BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KRANZ, INC.

and

TEAMSTERS UNION LOCAL NO. 43

Case 10
No. 58047
A-5803

(Grievance of Robert Torres)

Appearances:

Attorney Jonathan M. Conti, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Attorney Jeffrey Leavell, Attorney at Law, Jeffrey Leavell, S.C., 723 South Main Street, Racine, Wisconsin 53403, appeared on behalf of the Company.

ARBITRATION AWARD

On October 4, 1999, Kranz, Inc. and Teamsters Local Union No. 43 requested the Wisconsin Employment Relations Commission to assign an arbitrator to hear and decide a grievance pending between the parties. The WERC appointed William C. Houlihan, a member of its staff, to hear and decide the matter. Hearing on the matter was conducted on December 1, 1999, in Racine, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were submitted and exchanged by December 16, 1999.

This Award addresses a dispute over employee Robert Torres' entitlement to Saturday overtime work.

BACKGROUND AND FACTS

Kranz, Inc. and Teamsters Local No. 43 have been signatories to a series of collective bargaining agreements including the 1998-2003 agreement, the relevant portions of which are set forth below. As a part of its regular operation, Kranz offers overtime on a regular and

ongoing basis to bargaining unit employees. Typically, weekend overtime is posted by the preceding Wednesday. Historically, such overtime has been posted no later than 4:00 p.m. on Friday. Employees sign up and are awarded overtime by seniority. The Company has never telephoned employees to advise them as to the existence of overtime. The collective bargaining agreement is essentially silent on the entitlement to, and distribution of overtime. The system described exists as a practice between the parties.

Bob Torres, the Grievant, is a truck driver and has been employed by the Company for two years. Torres normally works a 55-60 hour work week. Normally, Torres does not sign for weekend overtime due to the number of hours he typically works Monday through Friday. During the week of August 16, 1999, Torres served a three-day disciplinary suspension, which resulted in his working two days that week. It was his testimony that under that circumstance, he would have signed for weekend work, had he been aware of its existence.

In July, the Company had posted a schedule of anticipated Saturday work for a series of weekends which included August 21. The Grievant had not signed that posting. There is a dispute over whether or not he had the seniority to claim the work had Torres signed the posting.

On Friday, August 20, 1999, in the late afternoon, the Employer discovered a need for additional help the next day, Saturday, August 21. A notice for the work was posted, though it is unclear precisely when. The Grievant left the plant at 3:53 p.m. It was his testimony that no such notice was posted upon his departure. It appears the notice went up after 3:53 p.m. and before 5:30 p.m. A less senior employee signed the posting and worked 4.1 hours on Saturday August 21. There was no attempt on the part of the Employer to telephone the Grievant and/or otherwise advise him as to the existence of overtime work.

On August 25, the Grievant filed a grievance which claims as follows:

> "Overtime for Saturday, 8-21-99 was posted on Friday 8-20-99 at 5:30 p.m. after 1st shift had left at 4:00 p.m. People lower on the seniority list than myself were working the time and one-half overtime and I was denied the opportunity."

The grievance was denied by memo dated August 31 from Bob Buske, Operations Manager. That memo provides as follows:

> The purpose of this letter is to respond to the grievance submitted by Bob Torres to me through the union steward Bill Petersen, on 8/30/99.

The grievance

Bob states that he was denied the opportunity to sign up for overtime hours that were scheduled for Saturday, August 21, because the overtime posting was put up after he had left for home the Friday before, August 20, 1999. He also states that because he did not have an opportunity to sign the overtime posting there were other "individuals" who worked on Saturday that had less seniority than he.

Response

In this instance of scheduling overtime hours I believe that Bob's description of what took place on Friday, August 20 was accurate. The overtime postings did not go up until well after Bob had left for home.

Normally, overtime hours for Saturday are posted either earlier in the week or at least early enough in the day on Friday so that everyone has an opportunity to see the posting. It is our policy to post overtime hours just as soon as we become aware of the overtime requirements unless it is an emergency customer requirement that needs immediate attention, and it is not practical or reasonable to do the posting.

On Friday, August 20, 1999 the second shift foreman was not aware of the need to call in additional people for Saturday until after he ran his picklists for the work that had to be done that evening. The picklists run is normally started by 4:00 p.m. and can easily take until after 5:00 p.m. to complete.

After finding out the workload was heavy and the receiving backlog could not be completed on the second shift that evening, the foreman made the decision to post for more help on Saturday. Unfortunately all of this took place well after Bob Torres left for home. The fact that Bob Torres left for home early was unusual in itself because of his Green Bay run. It was not intentional to exclude Bob from seeing the posting.

This was an unusual set of circumstances that only happened because of the fact that the overtime requirement was now (sp.) known until late Friday, but it could happen again. Because it could happen again, I am suggesting that Bob Torres notify the second shift Foreman whenever he is available to work on Saturdays, and if he chooses, he is welcome to call Kranz each Friday evening to see if Saturday is being scheduled.

If Bob or you would like to discuss this issue in more detail, I will make arrangements for that discussion.

ISSUE

The parties were unable to stipulate to the issue. The Union states the issue as:

Did the Company violate the collective bargaining agreement when it did not offer the Grievant the opportunity to work overtime on August 21, 1999? If so, what is the appropriate remedy?

The Company states the issue as:

Did Kranz, Inc. violate the collective bargaining agreement when it did not offer overtime to Mr. Torres on August 21, 1999 by telephoning him at his home?

I believe the issue to be:

Did the Company violate the collective bargaining agreement by posting weekend overtime after 4:00 p.m., Friday, and not calling the Grievant to inform him of the availability of work?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 4 – SENIORITY

Seniority rights of all employees shall be observed at all times. The Employer agrees that in case of a layoff or re-employment, those laid off first shall be re-employed first in the same order as laid off. The seniority list shall be drawn and posted in a conspicuous place on the premises of the Employer. The Company will give a copy of the seniority list to the Steward, and send one to the Union.

The Company shall be allowed two (2) working foremen and one (1) vacation replacement position. These three positions shall not be affected by the seniority clause.

The Company may hire employees who will act as vacation and absentee replacement (VAR) for regular employees. Employees who are hired as vacation absentee replacement (VAR) employees will be considered temporary and will not be eligible for seniority rights or benefits as set forth in Article 4,

9, 10, 11, 18, 19, 20. VAR's may be worked on a one regular absent, one VAR work basis.

A new employee shall work under the provisions of this Agreement, but shall be employed on a sixty (60) day trial basis, during which period he may be discharged without further recourse. In case of discipline within the sixty (60) day period, the Employer shall notify the Local Union in writing. After sixty (60) days, the employee shall be placed on the regular seniority list provided however, that if there is doubt as to the acceptability of the employee, the Employer, upon written notice to and with the approval of the Local Union, may extend the trial period for an additional period of thirty (30) days.

Job vacancies and new jobs shall be posted immediately by the Company on proper bulletin boards for a period of three (3) working days, setting forth generally the facts and conditions in respect to such jobs and requesting bids therefore. Any regular employee may sign the posting, one (1) copy of which shall be filed with the Company and the other with the Local Union. The employee with the most seniority applying for the vacancy shall be appointed to fill the same if, in the opinion of the Company, the employee is capable of adequately performing the job.

When the skill and ability of employees are equal, seniority shall prevail. There will be a thirty (30) working day trial period, however if in the opinion of the Company, the employee is unable to perform the work, the employee may be returned to his former position in less than the thirty (30) working days.

The position is of two working foremen and the vacation replacement position are exempt from this provision.

When new jobs are created or vacancies occur, the jobs will be posted for three (3) working days and shall state the nature of the position, shift and area of work and requesting bids therefore.

Until a posted position is filled by use of the bid procedure, the Company may temporarily fill any vacancy.

Employees can switch jobs at their discretion – but only with Employer (Kranz) approval on the basis of qualifications and the mutual consent of the two (2) employees involved.

Management can either hire or subcontract for any employee not to be in the Union to repair the high tech equipment (defined as any piece of equipment that cannot be repaired properly by a general handyman) that the Company is selling.

. . .

ARTICLE 8 – WAGES AND HOURS

. . .

Forty (40) hours shall constitute a week's work.

The working days shall be Monday, Tuesday, Wednesday, Thursday and Friday. The standard shift will be eight (8) hours, all work performed before or after the standard shift shall be paid at time and one-half (1½) the hourly rate set for the above.

. . .

Time and one-half (1½) will be paid for all work performed on Saturdays.

. . .

Failure to work overtime when ordered by the Company subjects the employee to disciplinary action and ultimate discharge. No employee shall be ordered to work more than sixty (60) hours per week.

. . .

Premium pay

Any work required before the normal start time window shall be considered overtime and shall be paid at the overtime rate. The normal start time window for the first shift is from 4:00 a.m. to 7:30 a.m. and for the second shift is from 4:00 p.m. to 7:30 p.m. and for transfer truck drivers, the start time is flexible. All employees on the second shift shall receive thirty cents ($.30) per hour more than the rate set forth in this Agreement.

. . .

POSITIONS OF THE PARTIES

It is the position of the Union that the parties' collective bargaining agreement provides that overtime shall be offered on the basis of seniority. The Union contends that the Company violated the agreement by failing to offer overtime to the Grievant for Saturday, August 21. It is the Union's claim that the Company's past practice is to post weekend overtime, at the absolute latest, before the end of Friday's first shift. Article 4 of the parties' collective bargaining agreement requires that seniority control the assignment of overtime. By failing to follow its posting practice on August 20, the Company violates its contractual obligation to award overtime on the basis of seniority.

The Union argues that the posting of overtime before the end of the first shift on Friday has been a mutually-accepted past practice. The Union cites record testimony to the effect that these overtime postings inevitably occur prior to 4:00 p.m. on Friday. While the Company argues that Torres' timecard reveals that he punched out at 3:53 p.m. on Friday, and perhaps the overtime was posted between 3:53 and 4:00 p.m., there is absolutely no evidence that this occurred. Company witnesses could not give a definitive answer as to when the overtime was posted, and the Company's answer to the grievance indicates that the events took place "well after Bob Torres left for home."

The Union contends that the Company made no effort to offer the same overtime opportunity to the Grievant as it did to a junior second shift employee. Since the Company's past practice is to post weekend overtime on Wednesday, or at least before the end of Friday's first shift, and because the Company did not follow this practice on August 20, it was obligated to contact Torres and offer him the same opportunity to work overtime that it did to its second shift employees.

The Union contends that it is not Torres' fault that he was not present when the overtime was posted. There is no contention that Torres was not entitled to leave when he did.

The Union contends that the Company's argument that it never called employees at home regarding overtime postings is not relevant, because the present situation is unique. The Company has always posted weekend overtime before the end of Friday's first shift, thus, there was never a need to call an employee at home. The only reason that the Company has not called employees at home is because such a scenario has not previously arisen.

The Union contends that Torres' failure to sign up for weekend overtime on July 6, 1999 is irrelevant as to whether the Company should have offered Torres the opportunity to work overtime on August 21, 1999. The Union notes that Torres typically does not need to work weekend overtime because he receives plenty of overtime during the week. As of July 6, this was the case. However, the facts changed during the week which included August 21,

when Torres only worked two days, thereby resulting in a need for weekend overtime. The Union goes on to argue that the posted July 6 work was different in kind from that available on August 20 and that the Grievant was not qualified for the former, but was for the latter. Finally, the Union contends that there was a more senior employee available for the August 21 work which was posted in July.

In conclusion, the Union contends that the Grievant should be paid for 4.1 hours of overtime he missed.

It is the view of the Company that the collective bargaining agreement is silent on the proper overtime posting method. The Company walks through the various provisions that address overtime and argues that if Torres or the Union seeks to impose a telephone calling list duty on the Company, it should be bargained. The Company says that the Union focuses on the Article 4 reference to seniority rights. The Company notes that that Article addresses layoff, new hires, job vacancies and probationary period. It does not address hours or overtime. Nowhere in the agreement are seniority rights defined, nor does the contract mandate how they are to be observed. However, the Company argues that the placement of the seniority rights sentence in Article 4 suggests the seniority rights to be observed are those implicated by layoff, job security, new hires and probationary periods. Generally, the assignment of overtime is an exclusive managerial right in the absence of contract language which restricts it.

The Company acknowledges that the past practice in assigning overtime is to post it on the bulletin board. The Company contends that it followed that practice. Kranz posts available overtime on a bulletin board sign-up sheet, and assigns it by seniority as a matter of past practice. All parties acknowledge that. The Company notes that the Grievant admitted that he left seven minutes before 4:00 p.m. on that Friday without speaking to the people he knew scheduled overtime. The Grievant also admitted he knew that the Company had no history of telephoning employees for overtime. Torres admitted that he was aware of the July 6, 1999 overtime posting, and that he was qualified for that overtime work, and did not sign for it. It was his decision not to work the Saturday. The Company contends that Torres could have telephoned later on Friday afternoon to talk to his supervisor or could have mentioned to his supervisor on his way out that he was interested in overtime. He did neither.

It is the Company's view that the Grievant seeks to create a new, burdensome and expensive practice that must be bargained. Torres' grievance seeks to impose a new duty on Kranz to interrogate bargaining members by telephone to determine whether they want to work overtime, clearly contrary to past practice. The burden is alleged to be impossible. Given the crush of business that Friday afternoon, the Company was in no position to begin telephoning employees to determine their availability for overtime. The details of such a system would be overwhelming.

DISCUSSION

The language of the collective bargaining agreement does not address the posting or assignment of overtime. As noted by the Company, Article 4, Seniority makes no reference to the assignment of overtime. However, both parties acknowledge a practice of posting weekend overtime, usually by Wednesday, and no later than 4:00 p.m. Friday, and thereafter assigning it by seniority.

It appears that the Company became aware of the need for Saturday work too late to post it by 4:00 p.m. Once aware, the Saturday work was posted and assigned. The question presented here is under the circumstances, was the Company required to call Torres? Both parties look to the practice to provide an answer.

The practice is to post overtime work ahead, typically by Wednesday, but no later than Friday at 4:00 p.m. My view of the record is that the Company could not post by 4:00 because they did not realize the need for overtime until after 4:00 p.m. The traditional analysis of past practice is commonly stated as follows:

> "In the absence of a written agreement, 'past practice' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties."

(Elkouri, at p. 632 citing CELANESE CORP. OF AMERICA, 24 LA 162.)

Inherent in the analysis is that the parties have arrived at some mutually understood way of handling certain matters they have encountered in the past. The underlying premise in applying past practice doctrine is that once parties have established a way of doing business with one another, they are, under certain circumstances, bound to that practice.

The application of past practice does not fit the facts presented in this dispute. This dispute exists because these parties faced a situation not previously encountered. The posting went up late because the Company was not aware of its need for Saturday overtime until after 4:00 p.m. It appears that this has either never happened before or if it did, has not been contested. Typically, Torres would not be interested in weekend work due to his heavy weekly work schedule. His interest in the August 21 overtime is atypical. Finally, the record indicates that Torres left before 4:00 p.m., which itself is an unusual circumstance for man who commonly works very long days. Buske's grievance answer notes that it was unusual for Torres to have gone home early.

It is the combination of these unique events occurring simultaneously that gives rise to this dispute. The parties' practice does not contemplate any of this. In summary, neither the words of the contract, nor the practice of the parties extend to the events which occurred.

Given the press of business, the Company acted reasonably. I find nothing in the labor agreement that required the Company to call Torres.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 29th day of September, 2000.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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