BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

FLEMING COMPANIES, INC., LACROSSE DIVISION

and

TEAMSTERS LOCAL UNION 695

Case 5
No. 60346
A-5954

Appearances:

Ms. Carol A. Hawkins, Director, Labor Relations and Employment Law, Fleming Companies, 1945 Lakepointe Drive, Lewisville, Texas, 75057, appearing on behalf of the Employer.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Scott D. Soldon**, 1555 North RiverCenter Drive, Milwaukee, Wisconsin, 53212, appearing on behalf of the Union.

ARBITRATION AWARD

The Union and Fleming Companies, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the Employer's mandatory shift overtime practice. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in LaCrosse, Wisconsin, on January 11, 2002, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post hearing briefs by March 21, 2002, marking the close of the record.

ISSUE

The parties were unable to stipulate to the issue presented and left it to the Arbitrator to frame the issue in the award.

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The Union would state the issue as follows:

> Did the Employer violate the collective bargaining agreement when it extended the maximum mandatory shift overtime from two hours to four hours? If so, what is the appropriate remedy?

The Employer did not provide the Arbitrator with its statement of the issue.

The Arbitrator adopts the Union's statement of the issue.

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – CONDUCT OF THE BUSINESS

2.1 **Company Authority**. The conduct of the business, the management and supervision of all procedures and operation is vested exclusively in the Company. The selection and direction of all working forces is vested exclusively in the Company except as modified by this Agreement . . .

ARTICLE 3 – HOURS AND OVERTIME

. . .

3.2 **Overtime**. . . .The Company shall continue to assign overtime consistent with past practice. (Emphasis in original.)

BACKGROUND

The parties do not dispute the background facts and circumstances leading to the instant dispute. They do, however, dispute the proposition that those facts create a binding past practice upon the parties. The Fleming Companies, Inc., LaCrosse Division, provides wholesale food distribution services to its customers. In early 2001, the company acquired a new customer, K-Mart Stores, which brought to the company a significant increase in product volume. By July, 2001, the K-Mart business and various problems associated with it, had created a situation which would result in a decrease in service levels to the customers unless the Employer found a way to increase productivity to meet the demand.

On July 16, 2001, the Employer met with the Union to discuss the impact of the new business on the operation and to explore ways in which the Employer could meet its customer's needs. The Employer advised the Union that it was necessary to increase the mandatory

overtime levels from the current and historic two hours per day to a maximum of four hours. At the meeting, the Union proposed several ways in which the mandatory overtime of two hours could perhaps be maintained, to wit.: hiring more employees; using summer help or casuals; procedures for identifying product stored in trailers; using third shift employees to work overtime; voluntary overtime; inventory control; asking more people on first shift to stay late. Two days following this meeting, July 18, 2001, the Employer posted a notice in the form of a memorandum from Warehouse Manager Bob Wilming to the employees informing them that, for the remainder of that week at least, the daily mandatory overtime was being increased from two to a maximum of four hours mandatory. The posting stated that "We are hopeful that this Overtime policy can be reversed shortly." The Employer advised the Union of its intent to post this notice prior to doing so but did not ask for, nor did it receive, the Union's agreement to implement the change. This increased mandatory overtime policy stayed in effect for about one month ending in the second or third week of August, 2001, and forms the basis of this grievance.

THE PARTIES' POSITIONS

The Union

The Union argues that the unilateral extension of the mandatory overtime period by the Employer violated the collective bargaining agreement because the practice of a two hour mandatory overtime period has been in effect for over 25 years and, as such, has become a part of the agreement. In other words, it is a binding past practice. Citing TEXAS UTIL. GENERATING DIV., 92 LA 1308, 1312 (MCDERMOTT, 1989), the Union says "In cases where the contract is completely silent with respect to a given activity, the presence of a well established practice, accepted or condoned by both parties, may constitute, in effect, an unwritten principle on how a certain type of situation should be treated." The Union refers to Richard Mittenthal's characteristic's of a binding past practice: clarity and consistency; longevity and repetition; and acceptability and argues that these characteristics apply to the instant practice and should, consequently, identify it as binding upon the parties.

The Union argues that this practice is clear and consistent because it has been the practice for over 25 years and because the record reflects that the practice was "normal operating procedure" as far back as 1982. (Referencing Union Exhibit 2) Also, over the years the Employer has approached the Union about extending the time requirements for mandatory shift overtime reflecting the Employer's understanding that changing it without the consent of the Union would be inconsistent with past practice.

For the same reasons mentioned above, the Union argues that the practice's longevity and repetition cannot be questioned.

As for the acceptability element, the Union argues that the practice was accepted without question for over 25 years and only became unacceptable in 2001 when the Employer unilaterally changed it.

Citing VILLAGE OF WASHINGTON PARK, 113 LA 362 (WOLFF, 1999), the Union argues that the Employer lacked the authority to change the mandatory overtime policy because, as an established past practice, it is as binding upon the parties as any other contractual term expressed therein. In order to change a binding past practice, the Union asserts that the Employer must negotiate with the Union for its removal or modification. It cites language from UNITED STATES BORAX & CHEMICAL CORP., 48 LA 641, 645-646 (BERNSTEIN, 1967) as follows:

> Contract and practice are interconnected. . . the common law of the shop necessarily integrates them. . . How, then, shall a practice which is interwoven with the written agreement be terminated? Does such an action require the approval of both parties or may the employer it to an end unilaterally? Once again, there is consensus among the authorities, holding that agreement is necessary to terminate at least in so far as employee benefits are concerned that has been in effect for at least a decade cannot expire; it must be affirmatively legislated out of existence by mutual consent.

Responding to the Employer's argument that its management rights justified the unilateral implementation of the new policy, the Union reminds the Arbitrator that other arbitrators have consistently held that management rights clauses do not relieve an employer of the duty to bargain over changes to a binding past practice and cites CITY OF ROCK ISLAND, 116 LA 173 (WOLFF, 2001) and FLEMING COMPANIES, INC., 112 LA 1018 (BRESSLER, 1999) in support.

Finally, the Union urges the Arbitrator to find that the collective bargaining agreement requires overtime to be assigned in accordance with past practice and that any deviation from that past practice absent negotiations with the Union constitutes a violation of the CBA.

The Employer

The Employer argues that there is no past practice relating to the scheduling of mandatory overtime. It cites the standards enunciated in CELANESE CORPORATION OF AMERICA, 24 LA 168, 172 (1954) for making a determination as to whether a past practice is binding or not:

> 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. ID.

The Employer argues that even though "the company for many years followed this practice, that is insufficient to make it binding on the company." It says that the practice is neither clearly enunciated nor is it accepted by the company, and there is no contractual language which expressly limits overtime scheduling to only two hours per shift. The Employer asserts that under Article 2.1 (Company Authority), it retains the exclusive right to manage and supervise all procedures and operations and to select and direct all working forces. Citing FORD MOTOR COMPANY, 19 LA 237, 241 (SHULMAN, 1952) as standing for the proposition that for a past practice to be binding it must spring from mutual agreement and, here, the Employer says, there was no such "mutual agreement." This fact is evidenced, argues the Employer, by the events in September, 2000, when the Employer attempted to exceed the two hour practice and met resistance from the Union. Ultimately, the Employer found alternative ways to get the work out and further conflict was avoided. Also, the Employer refers to events in June of 2001 where the Employer "made another unilateral move" when it implemented a "five hour window between overtime shifts for safety reasons." These two examples, says the Employer, demonstrate that in the overtime context there was no settled way of doing things and, hence, no mutual agreement binding on the parties.

Relative to the language contained in Article 3.2, which states that "the company shall continue to assign overtime consistent with past practice," the Employer argues that this language refers to the Union's concerns about reductions in overtime and for employees reporting early to work being compelled to work overtime for an additional two hours beyond the end of their shift. Thus, because this language refers to concerns other than the two hour mandatory overtime maximum, it does not control this case. Consequently, the Employer reasons that no contractual language limits its right to impose more than two hours in mandatory overtime if its business needs require it.

The Employer cautions the Arbitrator not to read an implied term into the contract which does not address the specific issue in this case and reminds the Arbitrator that simply because the Employer had not used its discretion to exceed the two hour limit on mandatory overtime in the past it should not consequently be deemed to have lost that discretion.

The Employer argues that because of excessive and unanticipated work volumes it was justified, by virtue of its management rights, in increasing the amount of mandatory shift overtime. It cites LOCAL 7815, UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, CLC, CASE 58, NO. 52451, A-5349 (CROWLEY, 1995) as standing for the proposition that the scheduling of work is "generally conceded to be a fundamental right of management" and that the past practice of scheduling overtime alleged in that case was "nothing more than the manner in which the employer had in the past, chosen to schedule overtime." The Employer also cites MALLINCKRODT CHEMICAL WORKS, 38 LA 267 (HILPERT, 1961) as the authority permitting the Employer to schedule overtime exclusively and unilaterally and argues that its actions in the instant case were consistent with that authority.

The Employer finally argues that the scope of the practice alleged by the Union must be viewed in light of the underlying circumstances so that the "true dimensions" of the practice may be appreciated. It argues that the operational needs of the LaCrosse Division required additional overtime and that the Employer had "maxed" out on the use of casuals and summer temps and was hiring new associates as fast as possible. Consequently, says the Employer, in order to maintain high levels of customer service and productivity it was forced to increase mandatory overtime. The Employer maintains that even if the practice rose to the level of a binding agreement, it cannot restrict the exercise of management's legitimate function. Citing STANDARD OIL COMPANY, 16 LA 73 (1951). The Employer argues that the business levels facing the company at the time were different than the business levels which had existed previously and that any prior past practice of overtime scheduling should be limited in scope to the circumstances existing at the time. It cites Arbitrator Meier's decision in CITY OF SUPERIOR AND SUPERIOR CITY EMPLOYEES UNION LOCAL 244, WERC CASE NO. 149, NO. 54477, MA-9696 as authority for this argument.

DISCUSSION

This Arbitrator's primary consideration of this matter is governed by the terms of the collective bargaining agreement and of the facts and circumstances surrounding the issue and the past practice of the parties. In fact, it is the existence, or lack thereof, of that past practice and its character as binding on the parties, or not, upon which this grievance stands or falls.

The Union argues that a past practice has been established as to the method by which mandatory shift overtime is scheduled. Because the practice has been to limit such overtime to two hours and because this practice has been in effect for over 25 years the Union believes that it has taken on the weight and authority of a term of the contract. In other words, it has become a "binding past practice." While the Union argues that the binding nature of the practice alone is sufficient for the Arbitrator to sustain the grievance, it asserts that the practice has become more than a *de facto* part of the contract; it has been bargained into the contract under Article 3, Sec. 3.2's language which states "<u>The Company shall continue to assign overtime consistent with past practice.</u>" (Emphasis in original.) Hence, a violation of the past practice of limiting mandatory overtime to two hours, according to the Union, is a clear violation of the black and white letter of the contract.

The Employer's position is just the opposite. It argues that a binding past practice cannot be established upon these facts within the accepted definitions of "past practice." It says that its scheduling practice was merely an exercise of its managerial rights with no thought of obligation or commitment for the future and that, faced with extraordinary circumstances, as it was in this case, it had the authority to unilaterally modify the practice.

We start the analysis with a clear and workable definition of "past practice." Richard Mittenthal provides it for us in his article "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Rev. 1017, 1019 (1961):

> First, there should be *clarity* and *consistency*. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond the same way to a particular set of conditions, their conduct may very well ripen into a practice. Second, there should be *longevity* and *repetition*. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of certain conduct do not ordinarily establish a practice. . . . Third, there should be *acceptability*. The employees and the supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created.

This record unequivocally supports the notion that the mandatory shift overtime scheduling practice was clear and consistent. Ronald Stokke, a 25-year plus employee, testified that since he began work at Fleming, mandatory shift overtime has always been two hours and that when the foremen advised him and his co-workers of the need for overtime they simply said "We need you to stay." Stokke testified it was understood that this meant they would put in two hours of overtime and punch out at four o'clock instead of the normal end of shift at two o'clock. Likewise, Loren Molling, a 24-year plus employee, testified as follows:

. . .

> Q. What shift do you work?
>
> A. First.
>
> Q. What are the hours of that shift?
>
> A. 6 to 2. 6 a.m. to 2.
>
> Q. . . . And in the course of those twenty-four plus years with the Company, have you ever been mandatoried for overtime?
>
> A. Yes. I have.
>
> Q. With the exception of whatever happened during the summer of 2001, for how many hours of shift overtime have the people been mandatoried?
>
> A. Two hours.

Q. And how has the Company or its foremen made it known to the fellows that they would have to work overtime on a given day? Give me examples of how they do that.

A. Usually the foremen will just say, "You are mandatoried for late,". . .

Q. How do you know how many hours that means?

A. It's always been two. When they say, you know, "You want to stay late?" you just automatically figure it's two hours.

. . .

Q. Have you ever heard the phrase, "Congratulations, guys, you are all boned"?

A. Yes.

Q. What does that mean?

A. That means you are mandatoried.

Q. Is that a foreman usage, that type of usage?

A. Yes.

Q. For how many hours are you mandatoried when they say that?

A. Generally it's always two hours.

Q. . . . Have there ever been times, except for the summer of 2001, when people were mandatoried for three or four hours?

A. No.

. . .

The testimony of 18-year employee Doug Michener is consistent with the foregoing. And Mike Newcomb, the Employer's distribution manager, who has been employed with the company for roughly 24 years, testified that, until the summer of 2001, they "Never got in a position where we had to do that (extend mandatory overtime beyond two hours) where it would have potentially impacted our customer base." Finally, Union Exhibit 2, a letter from the Employer's general counsel to the Union's business representative dated April 1, 1982, refers to the two hour overtime increments as "the Company's normal operating procedure." Thus, I find that the practice was not only clear and consistent but was followed often over a

lengthy period of time giving it the requisite longevity and repetition required by Mittenthal's definition. The last requirement of that definition, acceptability, is also demonstrated by the above evidence. There is no question that the foremen and the workers, by virtue of the language used to announce the requirement for mandatory overtime, evidenced their knowledge of the particular conduct and regarded it as the correct and customary means of handling the mandatory overtime situation. This acquiescence of the practice continued for a long period of time thus completing the final element enunciated by Mittenthal, acceptability.

There were many opportunities over the years for the Employer to have bargained a change in this consistent and embedded practice had that been management's desire. It did not do so, (at least until the year 2000, at which time the practice was codified under Article 3, Paragraph 3.2) and the practice became, over the years, an accepted part of the employee's working conditions. I therefore conclude that the Union has proved, as it had the burden to do, the existence of a binding past practice.

The Employer urges the Arbitrator to apply the standards enunciated by Arbitrator Justin in CELANESE CORPORATION OF AMERICA, 24 LA 168 (JUSTIN, 1954) and argues that if I do I will not be able to find a binding past practice to exist. I disagree. The standards set forth by Arbitrator Justin have been essentially incorporated in the Mittenthal test. They are that the practice be unequivocal; clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. (Id.) The record dovetails the practice in the instant case rather nicely with Arbitrator Justin's criteria and leads the undersigned to the same conclusion: the practice here is a binding one.

The Employer's argument that there was no mutual agreement between the parties fails in light of the foregoing references to the record. In support of this argument it refers to a situation in September, 2000, when the Employer "attempted to exceed the 'practice' of two (2) hour mandatory overtime. The company did not implement it on that occasion, but met with resistance from the Union on this issue." Of course it met with resistance from the Union! As a binding past practice the Employer's unilateral attempt to modify it would have constituted a breach. This event does not evidence the lack of mutual agreement, it evidences the Union's expression of its belief in the binding nature of the practice and the Employer's acquiescence of that practice due to its failure to implement change. This event is not evidence that "there was no settled way of doing things in the overtime context," as the Employer suggests, but, rather, that there *was* a settled way of doing things in that context and that the Union intended to keep it that way. Arbitrator Shulman's observation in FORD MOTOR COMPANY, 19 LA 237, 241 (1952) is cogent here:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. And in some industries there are contractual provisions requiring the continuance of unnamed practices in existence at the execution of the collective agreement. . . A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is a past practice but rather to the agreement in which it is based. ID.

The Employer argues that the Union's reliance on the last sentence in Article 3, Paragraph 3.2, in support of the idea that the practice had attained the character of a binding past practice has no merit because "that sentence was retained in the 2000 agreement at the request of the union to address concerns other than the one at issue here." The Employer asserts that the Union wanted to retain that sentence because it was concerned about an attempt to reduce overtime by adding a new shift and because the Union did not want members who reported early for work to be held after work for two hours mandatory overtime. Therefore, says the Employer, the agreement does not relate to the practice of limiting mandatory overtime to two hours but to other considerations related to that practice. In other words, the "past practice" referred to in Article 3, Paragraph 3.2, is not the two hour limit *itself* but the implementation of that limit upon employees who put in hours before their regular shift begins and the fact that the Union did not want overtime pay reduced below two hours in the event a new shift were added. I find no merit in this argument. There is a past practice or there is not. The testimony is clear on the point that the two hour mandatory shift overtime limit has been in effect for over 25 years and, with the inclusion of the language in Article 3, Paragraph 3.2, the practice becomes a part of the written contract as opposed to an implied term. The task then becomes merely to define the practice to which the language refers, which I have done. The Employer cites SERVICE EMPLOYEES INTERNATIONAL UNION, CASE 384, NO. 47049, MA-7152 (SHAW, 1993) in support of its argument that the scope of the practice here is limited to the above parameters and must exclude that part which limits mandatory shift overtime to two hours. The SEIU case, appropriately, limits the scope of a past practice *"to those matters the parties are in agreement with."* The parties in the instant case have been in agreement with this practice's two hour limitation on mandatory shift overtime for over 25 years. Hence, SEIU is not supportive of the Employer's position.

Finally, the Employer cites STANDARD OIL COMPANY, 16 LA 73 (1951) in support of its argument that even if the practice rises to the level of a binding practice it cannot restrict the exercise of management's legitimate function, i.e., its decision to increase mandatory shift overtime in the face of an increase in business. In STANDARD OIL, however, the agreement, unlike the one here, contained an express written exception for "special circumstances" which allowed the company to deviate from custom. The Board in STANDARD OIL observed:

> Custom can, under some unusual circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the Contract was entered into upon the assumption that that customary action would continue to be taken, such customary action may be an implied term. ID.

Such is the case here. But more, the implied term has been written into the contract at Article 3 as a result of the bargaining process. Since it was bargained by the parties, it came to be a "prescribed way" of doing things and not a "present way" of scheduling mandatory overtime. See FORD MOTOR COMPANY, ID. Therefore, the facts of STANDARD OIL do not square with those in this case. The same distinction applies to the facts in LOCAL 7815, UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, CLC, CASE 58, NO. 52451, A-5349 (CROWLEY, 1995), cited by the Employer, where there was no express contractual

provision on the scheduling of overtime. Even if the past practice had not been written into the contract, a party may not unilaterally modify a binding past practice. The management rights clause is broad but it does not give management the unilateral right to ignore a binding past practice any more than it gives management the unilateral right to modify a written term of the agreement. See FULTON COUNTY TREASURER, 110 LA 489 (1998); GENERAL MILL, INC., 101 LA 953 (1993); R. MITTENTHAL, Past Practice and the Administration of Collective Bargaining Agreements, ID.; CITY OF ROCK ISLAND, 116 LA 173 (2001).

In light of the foregoing, it is my

AWARD

The Employer did violate the collective bargaining agreement when it extended the maximum mandatory shift overtime from two hours to four hours.

In response to the Union's request that the Arbitrator issue a "cease and desist order," the Arbitrator believes that a finding that the Employer violated the agreement is tantamount to such an order insofar as the assumption is that the Employer will discontinue any such violations upon receipt of this award.

In response to the Union's request that the Arbitrator fashion a penal remedy against the Employer for future violations of the agreement related to this award, I decline to do so with the understanding that any such violations will or may be the subject of future litigation within which this award will be given appropriate weight and deference.

Dated at Wausau, Wisconsin, this 21st day of June, 2002.

Steve Morrison /s/
Steve Morrison, Arbitrator

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