BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

and

WISCONSIN TRUSS, INC.

Case 10
No. 54182
A-5494

Appearances:

Mr. Frederick C. Miner, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North RiverCenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, for General Teamsters Union Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, referred to below as the Union.

Mr. Barry Bohman, Assistant Manager, Wisconsin Truss, Inc., P. O. Box 387, Cornell, Wisconsin 54732, for the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission assign an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Roger Pedersen, referred to below as the Grievant. The Commission assigned Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on October 15, 1996, in Cornell, Wisconsin. No transcript was made of that hearing. The parties filed briefs by November 18, 1996.

ISSUES:

The parties were unable to stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Employer violate the collective bargaining agreement on April 13 or on April 20 by having a management employe deliver trusses to work sites near his home?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE II
RIGHTS OF THE PARTIES

Section 1.

The Union has the rights which are specifically provided in this Agreement as well as such rights as are given it by statute, unless those rights are limited by any provision of this Agreement.

Section 2.

The Employer possesses the sole and exclusive right to operate said business. All management rights repose in it. These rights which are normally exercised by the Employer include, but are not limited to the following:

a.) To direct all operations of the business.
b.) To . . . assign, make job assignments, . . .

. . .

d.) To maintain efficiency of the Employer.

. . .

h.) To determine the methods, means, and personnel by which the operations of the Employer **are** to be conducted.

. . .

Section 3.

The Union and its officers agree that they shall not attempt to abridge these management rights.

Section 4.

The exercise of all management rights is not subject to review under the grievance arbitration procedure unless the exercise of such rights is in contravention of the specific terms of this Agreement.

. . .

Section 7. Miscellaneous.

. . .

b.) Nothing herein will prevent supervisors (management) from doing any work which the Union Employees may be doing or prevent supervisors from "taking a shift". Supervisors (management) will be working supervisors without restrictions on their work activity. This shall not be used to allow the Employer to hire additional workers under the guise of supervision (management) during periods when Union members are laid off.

. . .

ARTICLE IV
HOURS OF WORK AND OVERTIME

Section 1. Normal Work Schedule.

The normal work schedule for the production Employees is Monday through Friday. For truck drivers, a different work schedule may be developed from time-to-time depending on the needs of the operation.

It is understood that the Employer has the right under Article II, to schedule work 7 days per week. In such event (to the extent possible), seasonal, casual and temporary Employees will be assigned to the weekend shifts. If there are insufficient personnel from that group, the Employer may assign least senior Employees to make up the work compliment (provided that the weekend shifts are not overtime hours. (sic) If the weekend shift gets overtime hours, then the overtime hours must be offered first to regular Bargaining Unit Employees. Nothing will prevent the Employer from using more senior Employees who voluntarily agree to work weekends or prevent the Employer from assigning the least senior person in that job classification to weekends.

As an example:

If there are 4 foremen, and the weekend shift is being manned by seasonal and casual, and no foreman wishes to voluntarily work the weekend, the Employer may assign the least senior foreman to weekend work.

The 7 day schedule used in 1994, which has been presented to the Union, is specifically recognized as permitted.

. . .

<u>Section 7. Overtime pay.</u>

For purposes of calculating overtime pay, the work week is Sunday through Saturday. Overtime hours worked will be paid at the rate of time and one-half (1 1/2) for work performed in excess of forty (40) hours per week and, as respects production workers for work performed in excess of 10 hours per day, and, as respects truck drivers, for work performed in excess of 12 hours per day. This is not intended to change the normal work week, as set forth in Section 1.

. . .

ARTICLE XVII
SUBCONTRACTING

Nothing in the Working Agreement shall abridge the Employer's right to contract out work, except that the Employer agrees not to subcontract any portions of (normal) production work normally done at the Cornell plant. This does not mean that the Employer can not (sic) subcontract out entire contracts or truss building projects such as hiring a truss company in another state to perform a contract to build trusses for delivery in that state and does not mean that the Employer can not (sic) decide to discontinue hauling all or part of its trusses, lumber, etc. in its own trucks; transportation modes and methods being a subject reserved to management.

. . .

ARTICLE XVII (sic)
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. . . .**

BACKGROUND:

The Grievant filed the grievance on April 22, 1996. 1/ The grievance notes that:

> I was denied the opportunity to work on Saturday April 13, 1996 and Saturday April 20, 1996, while non bargaining unit person(n)el worked delivering trusses.

The grievance requests the Grievant "to be made whole for all losses."

Barry Bohman, the Employer's Assistant Manager, made the truss deliveries on April 13 and 20. There is no dispute the Grievant was off duty, but not in layoff status on the two Saturdays in dispute. Bohman took the deliveries because contractors needed the trusses before the next work week and because each delivery was within ten miles of his home.

The bulk of the testimony at the arbitration hearing concerned past practice and bargaining history. That evidence is best summarized as a brief overview of witness testimony.

Mike Thoms:

Thoms served as the Union's Chief Spokesman during the negotiations for the 1995-97 labor agreement. Ray Hoel served as the Employer's Chief Spokesman. The Union proposed to eliminate Article II, Section 7 b.) to preclude management personnel from doing unit work. The Employer would not accept this proposal. Hoel pointed out that it was significant for the Employer to be able to use supervisors to take a shift. Thoms stressed to Hoel that the Union,

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1/ References to dates are to 1996, unless otherwise noted.

through a number of its proposals, sought to prevent the Employer from replacing unit employes and to afford its members a right of first refusal to available overtime work. The parties ultimately agreed to leave Article II, Section 7 unchanged.

Jim Verhulst:

Verhulst is the Employer's Plant Manager, and is responsible for hiring employes onto shifts. He noted that he tries to get employes forty hours of work per week and also tries to avoid overtime situations. Bohman, he noted, is salaried, and he added that the Employer did not pay any overtime for either April 13 or 20.

Verhulst noted that although Hoel served as the Employer's Chief Spokesman in bargaining, the actual decisions on accepting or rejecting proposals was made by the Employer's management team which included himself, Hoel, Bohman and Dan Schulner, the Employer's President. Verhulst testified that the Employer has always used management employes to perform unit work, including driving truck, whether or not a unit employe was working with them. The Employer did not, he added, give up that right in negotiations. He also stated that the Employer never agreed in bargaining to afford unit employes a right of first refusal to weekend work.

Verhulst noted that management employes perform work on an as-needed basis. Such work is not, he noted, planned but is a response to situations when the demand for work exceeds the supply of unit employes. Regarding truckers, he noted that management personnel would drive trucks only when the Employer generated more loads than available drivers could handle.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION:

The Union notes that the "facts are undisputed," and that the grievance questions whether the deliveries made by Bohman on April 13 and 20 should have been made by a unit member.

Article IV, Section 1 "specifically mandates," according to the Union, that "bargaining unit personnel have a right of first refusal of weekend overtime." Article II, Section 7 of the agreement does not afford the Employer a defense to this mandate. The Union argues that the purpose of that "provision is to allow supervisors to work alongside bargaining unit employees." The Union contends that "overflow work" falls within that provision, but not the April deliveries, since "bargaining unit personnel are available to perform the work." Any other conclusion would, the Union contends, subvert the purpose of Article IV, Section 1 by permitting "the substitution of management for bargaining unit employees."

The Union requests that the "grievance be sustained, and the grievant be made whole for his loss."

THE EMPLOYER'S POSITION:

The Employer contends that "this grievance is an attempt by the Union to modify the current contract to a condition that was not agreed to during the current contract neg(otia)tions." The evidence shows that "during both terms of the collective bargaining agreement" the Union failed to file any grievances regarding the known practice of supervisors "driving trucks while bargaining unit members (were) not driving." Beyond this, the Employer notes that the Union has tried, but failed, to eliminate Article II, Section 7 in bargaining. From this, the Employer concludes that the prior practice survived those negotiations.

Article XXVII underscores that the Union cannot modify the agreement except through collective bargaining. This underscores, the Employer concludes, the significance of the evidence of practice and bargaining history.

The Employer argues that the "only restriction" stated in Article II, Section 7 b.) "on supervisors (management) doing bargaining unit work is that additional employees may not be hired" as a pretext to permit management "to do bargaining unit work . . . when Union members are laid off." No unit employes were on layoff status in April. The Employer concludes that this, and the "well established past practice . . . that any member of management may do bargaining unit work," establish that it acted within its rights under Article II on April 13 and 20.

The Employer concludes that "the grievance should be denied."

DISCUSSION:

The parties did not stipulate the issues for decision. At hearing, the Employer urged there were defects in the processing of the grievance. The Employer has not, however, offered any argument on this point. The issues stated above do not, then, include any procedural matters.

The statement of the issue on its merits is contractually broad but narrow in its focus on fact. The breadth of the contractual focus reflects that the parties argue broad issues of management right and employment security which span different contract provisions. The narrow factual focus reflects that the record will not permit broad conclusions.

The strength of the Union's case rests on the fourth sentence of the second paragraph of Article IV, Section 1. The strength of the Employer's case rests on Article II, Section 7 b.). Neither provision can be considered to clearly and unambiguously govern the grievance. Section 4 of Article II establishes that Section 7 cannot be read to defeat other agreement provisions. The Union's isolation of the fourth sentence of the second paragraph of Article IV, Section 1 supports the Union's assertion of a right of first refusal. The fourth sentence does not, however, stand alone. Article IV, Section 1, read as a whole, is less than the mandate the Union claims.

The language of the disputed provisions and what evidence there is of bargaining history and past practice support the Employer's position.

The terms of Article IV, Section 1 afford less support for the Union's position than the terms of Article II, Section 7 b.) afford the Employer's. The first paragraph of Article IV, Section 1 establishes different work schedules for production workers and for truck drivers. The first sentence of the second paragraph deals with what happens when the Employer exercises its "right . . . to schedule work 7 days per week." The next sentence urges the use "seasonal, casual and temporary" employes "to the extent" possible when a weekend shift is created. The third sentence addresses how the Employer is to fill weekend shifts if the employes pointed to in the second sentence produce "insufficient personnel . . . to make up the work compliment." The fourth deals with weekend overtime opportunities.

Neither the language nor the structure of Article IV, Section 1 points to the mandate the Union asserts. The use of "shift" would appear to refer to production workers. The "example" given in the following paragraph underscores that the prior paragraph is directed to shifts of production workers. Since the first three sentences refer to filling a weekend shift of production workers, a reading of the fourth sentence to apply to the two isolated deliveries posed here is less than persuasive. The fourth sentence would appear to govern overtime opportunities traceable to weekend shift work. Such opportunities would be offered to "regular Bargaining Unit Employees." To apply the fourth sentence to a truck driver making the type of delivery posed by the grievance strains the language of Article IV, Section 1.

Against this must be posed the broad authority stated in Article II, Section 7 b.). The first sentence would not appear applicable. The reference to "taking a shift" would appear no more applicable to the two isolated deliveries posed here than are the references to "shift" work in Article IV, Section 1. The next sentence, however, makes "management" personnel "working supervisors without restriction on their work activity." This sentence is broad enough to cover the April 13 and 20 deliveries by Bohman. Article XVII is not strictly applicable to the grievance. The final sentence of that provision, like the first paragraph of Article IV, Section 1, does, however, underscore that the agreement affords truck driving a status unlike production work.

Evidence of practice and bargaining history affirm that the parties have read Article II, Section 7 b.) to apply to the type of work posed here. It is undisputed that supervisors have driven trucks in the past. Thus, Bohman performed a type of work previously done by management personnel. Beyond this, it is apparent the practice survived the negotiation of the 1995-97 agreement since the Union was unsuccessful in its attempt to delete Section 7 b.) from the agreement. In sum, the second sentence of Article II, Section 7 b.) bears more directly on the Grievant's claim to the work than does the fourth sentence of Article IV, Section 1.

This does not, however, establish that Article 7, Section 7 b.) has unlimited scope. The final sentence is not strictly applicable to the deliveries posed here, but underscores that the

preceding sentence cannot be read to gut employe rights. Verhulst confirmed that management assumption of unit work reflected unanticipated demand for work and was not calculated to threaten the job security of unit employes. He noted management assumed truck driving duties when there were more loads than unit drivers available to haul them. The grievance points to a fact situation which is less than a neat fit to this, since the Grievant was available for the hauls. Bohman took the loads because they were convenient to his home and avoided overtime.

To note that the evidence will not support an unlimited scope to Article II, Section 7 b.), and that the grievance poses a fact situation not neatly within prior practice fails, however, to support the Grievant's claim. Read as a whole, Article IV fails to establish the general right of first refusal the Union asserts. Article II, Section 7 b.) recognizes Bohman's ability to perform the type of work claimed by the Grievant. The work involved goes beyond what Verhulst stated is the typical use of management personnel, but the fortuity of convenient local deliveries required on a weekend would not seem to pose a threat to unit employe job security. In the absence of language in Article IV mandating this type of overtime opportunity for the Grievant, there is no solid contractual or factual basis to support the right of first refusal sought by the grievance.

It must, however, be stressed that this conclusion flows from the unique facts posed, and should be restricted to those facts.

AWARD

The Employer did not violate the collective bargaining agreement on April 13 or on April 20 by having a management employe deliver trusses to work sites near his home.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 12th day of February, 1997.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator