BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 245 UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC

and

DEAN PICKLE & SPECIALTY PRODUCTS COMPANY

Case 3
No. 57612
A-5771

Appearances:

Mr. Eugene L. Krull, Representative, Local 245 United Food & Commercial Workers International Union, AFL-CIO & CLC, West 2620 Rock Road, Appleton, Wisconsin 54915, appearing on behalf of the Union.

Schiff, Hardin & Waite, by **Attorney Henry W. Sledz, Jr.,** 6600 Sears Tower, Chicago, Illinois 60606, appearing on behalf of Dean Pickle & Specialty Products Company.

ARBITRATION AWARD

Local 245 United Food & Commercial Workers International Union, AFL-CIO & CLC, hereafter Union, and Dean Pickle & Specialty Products Company, hereafter Employer or Company, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the Employer concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated on July 8, 1999. The hearing was not transcribed. The record was closed on September 28, 1999, upon receipt of post-hearing written argument.

The parties stipulated to the following statement of the issue:

> Did the Company violate the collective bargaining agreement by not offering voluntary off-day work to the Grievants on February 27, March 1, March 22 and March 27, 1999?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 1. – INTENT AND PURPOSE

The general purpose of this Agreement is in the mutual interest of the employer and employee to provide for the operation of the Green Bay Plant of the Dean Pickle and Specialty Products Company (other than as respects receiving and handling crops as hereinafter excepted) under methods which will further to the fullest extent possible the safety and welfare of the employees, economy of operation, quality and quantity of output, elimination of waste, cleanliness of plant and protection of property. It is recognized by this Agreement to be the duty of the Company and the employees to cooperate fully, individually and collectively for the advancement of said conditions.

. . .

ARTICLE 4. – MANAGEMENT RIGHTS CLAUSE

The right to hire, promote, discharge or discipline for cause, to maintain reasonable discipline and efficiency of employees, is the responsibility of the Company. In addition, the products to be manufactured, the location of plants, the schedule of production, the methods, processes and means of manufacturing are solely and exclusively the responsibility of the Company. The Company may, at any time, employ a person in the plant who is a bonafide (sic) Management Trainee for a management position, but who is not intended to remain permanently in the plant; provided, however, that the employment of such trainee shall not cause a lay-off (sic) of any regular employee nor shall such Management Trainee displace regular employees. Such Management Trainee shall not be required to join the Union. There shall be no Management Trainees working in the plant if there is a regular employee on lay-off. (sic)

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ARTICLE 16. – OVERTIME

Section 1. – Except in cases of emergency, no employee other than weekly employees shall be required to work on the following days: Sunday, New Year's, Memorial Day, Independence Day, Labor Day, Thanksgiving, Day after Thanksgiving, Christmas Eve, Christmas Day and Good Friday.

Section 2. – Whenever the company shall consider it necessary, the Company can provide for a six day work week (six day week consisting of Monday through Saturday). Employees may be required to work on their scheduled off

day(s), except an employee will not be forced to work more than eleven (11) of his/her scheduled days off during the calendar year, and the employee will not be forced to work his/her scheduled days off more than seven (7) weeks in a row; however, the Labor Day weekend is optional. The Company's production requirements will dictate whether or not the plant will operate. If an employee would like the Labor Day weekend off, it will be the employee's responsibility to request the time off, at least two weeks in advance, and the Company will reply within one week. If necessary, there will be restrictions as to the number of employees from the same department who will be granted the Labor Day weekend off. Seniority will decide.

Section 3. – No employee, other than weekly employees, except when a six day work week is in effect, or in cases of emergency, shall be required to work on Saturday; provided, however, that any employee may, at his/her option, work on Saturday when there is work to do and the Company requests him/her to work at his/her regular time rate in order to complete his/her maximum hours or regular employment for such week. Employees working on Sundays or on any of the above-named holidays, except weekly employees, shall be compensated at the rate of time and one-half.

Section 4. – When employees, other than weekly employees, work on Saturday because of an emergency or mandatory six day work week, they shall be compensated at the rate of time and one-half, but when working on Saturday voluntarily for the purpose of completing their maximum hours for such week, they shall be compensated at their regular hourly rate.

. . .

ARTICLE 18. – WORKING HOURS

Section 1. – The work week shall be forty (40) hours per week. The normal working day shall be eight (8) hours per day. One half hour shall be allowed for dinner. Time and one-half shall be paid for all hours worked over eight (8) hours in any one day or over forty (40) hours in any one week. First shift production work shall commence no earlier than 5:00 a.m. and not later than 8:00 a.m., with the understanding that the main workforce will start no earlier than 6:00 a.m., and the key people for start up will start no earlier than 5:00 a.m., unless other start times are mutually agreed upon between the Company and the Union.

Section 2. – It is agreed that there shall be no split hours in any one work day, but that work shall be continuous.

Section 3. – Whenever the Company shall consider it necessary, the Company can provide for additional shifts.

Section 4. – Whenever the Company shall consider it necessary, the Company can provide for specialty shifts. (Class rate – Article 8, Section 1 – 25) for the following:

a. Pickle Process
b. Pourables/Hoffman House Makeup/Mustard

. . .

ARTICLE 30. – FOUR DAY/TEN HOUR SCHEDULE
Section 1. Four Day/Ten Hour Option:

The Company shall have the right to schedule the plant or any portion of the plant on a four (4) day/ten (10) hour schedule upon two (2) weeks advance notice to the Union. Such four (4) day schedule shall be any four (4) consecutive days during Monday through Friday. In such four (4) day/ten (10) hour schedule, the contract shall be modified to reflect that the following shall apply to employees who are scheduled on a four (4) day/ten (10) hour schedule:

Article 10 – Holiday Pay
Eight (8) hours pay shall be ten (10) hours pay.

Article 11 – Bereavement
Eight (8) hours shall be ten (10) hours.

Article 15 – Vacations – Add the following:
Employees who select one (1) week of vacation to be taken on a daily basis and who work on both a five (5) day/eight (8) hour schedule and a four (4) day/ten (10) hour schedule during the year, shall not receive more than forty (40) hours (44 hours for employees hired prior to October 30, 1997) pay for that one (1) week of split vacation (i.e. If the employee is on a four (4) day/ten (10) hour schedule and takes three (3) days of vacation and receives thirty (30) hours of vacation pay and then goes to a five (5) day/eight (8) hour schedule, that employee will have only ten (10) hours of vacation pay remaining for his/her split week of vacation. He/she may take his/her remaining vacation as two (2) separate days off, receiving eight (8) hours pay for one (1) day and two (2) hours pay for the other day; or he/she may take the one (1) day off as vacation and receive eight (8) hours pay and elect to be paid the remaining two (2) hours in lieu of actually taking the day off [Note: In practice, this example will be adjusted for employees hired prior to October 30, 1997, to reflect that those

employees are eligible for 44 hours per week.]). An employee who works a four (4) day/ten (10) hour schedule throughout the year and who chooses to select one (1) week of vacation to be taken on a daily basis, shall be entitled to only four (4) days of time off for that week.

Article 18 – Working Hours
This article shall be modified to reflect that time and one half shall be paid for all hours worked over ten (10) hours in any one day (for employees on a four (4) day/ten (10) hour schedule).

Article 18, Section 6 – Working Hours
Change the last sentence to reflect five (5) hours rather than four (4) hours.

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RELEVANT BACKGROUND

In December of 1998, the Company advised the Union that it would implement a four-day, ten-hour shift schedule. The four-day, ten-hour shift schedule was implemented on January 4, 1999. Under this schedule, production lines were operated Tuesday through Friday.

On Saturday, February 27; Monday, March 1; Monday, March 22; and Saturday, March 27, 1999, the Company scheduled a fifth production day of ten hours. The Company did not ask Patricia Brier and Denise Fassbender, hereafter the Grievants, to work on any of these production days. At all times material hereto, each of the Grievants had a medical restriction that limited her work to eight hours per day.

On March, 1999, the Grievants grieved the failure of the Company to offer them eight hours of work on each "fifth day" of production. Plant Manager Dennis Bentley denied the grievances, stating, inter alia, that both employes were on medical restrictions of not more than 8 hours per day; that the Company had scheduled 10 hour shifts on each "fifth day" of production; that the Grievants were not physically able to work the 10 hour shifts; and that, when the Company schedules production on an off day, the Company schedules the proper amount of crew for that production. Thereafter, the grievances were scheduled for arbitration.

POSITIONS OF THE PARTIES

Union

Article 16, Overtime, Sections 3 and 4, allow for employes to work at their regular rates to enable them to complete their maximum hours or regular employment for a week. Article 18, Working Hours, Section 1, states that the workweek shall be forty (40) hours per week.

The Company claims that it must be cost competitive. The Company, however, chose to operate the fifth day of production with all employes being paid overtime, rather than to offer this work to the Grievants, who would have been paid straight time.

During the regularly scheduled production days, the Grievants covered the ten-hour shift by splitting their shifts. The testimony of the Local Union President demonstrates that, on March 1, 1999, two employes who were scheduled for production failed to show up for work and the production line was operated successfully. The fifth day of production could run efficiently with the two Grievants working eight-hour split shifts to provide ten-hour coverage.

Prior to the start of the four day, ten hour production schedule, the Local Union President agreed that the Company would not have to make special accommodations for the Grievants. As the record demonstrates, there was no discussion concerning what would happen if the Company scheduled a fifth day of production. The Company allowed another employe with an eight-hour medical restriction to work on some of the fifth days of production.

The Company should have asked the Grievants to work on the fifth days of production. The grievances should be sustained and the Grievants awarded the monies owed them.

Company

The Union bears the burden of proof to establish that the Company's conduct violated some specific provision of the contract. If the Union cannot establish such a violation by a preponderance of the evidence, the grievances must be denied.

Articles 16 and 18 do not create a guarantee of 40 hours of work per week per employe. This conclusion is buttressed by the evidence of the conversation between Froberg and Fye, in which Froberg was advised that the contract did not create a 40 hour guarantee, and by the fact that no grievance was filed at the time that the four employes with medical restrictions were regularly scheduled to work thirty-two hours per week.

Management has the right to schedule work in a manner designed to optimize plant efficiency. The contract does not require the assignment of regular work or overtime work by seniority.

The Company has articulated legitimate and sound business reasons for not offering the off day work to the Grievants, which reasons remain factually unrebutted by the Union. The Company explained why it could accommodate the Grievants' medical restrictions on normal production days, but could not do so for off day work.

Another employe on medical restriction was offered work on an off day because less than a full ten-hour shift of work was available. When the available work was a full ten-hour shift, this employe was not offered work. The Company has acted consistently and fairly. Arbitrators have rejected the proposition that an employer must offer available work to an employe who cannot, due to medical restrictions, adequately complete all of the available work.

Historical production standards are based upon 85% of maximum production capability. The 15% "discount" reflects production lost to breakdowns, bad product, employe absences, and line changes. The fact that, on March 1, 1999, the production line ran smoothly, does not negate the validity of the Company's scheduling policies.

The Union has failed to demonstrate that the labor agreement requires the Company to offer available off-day work to the Grievants. The grievances must be denied.

DISCUSSION

The Union relies upon Article 18, Section 1, of the parties' collective bargaining agreement to argue that the Grievants are entitled to work forty hours per week. Article 18, Section 1, states in relevant part, that the "work week shall be forty (40) hours per week."

At all times material hereto, the Company has provided a forty-hour workweek, i.e., four days of ten-hour shift. Article 30 of the collective bargaining agreement provides the Company with the right to establish such a workweek and the Union does not dispute that the Company has the right to establish such a workweek.

At all times material hereto, the Grievants have been subject to a medical restriction that limits their work to no more than eight hours per day. Prior to the implementation of the four-day/ten hour schedule, Union and Company representatives discussed the scheduling of employes that had medical restrictions that limited work to no more than eight hours per day.

Plant Superintendent Brad Froberg and Union President Al Fye participated in these discussions. Their testimony establishes that the parties mutually understood that, under a four-day/ten hour work schedule, the medically restricted employes were not guaranteed a forty-hour workweek and that the Company could schedule the medically restricted employes to work a four-day/eight hour schedule. Given this understanding, it would not be reasonable to construe Article 18, Section 1, as providing the Grievants with a contractual right to work forty hours per week.

As the Union argues, the disputed work was performed on a fifth day of production and, thus, falls outside of the forty-hour workweek established by the Company. As the Union

further argues, the record does not demonstrate that the Company and the Union had any discussions concerning the right of the medically restricted employes to work on a fifth day of production.

Relying upon Sections 3 and 4 of Article 16, **Overtime**, the Union argues that the Grievants have a right to work on the fifth day of production, at their regular hourly rate, in order to complete a forty-hour workweek. Under Section 3, "any employe may, at his/her option, work on Saturday when there is work to do and the Company requests him/her to work at his/her regular time rate in order to complete his/her maximum hours or regular employment for such week." Section 4 confirms that employes that perform such Saturday work will be paid at their regular hourly rate.

The fifth days of production at issue occurred on February 27, March 1, March 22, and March 27, 1999. Given the fact that only two of these days were Saturdays, the language of Section 3, on its face, has limited applicability. Additionally, as set forth in the plain language of Section 3, an employe's right to work on Saturday for the purpose of completing the employe's "maximum hours or regular employment for such week" is not unconditional, but rather, the Company must request the employe to work.

Article 16, Section 3, does not state that the Company must "request" the most senior employe to work. Nor does this language contain any other restriction on the right of the Company to determine whom it will request to work. Absent such a restriction, the decision to offer, or to not offer, Saturday work to the Grievants is within the discretion of the Company.

As the Union argues, on some of the fifth days of production, the Company offered less than ten hours of work to a lab employe who had the same medical restriction as the Grievants. The collective bargaining agreement does not require the Company to provide the Grievants with the same work opportunities as this lab employe. Moreover, the Company's decision to run a ten-hour shift on the production line, but not in the lab, is consistent with the Company's Article 4, **Management Rights**, to schedule production and determine the "methods, processes, and means of manufacturing." The Company did not abuse its management discretion when it offered fifth day of production work to the lab employe and did not offer fifth day of production work to the Grievants.

It may be as the Union argues, that the Company was in error when it determined that it could not accommodate the Grievants' eight-hour work restrictions and meet its fifth day of production needs in the most efficient manner. Inasmuch as the record fails to demonstrate that the Company's determination was made in bad faith or unreasonable per se, the Company's determination that it could not accommodate the Grievants' medical restrictions is not an abuse of management discretion.

As set forth in the Company's response to the grievances, the Company did not request the Grievants to work on February 27, March 1, March 22 and March 27, 1999, because the Grievants were not physically capable of working a ten-hour shift. Neither the decision to schedule a ten-hour shift, nor the decision to staff this shift with employes that were physically capable of working a ten-hour shift, is an abuse of the Company's management discretion.

In summary, the contract language relied upon by the Union does not provide the Grievants with a contractual right to work on February 27, March 1, March 22 and March 27, 1999. Accordingly, the grievance has been denied.

Based upon the above and the foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Company did not violate the collective bargaining agreement by not offering voluntary off-day work to the Grievants on February 27, March 1, March 22 and March 27, 1999.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 14th day of October, 1999.

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

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