

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WEYERHAEUSER COMPANY

and

**UNITED STEELWORKERS (formerly PACE
INTERNATIONAL UNION) and LOCAL 0345**

Case 3

No. 65089

A-6181

Appearances:

Roy Thrash, Jr., Senior Attorney, Weyerhaeuser Company, 810 Whittington Avenue, P.O. Box 1060, Hot Springs, Arkansas 71901, appearing on behalf of the Company.

Donald O. Schaeuble, International Representative, Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, CLC, 18903 West Quarry Road, Reedsville, Wisconsin 54230, appearing on behalf of the Union.

ARBITRATION AWARD

United Steelworkers (formerly PACE International union) and Local 0345, herein collectively referred to as the "Union," and Weyerhaeuser Company, herein referred to as the "Employer," having jointly selected the undersigned from a panel of arbitrators provided by the Federal Mediation and Conciliation Service and, upon the undersigned's employment with the Wisconsin Employment Relations Commission, having consented to have the undersigned continue to serve as the impartial arbitrator to hear and decide the dispute specified below; and the undersigned having held a hearing on May 16, 2006, in Manitowoc, Wisconsin; and each party having filed post-hearing briefs, the last of which was received February 7, 2006.

ISSUE

The parties were unable to stipulate to the proper statement of the issue, but they agreed that I might state the issues. I have adopted the Employer's statement of the issues:

1. Did the Employer violate the Agreement by not paying time and one-half to employees for time worked on Thursday, December 23, 2004, and Thursday, December 30, 2004?
2. If so, what is the appropriate remedy? ¹

RELEVANT AGREEMENT PROVISIONS

" . . .

ARTICLE 11 Hours of Work

SECTION 1 This ARTICLE is intended to define the hours of work and to provide a basis for the calculation of overtime, and will not be construed as a guarantee of hours of work per day or per week.

SECTION 2 A day will be defined as the twenty-four (24) hour period commencing with the start of the employee's regularly scheduled shift. The basic workday will consist of eight (8) consecutive hours of such twenty-four (24) hour period.

SECTION 3 The basic work week shall consist of five (5) eight (8) hour days, Monday through Friday.

SECTION 4 Shift and work Schedules:

Third Shift: 10 p.m. to 6 a.m.

First Shift: 6 a.m. to 2 p.m.

Second Shift: 2 p.m. to 10 p.m.

. . .

SECTION 6 The work week will be defined as starting when the third shift reports for work at 10 p.m. on Sunday and ending at 10 p.m. the following Sunday. When the third shift reports for work at 10 p.m. on Sunday, it is considered the Monday shift for pay purposes. Start-up time prior to 10 p.m. will also be considered Monday for pay purposes. When the third shift reports for work at 10 p.m. on Friday, the hours worked will be considered Monday for

¹ The parties did stipulate that this is a group grievance affecting approximately the entire bargaining unit. They stipulated that I could reserve jurisdiction over the calculation of back pay, if either party requested that I do so in writing, copy to opposing party, within sixty (60) days of the date of the award. They also stipulated that the tape recordings of the hearing were for my own notes only, would not be available to either party and would be erased after the award was rendered.

pay purposes. When the third shift reports for work on Saturday, the hours worked will be considered as Sunday for pay purposes. (Reference Article 12, Section 19 for start times.)

SECTION 7 Maintenance Crew (A) will be scheduled from Thursday through Sunday at ten (10) hours each day. Maintenance Crew (B) will be scheduled from Saturday through Tuesday at ten (10) hours each day. The normal shift schedule will be from 6:00 a.m. to 4:00 p.m. with a twenty (20) minute paid lunch.

Maintenance Crew (C) will be scheduled from Thursday through Sunday at ten (10) hours each day. Maintenance Crew (D) will be scheduled from Saturday through Tuesday at ten (10) hours each day. The normal shift schedule will be from 8 p.m. to 6 a.m. with a twenty (20) minute paid lunch.

When any Maintenance Crew member (A, B, C, D) reports for work on their 5th day it will be considered their Saturday for pay purposes. When they report for work on their 6th and/or 7th day it will be considered their Sunday for pay purposes.

ARTICLE 12 **Overtime**

SECTION 1 All hours worked in excess of eight (8) hours per day will be paid at the rate of time and one-half their regular straight-time hourly rate.

Exception: Maintenance Crew (A, B, C, D). All hours worked in excess of ten (10) hours per day will be paid at the rate of time and one-half their regular straight-time hourly rate.

SECTION 2 All hours worked in excess of forty (40) per week will be paid at the rate of time and one-half their regular straight-time hourly rate.

SECTION 3 Overtime shall not be paid on both daily and weekly hours, but whichever is greater.

SECTION 4 Time and one-half will be paid for all hours worked on Saturday provided the employee worked or was paid for the number of scheduled straight-time hours made available during the week. Absences due to layoff, vacation, holidays, union business, jury duty, funeral leave, family medical leave, required military duty leave, worker's compensation, or a non-occupational disability claim will count as time worked. Employees who do not work their scheduled hours on Saturday will not be asked to work on the following Sunday unless approved by the Manufacturing Team Leader. Once straight time criteria is satisfied, hours worked on Saturday will be paid at time

and one-half their regular straight-time hourly rate. (For example, if an employee works only thirty-seven hours during the week, that employee would work three hours on Saturday at straight-time and the balance of hours worked would be at time and one-half).

Exception: Time and one-half will be paid to Maintenance Crew members (A, B, C, D) for all hours worked on their scheduled fifth day (Saturday) provided the employee worked or was paid for the number of scheduled straight-time hours made available during the week. Absences due to layoff, vacation, holidays, union business, jury duty, funeral leave, family medical leave, required military duty leave, worker's compensation, or a non-occupational disability claim will not count as time worked. Crew members who do not work their scheduled hours on the fifth day will not be asked to work on the sixth or seventh day unless approved by the Maintenance Team Leader.

SECTION 5 All hours worked on Sunday will be paid at a rate double their straight-time hourly rate provided the employee worked or was paid for the number of scheduled straight-time hours made available during the week. Absences due to layoff, vacation, holidays, union business, jury duty, funeral leave, family medical leave, required military duty leave, worker's compensation, or a non-occupational disability claim will count as time worked. Once straight time criteria is satisfied, hours worked on Sunday will be paid at double time, subject to Section 4. (For example, if an employee works only thirty-two hours during the week and five hours on Saturday at straight-time, that employee would work three hours on Sunday at straight-time and the balance of hours worked would be at double time).

Exception: Maintenance Crew (A, B, C, D) will be paid at double time for all hours worked on their sixth and/or seventh day (Sunday) provided the employee worked or was paid for the number of scheduled straight-time hours made available during the week. Absences due to layoff, vacation, holidays, union business, jury duty, funeral leave, family medical leave, required military duty leave, worker's compensation, or a non-occupational disability claim will count as time worked.

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SECTION 7 Hours worked on a recognized holiday will be paid at the rate of double their regular straight-time hourly rate in addition to their holiday pay.

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ARTICLE 22
Holidays

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SECTION 4 If a holiday falls on Sunday, it will be observed on Monday. If a single holiday falls on Saturday, it will be observed on Friday. For Maintenance Crews A and C: If a holiday falls on Monday, it will be observed on Sunday; if a holiday falls on Tuesday or Wednesday, it will be observed on Thursday. For Maintenance Crews B and D: if a holiday falls on Friday, it will be observed on Saturday; if a holiday falls on Wednesday or Thursday, it will be observed on Tuesday.

SECTION 5 Double Holidays

It is understood that when a double holiday, such as Christmas Eve Day and Christmas Day or New Year's Eve Day and New Year's Day, fall on Friday and Saturday of any given week, they will be observed as holidays on Friday and Saturday of that week. However, should business conditions permit the Company to shut down on the previous Thursday and observe the holidays on Thursday and Friday of that week, it will do so. Likewise, should Christmas Eve Day and Christmas Day or New Year's Eve Day and New Year's Day fall on Saturday and Sunday, the Sunday holiday will be observed on the following Monday. However, the Saturday holiday will be observed on Saturday unless business conditions at that time will permit the Company to shut down the plant and observe the Saturday holiday on the previous Friday. Likewise, should Christmas Eve Day and Christmas Day or New Year's Eve Day and New Year's Day fall on Sunday and Monday, the Sunday holiday will be observed on Sunday, and the Monday holiday will be observed on Monday. If business conditions permit, the Sunday holiday will be observed on Tuesday.

In the case of the Maintenance Crew, if the double holiday falls on Sunday and Monday, they will be observed as holidays on Sunday and Monday of that week. However, if business conditions permit the company to allow the holidays to be observed on Saturday and Sunday, it will do so. If the double holiday falls on a Monday and Tuesday, the Monday holiday will be observed on Sunday. If the double holiday falls on Tuesday and Wednesday, the Wednesday holiday will be observed on Thursday. If business conditions exist to allow the other holiday to be observed as a normal workday, the Company may do so.

In either of the above cases, the company will notify the employees as to what days of the week will be observed as holidays by December 15 for the Christmas holiday and by December 22 for the New Year's holiday.

SECTION 6 On each of the above holidays, all full time employees and Temporary Student Help will be paid at their straight-time hourly base rate for eight (8) hours (and shift differential if appropriate) and the Maintenance Crew will be paid at their straight-time hourly rate for ten (10) hours, provided:

A. The employees have completed their probationary period of continuous Company service; and

B. The employees work the last scheduled full workday preceding and the first scheduled full workday following the holiday, unless excused by the Supervisor.

...

SECTION 8 Hours worked on a recognized holiday will be paid at the rate of double their regular straight-time hourly rate in addition to their holiday pay.

SECTION 9 Nothing herein will prevent the Company from operating on holidays or on Sundays if it is so determined.

SECTION 10 It is also agreed and understood that the holidays as scheduled in the Agreement will be included as time worked for the purpose of computing overtime whenever they fall within the regular work week.

...

ARTICLE 32 Alternative Shifts

SECTION 1 In the event the plant or machine center(s) are needed to operate on an alternative shift schedule to meet customers needs, the parties will utilize the agreed upon process below. The following language will not apply to operations on the current 1, 2, or 3 shift schedules.

A) Phase I – Current Voluntary Overtime Process

During Phase I, the Company will keep Union advised if there are staffing issues regarding employees not working a reasonable amount of overtime.

If Phase I cannot handle shipment demands, Phase II or Phase III may be implemented after discussion with the Union. To implement Phase III, the criteria listed in “C” of this section must be met.

B) Phase II – Weekend Shift (Either 6AM to 6PM or 6PM to 6AM, Friday-Sunday)

The weekend crew will be a multi-skilled workforce and the employees will be required to move from operation to operation, based on business need.

Crews will consist of a minimum of ten employees, unless changed by mutual agreement.

If below crewing levels, options include: hiring, decreasing weekend crew size, or forcing the least senior employee. (Employees in Bargaining Unit as of 11/12/97 will not be forced into the 6PM – 6AM shift.)

Crew will be selected utilizing the Job Bidding & Posting Procedure.

Multi-Skilled Crew – employees need to become qualified to perform at least one corrugator skill and at least one converting area skill.

Once the crew is determined, the skill sets needed will be posted and filled within the shift, by seniority.

Anyone who bids off the weekend production crew may be retained on that shift up to 15 calendar days for education purposes.

Employees will be scheduled to work 36 hours and paid for 40 hours. Employees will be paid time and one half for all hours worked on scheduled days off, provided the employee works the scheduled straight time hours made available during the week. Employees will be paid double time plus holiday pay for all hours worked on holidays.

If Phase II cannot handle shipment demands, Phase III (must meet criteria of Phase III) may be implemented after discussion with the Union.

C) Phase III – Six or Seven, Twenty-Four Hour A Day Operation

The criteria to implement this alternative shift schedule will be based on the principle of a long-term strategy regarding Manitowoc's business. A combination of the following items could initiate implementation of an alternative shift schedule:

- Major influx of business
- Booking levels are consistently at a higher rate than our current capacity.
- Business levels are strong and are forecasted to increase.
- Major new target account acquisition is high and forecasted to continue.
- Overtime is not capable of meeting shipment demands.

SECTION 2 The following process will be utilized to handle alternative shift needs:

SECTION 3 Phases II and III. Any shift plan put into effect will be reviewed on a quarterly basis. If business conditions dictate the need to return to a traditional shift schedule, the employees will return to their former position and shift.

...

SECTION 6

Phase II – If a holiday falls on a Monday, the holiday will be observed on Sunday. If a holiday falls on a Tuesday, Wednesday, or Thursday, the holiday will be observed on Friday. If a holiday falls on Friday, Saturday, or Sunday, the holiday will be observed on that day.

Phase III – If a holiday falls on an employee’s scheduled workday, holiday pay will equal the number of hours in a regularly scheduled workday. If a holiday falls on an employee’s nonscheduled workday, the employee will receive straight-time pay equal to the number of hours regularly scheduled (and shift differential if appropriate). Holidays will be celebrated on the day they occur.

They also created Article 11, Sections 6 and 7, which read respectively as follows:

...

SECTION 6 The work week will be defined as starting when the third shift reports for work at 10 p.m. on Sunday and ending at 10 p.m. the following Sunday. When the third shift reports on Sunday, it is considered the Monday shift for pay purposes. Start-up time prior to 10 p.m. will also be considered Monday for pay purposes.

When the third shift reports for work at 10 p.m. on Friday, the hours worked will be considered as Saturday time for pay purposes. When the third shift reports for work on Saturday, the hours worked will be considered as Sunday for pay purposes. (Reference Article 12, Section 19 for start times.)

SECTION 7 Maintenance Crew (A) will be scheduled from Thursday through Sunday at ten (10) hours each day. Maintenance Crew (B) will be scheduled from Saturday through Tuesday at ten (10) hours each day. The normal shift schedule will be from 6:00 a.m. to 4:00 p.m. with a twenty (20) minute paid lunch.

Maintenance Crew (C) will be scheduled from Thursday through Sunday at ten (10) hours each day. Maintenance Crew (D) will be scheduled from Saturday through Tuesday at ten (10) hours each day. The normal shift schedule will be from 8 p.m. to 6 a.m. with a twenty (20) minute paid lunch.

When any Maintenance Crew member (A, B, C, D) reports for work on their 5th day it will be considered their Saturday for pay purposes. When they report for work on their 6th and/or 7th day it will be considered their Sunday for pay purposes.

FACTS

The Employer operates a corrugated fiberboard products plant in Manitowoc, Wisconsin. The Union represents production and maintenance employees at this plant. The Employer employs about 205 people at the plant of which about 160 employees are in the unit represented by the Union. The plant currently operates on a 5-day 24 hour basis. There are three shifts:

Third Shift: 10 p.m. to 6 a.m.

First Shift: 6 a.m. to 2 p.m.

Second Shift: 2 p.m. to 10 p.m.

The third shift reports to work at 10:00 p.m. Sunday night and the second shift ends its last work day of the week on Friday at 10:00 p.m. There is a separate work schedule provided in Article 11, Section 7 of the Agreement for some maintenance employees. These employees work 10 hour shifts for four days. There are about 6 maintenance employees who do not work the 5 day schedule, the remaining approximately 154 employees in the unit work the 5-day schedule.

In 2004, the Christmas Eve-Christmas 2-day holiday period and New Years Eve-New Year's Day 2-day holiday, both fell on a Saturday-Sunday, weekend. The Employer properly notified unit employees that it was going to exercise its right under Article 22, Section 5 of the current agreement to have the holidays in both weeks observed Friday and Saturday. It had never exercised this right before. Accordingly, employees reported for work on Thursday in both weeks. They were instructed not to log their time on the computer because if they did so, it would cause them to be paid time and one-half for the day. The result was that 5-day employees worked 32 hours (Monday through Thursday). They received 32 hour pay and 16 hours holiday pay.

Article 22, Section 10 of the Agreement provides:

"It is also agreed and understood that the holidays as scheduled in the Agreement will be included as time worked for the purpose of computing overtime pay whenever they fall within the regular work week."

The Union filed a grievance on behalf of all employees taking the position that unit employees should be credited under Article 22, Section 10 with the time worked and, therefore, were entitled to time and one-half under Article 12, Section 1, which provides as follows:

The Employer took the position that the Saturday holidays fell outside the normal work week and, therefore, do not count as time worked under Article 22, Section 10. The Union filed the instant grievance seeking the additional pay. The grievance was properly processed to arbitration.

POSITIONS OF THE PARTIES

Employer

The final phrase of Article 22, Section 10 states that holidays, "will be included as time worked for the purpose of computing overtime pay whenever they fall within the regular workweek." Saturday has never been a regular work day and, therefore, it is not appropriately counted as time worked. The Agreement is ambiguous because it contains two contradictory definitions of the regular work week, Section 3 (Monday through Friday) and Section 6 (10 p.m. Sunday to 10:00 p.m. Sunday). Section 3 should be applied. Section 6's definition is really for federal wage and hour act pay purposes. It is used to define when employees have earned overtime for actual work on Saturday and Sundays by virtue of having worked forty hours. Section 3 defines time worked. Monday through Friday is when employees normally work. It is much more logical to define something as "regular" as the work week which "normally" occurs. At this plant, this is Monday through Friday. All but six maintenance employees work a Monday through Friday work week. Construing the agreement as a whole, Article 12, Section 4 and 5 give clear insight into the intent of the parties as to regular work week when they implicitly refers to Saturday and Sunday as not being part of the regular workweek. Finally, the parties agree that under this Agreement, employees cannot be required to work Saturday and Sunday. The Union's argument directed at changes made to the Agreement made in 1997, particularly the deletion of the phrase "that is, on Monday through Friday" from Article 22. That deletion related to Article 32 (which has not yet been implemented) and to nothing else. Accordingly, the Employer seeks to have the grievance dismissed.

Union

The Employer violated Article 12, Section 2, of the agreement when it failed to pay time and one half for work on the Thursdays of the disputed holiday weeks. Specifically, the Employer failed to count the Saturday holiday as time worked. Article 11, Section 6 provides that Saturday is part of the regular work week when it states: "The work week will be defined as starting at 10:00 p.m. on Sunday and ending on 10:00 p.m. on the following Sunday." Article 11, Section 3 which appears to conflict with Article 11, Section 6, is no longer applicable because the later-adopted language of Article 11, Section 3 should govern. The

language of Article 11, Section 3 was added in the 1997 negotiations to distinguish Saturday and Sunday premium work from regular work for the maintenance crews. See, Article 11, Section 7. The Union's position is supported by the testimony of the local's President, Tom Voss, and the local's vice president, George Prigge, to the effect that the parties made other changes to the 1992-7 agreement to effect this change. Specifically, Article 22, Section 10 was changed to eliminate the reference to Monday through Friday being the regular work week. This is also supported by the Employer's unilaterally contemporaneous change of its military leave policy. The changes to the 1997 agreement gave the Employer the ability to work the third shift Sunday, Monday, Tuesday and Wednesday and have the holidays Thursday and Friday and to work the rest of the production work Monday, Tuesday, Wednesday and Thursday and have the holidays Friday and Saturday. Under the old agreement, the Employer was required to pay double time for work on these holidays. Thus, it still saves money. The Union requests that the arbitrator order back pay for all affected employees.

DISCUSSION

1. Statement of the Issues

The parties disagreed as to the correct statement of the issue. The Union proposed the following statement of the issue:

Did the Employer violate the intent of the contract when the Employer paid forty hours of straight time pay for the weeks of December 19 through December 25, 2004, and December 26 through Jan 1, 2005?

If so, what is the appropriate remedy?

I don't see a substantive difference between the issues. The Employer's proposed phrasing is more customary.

2. Contract Construction

The provisions cited above can yield conflicting interpretations and results. When language of a collective bargaining agreement can give two plausible results it is ambiguous. When the language of a collective bargaining agreement is ambiguous, arbitrators use a number of techniques to determine the intent of the parties. These techniques include, looking to the bargaining history of a provision, the purposes of the provisions, the practices of the parties, and, of course, the "rules" of contract construction long established by arbitrators and the courts.

Article 22, Section 10 controls the issue presented herein. It states: "It is also agreed and understood that holidays as scheduled in the Agreement will be included as time worked for the purposes of computing overtime pay whenever they fall within the regular work week." [Emphasis supplied.] The same provisions from the agreement which expired in 1996 provided:

It is also agreed and understood that holidays as scheduled in the Agreement will be included as time worked for the purposes of computing overtime pay whenever they fall within the first five (5) days of the regular workweek, that is, on Monday through Friday."

That former provision would have clearly resolved this dispute. The bargaining history leading to that change is instructive. The parties entered into interest based bargaining to modernize their collective bargaining agreement, to reduce overtime costs, to give the Employer the option for alternative shifts and to make other changes not related to this dispute. These changes apparently led to the third shift starting on Sundays. They also changed the work hours of some maintenance employees such that their normal hours would be on weekends when the plant was not active. Some maintenance employees work four-day, ten-hour days. One of the major changes was the adoption of Article 32 which authorized the Employer to, among other things, go to a six or seven-day, twenty-four hour operation. That provision has not yet been implemented. Nothing in the parties' purpose ever intended to significantly change the Monday through Friday work week as it is now practiced for the vast majority of the unit.

In any event, the current language of the Article 22, Section 10 on its face in the light of past practice still goes far to resolve this dispute. Specifically, the undisputed facts of this case are that the "regular work" week of virtually all of the unit employees remains Monday through Friday (third shift varying slightly). Thus, even without Article 11, Section 3, the past practice of the parties would indicate that the "regular workweek" of the vast majority of employees is Monday through Friday.

If, as the Union contends, that the definition of Article 11, Section 6 were to apply, the phrase ". . . whenever they fall within he regular work week" would have no meaning. Specifically, every paid holiday would count as time worked. If that were the "intent" of the parties, they simply would have left the phrase out of Section 10 entirely. When arbitrators are faced with competing choices of meaning between provisions, they prefer that choice which gives effect to all of the language of the agreement over a choice which leaves a portion of the agreement without meaning.

The Union's argument that Article 11, Sections 3's definition of the work week was inadvertently retained in the agreement in the 1997 negotiations is not persuasive. Section 3 remains the general rule in the plant, but the provisions added in the 1997 negotiation create numerous exception. That the parties actually intended Section 3 to remain the general rule is evidenced in the very agreement section upon which the Union heavily relies in this case, Article 11, Section 6. It states: "When the third shift reports on Sunday, it is considered the Monday shift for pay purposes." The provisions cited by the Union, Article 11, Section 7, Article 32, Section 2B express exceptions to the general rule of Section 3. These provisions apply to specific circumstances. They may be implemented or they may not be implemented by the Employer. If they are not implemented the general provisions of the agreement apply, including Section 3.

The Union's position relies heavily upon the intent of the parties as evidenced by unrelated provisions. Thus, the parties have historically given the Employer the flexibility to schedule work on holidays. The Employer has recognized the inconvenience to employees by agreeing to pay double time on holidays plus holiday pay. See, Article 12, Section 7. However, it is inappropriate to extend the rationale of that structure to the disputed provisions when the language of the parties does not support it. Accordingly, the Employer did not violate the agreement by not paying the additional premium pay. The grievance is, therefore, denied.

AWARD

That since the Employer did not violate the agreement by not paying the additional premium pay, the grievance is hereby denied.

Dated at Madison, Wisconsin, this 31st day of May, 2006.

Stanley H. Michelstetter /s/

Stanley H. Michelstetter II, Arbitrator

