

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**GREAT NORTHERN CORPORATION**

and

**UNITED STEELWORKERS INTERNATIONAL UNION, LOCAL 7-0932**

Case 2

No. 64760

A-6165

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**Appearances:**

**Michael Pyne**, International Representative, appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by **Ronald T. Pfeifer**, appearing on behalf of the Employer.

**ARBITRATION AWARD**

United Steelworkers International Union, Local 7-0932 (formerly PACE) [herein "Union"] and Great Northern Corporation [herein "Employer"], having jointly requested that the Wisconsin Employment Relations Commission assign the Undersigned, a member of its staff, to arbitrate the grievance specified below, and the Undersigned having held a hearing on June 1, 2005, in Appleton, Wisconsin, and each party having filed post-hearing briefs the last of which was received July 12, 2005.

**ISSUES**

1. Did the Employer violate Article 12 of the parties' agreement by refusing to pay Grievant James Behrendt for four hours of overtime for September 13, 2004?
2. If so, what is the appropriate remedy?

## RELEVANT AGREEMENT PROVISIONS

### **Article 12. OVERTIME**

Time and one-half shall be paid for all work performed in excess of eight (8) hours per day or forty (40) hours per week, whichever is the greater, but not for both. There shall be no pyramiding or duplication of overtime or premium under this Labor Agreement unless expressly so stated.

Double time shall be paid for all Sunday work. Sunday work shall be construed to mean work performed during the twenty-four (24) hour period beginning 6:00 a.m. on Sunday and ending at 6:00 a.m. on Monday.

All Holiday hours worked shall be paid at the rate of double time. On the contractual holidays, work other than emergency work will be by mutual agreement of the Union Committee only.

For the purpose of computing overtime, when a shutdown Holiday occurs *Monday through Friday*, such idle Holiday hours shall be considered as time worked.

Time and one-half shall be paid for all Saturday work as such when an employee is laid off during the week and works on Saturday.

When any part of the plant is scheduled to work normal production, overtime shall not be voluntary. For all non-production non-skilled jobs as determined by management, overtime will be voluntary. Volunteers for converting operations will be first sought from employees in converting classifications. Volunteers for corrugating operations will be first sought from employees in corrugating classifications. Volunteers for shipping will be first sought from employees in shipping. Volunteers for maintenance will be first sought from employees in maintenance. If an insufficient number of volunteers is obtained, then the volunteer request will be posted plant wide. If an insufficient number of volunteers is obtained from this posting, then the Company will require overtime of the junior qualified employees necessary to perform the tasks involved.

The Company shall not discriminate in the assignment of overtime. Overtime shall be limited to qualified employees. Employees on a normal Monday through Friday schedule shall, whenever possible, be notified of Saturday and Sunday work by a notice posted by 1:00 p.m. on the preceding Thursday. It is understood that events may occur which will require a change in the Monday through Friday schedule which is posted on the preceding Thursday

by 11:00 a.m. and the Company reserves the right to make and post those changes as soon as it becomes aware of them. It is also recognized that situations will arise where the Company is not in a position to know of the overtime need by the normal posting time described above. In such situations the Company shall notify the employee involved as promptly as possible. Under no circumstances will the approval of the Company of the replacement employee give rise to a grievance that some other employee should have been allowed to perform the overtime assignment. In any event, employees will not be required to work overtime beyond ten (10) consecutive hours on jobs other than their own or in their own line of progression, except on a voluntary basis. Employees will not be required to work daily shifts of 12 hours or more on an involuntary basis in any one period of time for a longer period than 3 consecutive work weeks.

When an employee is scheduled to work on Sunday, he shall be guaranteed at least four (4) hours of work. *An employee may give or trade a workday, Monday through Friday, with a qualified employee at straight time, by giving prior notice to the on-shift Crew Leader without incurring an absence occurrence.*

*An employee can work no more than twelve (12) consecutive hours and must have a minimum of four (4) hours off between work periods except in emergency situations and corrugator beginning of week start-ups.*

*If a give or trade is used during the week with no absence occurrence, Saturday will be paid at time and one-half.*

## **PROCEDURE FOR STAFFING OVERTIME**

Departments: Converting A & C, Shipping, Corrugator (sic), Maintenance

Note: Bander operations will be staffed from the department in which the operation occurs.

- I. Extended Shift Overtime
  - A. The following steps will be followed to select employees needed to fill extended shift overtime of four (4) hours (sic) or less:
    1. Step One – Machine Crew.
      - a. On shift employee from the same job classification.

- b. On shift employee from the other job classification (providing the person is qualified).
  - c. Employees from previous and/or succeeding shift in the same job classification.
  - d. Employees from previous and/or succeeding shift in the other job classification (providing the individuals are qualified).
2. Step Two – Machine Group (Job Seniority)
- a. Senior qualified on shift employee from the same job classification.
  - b. Senior qualified on shift employee from the other job classification.
  - c. Senior qualified employees from previous and/or succeeding shift in the same job classification.
  - d. Senior qualified employees from previous and/or succeeding shift in the other job classification.
3. Step Three – Department with Overtime (Plant Seniority)
- a. Senior qualified employee on shift.
  - b. Senior qualified employees from previous and/or succeeding shifts.
  - c. Other plant if A or C.
4. Other Departments (Plant Seniority)
- a. Senior qualified employee on shift.
  - b. Senior qualified employees from previous and/or succeeding shifts.
- B. Employees may find replacements for themselves (overtime only) as long as they are first approved by supervision as detailed in the Labor Agreement; Article 8 Hours of Work and Running Schedule.
- C. When extra employees are assigned a machine, over normal staffing, the regular Operator and/or Helper will first be asked to work the overtime. The Operator first; the Helper second; and, the extra employees third. If there is more than one (1) extra

employee, the person with the most company seniority will be asked first.

- D. If the overtime is more than four (4) hours, such as a machine cleanup which usually occurs on first shift, the work would be assigned by following the above outlined four (4) steps in paragraph A, providing a person does not work more than twelve (12) continuous hours, except for emergencies.

## II. Scheduled Saturday Overtime

- A. Employees are usually scheduled on the same shifts and machines for Saturday overtime as they were scheduled during the normal Monday-Friday work week. When only some of the machines are scheduled for Saturday, employees who have been assigned those machines during the normal work week will also be scheduled for the Saturday overtime, unless the regular employee (received job through posting) is available to work. In such cases the regular employee will be assigned the Saturday work.
- B. When the regular employee is not available, the Saturday overtime will go to the person who has worked the most hours on that job/machine in the preceding work week.
- C. When additional employees are needed to staff the plant on a Saturday, management will post a sign-up sheet. Employees signing will be selected in the same order as outlined above in I-A, Steps One (1) through Four (4).
- D. Employees volunteering to work on the Saturday before the start of their vacation will not be allowed to give away this time.

## III. Scheduled Sunday Overtime

- A. Employees will be assigned to jobs from the Sunday sign-up sheet. Selection will be based on Step A of the Extended Shift Overtime Policy.
- B. When there aren't enough qualified employees signed up, employee (sic) who were working (sic) schedule during the week on that machine and shift will be assigned to work.

- C. When an employee's machine is scheduled to run and he/she does not sign up, other qualified employees who sign up will be given the overtime based on the above mentioned selection process.
- D. When an employee signs to work Sunday, he/she will be expected to work if picked from the sign-up sheet. This overtime can only be given away, in an emergency situation to the next eligible qualified employee on the sign-up sheet.

#### IV. Maintenance

Extra people for the Maintenance Department who are picked from a voluntary sign-up sheet will be chosen by plant seniority and qualification.

#### V. Holiday Overtime

Volunteers will be chosen from (sic) a sign-up sheet based on plant seniority within the department scheduled to work. Volunteers from outside the department will be chosen by plant seniority and qualification.

### FACTS

The Employer is a manufacturer of corrugated paper in Appleton, Wisconsin. It operates its plant on a three shift per day, five day per week operation. The Union represents production employees at the plant, including Grievant, James Behrendt. The relationship between the Employer and the Union is cooperative and, particularly as it relates to scheduling, both parties are committed to administering the agreement's scheduling requirements in the most expeditious way.

The Grievant James Behrendt is a good employee who has worked for the Employer for 18 years. He is classified as a corrugator and was assigned at all time relevant to this case as a single-facer in the Corrugated Department. He has two children, ages 14 and 17 years. Mr. Behrendt works essentially all of the overtime the Employer offers him. This case does not involve any allegation of misconduct or untrustworthiness in any manner whatsoever against Mr. Behrendt. Instead, it involves the proper remedy when the Employer inadvertently schedules the wrong employee to work overtime.

The Employer's production operation requires a full complement of employees. If employees are absent due to either expected or unexpected reasons, the Employer fills in by requiring employees to work overtime. This is ordinarily done in expected absence situations

by scheduling employees to work 12 hour shifts to fill in for the absent employee. In unplanned situations where an employee fails to report to work the Employer offers overtime opportunities by seniority to those employees who are qualified for the work.

Employees in the Corrugated Department work a 3 shift basis. Employees rotate from one shift to another. Work schedules are ordinarily posted three weeks in advance.

Susan Schnell is a crew leader assigned to the second shift, 2:00 p.m. until 10:00 p.m. She was the supervisor responsible for the Corrugated Department during that shift. She reports to Randy Stangfield, Corrugator Superintendent. She ordinarily does the scheduling for the department. This particular department is difficult to schedule because of the machinery, skills involved and the need for full staffing. It is her ordinary policy to prepare a written schedule about three weeks in advance. Article 12 of the agreement requires that employees be notified of their schedule only by 11:00 a.m. of the Thursday before the week worked. This was done for the week in question which began Monday, September 13, 2004.

An employee named "Art" was scheduled to return from sick leave on Monday, September 13, 2004. He had a doctor's appointment scheduled Thursday, September 9, 2004, before he was scheduled to return. Ms. Schnell was concerned as to whether he would return. Ms. Schnell's starting time is 2:00 p.m. She reported to work on Thursday and immediately checked to see if Art would, in fact, return to work. She learned that his return-to-work date had been delayed to Wednesday, September 15. Ms. Schnell was required to find fill-in workers. Ms. Schnell honestly believed that the proper method was to hold one person over from the crew from the shift before Art's scheduled time on Monday for four hours (12 hour day) and bring in one person from the following shift's crew four hours early (12 hour day). Two employees were selected for the eight hour block of overtime. Rick Darnick was one of the two and was assigned four hours of overtime. As discussed below, she later learned that her choice was incorrect because Grievant had the right to the overtime by virtue of seniority.

Ms. Schnell followed her normal procedure when she changes schedules. She made the appropriate changes to the schedule, wrote "Revised Schedule" on the new schedule and highlighted the changes in yellow. She then posted the schedule in the ordinary place. She followed the procedure required by Article 12 and called each of the two employees at their homes to inform them they would be scheduled to work overtime the following Monday and Tuesday. If she had followed the correct procedure and selected Grievant to work overtime, she would have notified him at about this time that he had been scheduled to work overtime. Since she did not schedule him, he was not thus notified. This was done as quickly as practical and there is no suggestion that Ms. Schnell unreasonably delayed posting the new schedule.

It is undisputed that employees are responsible to check the posted schedule regularly. They are responsible to look for changes. The schedule for this department is somewhat complex. There have been times there have been errors in the schedules which Ms. Schnell has prepared. In each previous case, the employees involved had checked the schedule, recognized the error and notified Ms. Schnell in time to have the error corrected before the

affected overtime occurred. Thus, in this department, all scheduling errors have been corrected prior to the events in this case in time for the employees who were properly entitled to the overtime to actually work the overtime to which they were entitled.

The same problem has occurred in other departments. In some cases, the errors were not caught until after the overtime was actually worked. This has led to a number of grievances on the issue over the years. The Employer has always resolved valid grievances by paying the affected employee for the overtime to which he or she would have been entitled, but for the error.

Mr. Behrendt worked Thursday and Friday that week, September 9 and 10. His normal hours were 2:00 p.m. to 10:00 p.m. that week. Mr. Behrendt forthrightly testified that he could not recall if he checked the schedule that Thursday or Friday. He testified that it was his ordinary practice, however, to read the schedules for the times he was scheduled to work. He admitted that he viewed the scheduling as too complex to check to see if someone might be scheduled for overtime he was scheduled to work. He indicated it would take him about fifteen minutes to work through a schedule to determine if there were an error.

Mr. Behrendt reported to work on Monday, September 13, at his normal time, and recognized that Mr. Darnick was working overtime. He correctly recognized that another employee would be coming in early to work the required overtime he should have been offered. There is some irrelevant dispute about the time, but at about 3:00 p.m. he approached Ms. Schnell and told her that he believed he should have been offered the overtime. Ms. Schnell told him she would check into it by calling her supervisor, Mr. Stangfield. She called Mr. Stangfield who confirmed that Mr. Behrendt was entitled to the overtime by seniority. He told her to offer him overtime that evening and on the next day. Again, there was some irrelevant disagreement as to the time, but at about 6:00 p.m. or 7:00 p.m., Ms. Schnell approached Mr. Behrendt and offered him the opportunity to work overtime that evening and again the next day. The overtime she intended to offer for that night (Monday) was to work alongside Mr. Darnick on the corrugator. It is not normal for two people to work on the corrugator. The work was make-work.

Mr. Behrendt turned down the overtime for Monday night. At hearing, he stated that the reason he did this was that it was too late to make his normal arrangements to have his neighbor take care of getting his children up and off to school. The Employer challenged the credibility of this statement by putting in evidence the ages of the children and the fact that employees are required at this plant to work overtime if their replacement unexpectedly fails to report to work.

Mr. Behrendt worked the overtime for Tuesday. The Tuesday overtime was normal productive overtime instead of make-work. Mr. Behrendt filed the grievance in this case and the same was properly processed to arbitration.



### POSITIONS OF THE PARTIES

The Union takes the position that the Employer violated Article 12's overtime-by-seniority provision by assigning the Monday and Tuesday overtime to the wrong employee. Mr. Behrendt notified the Employer, but it failed to give him the overtime in question. It notes that the parties have traditionally remedied overtime assignment errors by granting the employee involved 4 hours of overtime pay. It notes that the Employer cannot remedy the situation as it tried to do in this case by assigning 4 hours of make-work overtime. This is true because the new overtime work is an overtime assignment entitled to assignment by seniority. The Union essentially takes the position that the issue concerning the notice is irrelevant because the employee is believable when he said he did not read the notice and, in any event, the issue is irrelevant. The Union seeks a remedy of four hours overtime pay at time and one-half. It notes that the contract provision for seniority overtime assignment would be without meaning if there were no penalty attached to its violation.

The Employer takes the position that it did not violate Article 12. The Employer first argues that Mr. Behrendt did not raise his claim for denial of overtime in a timely manner. Accordingly, his grievance should be denied. The Employer notes that the situation which arose was unexpected. An employee unexpectedly extended his absence creating a need to cover two days of work (on Monday and Tuesday, September 13, 14, 2005). The Employer asked Mr. Rick Darnick on the Thursday before to work four hour additional on each of those days to replace the absent employee. The Employer posted a "revised notice" as soon as possible which was late Thursday afternoon. The notice listed the changed schedule involving Mr. Darnick. Grievant acknowledged he did not look at the schedule even though he worked both Thursday and Friday. The notice was posted in the normal place for the schedule and it is the Employer's position he should be treated as if he looked at it. The Employer finds it incredible that a long term employee like Mr. Behrendt did not look at the revised schedule the week before and suggests that he may have delayed making his claim until Monday to make it impossible to give him the overtime in question. It notes that Mr. Behrendt had responded to similar notices previous to this posting.

Next, the Employer argues that it offered a reasonable solution by offering him overtime work. Mr. Behrendt testified that he refused the offer of overtime work on Monday because he could not notify his wife in time to arrange for child care. The Employer disputes the credibility of this with testimony which shows Mr. Behrendt was aware of the overtime offer earlier in the day that he made the claim. In the alternative, it argues that it was his responsibility to accept the overtime and, therefore, no further remedy is appropriate

It distinguishes this case from other cases in which it paid employees for lost overtime opportunities. In those cases, the Employer was notified when it was too late to correct the assignment problem and making a payment was the only appropriate solution.

## DISCUSSION

This case involves the relative responsibility of the Employer and affected employees when the Employer makes a scheduling error. The guiding principles are basic in labor relations. It is the Employer's responsibility to properly schedule the employee who has the seniority right to overtime. It is not the responsibility of the employees in general to correct the work of the Employer. The Employer admits it did not schedule the correct person for the overtime.

Employees have the responsibility to promptly notify the Employer if they believe that there has been an error in scheduling. This means that the employees should review the changes in the work schedules when they are posted, notify the Employer when they first recognize what they believe to be an error. Nonetheless, the Employer bears the overall responsibility for its error. The innocent failure of an employee to immediately recognize the problem is not grounds for relieving the employer of its responsibility to do it right the first time.

Grievant should have checked the schedule timely. The changes are highlighted and he has long experience in dealing with the scheduling practices. He admitted he checked only his own schedule on the Thursday before the disputed overtime occurred. This was merely an error on his part. The tenor of the evidence is that scheduling mistakes are rare, but do occur. Under these circumstances, it is understandable that on one or two days an employee might not check the schedule. This was an error on his part. I do not believe that he intentionally avoided looking at the schedule, or that he really engaged in any other pattern of behavior intended to deliberately avoid discovering the problem or, having learned of the problem, delayed reporting it to obtain pay in lieu of working. If I believed otherwise, the result in this case might well be different. Grievant has always accepted and sought overtime opportunities. There is no evidence of a pattern of behavior which would otherwise suggest improper manipulation on his part in not looking at the schedule.

Grievant timely found the error on Monday. He promptly reported it. It is understandable that even if he had looked at the schedule, he may not have recognized the problem until the Monday of the disputed overtime. At that time, the problem appears to be more recognizable because Mr. Behrendt would have the additional information of recognizing who was at work on Monday without having to work through the schedule.

The reason the parties have historically paid the senior employee for the lost overtime rather than requiring the employee to work is because if the Employer replaces the lost overtime opportunity with a one which occurred in the future, either this employee or a senior employee would be deprived of the overtime. Arbitrators have favored this remedy approach of pay for this type of violation under provisions similar to the one in question.<sup>1</sup>

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<sup>1</sup> Hill and Sinicropi, *Remedies in Arbitration* (BNA, 2d Ed.) pp. 376-70

The Employer is correct that if it can have the wrongly excluded senior employee perform the disputed overtime without creating another contract violation, it may do so. The purpose of the remedy for the violation is to put the wronged employee in the same position he or she would have been had the scheduling violation not occurred.

The Employer in this case chose to create a contemporaneous "make work" opportunity for Mr. Behrendt by having two employees do the work which ordinarily only one would do. It appears that one of the reasons that the Employer had for taking this unusual step was because of its suspicions that Mr. Behrendt really would not have accepted this overtime opportunity had it been properly offered. While I have serious questions as to why Mr. Behrendt did not make himself available for the make-work opportunity, the fact is that he received very little notice. It is likely the Employer's violation contributed to this situation because its violation was the main reason that Mr. Behrendt had short notice. Mr. Behrendt has regularly accepted overtime and, therefore, the Employer has failed to show that he would have turned down the overtime even if the Employer had not violated the contract.

The other aspect of the Employer's offer in this case was the make-work nature of the work offered. That type of work tends to be demeaning to the employee. Accordingly, it unduly denigrates the employee for having reported the violation and tends to interfere with the proper enforcement of the agreement. The arbitrator concludes that creating make-work opportunities is not an appropriate remedy for this type of violation.

### AWARD

That since the Employer violated the Agreement by not paying Mr. Behrendt for the lost overtime opportunity, it shall immediately make him whole for the instant lost overtime opportunity by paying him four hours pay at time and one-half at the applicable wage rate. The Arbitrator retains jurisdiction over the calculation of back pay if either party requests in writing, copy to opposing party, that I do so within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 24th day of October, 2005.

Stanley H. Michelstetter II /s/  
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Stanley H. Michelstetter II, Arbitrator

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