

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EGGERS INDUSTRIES, INC.

and

**MIDWESTERN COUNCIL OF INDUSTRIAL WORKERS,
UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA,
LOCAL 2832**

Case 58
No. 66130
A-6230

Appearances:

Ms. Sandra Graf Radtke, Esq., Gillick, Wicht Gillick & Graf, 6300 W. Bluemound Road, Milwaukee, Wisconsin 53213, on behalf of Local 2832.

Mr. Gary Milske, Personnel Manager, Eggers Industries, Inc., 164 North Lake Street, Neenah, Wisconsin 54956, on behalf of the Company.

ARBITRATION AWARD

According to the terms of Article 15 of the 2005-08 labor agreement between the captioned parties, the parties requested that the Wisconsin Employment Relations Committee appoint a staff arbitrator to hear and resolve a dispute between them regarding whether the Grievant was improperly denied the opportunity to work overtime on Sunday, June 11, 2006. Hearing in the matter was held at Neenah, WI on October 6, 2006. No stenographic transcript of the proceedings was made. The parties agreed to submit letter briefs postmarked October 13, 2006 and to waive the right to file reply briefs. The Arbitrator received the parties' briefs by October 16, 2006 whereupon the record herein was closed.

ISSUES

The parties stipulated that the Arbitrator should decide the following issues:

- 1) Was the Grievant improperly denied the opportunity to work overtime on Sunday, June 11, 2006?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE FIVE-OVERTIME

5.1 It is recognized that from day to day the needs of the business may require that overtime beyond the normal work schedule be worked by entire departments, or a few employees in certain departments. Department managers will seek qualified volunteers as determined by the company to fulfill such overtime requirements in the following order.

1. Employees within the department, with the same job title, from most senior to least senior.
2. Qualified employees within the department from most senior to least senior.
3. Qualified employees outside of the department but on the same shift, from most senior to least senior. Employees desiring overtime outside of their department must indicate by entering their name on the weekly overtime signup sheet by Thursday noon for the following week. However, if work is available within their home departments employees are required to perform that work first.
4. Qualified temps within the department.

If there are not enough volunteers to meet the overtime requirements, the department manager shall assign mandatory overtime to the least senior qualified employee including temps, within the department.

The department manager shall post mandatory same day overtime for 1st shift employees prior to the half hour noon lunch break of the day involved, second shift employees prior to 9:00 p.m., and for third shift employees prior to the half hour supper break at 3:30 a.m. Mandatory next day overtime must be posted by 3:30 p.m. for 1st shift employees, 12:00 midnight for 2nd shift employees and 7:00 a.m. for 3rd shift. For mandatory Saturday overtime only, 1st shift employees will be posted by 3:30 p.m. on the preceding Thursday, 2nd shift employees will be posted by 10:00 p.m. on the preceding Thursday, and 3rd shift will be posted by 7:00 a.m. on the preceding Thursday.

In the event both Saturday and Sunday overtime is required, employees who volunteer for Saturday overtime will be given first opportunity to work Sunday. If it is determined on Saturday that Sunday overtime is required, department managers will seek volunteers in the order listed above from employees working on Saturday. There will be no mandatory overtime on Sundays.

No employee will be forced to work more than 12 hours per day or more than 60/60/50/50/050 hours per week over a 5 week period, unless our “on-time” goal is in jeopardy. Any hours over the 12/60/50 rule are voluntary.

This language is not to be used to circumvent the use of seniority.

Both the Company and the Union promote the use of cooperation among employees to voluntarily schedule overtime in lieu of the mandatory assigned overtime described above.

...

BACKGROUND

The Company manufactures specialty and other doors for sale to stores and individuals and operates its Neenah, Wisconsin plant across three shifts. The Union and the Company have had a collective bargaining relationship for many years. Seniority in the plant is plantwide from date of hire, not based upon time worked in each department. The parties' 1996 labor agreement contained the following language:

...

- 4.9 It is recognized that from day to day the needs of the business may require that overtime beyond the normal work schedule be worked by entire departments, or a few employees in certain departments. Department managers will first seek volunteers from within the department to fulfill such overtime requirements. If there are not enough volunteers to meet the overtime requirements, the department manager shall notify 1st shift employees of such overtime assignments prior to the half-hour noon lunch break of the day involved, and evening shift employees prior to the half-hour supper break at 6:30 p.m. Overtime work shall first be assigned to the employee or employees who normally perform the work in question, and if such employee is unable to perform the assigned overtime work, then such overtime work will be assigned to the employee or employees with most the seniority in their department.

Prior to 1999, employees could volunteer in advance for available overtime on either Saturday or Sunday based upon their plantwide seniority. However, this resulted in senior employees declining to work on Saturday but volunteering to work all of the Sunday overtime which was paid at double time; junior employees would then be forced to work Saturday overtime which was paid at time and one-half.

When the parties negotiated regarding the 1999 labor agreement, they discussed their concern that senior employees were turning down Saturday overtime at time and one-half but taking Sunday overtime which was paid at double time. The parties then negotiated extensive additions to the labor agreement which became Article 5 – Wages, quoted above in the Relevant Contract Provisions Section of this Award.

The language placed in the agreement in 1999 may have been proposed by the Union.¹ It is undisputed that at the time the language regarding Saturday and Sunday overtime was placed in the agreement, the parties agreed that it was unfair for junior employees to be forced to work Saturdays and not be allowed to work Sundays at double time because senior employees had refused the former but took the latter overtime opportunities; and that the parties wanted to give employees an incentive to work Saturdays by giving them a preference for Sunday overtime work. Significantly, no discussion was held regarding what shift the workers who received these overtime opportunities should come from; the Company never sought to insert the phrase “by shift” or “in the Department” into the first sentence of paragraph 3 of Section 5.1 following subsection 4, and the Union never proposed to add language to sentence one of paragraph 3 of Section 5.1 to indicate that supervisors would have to call/contact employees on other shifts who had worked on Saturday to offer them Sunday overtime. In explaining its proposal, Union representative stated in negotiations that whoever worked Sunday would have to volunteer to work on Saturday.

FACTS

Seniority at the Company is plantwide from the date of original hire. Relevant portions of Article 11 read as follows concerning seniority:

ARTICLE ELEVEN – SENIORITY

- 11.1 The Company recognizes the principle of seniority in layoff, rehiring, transfers, and upgrading; except as to promotions to positions not covered by this agreement, as outlined in Article One (1), Section One (1).
- 11.2 New employees shall not acquire any seniority during their first thirty-one (31) calendar days of employment nor during a thirty (30) day probationary extension period. If they are retained by the Company after that period, their seniority shall begin with the original hire date of their last employment by the Company. The Company retains the right to discharge new employees during, or at the end of, both the probationary or extension of probationary period, with or without cause, and the discharge may not be made the subject of a grievance, either by the employee or by the Union.

¹ Gary Milske did not recall whether the Union proposed this change.

11.3 All seniority shall be based upon continuous service with the Company. Continuous service shall mean uninterrupted employment, but shall include absences under written leave of absence, periods of layoff due to lack of work, except as hereinafter provided, and periods of absence due to illness or accident.

. . .

11.6 Seniority shall be plantwide. . . .

Prior to June, 2006, Company shift supervisors traditionally used a seniority list of employees on their shifts, listed from most to least plantwide seniority, to seek volunteers for weekend overtime work; shift supervisors would ask qualified employees on the Thursday prior to the weekend overtime, if they wished to work the available overtime on the next Saturday and Sunday. It is undisputed that shift supervisors do not have a list of employees from other shifts or a master list of all employees' plantwide seniority and that shift supervisors do not communicate with each other as to which employees have volunteered to work on other shifts to perform weekend overtime. It is also undisputed that prior to June 10, 2006, the Company had always sought employee volunteers to work Saturday and Sunday overtime on all three shifts.

The Grievant, James Michener, has been employed in the Bead Nail Department² on the first shift for a number of years; as of June 10, 2006, Michener was 35th in plantwide seniority and had more seniority than Todd Van Stippen who was then a second shift Utility Department employee. Both Van Stippen and Michener were qualified to perform the three hours of sanding and chopping work on lights which was worked by Van Stippen on Sunday, June 11, 2006.

Second shift supervisor Steve Witkoswki stated herein that on Thursday, June 8, 2006, he and the first shift supervisor decided that there was enough accumulated work, chopping and sanding lights, to offer overtime on Saturday, June 10th to qualified first and third shift employees, but that there was not enough work to offer overtime to qualified second shift employees on Saturday, June 10th. Witkowski and the first shift supervisor decided to offer overtime on Sunday, June 11th, only to qualified second shift employees. After making these decisions, Witkowski and the first shift supervisor sought employees on their shifts to volunteer for the available overtime, by asking each qualified employee in the order of their plantwide seniority on that shift.

² There are apparently several terms used for various departments at the Company – the Bead Nail Department is also called the Beading and Glazing Department.

On Thursday, June 8th, Michener volunteered for the Saturday overtime on first shift that was offered to him and Van Stippen volunteered for the Sunday overtime on second shift that Witkowski offered him. On Saturday, June 10th, 126 unit employees worked overtime on first and third shifts and on Sunday, June 11th, 11 employees (including Van Stippen) worked overtime on second shift only. Neither Michener nor any other first and third shift employees who had worked Saturday overtime were offered any Sunday overtime on June 11th. The ten most senior employees who worked on Saturday, June 10th were identified by the Company herein as follows:

	<u>Seniority #</u>
Dick Schoepke	2
Gary Foth	8
Mark Hoeper	7
Randy Tesch	9
Bruce Wilz	10
Jeff Risnan	12
Jerry Konitzer	22
Jeff Spelski	28
Randy Steckling	32
Jim Michere	35

Witkowski stated that he did not know who the first and third shift employees were who had volunteered to work on June 10th, and he made no effort to find out which first and third shift employees had volunteered to work the Saturday overtime or what plantwide seniority they had. This was so even though Witkowski stated that his normal procedure in the past was to give employees who had worked Saturday overtime first opportunity to work available Sunday overtime on the same weekend. Finally, Witkowski stated that he had never had to seek volunteers from other shifts for Sunday overtime; but that it had never happened in his tenure with the Company (32 years) that there was not enough work for all three shifts to work overtime on both Saturday and Sunday.

On June 15, 2006, Michener timely filed the grievance herein, seeking to be made whole. On June 22nd, the Company denied the grievance without giving a reason therefor. The case was then appealed to arbitration before the Undersigned.

POSITIONS OF THE PARTIES

Union:

The Union argued that the Company admitted herein that it agreed to the language of Article 5, paragraph 3, sentence one, where both Saturday and Sunday overtime were determined to be necessary prior to the Saturday in question, so that employees who worked on Saturday would have an incentive to volunteer for that work at time-and-one-half so that they

would get first opportunity to work the following Sunday at double time. In the Union's view, paragraph 3, sentence one applies on its face only to the situation just described. The Union noted that no exceptions are stated in sentence one. Therefore, pursuant to the express language of the first sentence of paragraph 3 of Article 5, on Thursday, June 8th when Grievant Michener volunteered to work overtime on Saturday, June 10th (which Michener worked as he promised), Michener should have been offered overtime on Sunday, June 11th before Van Stippen (who had not worked any overtime on Saturday, June 10th) was offered Sunday overtime.

The Union further urged the Arbitrator to reject the Company's argument that sentence two of paragraph 3 of Article 5 should be applied to this case as the express language of that sentence limits its application to situations where weekend overtime is determined to be necessary on the Saturday that the overtime will occur, and not before. Here, the Union noted, management decided that Saturday and Sunday overtime would be worked on the Thursday before the necessary overtime, making the first sentence of paragraph 3 the only applicable provision of Article 5. Therefore, there was no reason to revert to the enumerated steps for the assignment of weekday overtime listed in Section 5.1 of the contract in this case.

The Company's argument that its approach would be more convenient for its managers who employ truncated seniority lists applicable only to their departments on their shifts should be rejected as the language of paragraph 3, sentence one, does not recognize any exceptions to its clear directives to offer Sunday overtime first to those who worked overtime on the prior Saturday. Thus, the legal maxim, “expressio unius est exclusio alterius,” must be applied in this case as the parties chose to exclude all other prerequisites for the first offer of Sunday overtime, (including convenience)—only those who volunteered for Saturday overtime were to get first opportunity to work the following Sunday. In these circumstances, the Arbitrator must enforce the clear language of paragraph 3 sentence one of Article 5 and she must sustaining the grievance and make Michener whole.

Company:

The Company asserted that it agreed to the changes made in Article 5.1 in 1999, “to eliminate the situation where a senior employee in a department would decline Saturday overtime, at time and a half, but take the Sunday overtime, paid at double time” (ER Brief, p.1), which resulted in junior employees being forced to work Saturdays. However, the Company argued that the amended contract language does not require Department managers to go outside the shifts/departments within their responsibility, to seek volunteers to work Sunday overtime, citing Article 4.9. The Company asserted that when it agreed to add language to Article 5 regarding how to assign Saturday and Sunday overtime, “. . . we clarified that it must be on the same shift” (ER Brief, p. 2).

In the Company's view, the language should apply only to employees within each shift, not for overtime work on other shifts. The Company noted that Department managers have never sought overtime volunteers on different shifts, and had the parties intended that managers would have to seek overtime volunteers across other shifts, the parties would have specifically stated so in the labor agreement. The parties did not do this and, the Company pointed out, no prior contracts required this and the effective agreement contains no such requirement in any of its provisions. Therefore, the Company sought denial and dismissal of the agreement.

DISCUSSION

There is no question that in 1999 the Company and the Union agreed across the bargaining table that it would be beneficial to employees and the Company to give senior employees an incentive to volunteer to work Saturday overtime by giving those who volunteered to work on Saturday, first opportunity to get Sunday overtime paid at double time. It is significant that no discussion occurred between the parties regarding how this would be accomplished except the parties did agree that only employees who had worked overtime on Saturday should get the first right of refusal for all overtime on the following Sunday. The Company has not argued that the language of Article 5, paragraph 3 of the labor agreement is ambiguous, but it has argued that this portion of the contract should not be applied to the fact situation presented by this case and/or that the language was never intended to require shift supervisors to seek volunteers from other shifts to work on Sunday who had worked the Saturday before.

In my view, the language of Article 5, paragraph 3, sentence one, of the labor agreement is clear and unambiguous on its face and contains no limitations/exceptions. In this regard, it is significant that Article 11 states that "seniority shall be plantwide" and "based upon continuous service with the Company." This Arbitrator could find no language to the contrary in the effective labor agreement. Therefore, the shift supervisors' traditional use of seniority lists which cover only their own departments and shifts for seeking Sunday overtime volunteers is unsupported by any language in the contract.

As the Union noted, it was up to the Company negotiators to bargain limitations or exceptions into the disputed language of Article 5 to make it clear that managers (who had determined that overtime would be necessary prior to the Saturday in question)³ would not be required to contact senior employees across all three shifts when offering Sunday overtime to those who had volunteered to work on Saturday. Without some express limitation/exception, the Company and its managers are bound to follow the clear terms of Article 5 and offer Sunday overtime to qualified employees who volunteered to work the Saturday before,

3 The second sentence of paragraph 3 of Article 5 is not relevant to the dispute in this case as the supervisors determined that weekend overtime would be necessary on Thursday, June 8th, not on Saturday June 10th.

without regard to their shift or department. Significantly, the Company offered no evidence of any written proposals it made regarding the 1999 amendments to Article 5, nor did it offer any evidence of bargaining history to support its assertions on this point that it made it clear that supervisors had no responsibility to offer Sunday overtime to employees on different shifts.

The Company has argued that it would be more convenient for its managers if they were only required to contact employees on their own shifts/in their own departments for weekend overtime. However, no language in Article 5 recognizes convenience or any other exception to the requirement of offering "the first opportunity" for Sunday overtime to those who volunteered to work the prior Saturday. Where, as here, the effective contract recognizes only plantwide seniority (not department, shift or classification seniority), plantwide seniority must be used to offer Saturday and Sunday overtime which involve seniority rights.

It is undisputed that the situation that arose in June, 2006, had never occurred before—where there was not sufficient overtime on Saturday to work all three shifts yet there was work left to do on Sunday. Here, the record showed that second shift supervisor Witkowski and the first shift supervisor decided on Thursday, June 8th to offer first and third shift employees Saturday overtime, that second shift employees would be offered no Saturday overtime but that second shift employees would be offered overtime work on Sunday, June 11th which had not been completed by first and third shift employees on Saturday, June 10th. In these circumstances, the fact that the Company's supervisors have not had to contact employees across all three shifts to offer them Sunday overtime prior to this situation constitutes insufficient evidence of a mutually agreed – upon, binding past practice.

In addition, neither Witkowski nor any other Company witness stated herein that there was no other way to complete the necessary chopping and sanding work or that Sunday second shift overtime was necessary to make timely shipment of the product.⁴ Also, no evidence was proffered to show that the Company could not provide a plantwide seniority list for all of its supervisors to use in soliciting overtime volunteers. In light of the supervisors' preference (indicated by Witkowski) to seek weekend overtime volunteers the Thursday before the weekend work involved, it is highly likely that the arrangement of Sunday overtime across all three shifts would be easily accomplished days in advance.

Even if the parties never anticipated the particular issue which arose herein when they agreed to the amended language of Article 5 in 1999, where, as here, the language is clear and unambiguous on its face, the clear language must be enforced and applied to such an unanticipated issue. I therefore issue the following

⁴ It should be noted that Witkowski stated herein that normally chopping and sanding work is not time-sensitive and that it is allowed to build up over time so that it can be completed later in a block.

AWARD⁵

Grievant Michener was improperly denied the opportunity to work overtime on Sunday, June 11th, 2006. As Michener was the tenth most senior employee who worked on Saturday, June 10th, he was entitled to be offered the opportunity to work on Sunday, June 11th before the eleven second shift employees who worked overtime on Sunday (none of whom worked on Saturday) were offered that opportunity. No evidence was presented to show that Michener was unavailable to work on June 11th. Therefore, the Company is ordered to pay Michener four hours overtime pay at double time for the lost opportunity to work overtime on June 11, 2006 and to comply with the clear language of Article 5 in the future.

Dated in Oskosh, Wisconsin, this 28th day of November, 2006.

Sharon A. Gallagher /s/

Sharon A. Gallagher

5 I shall retain jurisdiction of the remedy only for 60 days after the date of this Award should issues arise concerning the remedy.

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