

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LEICHT TRANSFER AND STORAGE CO.

and

TEAMSTERS LOCAL NO. 75

Case 3

No. 66259

A-6243

(Overtime Work Schedule Grievance)

Appearances:

Thomas J. Duffey, Sr., Attorney at Law, Duffey Law Office, S.C., 933 North Mayfair Road, Suite 302, Milwaukee, Wisconsin, 53226, appeared on behalf of Leicht Transfer and Storage Company.

John J. Brennan, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Milwaukee, Wisconsin, 53212, appeared on behalf of Teamsters Local No. 75.

ARBITRATION AWARD

Leicht Transfer and Storage Co., herein Leicht, the Company or the Employer, and Teamsters Local No. 75, herein the Teamsters or the Union, are parties to a collective bargaining agreement which was in effect at all relevant times and which provides for the final and binding arbitration of certain disputes. The Union requested and Leicht agreed that the Wisconsin Employment Relations Commission provide a panel from which the parties selected Paul Gordon, Commissioner, to serve as arbitrator to resolve a grievance filed by the Union on behalf of Brian Mallien, herein Mallien or Grievant, as to a work schedule. Hearing was held on the matter on October 20, 2006, in Green Bay, Wisconsin. No transcript was prepared. A briefing schedule was set and extended, and the record was closed on December 15, 2006.

ISSUE

The parties did not stipulate to a statement of the issues. The Union states the issue as

Did the Company violate the Labor Agreement by failing to offer overtime to the grievant for hours during which less senior employees did work overtime?

The Company states the issue in its brief as

Did the Employer violate the terms of the Collective Bargaining Agreement and Mr. Brian Mallien's seniority rights by not honoring his request to work overtime from 6:00 p.m. to 2:00 a.m. at WHSE 98 on 5-3-06?

The issue as phrased by the Company is selected as that which best reflects the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE 1. RECONGNITION – UNION SHOP

The Employer recognizes the Union as the exclusive bargaining agent with respect to wages, hours and other conditions of employment for employees assigned to and working at its facilities located at the following locations or replacement facilities within the Green Bay Metro area (i.e. – Green Bay, DePere, Ashwaubenon, Bellevue, Denmark, Howard and Suamico) for handling work, where handling work is performed by its employees. Warehouses - 10, 21, 22, 25, 27, 32, 33, 41, 42, 43, 44, 53, 54, 71, 72, 85, 97, and 98. In the event that a customer moves its business outside of the Green Bay Metro area, management is not prohibited from bidding the work through any entity created by management.

. . .

ARTICLE 11. SENIORITY

Seniority rights shall prevail. . . .

. . .

In reducing the personnel because of lack of work or other legitimate reasons, the last employee hired shall be laid off first; and in returning to work, the last employee laid off shall be the first to be returned to work and rehired, provided the employee involved is qualified to do the work. In no case shall any new help be hired until all old employees are reinstated, provided they are qualified to do the work. In the case it is proved an employee(s) younger in seniority performed work when a qualified employee(s) older in seniority was available, that employee(s) older in seniority shall be entitled to pay for such time worked. The Employer may employ any qualified employee laid off, in an emergency for a period not exceeding one (1) week.

...

ARTICLE 15. WAGES AND HOURS

...

Overtime opportunities will be offered to all employees in the bargaining unit in accordance to seniority. When there are insufficient volunteers to meet the needs of the operation, the least senior employee(s) will be assigned to work.

Same day overtime – Overtime between zero (0) and two (2) hours per person will be offered within a work group (e.g. case pick) assigned to a specific facility. Overtime will be offered within the work group first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. Overtime exceeding two (2) hours will be offered, within the facility where the work needs to be done, first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. In each case overtime will be offered only for those operators qualified/certified to operate all equipment required to fill the vacant position at a reasonable performance standard.

The intent of this language is that same day overtime within a work group or within a facility is always offered first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. Incumbents will first be offered overtime available within a work group when it is two hours or less, and then within a facility when it is between two and four hours. Overtime greater than four hours will be offered using the master seniority list within the public warehouse employee bargaining unit for those operators qualified/certified to operate all equipment required to fill the vacant position at a reasonable performance standard.

...

ARTICLE 16. CONTINUOUS OPERATIONS

...

The three day work week is handled as follows: The guaranteed work day will be twelve (12) hours and will be paid at the rate of straight time to include any shift premium for the first ten (10) hours per shift and forty hours (40) per week. For the purposes of computing overtime after 40 hours, all hours worked or paid during the week apply towards the 40 hour calculation.

The four day work week is handled as follows: Overtime is defined by this formula – the total hours worked in the week, minus 40 hours, shall define the total overtime hours to be paid that week. An example is where an employee works a 48 hour work week during their scheduled four day work

week. They are paid 40 hours at straight time pay and eight hour at overtime pay.

Employees can be forced to work only on Mondays, Tuesdays, Wednesdays or Thursdays; No more than eight (8) hours per day. Employees can volunteer to work on any day off.

. . .

ARTICLE 22. GRIEVANCE PROCEDURE

A grievance shall be processed as follows.

1. The grievance shall be presented within three (3) working days after discovery and discussed with the employee's supervisor, by the employee and steward if requested.

2. If not settled satisfactorily within five (5) working days of Step 1, the grievance shall be, within ten (10) working days, reduced to writing and referred to Management and the Business Representative of the Union. The Employer will provide a written answer to the grievant and the Union within ten (10) days following a meeting with the business Agent.

3. If not settled satisfactorily after further discussions within fifteen (15) working days of the Employer's written response, either party may within ten (10) working days (excluding Saturdays and Holidays) notify the other party after a deadlock in Step 2 of their desire to arbitrate.

ARTICLE 23. ARBITRATION PROCEDURE

The party desiring arbitration shall notify the other party in writing of its desire to arbitrate, and within five (5) days of submitting that notice shall request that the grievance be referred to binding arbitration before an arbitrator who shall be selected within seven (7) day after such request from a panel of five (5) arbitrators submitted by the Wisconsin Employment Relations Commission. The party requesting arbitration shall strike the first (1st) name from the panel, and the parties shall then make alternate strikes until the arbitrator is selected. The decision of the arbitrator shall be final and binding on the Employer, the Union and the employee(s) involved and shall be in writing.

The arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement.

...

APPENDIX B
Contract Workers

1. The Company has the right to subcontract traditional warehouse work provided all regular warehouse employees are working or have been afforded the opportunity to work.

...

6. Same day overtime – Overtime between zero (0) and two (2) hours per person will be offered within a work group (e.g. case pick) assigned to a specific facility. Overtime will be offered within the work group first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. Overtime exceeding two (2) hours will be offered, within the facility where the work needs to be done, first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. In each case only for those operators qualified/certified to operate all equipment required to fill the vacant position at a reasonable performance standard.

The intent of this language is that same day overtime within a work group or within a facility is always offered first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. Incumbents will first be offered overtime available within a work group when it is two hours or less, and then within a facility when it is between two and four hours. Overtime greater than four hours will be offered using the master seniority list within the public warehouse employee bargaining unit for those operators qualified/certified to operate all equipment required to fill the vacant position at a reasonable performance standard.

...

APPENDIX C
CASE PICK WAREHOUSE BARGAINING UNIT

The parties are agreeable to the creation of a new bargaining unit in lieu of contract workers, assuming cost parameters can be agreed upon as previously outlined.

...

The Employer's Warehouse Operation, for the purpose of collective bargaining, is comprised of two bargaining units, the one covered by this Agreement (The

Public Warehouse Employee Agreement) which is commonly referred to as the “General Public Warehouse” operation and a separate and distinct bargaining

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unit which is commonly referred to as the “Case Pick Warehouse” operation which is covered by a separate Agreement which is referred to as the “Case Pick Warehouse Agreement”.

The employer hereby recognizes the Union as the exclusive bargaining agent with respect to wages, hours and other conditions of employment for its warehouse employees who perform case picking duties and other job functions within the various Leicht Transfer and Storage Co. warehouse facilities and in addition thereto they will serve as vacation and absentee replacements for public warehouse employees and perform public warehouse employee work which cannot be handled by the existing public warehouse employee bargaining unit. These employees will not be considered as casual or supplemental employees for the purpose of pension contributions required to be paid on employees in the public warehouse employee bargaining unit.

...

BACKGROUND AND FACTS

The Company operates approximately 14 warehouses in the Green Bay, Wisconsin area and has about 125 employees, approximately 90 of those handling products for customers in the warehouses. On May 3, 2006 Grievant was such a handler, also known as an operator. He is a member of the bargaining unit recognized in the above collective bargaining agreement covering the public warehouse employees.

The Union represents the operators. Operators are of two groups: the group A or Unit A group, which is the public warehouse group, and; the group B or Unit B group, the case pick group. Each group is covered under a separate collective bargaining agreement. The case pick group bargaining unit is referred to in the public warehouse group collective bargaining agreement as set out above. At the time the public warehouse employees’ agreement was signed, the parties were in the process of negotiating a contract whereby the contract employees would become a separate bargaining unit – the case pick bargaining unit. This unit was formed and a separate labor agreement was negotiated for them.

Unit A public warehouse employees are paid approximately \$3.00 per hour more than Unit B case pick employees.

At the end of April and beginning of May, 2006, Grievant was in continuous operations Crew D. He had generally worked at warehouse 98, but had worked at several different

warehouses of the Company from time to time. Occasionally he was moved from one warehouse to another during a shift when the Company had work needs to do so. Among other

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things, employees are sometimes interchanged between warehouses 21, 97 and 98. Grievant worked a 6:00 p.m. to 6:00 a.m. shift May 1, May 2, May 5, and May 6, with 40 hours straight time and 8.5 hours at time and one-half.

On May 1st Grievant had submitted a "SIGN-UP FOR VOLUNTEER WORK" form to request overtime for May 3rd, when he was not otherwise scheduled to work that week. He used the form prepared by and required by the Company to request the overtime. The form has been rewritten several times in recent years. For volunteer work (and forced work) the form requested employees to indicate their choices in order of preference. Grievant was the most senior employee requesting such overtime opportunity, should there be one. In completing the form he indicated the choice for volunteer work for: Date, 5/3/06; Day of Week, Wednesday; Shift, 6 pm to 2 am, and; Location, Whse.98. This form contained the statements: "Volunteer work will be assigned based on availability of work and seniority", and; "The scheduler will only assign work to you if the shifts you indicated are available, and you are next in line based on the seniority list". In the past there had been some occasions where an employee would only put the date down and for the shift and location wrote in "call me", and overtime shifts were awarded. It is not clear if the form used at such times contained the two statements referred to above.

Grievant was not offered an opportunity to work any hours at any location pursuant to the request. His name was not put on the schedule and he was not called by the Company. No employee in the public warehouse employee bargaining unit was offered any overtime opportunity outside of their regular shift on May 3rd. No one who worked at warehouse 98 during that shift worked overtime. There was no overtime work available on that date at warehouse 98. The Company Scheduler felt he had the work needs covered for warehouse 98 without any need for overtime and thus did not schedule Grievant for volunteer overtime.

Work schedules for both bargaining units' employees are made out by the Company Scheduler. The Scheduler normally knows by noon what the workload will be for the following day, and he then determines the number of employees needed to be scheduled at the various warehouses. He then schedules the employees who are, pursuant to their regular schedules, available for the various shifts at the various warehouses. At about 2:00 p.m. he posts the work schedule for the following day. Those on regular bid shifts would know when they would be working, but not necessarily where they would be working until the schedule is posted. If the Scheduler does not have enough regularly scheduled employees to fill the workload needs, he goes to the SIGN-UP FOR VOLUNTEER WORK FORMS (previously submitted) and selects the employees from those forms by shift and warehouse location requested by seniority. The Scheduler has, on occasion in the past, moved less senior employees scheduled to work in one warehouse to another in order to accommodate a request for volunteer overtime, particularly if there was an opening at the second warehouse.

Among the group B employees in the case pick warehouse employees unit are Mr. Fisher and Mr. Fajardo. They perform basically the same work as Grievant and have less seniority than Grievant. During the week of April 30th through May 6th they were scheduled to work and did work the 6:00 p.m. to 4:00 a.m. shift on 4/30, 5/1 and 5/3, all at

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warehouse 21. They are paid time and one-half after working 40 hours in a week. Due to the number of hours actually scheduled and worked by these two employees that week, Fisher went on overtime 6 hours into his shift at midnight on May 3rd and Fajardo went on overtime 4 hours into his shift at 10:00 p.m. on May 3rd. The Company typically allows the case pick employees (and public warehouse unit employees) to complete their entire shifts once they start to work on their scheduled days. The Company Scheduler knew, when doing his scheduling on May 2nd for the evening of May 3rd, that Fischer would be going on overtime 6 hours into his shift on May 3rd if he did not work more than 10 hours on the evening of May 2nd (earlier if he worked more hours on May 2nd), and that Fajardo would be going on overtime 4 hours into his shift on May 3rd if he did not work more than 10 hours on May 2nd (earlier if he worked more hours on May 2nd). The workforce required by the Company at warehouse 21 on May 3rd all reported to work as scheduled, and there was no need for another employee to work at warehouse 21 or at any other warehouses that evening. Other than the overtime of Fischer and Fajardo noted above, no volunteer overtime was granted to any employee on May 3rd at warehouse 21.

Warehouse 21 is approximately two miles from warehouse 98.

Ms. Brunner is a group A Crew B continuous operations employee in the public warehouse employee bargaining unit. She is junior in seniority to Grievant. She worked her regularly scheduled 6:00 p.m. to 6:00 a.m. shift on May 3rd at warehouse 98. She is a backup foreman on Crew B for warehouses 21, 97 and 98. As a backup foreman she is assigned to designated warehouses. She was designated to work warehouse 98 on May 3rd. A foreman from the public warehouse unit also worked that shift at warehouse 98 on 5/3. Foremen bid continuous shifts to a specific warehouse, while other operators do not bid to a specific warehouse. Unless she is backing up another Foreman, Brunner will work with one of the Foremen.

Grievant filed a written grievance on May 3rd due to his not being scheduled to work that day. He actually filed two written grievance forms. The first stated:

. . .

Complaint in Detail: I volunteered to work on 5-3-06 at whse. 98 and wasn't scheduled to work. My supervisor said if I had volunteered for whse. 21 I would have been scheduled to work. My grievance is they have a junior employee working at whse. 98 that could work whse. 21 while I would work whse. 98 (seniority shall prevail)

. . .

FACTS OF CASE: waiting for reply back on hours on R-Fisher had 44 hours on 5/3/06 and A-Fajardo had 48 hours on 5/3/06. Brian M. should get 8 hours O.T. pay and Brian Q talked to Jamie about it on 5/3/06.

. . .

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Brunner is the other junior employee referred to in that grievance. The Union Steward investigated the grievance and found from payroll that two case pick unit employees had been on overtime for part of their shifts on May 3rd at warehouse 21. Within a few days, and after discussions between Grievant and the Company as to the grievance, Grievant was asked by the Company to restate his grievance to make it more clear. He did so, and filed a second grievance form with the same date. He was grieving the same factual circumstance each time, about having been refused overtime. The second grievance filed stated:

. . .

Complaint in Detail: I volunteered to work on 5-3-06 but was not scheduled to work. Jamie said he didn't need me. R. Fisher and A. Fajardo (case pick whse. Employees) had overtime that night. According to our labor agreement overtime is offered to us first plus shift. So I feel I should get 8 hr. overtime pay.

. . .

By memo of July 21, 2006, the Company formally answered the grievance as follows;

. . .

3) Brian Mallien – 5/3/06 Grievance denied. Leicht believes that the contract was followed regarding the week Brian has questioned. The wording in the contract is regarding “same day overtime”. “Same day overtime” implies that an Operator must be on-duty and available to be eligible for the overtime. Brian was not on-duty and available to be eligible for the hours in question. If overtime results from a B group Operator working more than 40 hours in a week, our understanding of the agreement is that the B group Operator should not be bumped out of their normally scheduled days of work just because an A group Operator wants more hours.

The matter proceeded to arbitration. Further facts appear as in the discussion.

POSITIONS OF THE PARTIES

Company

In summary, the Company argues that the grievance at issue in this case is the first one filed, which is the one that was taken through the grievance procedure resulting in this arbitration – not the second version of the grievance. Grievant had requested voluntary overtime on a specific date, specific shift and specific location. The Company argues that the

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same day overtime provisions in the labor agreement infer that the employee, to be eligible for same day overtime, must be on duty and available at the time that the overtime opportunity occurs, and that this arbitration involves voluntary overtime, not same day overtime. The Company also argues that it had previously scheduled the full compliment of employees that it would require at all warehouses for the night shifts on May 3rd from regularly scheduled employees and did not require any voluntary help. Grievant had requested a 6:00 p.m. to 2:00 a.m. shift on May 3rd at warehouse 98. If the request had been for example, for a day that Grievant and the two case pick employees all had off and there was an overtime position available, then Grievant would be granted the shift because of his seniority. Here though, all shifts were already filled by regularly scheduled employees. And Brunner, who is junior to Grievant, was not needed to work at warehouse 21 so there was no need to move her from warehouse 98 to make room for Grievant. The Company, through its Scheduler, does not recall telling Grievant if he had volunteered to work at warehouse 21 he would have been scheduled to work there. The Company argues that it determined it had enough regularly scheduled employees for May 3rd and did not have to go to the SIGN UP FOR VOLUNTEER WORK forms for additional help. The Company had no need for another employee at any of its warehouses that evening and therefore did not need Grievant. It consequently did not honor his request since there was no overtime opportunity available. No one was called in to work voluntary overtime that evening at any warehouse.

The Company also argues that Fischer's 44 hours at the completion of the May 3rd workday and Fajardo's 48 hours has no bearing in this grievance and based on those hours Grievant has no right to receive 8 hours overtime as stated in the Facts of Case part of the grievance. Grievant's claim for 8 hours overtime pay based on Fisher and Fajardo having gone into overtime on May 3rd is in the second grievance, which is not before the arbitrator. That grievance was not submitted to arbitration in accordance with Article 23 of the labor agreement. Nevertheless, Fischer and Fajardo are in a different bargaining unit and covered by a separate and distinct collective bargaining agreement from Grievant's. They are paid time and one half after working 40 hours in a week. They went into overtime during parts of their shifts on May 3rd. While not guaranteed they will work their complete scheduled shifts, the Company practice is typically to allow them to complete their entire scheduled shift once they start to work on their scheduled days. When preparing the schedule, the Company Scheduler knew, or should have known, that they would be going into overtime during their shifts on May 3rd. To honor Grievant's request and bump Fajardo off his shift at midnight would be

contrary to the typical practice of allowing a non guaranteed employee to complete his entire scheduled shift once he starts to work on his scheduled days. And, grievant did not request to come in at midnight. He requested volunteer overtime to come in at 6:00 p.m. and did not request to work voluntary overtime at warehouse 21, where Fisher and Fajardo were working. Grievant requested warehouse 98.

The Company argues the first grievance should be denied, and the second, which is not before the arbitrator, is without merit and was not submitted to arbitration by the Union.

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Union

In summary, the Union argues there are two grievances relevant to the issue, both dated May 3, 2006. The second grievance was filed after the Company asked for a more detailed explanation of what was being grieved. In both Grievant is grieving the same basic fact: two junior case pick employees worked overtime on May 3rd while the Company failed to call Grievant for volunteer overtime. The Company answered both grievances by memo of July 21, 2006. The Union argues that at the time the parties negotiated their current labor agreement they were also negotiating an arrangement whereby the contract employees would become a separate bargaining unit represented by the Union. They negotiated a separate labor agreement by April 1, 2006. When negotiating the public warehouse bargaining unit labor agreement the Union negotiated language in respect to seniority rights generally, but more specifically with respect to overtime opportunities. The language is found at pages 12, 13 and 31 in the agreement. The contract speaks to same day overtime, which is the type of overtime worked by Fisher and Fajardo, the case pick employees who were the subject of Grievant's grievance. They worked overtime when Grievant should have been called in to work. Fisher's and Fajardo's overtime was tacked directly onto their regular shifts because the Company intentionally scheduled Fajardo for four 12 hour shifts rather than his regular bid 10 hour shifts. Fisher had been intentionally scheduled 4-1/2 hours more than his regular shift.

The Union argues that the same day overtime language allows these case pick employees to work overtime between zero and two hours within the work group before the general distribution on the basis of seniority. The employer could, but hasn't, argued that the case pick employees are entitled to a maximum of two hours each day without offering the overtime on the basis of seniority. They are paid overtime after 40 hours. Because their overtime on May 3 exceeded two hours master seniority had to be followed. This is supported by the language in the labor agreement at pages 13 and 31. Identical language is in appendix B, and page 12. The contract addresses the remedy under Article 11, page 7, wherein the older in seniority shall be entitled to pay for such time worked. The Company admitted that where overtime is available it must be offered by seniority because Article 15 of the labor agreement requires that.

The Union further argues that the Company's case is based on the simplistic approach that no overtime was worked in warehouse 98, or at all. Clearly two junior employees worked 4.5 and 8 hours overtime on May 3. The Company, by implication, claims it is not required to

offer the Grievant the overtime because he only asked for overtime in warehouse 98. Warehouses 98, 97 and 21 are routinely scheduled in association with each other. Similarly on September 12, 2006, Grievant's similar request was honored and Brunner was scheduled to work warehouse 21. This regularly occurred before and after the grievance was filed. Nowhere in the labor agreement is there a distinction made about overtime opportunities of greater than four hours by warehouse. Overtime opportunities are first offered within a work group of two hours or less, then within a facility between two and four hours. Overtime greater than four hours is without regard to facility, the bargaining units

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covering all warehouses. In negotiating the agreement there was never any intention to exclude individuals from working voluntary overtime on their days off. Most of the overtime that full time public warehouse employees obtain is on their off days. Both A Unit and B Unit groups get as much overtime as they want. This case is not about bumping a B Unit worker out of a regularly scheduled shift. Here the Company intentionally scheduled 10 hour employees to work 12 hour shifts, four days in a row to avoid paying A Unit employees overtime in favor of cheaper labor from the B Unit. The Company wants to ignore the fact that Grievant was denied overtime when two junior case pick employees worked more than four hours overtime that day. The Company wants to ignore master seniority, and the practice of scheduling Grievant to warehouse 98 and staffing warehouse 21 with less senior employees. The Company wants to ignore the fact that it made an error in scheduling in this case.

Company Reply

In summary, the Company replies that Joint Exhibit 2 is the grievance not settled, and that grievance only is before the arbitrator. In that grievance Grievant stated "My grievance is they have a junior employee working at WHSE 98 that could work WHSE 21 while I would work WHSE 98 (Seniority shall prevail)". The Employer had no need for an additional employee at warehouse 21, so Brunner was not moved from her regular schedule. There was no need for an extra employee at either warehouse 21 or 98. Grievant makes no claim in Joint Exhibit 2 that his seniority rights were violated due to Fisher or Fajardo working overtime.

The Company argues that the other grievance is completely different, and not submitted for arbitration according to Article 23 of the labor agreement. The form Grievant filled out for voluntary overtime stated, among other things, that "Voluntary work will be assigned based on availability of work and seniority", and "The scheduler will only assign work to you if the shifts you indicated are available and you are next in line based on the seniority list". There was no overtime available on the shift Grievant indicated, so he was not called in. The Company acknowledges that it is obligated to offer requested voluntary overtime opportunities to its employees by seniority. There was no voluntary overtime opportunity to offer to Grievant who would have had the first crack at the voluntary overtime that he requested had it become available.

The Company also argues that Grievant did not request to come in to work overtime at 10:00 p.m. or at midnight, he requested to come in at 6:00 p.m. for volunteer overtime not

same day overtime. The weekly overtime Fisher and Fajardo worked on May 3rd was mainly during their regularly schedule shifts which, while not guaranteed, is typically allowed to be completed as an entire shift once they start work on their scheduled days. To be eligible by seniority for same day overtime the claimant must be on duty and available. And, the language from Article 11 has to do with a layoff.

The Company denies its case is built on a simplistic approach that no overtime was worked at warehouse 98. The Company also argues it had its full compliment of employees scheduled to fill its needs and did not need an additional employee to come in at any of its

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warehouses. Consequently, no overtime opportunity existed for Grievant. No junior employee was called in. The Company has occasionally, for good reason, allowed the move of a junior employee to another warehouse to accommodate a senior employee to work overtime, as in September of 2006, but on May 3rd there was no need for another employee at warehouse 21. The Company acknowledges that when negotiating the new Case Pick labor agreement it never intended to exclude individuals from working voluntary overtime on their off days just as they had always done and which they still do with regularity today. The scheduling of a 10 hour employee for 12 hours for four days to avoid paying Group A overtime is simply nonsense. Schedules are made up a day in advance, using the best judgment in determining needs. If the Company doesn't service customers' warehouse need to the customers' satisfaction, those customers will leave the Company, and we probably wouldn't be discussing problems with full employment because the business would be gone. The Company will pay premium pay if it is required to maintain customer business rather than lose that business to one of its many competitors.

DISCUSSION

While the issue to be decided ultimately concerns application of the collective bargaining agreement's language to the facts of the case, a threshold issue concerns which grievance has raised the issue.

The Company has argued that it is only the first grievance filed which has been processed through the grievance procedure to this arbitration and that limits the issue to Brunner having worked at warehouse 98 rather than the more senior Grievant. However, it is clear that the Company itself asked Grievant to resubmit the grievance to make it more clear, which is what he did. And, the Company, in denying the Grievance on July 21, specifically references overtime resulting from a B group operator working more than 40 hours in a week. Also, although the testimony was not well developed at the hearing, it is clear from the testimony of the Union Steward and the first grievance form itself that the Steward received the grievance from Grievant and investigated the payment of overtime to group B employees for that date. References to those two employees appear on the grievance in the Facts of Case part. The clear implication is that the Steward made this reference as part of the first grievance. It is also clear that the grievance was discussed with Company officials who then

asked that it be made more clear. In doing so the second grievance, Union Exhibit 1, referenced the same two case pick employees. Importantly, there is only one set of facts and circumstances that existed on May 3, 2006. There is no doubt to the undersigned that it was the fact that case pick employees worked overtime that evening while Grievant did not is what is at the heart of this grievance, regardless of how it was phrased originally or the second time. It is one grievance. Even the parties to the arbitration did not agree as to how to phrase the issue to be decided. Both parties presented evidence and argument in the arbitration proceedings as to both the Brunner circumstance and the Fisher and Fajardo circumstance. No one was surprised or misled here about the nature of the grievance,

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and the Company is not making those claims. The Company briefed those circumstances on the merits. There is only one grievance, it went through the process according to Article 22 of the collective bargaining agreement and proceeded to this arbitration. And, the issue to be decided as phrased by the Company is, as explained below, broad enough to cover the facts and circumstances as to Brunner as well as Fisher and Fajardo, even with its reference to a specific date, shift and location.

The issue requires determining whether the terms of the collective bargaining agreement and Grievant's seniority rights were violated by not honoring his particular request to work overtime. His request, made on a Company prepared and required form, contained specific date, shift and location information as called for on the form. The language in the agreement is less specific as to date, shift and location. There are some specific length of time references in the agreement. The basic overtime provisions are in Article 15, and are:

Overtime opportunities will be offered to all employees in the bargaining unit in accordance to seniority. When there are insufficient volunteers to meet the needs of the operation, the least senior employee(s) will be assigned to work.

Same day overtime – Overtime between zero (0) and two (2) hours per person will be offered within a work group (e.g. case pick) assigned to a specific facility. Overtime will be offered within the work group first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. Overtime exceeding two (2) hours will be offered, within the facility where the work needs to be done, first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. In each case overtime will be offered only for those operators qualified/certified to operate all equipment required to fill the vacant position at a reasonable performance standard.

The intent of this language is that same day overtime within a work group or within a facility is always offered first to the public warehouse bargaining unit employees by seniority, then to the case pick bargaining unit employees by seniority, and then to contractors. Incumbents will

first be offered overtime available within a work group when it is two hours or less, and then within a facility when it is between two and four hours. Overtime greater than four hours will be offered using the master seniority list within the public warehouse employee bargaining unit for those operators qualified/certified to operate all equipment required to fill the vacant position at a reasonable performance standard.

The same language in the last two paragraphs is also in Appendix B of the agreement concerning contract workers and referencing case pick workers. As contemplated by the parties when signing the public warehouse employee agreement, the contract workers became the case pick employees, covered by the contemplated case pick employees contract. The other relevant reference to overtime in the public warehouse employee's agreement is in Article 16.

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The three day work week is handled as follows: The guaranteed work day will be twelve (12) hours and will be paid at the rate of straight time to include any shift premium for the first ten (10) hours per shift and forty hours (40) per week. For the purposes of computing overtime after 40 hours, all hours worked or paid during the week apply towards the 40 hour calculation.

The four day work week is handled as follows: Overtime is defined by this formula – the total hours worked in the week, minus 40 hours, shall define the total overtime hours to be paid that week. An example is where an employee works a 48 hour work week during their scheduled four day work week. They are paid 40 hours at straight time pay and eight hour at overtime pay.

With Grievant being in a continuous operations work crew, there is no issue in this case that had he worked on May 3rd all of such hours would have, eventually, counted towards additional overtime for him under Article 16. The controlling question is whether he was entitled to overtime pursuant to Article 15.

All of the agreement's terms must be read together and all terms and provisions must be given meaning. Usually a specific provision will control if it is in conflict with a more general provision. Article 15 contains a very simple general statement that overtime opportunities will be offered to all employees in the bargaining unit in accordance with seniority. Beginning with this principle, the Company argues that there was no overtime at warehouses 98 or anywhere else on May 3rd so there was no overtime opportunity denied to Grievant. However, the record does demonstrate that both Fisher and Fajardo did indeed work overtime on May 3rd because they exceeded 40 hours in a week part way into their May 3rd shifts. They worked at warehouse 21, rather than warehouse 98. The point is, there was an overtime opportunity with the Company and the agreement does not say the overtime opportunity has to be at any particular location. The record is clear that both Fisher and Fajardo are junior to Grievant. They are in the case pick unit. But, that is specifically referred to in the priorities expressed in the next two paragraphs concerning overtime, which is clearly to prioritize public warehouse unit employees over case pick unit employees – same day provisions notwithstanding. Here, there were overtime opportunities which were created by the Company's particular scheduling

and work hours of the two case pick employees when they each exceeded 40 hours on May 3rd. Those opportunities were not offered to Grievant as otherwise required by this first general principle in the agreement and the specific provision for overtime in excess of two hours.

The Company argues that the agreement was not violated because the overtime worked by Fisher and Fajardo was not same day overtime for Grievant, and it is same day overtime which is specified in the contract. This argument simply ignores the above general principle. The Company argues, and indeed responded in its July 21st memo that the same day provisions for overtime imply that Grievant would have to be working and on duty in order to qualify for those overtime opportunities. But that is not what the agreement says. There is no such condition in the agreement. The same day overtime paragraph is followed by the paragraph expressing its intent that same day overtime within a work group or within a facility is always

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offered first to the public warehouse bargaining unit employee, then to the case pick unit employee. There are some limits or qualifiers then put on this provision. The first limit is for the first two hours of same day overtime, which by agreement is offered first to incumbents. Here, Fisher and Fajardo. The next two hours are to be offered within a facility. Grievant was not scheduled in the facility on May 3rd. This is where the Company might draw the distinction it makes. However, there is no record of overtime being requested by anyone in the facility or offered to anyone else in the facility. If other public warehouse employees were in the facility then the agreement provides they are to be offered the overtime opportunity before case pick employees, Fisher and Fajardo. But here there are no facts which would support the exclusion of Grievant from these hours by anyone in the facility. The next limit or qualifier is a very clear statement that overtime greater than four hours will be offered using the master seniority list within the public warehouse employee bargaining unit. This contains no limit as to facility. The reference to the master seniority list is a clear look at a list that does not, and would not, contain only the names of employees currently on duty and present at a facility during a regular shift or otherwise. This provision, even though it involves same day overtime, applies to Grievant in this case. The provision for overtime greater than four hours using the master seniority list would be meaningless if it were limited, by implication, to one already present and on duty. All provisions in an agreement must have meaning and cannot be read or interpreted out of existence. Grievant would be entitled to those four hours and, in the absence of an offer of the opportunity of the two hours over the first two hours of overtime to anyone else in the facility, to those hours also. This is a total of six hours.

There was an overtime opportunity made by the Company for May 3rd that exceeded two hours for both Fisher and Fajardo which the agreement provides to be offered to Grievant. However, the Company points out that Grievant requested a specific day, shift and location to work the overtime, and there was no overtime at the location for the shift he indicated. Grievant used the form provided and required by the Company to indicate his volunteer overtime preference. But the shift and location requirements are not contained in the agreement provisions for overtime. Those time and shift provisions are on a form designed by the Company and which apparently has been changed several times over recent years. The form has also been filled out differently by different employees, with at least one filling in a

simple “call me” for shifts and locations. Although both parties have made some argument as to practices concerning overtime, neither party has presented a persuasive case, evidence, or argument that any binding, long standing practice has been recognized by both parties as to how the form is to be used. It clearly calls for more information than what the agreement requires. Without the form being in the agreement and without it being the basis for a binding past practice, it cannot override or add to the provisions of the agreement. It cannot eliminate the provisions of the agreement. That is the practical effect of what this form attempts to do in this purported application. The Company has been very careful both in framing its issue and in its arguments on this point to note the specific shift and location requested by Grievant. But that does not eliminate the provisions of the agreement which require Grievant, as senior and in the public warehouse unit, to be offered the overtime opportunities the agreement otherwise gives him a claim to. The form does ask for “preferences” of employees requesting

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voluntary overtime. After the two hour incumbent and four hour facility provisions, there is nothing in the agreement which entitles any employee to a specific location, shift or time for the voluntary overtime.¹ The agreement requires that available overtime be offered to the senior employee, but does not require that it be accepted if it does not match the preferences.

There is the matter, as the Company contends, that once an employee starts a shift they are usually or typically allowed to finish out that shift even if it is scheduled to go into overtime for a day or week. This applies to both bargaining units. However, again, neither party has presented a compelling argument on these facts that any long standing, binding practice between the parties has developed whereby this would prevent a junior employee from being, knowingly, scheduled to work overtime hours without first offering the overtime to the employee called for in the agreement – at least as to those in excess of two hours. This is a function of scheduling. The Company Scheduler knows the minimum number of hours worked by an employee and can reasonably estimate when a certain minimum of overtime will occur for that or any employee. It is the Company who controls the scheduling within the confines of the agreement. The agreement for the public warehouse unit does give certain overtime payment to continuous operations crews after certain numbers of hours in the three day and in the four day work weeks. Case pick workers earn overtime after 40 hours in a week. The case pick unit employees’ contract is not in evidence in this case to see the exact provisions of their hours, shifts, etc. But even if it were, that is a separate agreement which does not control the provisions of the public warehouse unit employees’ agreement. Rather, the public warehouse unit employees’ agreement clearly gives priority to them over the case pick unit employees when it comes to overtime over two hours. Any potential conflict between the two agreements on this point is not a matter presented or argued for a decision here. The undersigned is not persuaded that allowing employees to finish out a shift on overtime in excess of two hours prevents, or should prevent, that overtime from first being offered to the senior employee, the

¹ As opposed to the continuous shift overtime provisions of Article 16.

Grievant, under this agreement.

The Union has contended that the Company should have moved Brunner from Warehouse 98 to Warehouse 21 to make room for Grievant by Brunner displacing Fisher or Fajardo. But, as discussed above, the agreement does not give Grievant a right to demand where he will work available overtime. Nor does it give him a right to schedule other employee's hours or locations. And similar to filling out a shift, there has been no persuasive case made that establishes a binding past practice of accommodating Grievant's or anyone's request for overtime by moving other employees – even though that has been done occasionally. The Company is correct in respect to there being no overtime available in warehouse 98. There was no overtime opportunity there under the agreement. The overtime over two hours that was available and not offered to Grievant was in warehouse 21, which is where the agreement provisions required the opportunity to have been offered to him. If he did not want that location or hours he need not accept the offer of the opportunity.

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Fisher worked 2.5 hours overtime above the two hour mark and Fajardo worked six hours overtime above the two hour mark. The parties disagree whether Article 11 requires the payment of overtime to Grievant as a remedy. The Company argues that Article 11 is only concerned with a layoff situation. The Union contends it has general application. In the context of the paragraph in which the language occurs, it appears that it is referencing a layoff situation. However, Article 11 in its entirety deals with seniority in a number of different situations. Its general principle is simply that seniority rights shall prevail. The Article does provide some guidance as to how a remedy should be fashioned in at least one circumstance where a junior employee works hours that should have been worked by a more senior employee. That is consistent with a simple make whole remedy that might otherwise be expected for the failure to offer overtime. The Article is not at odds with that. Fajardo went into overtime at 10:00 p.m. on May 3rd, and Fisher at midnight. With Fajardo going into overtime first, the opportunity for overtime after two hours would have been in Fajardo's case. This means Grievant would have been working at the time Fisher' overtime in excess of two hours began, and Grievant could not have worked both at the same time. The Grievant should have been offered the opportunity to work six hours overtime and he wasn't. He should be made whole for that by payment of six hours overtime.

The Company did violate the terms of the collective bargaining agreement and Grievant's seniority rights by not honoring his request to work the overtime from 6:00 p.m. to 2:00 a.m. at warehouse 98 on May 3, 2006 as to the overtime in excess of two hours worked by Fajardo, which is six hours. Accordingly, based upon the evidence and arguments in this case, I issue the following

AWARD

The grievance is sustained in part as to the overtime in excess of two hours worked by Fajardo that began on May 3, 2006, which was six hours. As a remedy the Company will make Grievant whole by paying him six hours of overtime.

Dated at Madison, Wisconsin this 6th day of June, 2007.

Paul Gordon /s/

Paul Gordon, Arbitrator

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