BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

SUPERVALU, INC.

Case 30
No. 60748
A-5990

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen,** 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Michael, Best & Friedrich, by **Attorneys Stacie J. Andritsch** and **John Lavine,** 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the Employer.

ARBITRATION AWARD

Supervalu, Inc. of Pleasant Prairie, Wisconsin, hereinafter Company, and Teamsters Local No. 43 of the International Brotherhood of Teamsters, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all time relevant to this proceeding which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Commission on January 10, 2002. Commissioner Paul A. Hahn was appointed to act as arbitrator on February 6, 2002. The hearing took place on April 24, 2002 at the Company in Pleasant Prairie, Wisconsin. The hearing was transcribed. The parties were given the opportunity to file post hearing briefs. Post hearing briefs were received by the Arbitrator on July 3, 2002 (Company) and July 5, 2002 (Union). The parties were given the opportunity but chose not to file reply briefs. The record was closed on July 5, 2002.

ISSUE

The parties stipulated to the following issue:

Did the Company violate the collective bargaining agreement?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 6. - MANAGEMENT RIGHTS

6.01 The Union recognizes those rights and responsibilities which belong solely to the Employer, including, without limitation on the generality of the foregoing, the right to manage the Employer's business and to direct the work and the working force; the right to hire employees of its own selection; the right to maintain order and efficiency; the right to extend, maintain, curtail or terminate the trucking, warehouse and/or garage operations of the Employer and the assignment of work; the right to determine the number of shifts, the number of days in the workweek, hours of work and the number of persons to be actively employed by the Employer at any time; the right to study or introduce new or improved trucking, warehouse and/or garage methods or facilities; the right to determine the number, length and location of truck routes and the right to split, cut, consolidate or eliminate a route or routes; the right to discipline, transfer, promote, suspend or discharge employees for proper cause and lay off employees for lack of work or other proper reasons: the right to assign work, including overtime work and work on Saturdays, Sundays and holiday; the right to establish and maintain rules and regulations; and the right to set standards of a fair day's work and to maintain performance records for all jobs. All rights, powers or authority the Employer had prior to signing this Agreement with the Union are retained by the Employer, except those specifically surrendered or modified by this Agreement.

ARTICLE 7. – SENIORITY

7.01 DEFINITION Seniority is defined as the length of continuous full-time service with the Employer while working under the jurisdiction of this Agreement. Drivers, warehouse, garage mechanic and maintenance mechanic employees shall each be separate seniority groups.

. . .

7.09 TEMPORARY TRANSFERS Temporary transfers of more than one (1) hour will be made by seniority.

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ARTICLE 12. – SAFETY OF EQUIPMENT, ACCIDENTS AND REPORTS

. . .

12.02 Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property in violation of an applicable statute or court order, or governmental regulation relating to safety of person or equipment.

. . .

12.07 A safety committee comprised of stewards or alternates shall periodically meet with management to discuss and find avenues to alleviate safety problems that may arise.

. . .

ARTICLE 14 – WORKDAY AND WORKWEEK

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14.09 CALL-IN Any full-time warehouse, garage mechanics and maintenance mechanic employees who are called in to work outside their regular scheduled shift and do so report shall be guaranteed four (4) hours pay and any driver employees who are called in to work outside their scheduled shift and do so report shall be guaranteed six (6) hours pay. Such call-in pay guarantee provision does not apply in any situation where call-in time is consecutive with employees' regular scheduled shift. Time and one-half (1 ½) premium pay shall only apply when such employees called in to work meet requirements in section 14.05 above.

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LETTER OF UNDERSTANDING
SUPERVALU AND TEAMSTERS LOCAL #43
WAREHOUSE, MAINTENANCE & GARAGE OVERTIME PROVISIONS

Departments shall be defined as:

MAINTENANCE GARAGE
MAINTENANCE WAREHOUSE
GROCERY WAREHOUSE
PERISHABLE WAREHOUSE
RECOUP / SANITATION
REPACK / CIGARETTES

. . .

5th (as it applies to 4 day-per-week work schedules) 6th &
7th DAY OVERTIME REQUIRED BY THE EMPLOYER

The Company shall seek volunteers:

1. By seniority from the same department.
   If additional volunteer employees are required, then:
2. By seniority from the same classification.
   If additional volunteer employees are required, then:
3. Supplemental Associates.
   If additional volunteer employees are required, then:
4. Mandatory overtime for all supplemental associates from the same classification qualified to perform the work available.
   If additional volunteer employees are required, then:
5. By reverse order of seniority from the original department.

- All 20% non-guaranteed employees qualified to perform the work available will be required to work in any department prior to the 80% guaranteed employees being required to perform such work.
- Supplemental Associates will be scheduled to work unless excused in advance for legitimate reasons by the appropriate Resource Manager.

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STATEMENT OF THE CASE

This grievance involves Supervalu, Inc. and Teamsters Local Union No. 43. (Jt. 1) The Union alleges that the Company violated the collective bargaining agreement by failing to assign the Grievant, a sanitation department employee, to move pallets, a task normally assigned to the sanitation department, on the Grievant's regular scheduled off days of September 17 and 18, 2000. (Jt. 2)

The Company operates a grocery warehouse operation in Pleasant Prairie, Wisconsin. Both parties agree that there are few factual disputes in this case. The Company has operated its Pleasant Prairie Warehouse operation since about 1990. Product is shipped into the warehouse five days a week and shipped out of the warehouse seven days a week. The parties sit down annually to determine an appropriate shift bid which determines the number of employees assigned to each job per shift and within each department. The employees are then permitted to bid for these jobs and shifts based on their seniority. Staffing needs and weekly schedules are determined on a more contemporary daily and weekly basis throughout the year.

Approximately two to three weeks before a scheduled shift, warehouse supervisors make a workload projection based on historical data. That data is contrasted with the shift bid configuration taking into account the number of scheduled vacations, leaves of absence, light duty assignments etc. to determine whether "extra day" overtime is required. Extra day overtime is work assigned to an employee on their scheduled day off. When a determination is made that such extra day overtime will be required, the Company posts a notice approximately one week in advance and offers the overtime in accordance with the letter of understanding set forth under the relevant contract provisions stated above. (Jt. 4 & 5)

The Company also has employees who do not obtain a job bid who become part of a warehouse "pool" staff and are assigned work as needed. Daily adjustments are often made using employees from the pool particularly when employees do not show up for their assigned scheduled shift.

The Company ships and receives product on pallets. Customers of the Company tend to stockpile pallets and can return them to the Company at any time and at their discretion. On or about September 10, 2000 the Warehouse Superintendent reviewed his needs for extra day overtime in various departments for the following week which included September 17 and 18. After reviewing the information, the Warehouse Superintendent determined that he would not have a need for extra day overtime in sanitation but would have such a need in grocery/shipping and put up an extra day posting for shipping only. When the Warehouse Superintendent reported for work on September 17, 2000 he found a large number of returned pallets which arguably were clogging up the receiving dock and compromising the efficiency and safety of the operation. (Er. 12) The Warehouse Superintendent saw an immediate need to move these pallets which, importantly, is normally a sanitation job. The Grievant works in the sanitation department and his regularly scheduled days off were September 17 and 18, 2000. Before he finished his work week the Grievant had asked his supervisor if there was any overtime on his days off (September 17 and 18) and was told that no overtime was available. The Warehouse Superintendent did not call the Grievant to come in on September 17 or 18 and instead used two employees, one on each day, who had bid for overtime on the 17th and 18th because they were employees in grocery/shipping for which overtime was scheduled on September 17 and 18. (Jt. 4 & 5)

The Company admittedly did not call the Grievant to work those two days as it regards the removal of pallets as unanticipated overtime and the Company is not required to call in employees and can transfer employees already on the Warehouse premises to move the pallets. The Union takes the position that the clear contract language including the letter of understanding regarding overtime required the Company to call the Grievant and give him the opportunity to work the overtime on September 17 and 18 because Grievant was available to do the pallet removal, sanitation work.

The Union filed the grievance in this matter on September 22, 2000. The Grievance was denied by the Company on September 25, 2000. The parties failed to achieve resolution

through the grievance procedure and the matter was appealed to arbitration. Hearing in this matter was held by the Arbitrator on April 24, 2002 in Pleasant Prairie, Wisconsin. No issue was raised as to the arbitrability of the grievance.

POSITIONS OF THE PARTIES

Union

The Union takes the position that there is no ambiguity in the contract language; the Letter of Understanding covers overtime on the sixth and seventh day of a workweek, in this case September 17 and 18, 2000. Nor, the Union argues, is there any contract language that gives the Company the right to make temporary transfers to abrogate the clear language of the Letter of Understanding. The Union counters the Company argument that the removal of pallets is unanticipated overtime that is not subject to the Letter of Understanding by arguing that nowhere in the labor agreement is there any language that distinguishes between anticipated overtime and unanticipated overtime. The Union argues that the Letter of Understanding applies to overtime and Article 7 (Transfers) applies to assignments made on straight time.

The Union takes the position that the Company's argument that there is a "longstanding" past practice applying the Letter of Understanding only to planned overtime is contrary to the clear contract language of the Letter of Understanding that applies to overtime with no distinction between anticipated or unanticipated overtime. The Union argues the standard arbitrable doctrine that past practice cannot modify clear contract language. The Union submits that there has been no mutual agreement between the Union and the Company to amend the Letter of Understanding. The Union argues that the overtime procedure that was revised in 1999 defeats any past practice claim and provides that management will contact employees for overtime work if the work is posted after a shift has departed for the day, outlining specific circumstances where employees will or will not be contacted for overtime. The Union takes the position that the call-in provisions of Article 14 require that employees will be contacted for "work outside their regular scheduled shift." Thus, the Union argues, the contract, the Letter of Understanding and the overtime posting procedure are consistent with the Union's position that the Company must attempt to call in an employee from the department in which the overtime work arises.

Concerning the Company's argument that the pallets needed immediate attention because of a potential safety hazard, the Union agrees that the pallets need to be taken care of but argues that there was not an emergency situation on September 17 and 18 and sanitation employees could have been called into work to remove the pallets or that sanitation employees already assigned who were working their regular shift on September 17 and 18 could have been taken off their regular duties and assigned to the removal of pallets and that other

sanitation employees could have been called in to perform the regular duties that those sanitation employees were performing. The Union submits that the Company failed to show that the pallet removal was so urgent that it could not wait until another sanitation employee arrived or was transferred from his or her regular duties to remove the pallets.

In conclusion, the Union argues that for the foregoing reasons the Arbitrator should sustain the grievance and make the Grievant whole.

Company

The Company's main argument is that the Letter of Understanding in the labor agreement does not on its face contain a requirement that the Company needs to call in employees in sanitation to meet its unanticipated needs in sanitation as happened on September 17 and 18 to remove pallets. The Company submits that a requirement that the Grievant should have been called in on September 17 and 18 is at odds with the Company's express and inherent management rights, a decade-long past practice, the 2000 labor negotiations between the parties and the practical realities of how the Company needs to deal with immediate, unanticipated staffing needs and safety issues.

It is the position of the Company that the management's rights language of Article 6, gives it the right to assign work including overtime work and work on Saturdays, Sundays and holidays. The Company also argues that Article 7, Section 7.09 allows the Company the right to make temporary transfers by seniority in order to get the work done.

Addressing the Letter of Understanding, the Company points out to the Arbitrator that the Letter of Understanding regarding extra day overtime (September 17 and 18) was not a situation where the overtime was required; in other words the Company argues that overtime "required" by the Employer (the language of the Letter) means overtime that the Company plans for, schedules and posts more than a week in advance. Required does not refer to the assignment of unanticipated work even on an overtime basis that occurs during the day and requires immediate attention like the pallet situation.

The Company submits that the Letter of Understanding was negotiated in 1990 and testimony of its witnesses made clear that it was intended to give less senior employees the ability to get anticipated or scheduled overtime work in their respective departments and does not refer to unanticipated overtime which is the pallet removal situation. The Company argues that it has consistently used employees already on the warehouse premises by transferring employees from the work for which they were scheduled to take care of unanticipated pallet work. The Union has never grieved that practice of the Company until the current grievance. The Company submits that in the case of the Grievant it followed the exact practice that was agreed to in the 2000 negotiations; the Grievant was not scheduled to work the sixth or seventh

day as were the two employees in the grocery department who had signed a posting for grocery work in shipping. Further, the Company argues that its testimony showed that the overtime posting procedure (U 13) was outdated and inconsistent with the Company's practices before Union #13 was revised in 1999.

The Company submits to the Arbitrator that the Union is attempting to achieve through arbitration what it was unable to accomplish at the bargaining table in the 2000 negotiations when the Union made a failed attempt to change the Letter of Understanding. Lastly, the Company submits that it has an obligation to maintain a safe work place, and in the past it had been the object of an OSHA investigation regarding the pallet situation. This safety obligation supports the business judgment made by the Company to immediately take care of the pallets rather than calling in the Grievant.

In conclusion, the Company submits that the Union failed to meet its burden of proving that the Letter of Understanding stripped the Company of its otherwise inherent and express right to use temporary transfers from the "pool" to meet its unanticipated needs and that the Company's past practice for meeting these unanticipated needs, in this case the handling of the pallets on September 17 and 18, has become part of the labor agreement. The Company requests that the grievance be denied.

DISCUSSION

This is a contract arbitration case. The Union, which has the burden of proof, alleges a violation of the parties' labor agreement by the failure to call in the Grievant to work overtime on September 17 and 18, 2000, the Grievant's scheduled days off. On those days, the Company used employees already scheduled to work to remove and organize pallets that had been delivered to the Company. This work was performed by two employees assigned to the grocery division of the Company rather than to sanitation employees who normally dealt with pallets. The Grievant is a sanitation employee. There are few facts in dispute and the grievance involves in essence contract interpretation.

The circumstances that gave rise to this grievance involved the return of pallets to the Company on September 17 and 18, 2000. As the Company's customers have complete discretion as to when they return pallets, the Company cannot anticipate on what day or days a significant number of pallets might be returned to the Company. There was no evidence introduced that any type of pattern for returning pallets could be established and therefore no challenge to the Company's evidence that the return of pallets is unanticipated or can be predicted with enough regularity to schedule sanitation staff at the appropriate time and date. Further, there was no challenge to the Company's evidence that the pallets returned on the 17th and 18th necessitated some action to remove and organize them for efficiency of operations and safety. (Jt. 12, Tr. 31 & 32) While the Union may be correct that the evidence did not

present an emergency situation, the Union did not argue that nothing should have been done with the pallets, only that there was time to call the Grievant by phone and have him come in to do this sanitation work. The debate is simply whether the Company had to or did not have to call the Grievant. The two employees who did the pallet work on the days in question were already in the warehouse working in the grocery division pursuant to a posting they had signed giving them the opportunity to work overtime for a shipping need. (Jt. 4-7)

Turning to the applicable contract language cited above, I find that the Company has the better of the argument. There can be little issue that the Management Rights clause gives the Company significant discretion in the assignment of work. The main area of dispute is over the Letter of Understanding. The Union argues that this provision of the contract covers all overtime; the Company argues that the language does not cover unanticipated overtime; the pallet situation in this case. I find that the Company's interpretation is correct. The language in the Letter specifically refers to "Overtime Required by the Employer" (Jt. 1) Understandably, the Union does not emphasize the word "required" and the Company does in their respective arguments. The word required is not defined in the labor agreement or the Letter but it has some commonly accepted meanings: impose a duty, necessary, compulsory, needed. 1/ I find that work cannot be needed or necessary unless it is known that it is needed or necessary. Therefore, I find that the pallet work on the 17th and 18th was unanticipated and not subject to the Letter of Understanding which only covers anticipated or required overtime. As there is no dispute or evidence that the Company could know or anticipate the number of pallets it had to deal with on those dates, it could not know it needed employees to handle them and logically did not require employees to work or ask for volunteers. Therefore the posting procedures of the Letter were not violated.

1/ Bartlett's Roget's Thesaurus, Little Brown and Company (Inc.) 1996; Webster's New Collegiate Dictionary G & C. Merriam Co. 1981.

Looking at the remaining provisions of the agreement subject of the debate, I find the parties' positions on Article 7 to be somewhat confusing and not determinative. I therefore choose not to interpret Article 7 as to whether it applies to overtime or only straight time or some combination thereof. I find that the Company under the Letter and Management Rights clause could transfer employees from the jobs they were scheduled to work on the sixth and seventh day to handle unanticipated overtime. The Call-In provisions of Article 14 are not dispositive as that language does not mandate a call-in but only states what happens when an employee is called. The posting memorandum, Union exhibit 13, does not give the Union much assistance in meeting its burden. Company witness Krause testified that the memorandum regarding posting (U. 13) refers to posted overtime and the grievant would not

have been eligible to sign the posting as he was in the sanitation department and the posting was for grocery. (Tr. 90, 91, 96 & 97) Human Resources Director Zeeck, who testified about exhibit 13, was obviously not that familiar with the posting memorandum as Krause, a warehouse superintendent, and did not know if the memorandum was still in effect. In response to questions on the memorandum the most that could be elicited from Zeeck was that in certain situations an employee could, like Grievant, have been called into work. He never testified that it was required. (Tr. 53-54)

The Company's interpretation of the Letter and its practice was significantly bolstered by the testimony of Regional Vice President of Human Resources, Samer, who testified that he negotiated the 1990 labor agreement and Letter. Samer's unchallenged testimony was that the Letter was negotiated to try and balance overtime opportunities and was only to apply to known overtime that would occur and for which the parties agreed a posting procedure was necessary and appropriate; the Letter did not apply to the unanticipated moving of pallets. (Tr. 69-72) It is clear from the record evidence that the Company has not posted for or called employees in for unanticipated overtime since the 1990 agreement. Further, the practice has not before the instant grievance been grieved by the Union. (Jt. 9)

The Union argues that the Company could have handled the pallet cleanup differently by calling in the Grievant, by assigning sanitation employees already in the warehouse to do the work rather than their scheduled assignments and call in other sanitation employees to complete the regular sanitation assignments. The Company could have chosen one of those suggested alternatives but the key is that it was not required to do so by the agreement and it is not my prerogative to determine the Company's staffing and assignment needs.

I find that the Company did not violate the collective bargaining agreement when it did not call the Grievant to work on September 17 and 18, 2000 for the reasons discussed and decided herein.

Based on the foregoing and the record as a whole, I issue the following

AWARD

The Company did not violate the collective bargaining agreement. The grievance is denied.

Dated at Madison, Wisconsin, this 12th day of July, 2002.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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