue involving health and safety or problem with employes drinking on holidays and then showing up for work; and finally, no evidence that bargaining unit employes wanted off on July 4.

The Union argues that it is not fair for the Company to claim that the two employes affected by the shutdown did not lose any money because "when the Company cancelled the third shift, they did not know Joe Haas and Robert Archibald were going to get an opportunity to work the weekend overtime."

The Union adds that the Company is attempting to confuse the issue by continuing to refer to the UAW production workers in this grievance. The Union maintains this grievance is not about the UAW who agreed to the cancelled shift, but about two Union employes who were not allowed "to work the start of their work week because of very arbitrary and non-legitimate reasons."

Finally, the Union argues that when Article XII, Section 2 is harmonized with other contract provisions which protect employes' work, and pay as well as define exceptions for relieving employes from duty, it is clear that the contract does not permit the Company to cancel the aforesaid shift except for a legitimate reason. Since, as noted above, the Company did not have legitimate reasons for cancelling the shift, the Union requests that the grievance be sustained, and that the Arbitrator order the Company to make the grievants whole for lost wages due to the Company's action in the amount of 8.7 hours of pay each.

COMPANY'S POSITION:

The Company, on the other hand, initially argues that since the Union is alleging a contract violation, it has the burden of proof. The Company submits that the Union has not met its burden, and for the reasons discussed below, the grievance should be dismissed.

First, the Company maintains that the contract does not guarantee 40 hours of work and does not restrict management's right to schedule work. The Company adds that this right to change schedules under a "regular" or "normal" work week clause as found in Article V, Section 1 is necessary in order to permit efficient operations by the employer and should not be lightly disregarded citing St. Regis Paper Co., 51 LA 1102 (1968) and Stacey Mfg. Co., 50 LA 1211 (1968) in support thereof.

Second, the Company contends that the particular language referred to in the management rights clause relied upon by the Union concerning the Company's right to cancel a shift for "legitimate reasons" does not apply to cancellation of an entire shift but instead deals solely upon how the Company should treat an individual employe in a transfer or layoff. In other words, according to the Company, the phrase "legitimate reasons" modifies only the clause immediately preceding it and does not modify all other clauses in the paragraph. In this respect, the Company opines it is no different than the "proper cause" modifier that applies only to the phrase "suspend or discharge" which is found earlier in the paragraph.

The Company concludes that the only language that restricts all of the clauses in the management rights paragraph is the "harmonization-nullification" clause which it feels it did not violate "because no separate contract right to a guaranteed work week has been violated." (Emphasis supplied)

Third, the Company argues alternatively that the reasons for the shift cancellation were legitimate reasons within the meaning of the contract. In this regard, the Company maintains that it can allocate work to employes based upon standards other than whether work is available or whether an outside force has disrupted the work flow. One such standard, according to the Company, is operating efficiency citing Deere and Co., 45 LA 388 (1965) and Article XII, Section 1 as recognizing this standard. The Company feels the reasons for cancellation relate to

operating efficiency particularly concerns over attendance problems and fitness for duty. The Company adds that "better" arbitral precedent supports the proposition that it should be able to reschedule its work week during a holiday week and that it has not acted in bad faith when it decided to cancel the third shift herein.

Fourth, the Company argues that there can be no back pay remedy because there has been no definable loss by the employes in question. In this regard, the Company maintains said employes worked overtime that week and as a result, their earnings were the same as their earnings in many other weeks. The Company adds that it is speculative to assume that said employes would have worked on Friday and Saturday, as they did that week, if the July 4 shift had been run.

DISCUSSION:

At issue is whether the Company violated the contract when it cancelled the third shift on Tuesday, July 4, 1995.

The Union argues that the Company violated Article XII, Section 2 of the contract because it did not have a legitimate reason for cancelling the aforesaid shift. The record, however, does not support a finding regarding same.

Article XII, Section 2 provides that the Company has the right to "relieve employees from duty because of lack of work, or for other legitimate reasons." The Company, however, argues that this contract language dealing with the Company's right to cancel a shift for "legitimate reasons" does not apply to cancellation of an entire shift but instead applies where the Company transfers or lays off an individual employe. The problem with this approach is that the contract does not specifically say this. Nor did the Company provide any testimony or evidence of bargaining history or past practice to support this interpretation of the disputed language. To the contrary, the clause is broadly written, in the opinion of the arbitrator, to give the Company the right to relieve employe(s) of work for any legitimate reason. For these reasons, the arbitrator rejects the Company's argument that said contract provision does not apply to the instant dispute.

The Union's main argument in support of its position that the Company did not have a legitimate reason to cancel the third shift on July 4 is that the Company took this action to accommodate the wishes of a supervisor who had a softball tournament on the date in question. However, a Company witness who participated in the decision to cancel the shift testified, unrebutted by the Union, that this concern was not part of the decision-making process and that the supervisor's wishes had no bearing on the decision. Therefore, the arbitrator rejects this argument of the Union.

The Company did not want to start up the third shift on July 4, 1995, for reasons of attendance, business efficiencies and safety. The Union provided some testimony and evidence

that its bargaining unit employes on the third shift regularly reported to work on holidays. However, one Union witness admitted that he had received warnings due to attendance. He also admitted that it was fair for the Company to be concerned about attendance on the third shift. And, contrary to the Union's assertion, the record indicates the Company experienced some problems with attendance on holidays in the past.

Another Union witness admitted that safety and productivity were legitimate concerns of management. In addition, there is some evidence in the record that third shift employes have been disciplined in the past due to a lack of productivity. Based on all of the foregoing, the arbitrator finds that the Union did not rebut the legitimate reasons offered by the Company for cancelling the aforesaid shift.

The Union next argues that it is unfair for the Company to claim that bargaining unit employes were not adversely affected financially by its decision to shut down the shift because the Company did not know at the time it made this decision that said employes would get the opportunity to work overtime that week. However, fair or not, since, as noted above, the Company acted within its contractual authority to cancel the shift, the arbitrator also rejects this argument of the Union.

The Union adds that the Company is attempting to confuse the issue by constantly referring to the UAW workers. However, based on the Union's contract with the Company, and the record evidence, the arbitrator finds that the Union's grievance must fail so the arbitrator likewise rejects this argument put forward by the Union.

Finally, the Union argues that when Article XII, Section 2 is harmonized with other contract provisions it is clear that the contract does not permit the Company to cancel the aforesaid shift except for a legitimate reason. However, as noted above, the Company had a legitimate reason for cancelling the shift. In addition, the Union concedes that the Company has sent employes home or cancelled shifts in the past due to legitimate reasons without protest or filing of grievances by the Union. Finally, the Union also concedes that there is no contractual guarantee of a forty (40) hour work week. Based on same, the arbitrator rejects this argument of the Union as well.

In view of all of the foregoing, and the record as a whole, the arbitrator finds that the answer to the issue as stipulated to by the parties is NO, the Company did not violate the contract when it cancelled the third shift on Tuesday, July 4, 1995, and it is my

AWARD

That the grievance filed in the instant dispute is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 6th day of August, 1996.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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