

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SAPUTO CHEESE, USA, INC.,

and

TEAMSTERS, “GENERAL” LOCAL UNION NO. 200

Case 3

No. 65683

A-6209

Appearances:

Mr. Bernard J. Bobber, Esq. Foley & Lardner LLP, 777 East Wisconsin Avenue, Milwaukee, Wisconsin, 53202-5306, on behalf of the Company.

Mr. Nathan D. Eisenberg, Esq. Previant, Goldberg & Uellman, S.C., 1555 North River Center Drive, Suite 202, Milwaukee, Wisconsin 53212, on behalf of the Union.

ARBITRATION AWARD

Pursuant to Article 7 of the 2005-10 labor agreement between the captioned parties, the parties requested that the Wisconsin Employment Relations Commission issue three separate panels of five Staff Arbitrators from which they could select an Arbitrator to hear and resolve a dispute between them regarding the assignment of overtime in the “Blue Cheese Department” (hereafter BCD). The parties jointly selected Arbitrator Sharon A. Gallagher to resolve three consolidated grievances. A full and fair hearing on the matter was held at Fond du Lac, Wisconsin on September 11, 2006. No stenographic transcript of the proceedings was made. At the close of the hearing, the parties agreed to file their briefs postmarked October 13, 2006 and they agreed to waive their right to file reply briefs. After a mutually agreed upon extension, the Arbitrator received the parties’ briefs by November 6, 2006, at her Oshkosh office, which she then exchanged for them, whereupon the record herein was closed.

ISSUES

The parties stipulated that the Undersigned should determine the following issues:

- 1) Did the Company violate the collective bargaining agreement when it offered overtime to employees where it did not offer the same amount of overtime to more senior employees?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 10: PROTECTION OF RIGHTS, MANAGEMENT RIGHTS AND TRANSFER OF COMPANY TITLE AND INTEREST

. . .

B. Management Rights. Excepts as otherwise specifically provided in this Agreement, shall include the management of the Company's establishment and shop and the direction of the working forces, including, but not limited to, the right to hire, suspend, discipline or discharge for cause, and the right to maintain order and efficiency, the right to reduce the working force or relieve employees from duty because of lack of work or other legitimate reasons, the right to select sources of materials, equipment and the Company's customers, the right to schedule work, shift, shift hours and overtime requirements, the right to determine the products to be manufactured, purchased, handled or sold, and the means, methods, processes and schedule or production thereof, the right to introduce new or improved methods or facilities, when and in such manner as it deems it advisable to do so.

It is further understood and agreed that this contract constitutes the whole and entire agreement between the parties, concerning wages, hours and working conditions.

. . .

ARTICLE 18: MAINTENANCE OF STANDARDS

A. The Company agrees that all conditions of employment in its Plant relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement.

It is agreed that the provisions of this Article 18 shall not apply to inadvertent or bona fide errors made by the Company or the Union in applying the terms and conditions of this Agreement, if such error is corrected within ninety (90) days from the date of error.

The Company agrees to advise the Union, in writing, of changes in operation.

B. Changes in Operation. Recognizing that the Company, during the period of this Agreement, may install new types of equipment, change equipment and methods of plant operation, remodel or construct new plants or facilities and manufacture and sell new products, the following procedure will be followed in establishing wage rates for any new or changed jobs:

1. Prior to putting into operation the Company will set and notify the Local Union of the wage rate for any new or changed job. Such rates shall be commensurate with the rate in effect for comparable jobs requiring relative skill and working conditions, as it relates to Saputo Cheese USA, Fond du Lac-Scott Street Plant.

2. If unable to agree on the new rate, either party may appeal immediately under the terms of Article 7.

ARTICLE 26: HOURS OF WORK

A. Workweek

Forty (40) hours in five (5) days shall constitute the regular workweek. Any hours worked in excess of eight (8) hours in one (1) day (or over ten (10) hours in the case of any employee on a 4 day, 10 hours schedule) or forty (40) hours in a week will be compensated for at time and one-half (1-1/2) the regular hourly rate, there shall be no pyramiding, an employee shall receive overtime for the day or week, but not both.

It is recognized that operating fluctuations may vary the scheduled workweek, but consistent with good business needs and requirements, the Company will make every reasonable effort to provide forty (40) hours each week for senior employees. The term "consistent with good business needs and requirements" shall not include a reduction in the workweek for the purpose of spreading employment, unless mutually agreed to between the Company and the Union. The employee workweek shall consist of seven (7) consecutive

workdays, including Saturday and Sunday. Reasonable efforts shall be made to schedule employee's forty (40) hours with two (2) or more consecutive days off depending on the schedule being used. When a holiday occurs, the Company has the right to schedule work on said holiday.

. . .

B. Work Schedules

Work schedules and starting times shall be posted on Thursday afternoon at 4:00 p.m. with changes to be made until 8:00 a.m. Friday morning for the following week. The schedule may further be altered when an emergency exists causing production interference due to power or mechanical failure or breakdown or other acts beyond the Company's control.

Employees will not be allowed to work split shifts.

Its is agreed when a milk emergency exists, the Company shall have the right to revise schedules and starting times while such emergency exists.

. . .

D. Overtime

When overtime hours occur within a department, such overtime hours shall be worked in accordance with departmental seniority provided the employees are qualified to perform the available work. If the overtime cannot be accommodated through departmental seniority, it shall be assigned on the basis of bargaining unit seniority consistent with demonstrated capabilities and performance. The Company will maintain a bargaining until call-in list for this purpose.

When an employee is required to work on their day off, he shall be compensated at the rate of time and one-half (1 ½) their rate of pay for all hours worked. Hours worked on scheduled days off shall not be used for the computation of weekly overtime.

. . .

BACKGROUND

The Company manufactures cheese products in its thirteen plants across the United States. Since 1997, the Company has operated a plant in Fond du Lac, Wisconsin, which is located on Scott Street. At the Scott Street Plant, the Company manufactures Blue Cheese and Mozzarella stick products, employing 140 hourly employees represented by the Union in its production and maintenance bargaining unit. The Scott Street Plant is organized into fifteen production and packaging departments and operates three shifts: 6:00 AM to 2:00 PM, 2:00 PM to 10:00 PM and 10:00 PM to 6:00 AM. The Blue Cheese Packaging Department (BCD) employs more than 50 unit employees, more than any other department.

The Tote Room at the plant is an area where employees wrap Blue Cheese wheels in foil, box them and prepare them for shipping to customers. There are six production lines run at Scott Street: 5-pound bag, 25-pound/50-pound crumbler/bowl, Tote Room, 24-ounce Deli, Wax, and Deli cup (4- to 10-ounce). The Company normally receives Blue Cheese orders by Wednesday nights or on Thursday; managers then organize the orders according to which production lines must work to fill the orders; they then calculate the number of shifts needed to meet the orders. Managers then start at the top of the seniority list to ask employees which shifts and lines they wish to work. The regular schedule is then posted on Thursday by 4:00 PM based on the above but it can be changed until 8:00 AM on Friday, at which time the schedule is set for the week. Each week when the schedule is created, Company managers try to minimize overtime.

It is undisputed that for many years, supervisors in the BCD have gone to the top senior employees (listed by departmental seniority) and offered them first opportunity to work all overtime hours. The most senior people may accept the offered overtime hours, even if the overtime work cannot be completed either before or after their regular shifts. If this is so, supervisors give the actual work to less senior employees who can perform it at the time needed, but, traditionally, supervisors have also given an equal number of overtime hours to the senior employees (who wished to work overtime) either before or after their regular shifts by finding the senior employees other work to perform, which has included filling orders or wrapping and packing products for shipment in the Tote Room.

As a general rule, employees on sick leave or vacation when the overtime is worked, are not considered available to work so that traditionally, supervisors have bypassed senior employees for overtime opportunities that became available while they were sick or on vacation. However, being on personal business time off or in training has not constituted unavailability. For example, it is undisputed that a senior employee, Randy Frank, had called off on personal business and yet he was paid for the overtime he had not been offered which a junior employee worked (Union Exhibit 4). In addition, the Company paid senior employee Cathy Wagner for overtime worked by a junior employee in 2003 or 2004 while she was in training as a machine operator.

In the Fall of 2005, the Company and Union engaged in negotiations for the effective agreement. In a grievance meeting held on September 26, 2005, during a discussion of overtime, Plant Manager Tim Hilgers stated that he would challenge the practice at Scott Street of creating overtime work for senior employees who were skipped for overtime opportunities. Hilgers admitted herein that as of September 26, 2005, there was a past practice of creating overtime for senior employees and by his statements on September 26, 2006 he intended to eliminate that practice. Union Witness Cathy Wagner confirmed that in a September, 2005 meeting with the Union prior to contract ratification of the 2005-10 contract occurred where Hilgers stated that he no longer wanted to create overtime work for senior employees.

FACTS

This case involves three grievances. On January 18 and 19, 2006, Chrys Tautges, who had chosen to work second shift that week, was passed over for four hours of overtime each day which was worked by less senior first shift employees from 2:00 AM to 6:00 AM each day. On each of these days, the Company needed to run its 5-pound line while working around the scheduled sanitation of that line for several hours beginning at 10:00 PM. As a result of needed sanitation of the line, the overtime could not be run after second shift and it was offered prior to first shift on each day. Tautges filed one of the instant grievances, citing a violation of Article 26 (D) on January 18 and 19, 2006.

On or about January 30, 2006, Marie Collins, a senior employee then working first shift, was bypassed for overtime which was worked for four hours by junior employees at the end of second shift. Collins filed one of the instant grievances citing a violation of Article 26 (D).

On February 7, 2006, senior first shift employee Nancy Schneider was bypassed for four hours' overtime reworking imperfect Blue Cheese. The overtime was worked by second shift junior employees who agreed on February 6th to come in four hours before their regular shift start time to work the overtime from 10:00 AM to 2:00 PM. Schneider filed one of the instant grievances, citing a violation of Article 26 (D). The three grievances were then consolidated, brought forward and heard by the Undersigned on September 11, 2006.

POSITIONS OF THE PARTIES

Union:

The Union urged that a long-standing, binding past-practice has been created which required the Company to equalize overtime each day in the Blue Cheese Department (BCD). Thus, where the Company offers overtime to junior employees all

more senior employees in the BCD on other shifts must also be offered overtime work. In this regard, the Union noted that all seven witnesses, (including the Company witnesses) who testified at the instant hearing confirmed the overtime equalization past practice as asserted by the Union, and that these witnesses also confirmed that the practice has been in place for up to 20 years or as long as the longest-tenured employees could remember. The Union noted that on 32 dates from June, 2004 through November 2005 overtime was offered in the BCD strictly by seniority across all shifts (U. Exh 11); and that senior employees were given an equal amount of overtime work in the Tote Room whenever the Company used less senior employees to perform needed overtime work on other shifts.

Furthermore, the Union urged that many grievance settlements of record demonstrated the Company's acceptance of the overtime equalization past practice, as follows:

1. On December 22, 2000, Randy Frank filed "called in 'personal business'" and on (sic) was not offered overtime for the following day. (Union Ex. 6). The Company paid Frank 6 hours of lost overtime. (Id.)
2. On February 2, 2002, Nancy Schneider grieved the Company's failure to ask her to work overtime. (Union Ex. 13). The company paid her eight hours for the failure. (Id.)
3. On August 12, 2002, Charlene Kimball grieved the loss of an overtime opportunity. Kimball grieved an instance where a more junior employee, Lynn Water, was offered thirty minutes of overtime while more senior employees were not offered overtime. (Union Ex. 12). Each of the senior employees signed the grievance, and, as the most senior grievant, Kimball was awarded the ½ hour of overtime missed. (Id.)
4. On September 10th and 11th, 2003, four senior employees, Michelle Scott, Cathy Wagner, Debra Santee, and Julie Trewin, were not offered overtime opportunities when less senior employees were offered overtime. (Union Ex. 3). The four women grieved the loss of overtime, and the company paid them 8 hours each (Id.)
5. On July 5, 2005, Joann Diaz and Chrys Tautges were skipped over when overtime was being offered. Each was paid four hours. (Union Ex. 14). In this instance, no grievance needed be filed after the women took the matter up with their supervisor.

6. On September 8, 2005, Gloria Eichman filed a grievance (sic) where she was offered four hours of overtime, (and declined it), but where the overtime opportunity was only 2 hours. (Union Ex. 1). After the fact Eichman realized that she had been deprived of the opportunity to work overtime only two hours, and grieved the incident. The company paid ½ of the overtime Eichman missed.

7. On September 27, 2005, Mary Bender grieved an incident where a less senior employee was given overtime without first offering such over time (sic) to her. (Union Ex.2). The Company paid Bender the four hours of overtime she lost. (Id.) Admittedly Bender was a laboratory employee, represented under a separate collective bargaining agreement with Local 200, however she was represented for the purposes of the grievance by a steward from the Production bargaining unit.

As the overtime equalization practice (which clearly constitutes a substantial benefit to senior BCD employees) has been proved to be binding by the Union, the Union asserted that the Company could not unilaterally change it. Rather, the Union urged that the Company was required to negotiate with the Union to eliminate the practice. And this it did not do when the 2005-2010 agreement was open.

The only reason Plant Manager Hilgers stated he wanted to eliminate overtime equalization was because of the increased cost of overtime. The Union contended that cost is not a valid reason to support unilateral elimination of the practice. Also, the Company's argument that the overtime equalization practice requires it to create overtime work for passed-over senior employees is not the true issue in this case. Rather, the Union urged, it is the distribution of overtime that is at issue herein.

Although former Plant Manager Paider stated herein that the underlying basis for the overtime equalization practice has changed because the Company had transferred the 5-pound Blue Cheese line to another Company facility, the Union noted that Hilgers mentioned only costs, not the transfer of work, as his reason for eliminating the practice. In addition, the Union asserted that the availability of overtime is different from the issue of equalization and that the Company failed to prove the two issues were related in this case or that the lesser availability of overtime prevented the equalization of overtime.

The Union pointed to the Maintenance of Standards clause which it argued expressly guarantees the continuation of the overtime equalization practice in this case by reference to the preservation of "overtime differentials." Contrary to the Company's assertions, daily equalization of overtime will not create split shifts as there

is normally sufficient time to either hold employees over after their regular shifts or ask them to come in before their regular shifts. Also the Company's argument that it would have to create overtime for employees if the Union prevails herein is fallacious. The Union argued that overtime could be arranged to be worked either before or after the senior employees' regular shifts. Here, the Company failed to plan and distribute overtime properly. Furthermore, the Union noted that under the contract, senior BCD employees are free to choose what shift they will work on a weekly basis (by seniority) and still receive offers of overtime available on all other shifts. This would not be the case if the overtime equalization practice were done away with as senior employees choosing second shift would likely lose overtime opportunities. In all of the circumstances, the Union urged the Arbitrator to sustain the grievance.

Company:

The Company argued that the grievances must fail because the Company followed the contractual overtime procedure stated in Article 26 (D) in each instance. In this regard, the Company asserted that the language of Article 26 (D) requires that only employees who "are qualified to perform the available (overtime) work" are to be offered it by departmental seniority. In the Company's view this means that senior employees who would have to work a split shift or who are already working their regular shifts when the overtime must be worked in order to do the "available work" as determined by the Company, cannot be considered "qualified" to perform it. In addition, the Company noted that the labor agreement contains no language requiring equalization of overtime or requiring the Company to create overtime opportunities for senior employees. Indeed, the contract does not even guarantee employees 40 hours/week of work, which necessitates a conclusion that no violation of the agreement has occurred in this case.

The Company observed that the labor agreement contains Article 10 (B), a provision stating that the terms of the contract constitute the "whole" agreement between the parties. The Company also urged that as Article 26 (D) is clear and unambiguous, past practice evidence proffered by the Union must be rejected by the Arbitrator. Therefore, the Company asserted that the Union's attempt to create an overtime hours entitlement, despite the express terms of Article 10 (B) and Article 26 (A), demonstrates how the Union has misused past practice herein.

In any event, the Company contended that the Union failed to prove a binding past practice "to create otherwise unnecessary work to offer overtime hours (and pay) to employees who are not qualified for other overtime work in that department the same day" (ER Brief p. 12). In addition, the Company observed that the Union failed to prove a practice existed in any of the other 14 departments at the Company. The Company contended that the evidence proffered by the Union concerning the "practice" in the BCD was insufficient to show a consistent mutually agreed-upon practice existed

even in the BCD. Rather, the evidence showed that Company managers offered some overtime as alleged by the Union only after determining the Company's needs and its budgetary constraints. Significantly, the Company asserted the examples of past overtime payouts submitted by the Union showed that supervisors made unexplained mistakes in not offering overtime to some senior employees.

Furthermore, the underlying conditions have changed and overtime opportunities are no longer available because the Company now has a plant in South Dakota with a 5-pound line and that work has further decreased due to the loss of two large volume customers. These substantial changes in circumstances mean that the Company was privileged to change the overtime practice for legitimate business reasons. Finally, assuming, arguendo that a past practice existed as asserted by the Union, the Company urged that Plant Manager Hilgers repudiated it in September, 2005, during a contract hiatus (before the effective agreement was entered into) when he clearly announced to the Union that the Company would no longer abide by the practice. In these circumstances, the Company urged the arbitrator to deny and dismiss the grievance.

DISCUSSION

The initial question in this case is whether Article 26(D) is clear and unambiguous or whether it is vague so that the past practice alleged by the Union herein can "fill in the blanks" in the agreement. A close analysis of Article 26(D) shows that the details of the distribution of overtime are not spelled out. All that is stated in Article 26(D) is the mandate that overtime hours "shall be worked in accordance with departmental seniority provided the employees are qualified to perform the available work." This broad language unequivocally requires overtime to be assigned by departmental seniority but it fails to describe the procedures to be used to accomplish this goal. Therefore, I find the language ambiguous, making evidence of past practice and bargaining history relevant and admissible herein.

The Company has argued in this case that it should not have to create overtime opportunities for senior BCD employees who are not qualified to perform the work because they are not "available" to work overtime at the time needed or because the senior BCD employees would have to work a split shift. Neither the ordinary meaning of the word "qualified" nor the legal meaning of that word supports the Company's argument on this point.¹ Indeed, had the parties intended to apply this portion of

¹ The Random House Dictionary of the English Language, Random House, p. 1079 (College Edition, 1968); Black's Law Dictionary, West Publishing Company, p. 1241 (Sixth Edition, 1990). In general, one is "qualified" who is competent; who has the necessary skills, knowledge, accomplishments, experience and/or credentials to perform the work. Thus, possessing necessary qualifications normally means more than being available in time to perform work.

Article 26(D) in this fashion, they could have expressed this in Article 26(D) or they could have added verbiage to Article 26(B) to make clear that overtime work would not create split shifts. However, the parties did not do this. In these circumstances, the Company's argument on this point must be rejected.

The Company has also noted that Article 26 (A) expressly states that employees are not guaranteed forty hours of work per week, and that the Company is prohibited by Article 26(B) from scheduling split shifts. The Company urged that Article 26(A) and (B) as well as Article 10, which contains a "zipper clause," allowed the Company, indeed required it, to pass over senior BCD employees for overtime. In contrast, the Union has argued that the language of Article 18 shows that the parties expressly intended that practices concerning, *inter alia*, "overtime differentials" which were in existence at the time the labor agreement was agreed upon must be maintained. This language, the Union urged, negates the effect of Articles 10 and 26(A). Furthermore, the Union contended that alleged make-work and split shifts could be easily avoided if the Company planned overtime in advance.

In the opinion of this Arbitrator, the Company failed to prove that its Article 10 management rights and zipper clause² must prevail. The lack of any evidence concerning the bargaining history surrounding Articles 10 and 26(A), (B), and (D) or prior cases on point, makes the finding urged by the Company on this point impossible in light of the past practice evidence submitted by the Union. In addition, the Company's argument that the lack of a forty hour guarantee in Article 26(A) showed that the Union's insistence on an overtime equalization past practice must be contrary to the parties' intent amounted to conjecture as no evidence was proffered by the Company to support it. Specifically, no evidence was submitted herein showing the parties' reasoning or motivation for placing a zipper clause in the agreement and also reserving to the Company the right to schedule overtime requirements in Article 10, while providing that the Company must maintain extant past practices such as "overtime differentials."

The record evidence herein showed that the Union and the Company mutually agreed and understood that senior BCD employees who indicated their interest in offered overtime must be given an equal number of overtime hours as worked by less senior BCD employees. This mutual agreement and understanding was supported by testimonial evidence from all witnesses herein as well as documentary and testimonial evidence showing that past grievances were filed and then settled when senior BCD employees were passed over for overtime worked by less senior BCD employees. In

² It should be noted that the "zipper clause" contained in Article 10 is not a particularly strong one as it fails to state that it constitutes a waiver of the right to bargain regarding items/issues specifically addressed in the contract and it fails to state that the management rights reserved to the Company in Article 10 are not limited by prior custom or practice.

this regard, it should be noted that no evidence was submitted herein to show that the practice arose by happenstance, that it was merely a convenient method of handling overtime or that the Company made it clear that it intended the distribution of overtime practice to constitute a gratuity. Quite the contrary, the record facts showed that in many past cases, the Company specifically created overtime opportunities for senior BCD employees who were passed over for overtime. In these circumstances, the Undersigned concludes not only that the overtime distribution custom at the Scott Street Plant in the BCD was a clear and unambiguous practice but that it was also mutually agreed-upon and long-established.

It is significant that the above analysis is not in conflict with the language of Article 26, Sections (A) and (D). Rather, these Sections generally support the Arbitrator's approach herein. In this regard, the Arbitrator notes that Article 26(D) specifically requires the Company to use departmental seniority in assigning overtime within each department.³ In addition, Article 26(A) states that the Company must make "every reasonable effort" to provide "senior employees" with forty hours of work "each week." This language shows that the parties intended to treat senior employees differently from junior employees—to benefit them as much as possible in granting them hours of work.

Thus, the past practice regarding overtime distribution proved herein by the Union granted a significant benefit to senior BCD employees which, based upon this record, was mutually established and recognized. As such, it was the kind of practice that the Company was not privileged to unilaterally modify or terminate during the term of a labor agreement between these parties. However, the above conclusion does not mean that the Company could not terminate the overtime distribution practice by giving the Union proper notice upon expiration of the labor agreement.

In this case, Union witnesses admitted that Plant Manager Hilgers told Union representatives during a grievance meeting concerning overtime (which occurred during the contract hiatus before the parties formally agreed to the terms of the 2005-10 labor agreement) that he no longer intended to create overtime work for senior BCD employees. In this case, the Union has argued that because the practice constituted a benefit to senior BCD employees, Hilgers was obliged to negotiate its elimination and that Hilgers' wish to save money was an insufficient reason to support unilateral termination of the practice. These arguments miss the mark. Here, the Company timely notified the Union that it wished to eliminate the past practice during a contract hiatus. It was then up to the Local Union representatives, then in contract negotiations with the Company, to negotiate the overtime distribution practice into the 2005-10

³ The Company argued that only overtime in the BCD has been addressed herein. Article 26(D) recognizes that overtime must be addressed department by department. Therefore, the fact that the Union has not argued a practice exists in any other department at the plant does not undercut the Union's arguments herein.

agreement. However, the Union never made any proposals to try to preserve the overtime distribution past practice, as it had to do in order to preserve the practice after Hilgers' notice of repudiation.

The Union has argued that Hilgers' reason⁴ for terminating the overtime equalization practice—that it was costly—was insufficient to support Hilgers' termination. As Hilgers delivered his notice of termination during a contract hiatus, the reason he stated was sufficient to support the repudiation as it gave the Union an opportunity to craft a contract proposal to address the Company's asserted concerns.

In all of these circumstances, and based upon the above analysis, this Arbitrator issues the following

AWARD

The Company did not violate the collective bargaining agreement when it offered overtime to employees where it did not offer the same amount of overtime to more senior employees. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 19th day of January, 2007.

Sharon A. Gallagher /s/

Sharon A. Gallagher

⁴ The Company also submitted evidence, not seriously challenged or disputed by the Union, that it had largely moved its five-pound Blue Cheese wheel operations from the Scott Street Plant to its South Dakota plant and that it had lost two large contracts to provide Blue Cheese to customers, decreasing the amount of wrapping and packing work in the Tote Room. In this Arbitrator's view this evidence would tend to support the Company's separate argument that it could no longer afford to create overtime work for passed-over senior BCD employees.