BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

WISCONSIN TRUSS, INC.

Case 4
No. 52877
A-5383

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John J. Brennan, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Brigden & Petajan, S.C., Attorneys at Law, by Mr. Albert H. Petajan, 600 East Mason Street, Suite 400, Milwaukee, Wisconsin 53202-3831, appearing on behalf of the Company.

ARBITRATION AWARD

The Union, with the concurrence of the Company, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The undersigned was so designated and hearing in the matter was held on May 23, 1996, in Cornell, Wisconsin. The hearing was not transcribed and post-hearing briefs were filed by September 3, 1996.

ISSUE:

The Union frames the issue as follows:

> Did the Company violate the collective bargaining agreement by failing to allow shift preference to be determined by seniority when it hired seasonal employes in the summer of 1995?
>
> If so, what is the appropriate remedy?

The Company frames the issue as follows:

> Did the Company violate Article XXIV of the collective bargaining agreement by refusing to honor the requests of Lee Swanson and Tony Lange to transfer from second shift to first shift on June 15, 1995?
>
> If so, what is the remedy?

The undersigned adopts the following statement of the issue:

> Did the Company violate the collective bargaining agreement when the Company denied the requests of Lee Swanson and Tony Lange to transfer from second shift to first shift?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE I
RECOGNITION

Section 1.

Wisconsin Truss, Inc., (hereinafter referred to as Employer) recognizes **General Teamsters Union Local 662 affiliated with the International Brotherhood of Teamsters, AFL-CIO** (hereinafter referred to as Union) as the sole collective bargaining representative of all full-time and regular part-time Employees employed by the Employer in connection with its truss manufacturing operations at Cornell, Wisconsin, excluding all office and office clerical, secretarial, managerial, engineering, and drafting Employees, **temporary Employees,** independent contractors and their Employees, professional Employees, guards, and supervisors as defined in the Act.

. . .

Section 4. Definition of Employees.

a.) A full time Employee is defined as an Employee who completes the probationary period and who works or is scheduled to work a minimum of 32 hours per week.

b.) A regular part time Employee is defined as an Employee who has completed the probationary period and who works or is scheduled to work less than 32 hours per week.

c.) A probationary Employee is defined as an Employee who has not completed the probationary period. The probationary period is the first 500 hours the Employee works. A probationary Employee shall not receive any fringe benefits from this Agreement.

d.) Seasonal, casual Employees. Any Employee hired as a seasonal or casual worker shall not be considered a "seniority" or "regular" Employee. Such status shall apply to Employees hired during the busy season from May 1 to November 1. **(6 month period may be varied - see sub paragraph F.)** Such status also pertains to Employees hired to cover situations such as Christmas, deer hunting season and like situations. It also applies to Employees hired to cover situations such as replacements for absenteeism and vacations. It applies to student summer employment (but does not apply to student/ summer Employees now hired who are union members as of 7/25/93). It being intended that the employer may employ extra help as long as such employment does not cause any layoff to regular Employees and as long as regular Employees are not unemployed and available.

e.) Such seasonal or casual Employees shall acquire the status of "regular Employees" should they be retained in service after **the first of the month following the six month Peak Period designated by the Employer and as defined in Sub Section "F" below,** provided they have completed ninety days of continuous employment. This Agreement shall not apply to this category of Employees. They shall not be required to join the Union until achieving "regular" status and shall not be entitled to benefits under this Agreement.

f.) The Employer shall have the right to vary the 6 months by selecting a different 6 months period as peak time. Said six month period shall be consecutive. For example, June 1, to Dec. 1 or April 1 to Oct. 1. The Employer will still

have the right to use temporary Employees or casual Employees for "situations such as Christmas, deer hunting and like situations" or for "situations such as replacements for absenteeism and vacations". Such hiring of temporary or casual Employees outside of the 6 months of Employer selected peak time shall not constitute a selection of a different 6 months period, it being intended that this paragraph f.) will expand the Employer's rights over the previous contract, not limit them.

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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 hire, promote, transfer, assign, make job assignments, lay off Employees, and retain Employees in positions with the Employer and to suspend, demote, discipline, or discharge said Employees with just cause.

. . .

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

. . .

j.) Any action not in conflict with this Agreement is

reserved to management.

k.) To determine job qualifications.

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 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.

Section 7. Miscellaneous.

a.) No attempt has been made in this Agreement to limit the kind of work to be done by individuals or groups of Employees and Employees covered by this Agreement will do all reasonable types of work for which they are qualified as assigned by the Employer. It is specifically stated that the duties of the Employees

covered by this Agreement are only primarily for their

department and that the Employer may assign them to work in other departments and may assign specific duties to the Employees which are not traditionally their duties.

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.

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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. 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.

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ARTICLE XIV
GRIEVANCE PROCEDURE AND DISPUTE RESOLUTION

Section 1. Grievances and Arbitration

Grievance is defined as any difference or dispute regarding the interpretation or enforcement of the terms of this Agreement. In case any grievance relative to the provision of this Agreement shall arise, it shall be handled in the following manner:

a.) An Employee with a grievance shall report such grievance within five (5) days of the occurrence to the General Manager of Wisconsin Truss, Inc.. (sic) The Employee, if he/she wishes, may be accompanied by a Union Representative.

b.) If the grievance is not resolved in Section 1(a) above, or if the General Manager fails to answer within ten (10) days, the grievant must file the grievance in writing to the Employer within ten (10) days after answer of or failure to answer by the General Manager. Failure to file said grievance with the Employer within ten (10) days shall deem the grievance resolved against the Employee. The Employer will within ten (10) days of receiving the written grievance, advise the Employee and Union in writing of the action taken in regard to the grievance.

Section 2.

Grievances not settled in Section 1(b) of the grievance procedure may be appealed to arbitration provided that:

a.) Written notice of a request for arbitration is made to the Employer within thirty (30) days of the receipt of the answer by the Employer to the grievant as outlined in Section 1(b).

b.) The issue must involve this grievance as more specifically described above.

c.) When a timely request has been made for arbitration, the parties or their designated representatives shall attempt to select an impartial arbitrator. Failing to do so, they shall jointly request the Wisconsin Employment Relations Commission to provide an Arbitrator from its staff within thirty (30) days of the appeal. The decisions of the Arbitrator shall be final and binding on both parties. The Arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement. The decision of the Arbitrator shall be based solely upon his/her interpretation of the expressed language of this Agreement. Each party shall be responsible for respective legal fees if needed.

d.) The Employer and the Union will share equally any joint costs of the arbitration procedure, such as the fee and expense of the Arbitrator and the cost of a hearing room.

The provisions of this Article, with respect to filing grievances shall be available to the Employees of Wisconsin Truss, Inc. and the Union.

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ARTICLE XVI
SENIORITY

Section 1.

Seniority is a period of continuous employment of Employees by the Employer in the bargaining unit commencing with the first hour and date of work and including time for vacations, leave of absence, temporary layoff due to lack of work, military service as prescribed by law, illness, accident or other mutual agreement.. (sic) Should two or more Employees be employed **on** the same date and hour, then seniority shall be determined by arranging said Employees or group of Employees in alphabetical order on the seniority list starting with the last name and then the first name.

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Section 3.

The Employer shall post a list of Employees arranged in order of their seniority. This list shall be posted in a conspicuous position at the place of employment. The Union shall be entitled to a copy of the seniority list each twelve (12) months upon request. The Employer shall post a seniority list at least once every twelve (12) months and shall maintain a seniority roster at the work place. Protest of any Employee's seniority date or position on such list must be made in writing to the Employer within thirty (30) days after such seniority date or position first appears, and if no protests are timely made the dates and positions posted shall be deemed correct. Any such protest which is timely may be submitted to the Grievance Procedure.

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Section 6.

There shall be no seniority among or of probationary, casual, or seasonal Employees.

Section 7.

Regular part time Employees will accrue seniority and seniority rights only in relation to other regular part time Employees. Regular part time Employees will be laid off prior to regular full time Employees. Regular part time Employees will be given first opportunity to become full time Employees as openings occur. Seniority, skill and ability shall prevail in filling all openings. If such Employee(s) proves to be unsatisfactory in the required probationary period, he/she shall be returned to his/her former part time position.

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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.
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> . . .

BACKGROUND:

On or about June 15, 1995, two Production Workers, Lee Swanson and Tony Lange, requested to be transferred from second shift to first shift. When the Company denied these requests, the Union filed a class action grievance alleging that the Company violated Article XXIV, and all provisions related thereto, in that "the Company refuses to recognize seniority as it relates to shift selection by employing seasonal employes on the day shift while denying regular bargaining unit employes with seniority the opportunity to work the day shift." Thereafter, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

Under the basic standards of contract interpretation, where the language of an agreement is clear and unequivocal, the language will normally be given its expressed meaning. The clear language of Article XXIV requires the Company to do two things: (1) allow employes to request shift preference by seniority and (2) give that request due consideration. Article XXIV does not state that its application is limited to "bargaining unit positions."

Since the Company failed to post first shift work prior to employing seasonal/casual employes to work first shift, the Company did not allow employes to express their shift preference. Since the Company did not allow employes to express their shift preference, the Company could not have given "due consideration" to shift preferences.

At the time that the contract was negotiated, the Company attempted to obtain Union agreement that it could move employes from shift to shift without regard to seniority to improve productivity. This proposal was rejected by the Union and then dropped by the Company. The Company also requested and then dropped a proposal to delete Article XXIV.

The Company is attempting to gain in arbitration that which it could not gain in

negotiation. If Article XXIV is given any construction other than that urged by the Union, then negotiated rights would be negated. A second basic standard of contract interpretation is the avoidance of a forfeiture.

A third basic standard of contract interpretation is that the agreement is to be construed as a whole. Article IV demonstrates the parties' commitment to the recognition of bargaining unit preference over seasonal/casual employes, as well as the preference for seniority between bargaining unit employes. Seniority is also recognized in other provisions of the contract, such as vacations, layoffs and job postings. Construing the contract as a whole, it is evident that the parties intended to have seniority preference within the bargaining unit, as well as bargaining unit preference over non-bargaining unit employes.

The same type of work is performed on all shifts. No shift is more difficult than the next. The work is not complex and employes learn how to perform the work fairly quickly. Many seasonals return for two or three consecutive years, and, therefore, have as much knowledge of the job as a regular full-time employe who has been around for a relatively short period of time.

The Company's alleged justification for its position is the need for experienced individuals to be working with inexperienced employes. However, in practice, the Company regularly has more seasonals than regular full-time employes, which is a testament to the ease with which the job is learned and performed. There is no merit to the Company's argument that there must be a balance between regular employes and seasonal/casual employes on each shift.

If Article XXIV is to be given any meaning and if the integrity of the bargaining unit is to be maintained, then the grievance must be sustained. The Company should be ordered to (1) cease and desist from its conduct in disallowing shift selection preference; (2) immediately post for shift selection preference and be ordered to do so each time in the future that an influx of seasonal employes occurs; and (3) award first shift preference to those who have selected it back in the spring of 1995 and 1996.

Company

Under the contract, management retains the right to determine the work to be done and to assign employes, except as such rights may be restricted by the contract. Article XXIV was not intended to provide a mechanism by which regular employes could bump into positions held by seasonal/casual employes. Nor does Article XXIV grant an absolute right to change shifts based on seniority. Article IV, Section 1, while not having any direct bearing on this grievance, also recognizes that work schedules are not strictly a function of seniority when it states that "to the extent possible" seasonal, casual, and temporary employes will be assigned weekend shifts.

As has been decided in a prior arbitration award, Article XXIV provides a conditional right to select a shift on the basis of seniority. One of the conditions which affects shift selection is "adequate staffing." "Adequate staffing" involves not only having a casual employe work with a regular employe, but also having a regular employe who is experienced in the task to be performed.

If the Company had granted the requests of Swanson and Lange, then second shift would have been left with only three experienced Production Workers. Two of the five work stations would have been operated entirely by inexperienced casual employes. This staffing pattern would have impacted adversely upon both the quality and quantity of production.

The desired ratio of regular employes to seasonal/casual employes is two to one. The fact that the Company has been forced to work at less than the desired ratio to fill orders during peak periods does not mean that such staffing was desirable or adequate.

Posting of a sign-up sheet was not an issue until the arbitration hearing. As an accommodation, the Company has posted for primary and secondary shift selections when there are major changes in shift schedules. However, a plain reading of the language of Article XXIV would imply that employes may express their shift preference at any time by any means. The disposition of the Hall grievance is not relevant to the instant dispute.

Swanson and Lange were permitted to express their shift preference. The Company gave due consideration to these requests. The Company did not grant the requests because, to do so, would result in inadequate staffing on the second shift. The Company has complied with the requirements of Article XXIV. The grievance is without merit and should be dismissed.

DISCUSSION:

While seasonal/casual employes are not represented by the Union, Article I of the collective bargaining agreement defines seasonal/casual employes and refers to seasonal/casual employes, as well as to regular employes, as "Employee." Since Article XXIV provides a mechanism by which "Employees" may express shift preferences and, further, states that ". . . other things being equal, Seniority shall control in selection of Employees" to staff a particular shift, the plain language of Article XXIV does not support the Company's argument that Article XXIV was not intended to provide regular employes with any rights to shifts worked by seasonal/casual employes.

The language of Article XXIV, on its face, does not contain any requirement to post a shift selection sign-up sheet. The Union argues, however, that such a posting requirement is implied because employes could not otherwise express their preference for shifts. The undersigned disagrees. If a qualified employe wishes to work another shift, then the qualified employe may express his/her preference for the other shift by submitting a request to the Company, as did Lee Swanson and Tony Lange.

The Union also argues that the duty to post a shift selection sign-up sheet is recognized in the resolution of the April 27, 1994 Harold Hall grievance. This grievance alleged that the

Company violated "Article XXIV and all other provisions related thereto" because "Employees weren't given a chance to use seniority in shift preference." While the Union argues that this grievance is identical to the present grievance in that it protested the use of seasonal employes on a given shift without allowing shift preference to senior regular full time employes, the record does not support this argument. Rather, the unrebutted testimony of the Company's Assistant Manager, Barry Bohman, establishes that the Hall grievance was generated when the Company moved from two to three shifts in 1994.

As the Union argues, the parties did resolve the Hall grievance. Union Representative Michael Thoms confirmed his understanding of this resolution in a letter to Company General Manager, James VerHulst, dated June 9, 1994, which states, in relevant part, as follows:

> **2. HAROLD HALL**
>
> Class action grievance filed by Shop Steward Harold Hall dated April 27, 1994 protesting shift assignments of employees (not giving preference to senior employees). A sign-up sheet is posted so qualified senior employees can select preferred shifts by seniority.

Barry Bohman recalls that the Hall grievance of April 27, 1994 was resolved when the Company agreed to post a sign-up sheet which permitted employes to indicate a first and second choice of shifts. Bohman denies that the Company agreed to permit employes to choose a shift based upon seniority and asserts that the sign-up sheet was used to (1) determine employe shift preferences and (2) determine if the Company could accommodate the employe's shift preference.

While it is evident that the parties resolved the Hall grievance of April 27, 1994, it is not evident that the parties mutually intended this resolution to have any effect other than to determine shift assignments at the time that the Company moved from two shifts to three shifts in 1994. In summary, the language of Article XXIV, neither expresses, nor implies, that the Company is required to post a shift preference sign-up sheet. Nor is such a requirement imposed upon the Company by the resolution of the Hall grievance. Accordingly, the undersigned rejects the Union's assertion that the Company violated the collective bargaining agreement by not posting a shift preference sign-up sheet prior to employing seasonal/casual employes to work first shift.

Having received a shift preference request from Lange and Swanson, the Company has an Article XXIV duty to give "due consideration" to the request "in determining staffing." "Due consideration" is defined to mean "other things being equal, Seniority shall control in selection of Employees." As stated in Article XXIV, among the "other things" to be considered by the Company are "the Employer's need for adequate staffing on each shift and compatibility of the

crew on the shift."

Article XXIV has been interpreted in a prior grievance arbitration award issued by Arbitrator David Shaw. In this award, Arbitrator Shaw states as follows:

> 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 undersigned concurs with these statements of Arbitrator Shaw.

The record demonstrates that the requests to move to first shift were denied because the Company had concluded that, if the requests were granted, then second shift would not have adequate staffing. The Union argues that this conclusion is without merit because there is no significant difference between the work abilities of seasonal/casual employes and regular production employes.

Thoms, the only Union witness to testify at hearing, stated that he did not believe that there was any significant difference between the work abilities of seasonal/casual employes and regular employes. Thoms' testimony, however, is rebutted by the testimony of Day Shift Supervisor George White, Production Manager Robert Williams, and Second Shift Supervisor Dan Bohman who persuasively stated that the work experience of the regular employes provides the regular employes with greater skills and abilities to perform the work of the Company. 1/

1/ Among the skills and abilities enhanced by work experience are: reading blueprints and engineering sheets; operating the set-up computer; distinguishing among the types and grades of lumber; recognizing and assembling the one hundred to two hundred different truss designs; recognizing and correcting production problems; and running production equipment efficiently and safely.

If Swanson and Lange had been transferred to first shift, they would have been replaced by the two seasonal/casual employes on first shift. While it is evident that some seasonal/casual employes return from year to year and, thus, gain work experience, it is not evident that the two seasonal/casual employes on first shift had any significant work experience with the Company. 2/ Given the evidence that experienced regular production employes have greater skills and abilities than seasonal/casual employes, the Company's conclusion that seasonal/casual employes were not adequate replacements for Swanson and Lange is reasonable. 3/ Since "other things are not equal," Swanson and Lange do not have a seniority right to transfer into first shift.

Contrary to the argument of the Union, the Company has not attempted to gain through arbitration that which it could not gain through contract negotiation. Rather, the Company has exercised rights granted to the Company under Article XXIV.

AWARD

1. The Company did not violate the collective bargaining agreement when the Company denied the requests of Lee Swanson and Tony Lange to transfer from second shift to first shift.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 2nd day of May, 1997.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

2/ One of these employes is 16 years old and the other is 18 years old.

3/ Swanson was hired on September 20, 1993, and Lange was hired on October 5, 1992. Thus, each was an experienced production employe.