BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

BIG BUCK BUILDING CENTER

Case 3
No. 66404
A-6256

(Ishman Seniority Grievance)

Appearances:

Mr. John J. Brennan, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite, 202, P.O. Box 12993, Milwaukee, Wisconsin, appearing on behalf of the Teamsters Local Union No. 43.

Mr. James R. Korom, Attorney, von Briesen & Roper, S.C., P.O. Box 3262, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin, appearing on behalf of Big Buck Building Center.

ARBITRATION AWARD

The Teamsters Local Union No. 43, hereinafter "Union," and Big Buck Building Center, hereinafter "Company," requested that the Wisconsin Employment Relations Commission assign staff arbitrator Lauri A. Millot to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on February 8, 2007, in Racine, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on March 10, 2007, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union frames the substantive issues as:

1. Did the Company violate the contract by failing to call in the Grievant for overtime on September 23, 2006?

2. If so, what is the appropriate remedy?

The Company frames the substantive issues as:

1. Did the Company violate Article 6 of the contract by failing to call in the Grievant for overtime on September 23, 2006?

2. If so, what is the appropriate remedy?

Having considered the relevant evidence and the arguments of the parties, I accept the Union's framing of the substantive issues.

RELEVANT CONTRACT LANGUAGE

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ARTICLE 6. SENIORITY

Seniority rights shall be observed at all times except as modified hereinafter. The Employer agrees that in case of a layoff and reemployment those laid off last shall be re-employed first in the same order, provided they are qualified and able to perform the duties of the position to be filled. Seniority lists shall be drawn and posted in a conspicuous place on the premises of the Employer. All questions arising concerning seniority rights shall be referred to the Union and management for adjustment and settlement.

Seniority shall be determined at each individual yard. Yards with more than six (6) full-time Union employees shall have separate seniority lists broken down between (1) sale persons, and (2) drivers and loaders. In yards having separate seniority lists, overtime for the purpose of servicing customers at the place of employment shall be offered on the basis of seniority to yard salespersons.

There shall be separate seniority lists for part-time and full-time employees. Part-time employees shall have the opportunity to become full-time employees, should an opening arise. Such opportunity shall be in order of seniority on the part-time seniority list. When part-time sales employees hereunder move to full-time status, they shall serve a ninety (90) day probationary employment period under Article 3.

Employees who are laid off from their job classification will displace the most junior employee in any classification provided they are qualified to perform the work and be subject to a thirty (30) day probationary period in the new classification. At the end of the thirty (30) days, management shall determine whether the employee is qualified to perform the work.

When a vacancy in a existing job classification in yards of six (6) or more full-time union employees exist, such job or vacancy shall be posted in a conspicuous place at the yard where such vacancy occurs for period of five regularly scheduled working days, during which time employees, may apply for such job or vacancy by submitting in writing a signed notification of the desire to so apply. Said job or vacancy shall then be filled in (sic) basis of seniority and job qualifications for the open position and be subject to a thirty (30) day probationary trial period in the new classification. If within the thirty (30) day probationary trial period the employee feels he or she is unable to qualify for the job, or she can return to his or her regular job at regular seniority. At the end of the thirty (30) days, management shall determine whether the employee is qualified to perform the work.

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ARTICLE 15. MAINTENANCE OF STANDARDS

The Employer agrees that all conditions of employment relating to wages, overtime differentials and working conditions shall be maintained at not less than the minimum standards in effect at the time of the signing of the Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

ARTICLE 16. HOURS OF EMPLOYMENT

. . .

The regular working hours for employees covered by this Agreement shall not be more than eight (8) hours per day for Monday, Tuesday, Wednesday, Thursday, and Friday. Work performed outside of the regularly scheduled hours on these days in excess of eight (80 hours per day or forty (40) hours per week, shall be considered overtime and shall be paid for at the rate of time and one-half. Any work performed on Sunday shall be paid at double the straight hourly rate.

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BACKGROUND AND FACTS

The Grievant, Dana Ishman, is a tractor/trailer driver at the Company's Racine location. The Company manufactures tresses for delivery to contractors. The Grievant is the most senior driver at the location. The Grievant's supervisor is Company Yard Manager, Steve Graf.

On September 22, 2006 the Grievant worked one-half of the day, returned to the yard and informed his supervisor that he was leaving. Graf telephoned the Grievant's home at approximately 10:22 a.m. and left a message for the Grievant to return his call. Graf telephone the Grievant's home a second time between 11:30 a.m. and noon and spoke to the Grievant. Graf informed the Grievant that he needed to obtain certification of fitness for duty from a Concentra, a local health care provider, before he could return to work. During their telephone call, the Grievant did not inform Graf that he was ill. The Grievant did not telephone the Company any further that day nor did he obtain a fitness for duty certificate.

As a result of the Grievant's leaving work early, the delivery to Chicago that the Grievant was scheduled to complete that afternoon was not made and it was necessary for the Company to schedule the delivery for the following day which would be at overtime pay. In addition to the Chicago overtime delivery scheduled for September 23, a Milwaukee overtime delivery was scheduled.

The parties stipulated that the overtime available on September 23 could only have been performed by the Grievant, DV, and WB. Steve Graf, Company yard manager, offered one overtime route to DV at the worksite and telephoned WB at his home and offered him the other overtime route. DV was on vacation on September 22, 2006. Graf did not offer the overtime delivery to the Grievant.

Additional facts, as relevant, are contained in the **DISCUSSION** section below**.**

ARGUMENTS OF THE PARITES

Union

The Company violated the parties' collective bargaining agreement when it failed to offer the Grievant overtime work on September 23, 2006.

The Company violated the clear language of Article 6. The contract is clear – seniority is controlling unless there is some modification elsewhere in the parties' agreement. While the Company argues that a different practice exists, the Union has shown that the practice followed by the parties is that overtime opportunities are offered strictly by seniority among the classification where the work needs to be performed. The Grievant is the most senior of the three tractor/trailer drivers and should have been offered the overtime.

The Company has always offered overtime to the Grievant before the other drivers. Graf testified that he could not remember any instances, other than the one before the Arbitrator, that he passed over the Grievant for overtime.

Graf was punishing the Grievant when he decided to not offer him the overtime. Although Graf inferred he was not confident that the Grievant would report for work, he had no historical basis to reach this conclusion. The Grievant had regularly accepted overtime and had always fulfilled the obligation. The Grievant was disciplined for taking a half day off on that Friday. The Company punished him again by not offering him overtime work on Saturday.

Articles 15 and 16 of the labor agreement support the Union's position. Article 15 requires that all terms and conditions of the parties' agreement be maintained and protected from regression. Article 16 requires that overtime be paid at time and one half.

The Union requests that the grievance be granted and that the remedy of seven and one-half hours of overtime be paid to the Grievant.

Company

Article 6 of the collective bargaining agreement does not require that the Company distribute overtime by seniority to all employees at the yard. Rather, Article 6 contains a generic provision that seniority rights are to be observed at all times "except as modified hereinafter". That language is modified by the specific overtime language for yards with separate seniority lists. When there are separate seniority lists, overtime is to be distributed by seniority to yard sales personnel. Since the distribution of overtime to drivers and loaders was not listed, the concept of *expression unius est exclusion alterius* is applicable and there is no obligation to distribute overtime to drivers based on seniority.

The Grievant testified to two instances in the past when he was paid for overtime opportunities that he was not offered by the Company. The Company disputes that such payments were made. The Grievant did not know when these two instances occurred and did not provide any written evidence to support his assertion. It is impossible to determine the facts that resulted in the alleged restitution and therefore it is impossible to assert that they are the same as those presented in this case.

The evidence establishes that the Company regularly offered overtime to employees at the job site. If a more senior employee had left the yard for the day, the less senior employee still in the yard was offered the overtime. If a more senior employee was on vacation, the less senior employee was offered the overtime.

Article 16 supports the Company's decision. Article 16 states that changes may be made to the work schedule for "emergencies such as death, illness, absence or disability." The Grievant was either ill or absent since he had just walked off the job. The Company was

presented with an employee who had just created a disturbance with a customer and walked off the job resulting in that same customer's products not being delivered. It was entirely reasonable and warranted for the Company to exercise its discretion and alter the work schedule to negate so that there would be no further interaction between the Grievant and the customer.

The Company was concerned about the reliability of the Grievant given the unique facts and circumstances that existed at the time. The Grievant had walked off the job. He had not returned Company phone calls and had not obtained fitness for duty certification. The Company was justified when it assigned overtime work to the two employees who were healthy and willing to do the work.

The Company maintains that no contract violation has occurred and the grievance should be dismissed.

DISCUSSION

The issues in this case are straightforward and the relevant facts are not in dispute.

The Union argues that the Company violated the labor agreement when it did not offer either of the overtime delivery routes to the Grievant. The Company disagrees on the basis that 1) the contract does not require that overtime is offered by seniority; 2) that the Company has an established practice of dispensing overtime; and 3) that there were valid extenuating circumstances that justified not calling the Grievant for the overtime.

Looking first to the labor agreement, the first sentence of Article 6 provides that "[s]eniority rights shall be observed at all times except as modified hereinafter". This sentence is clear and unambiguous – unless there is a language elsewhere in the labor agreement that negates the priority of seniority, seniority controls.

The second paragraph of Article 6 states:

> Seniority shall be determined at each individual yard. Yards with more than six (6) full-time Union employees shall have separate seniority lists broken down between (1) sale persons, and (2) drivers and loaders. In yards having separate seniority lists, overtime for the purpose of servicing customers at the place of employment shall be offered on the basis of seniority to yard salespersons.

This language addresses the issue of overtime to the extent that it establishes a specific procedure for yards with separate seniority lists. The Racine location has one seniority list and the Grievant was not a yard salesperson. As a result, this paragraph is not applicable to the facts in this case.

The Company views the absence of language which specifies an overtime distribution procedure for drivers as a modification to the strict seniority expectation contained in the first sentence of Article 6. The Company's argument is circular. The absence of specific language does not create a modification. Rather, the absence of any specific provision applicable to drivers requires that the general language that establishes seniority rights as controlling is germane. The Union's argument that the plain language of the agreement establishes that overtime shall be distributed based on seniority is persuasive.

I move next to the Company's assertion that a binding past practice exists which was followed in this instance. The Company argues that the parties have a practice of awarding seniority based on who is at the yard at the time the overtime assignments become available. A practice is binding on the parties when it is "1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period time as a fixed and established practice accepted by the parties." Elkouri & Elkouri, *How Arbitration Works*, 6th ed., p. 608 (2003). The Grievant testified that the Company has consistently offered overtime to those at the yard, regardless of seniority, before it called him. Graf confirmed the Grievant's testimony. The record is void of any evidence that establishes the length of time that the Company has followed this procedure, but it was clear from the testimony that both the Company and Union accepted and understood the procedure. The evidence establishes that the Company has a practice of first offering overtime to those at the yard**.**

The Company also argues that it has a practice of not offering overtime to those on vacation or not at work due to illness. On September 22, the only employee that was at the yard was DV and he was offered an overtime route for September 23. Graf then called WB who was on vacation and offered him overtime work on September 23. The Company did not follow what it argues **is** its practice and therefore, the Company's past practice assertion fails.

The Union points out that the Company paid the Grievant on two occasions in the past when he was passed over for overtime. The Company disputes the payments. The Grievant could not identify the dates of the lost overtime or the dates of payment. The Union did not provide a written record of the payments and there is no further information to determine the nature of the payments. While it is possible that the payments were made, it is just as probable that the payments were not made. Given the lack of evidence regarding the payments and the diverging testimony, I cannot give credence to the Union's assertions so as to alter the outcome of this case.

The Company next argues that there were valid extenuating circumstances that justified its decision to not call the Grievant for overtime. The record supports this conclusion.

The Grievant worked 3 hours and 50 minutes on Friday, September 22; returned to the yard; told his supervisor he was leaving and then left the worksite. The Company called the Grievant at home on two separate occasions later in the day on Friday. The first call was received by voicemail or his answering machine and the Grievant did not return the call. The second call was received at about noon and the Grievant was directed to obtain certification

that he was fit for duty from local health care provider, Concentra before he could return to work. The Grievant did not obtain the certificate that day and did not telephone the Company and tell them that he had obtained the certificate.[1]

The Grievant was directed to obtain a fitness for duty certification in order to return to work. Given the unique circumstances surrounding the Grievant' hasty and uncharacteristic departure from the yard on September 22, it was reasonable for the Company to be concerned and ask for the certificate. [2] The Grievant did not obtain this certification nor did he inform the Company that he was getting it. The Grievant was therefore was ineligible to report for work on September 23 and was ineligible for overtime assignment. The Company is not obligated to offer overtime to an employee that has not provided certification that he is able to fulfill the essential functions of his position.

AWARD

No, the Company did not violate the contract by failing to call in the Grievant for overtime on September 23, 2006. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 23rd day of July, 2007.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

[1] The record is void of any evidence which confirms or denies that the Company's proffered expectation that the Grievant obtain a certificate of fitness for duty before returning to work was enforced.

[2] The Grievant was not directed to obtain the fitness for duty as a result of illness. Although, the Grievant testified that he left work on September 22, 2006 because he was "ill", on cross examination he indicated that he left because "things did not go well with the customer". The Grievant never told Graf he was leaving because of illness.

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