BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

UNITED BROTHERHOOD OF CARPENTERS, LOCAL 1349

and

EGGERS INDUSTRIES, INC.

Case 64
No. 70148
A-6422

Appearances:

Gillick, Wicht, Gillick and Graf, by **Attorney George F. Graf**, 12725 Cardinal Crest Drive, Brookfield, Wisconsin 53005, on behalf of the Union.

Littler Mendelson, P.C.**, by Attorney Jonathan O. Levine, 25**0 East Wisconsin Avenue, 18th Floor, Milwaukee, Wisconsin 53202, on behalf of the Employer.

ARBITRATION AWARD

At all times material, United Brotherhood of Carpenters, Local 1349 (herein the Union) and Eggers Industries, Inc. Employer (herein the Employer) were parties to a collective bargaining agreement covering the period from August 19, 2007 to August 19, 2011. On August 31, 2010, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over allegations that the Employer did not give adequate notice in advance of scheduling plant shutdown days during the week of July 4, 2010, for which the employees were required to reserve and use vacation days. The Undersigned was selected to arbitrate the dispute from a panel of WERC staff members and a hearing was conducted on January 26, 2011. The proceedings were transcribed and the transcript was filed on February 2, 2011. Briefing was completed by March 21, 2011, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issue. The Union would frame the issues as follows:

Was the Company's scheduling of plant shutdown days during the week of July 4, 2010 reasonable?

If not, what is the appropriate remedy?

The Employer would frame the issues as follows:

Did the Company violate the contract by the manner in which it scheduled shutdown days?

If so, what is the appropriate remedy?

I adopt the following statement of the issues:

Did the Company violate its agreement with the Union by the manner in which it scheduled shutdown days in July 2010?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE VIII
Vacation and Paid Holidays

. . .

Section 3.

(a) When vacation request forms are distributed on December 1, the Company will notify employees of a maximum of forty (40) hours shut down time for the upcoming calendar year which may be scheduled throughout the calendar year at the Company's discretion.

Employees will be required to use vacation days for the scheduled shutdown days.

. . .

ARTICLE XII
Hours of Employment and Overtime

Section 1. The Company will seek to maintain a regular minimum work week of forty (40) hours including eight hours per day Monday through Friday at the East Plant and a schedule of four ten hour days, Monday through

Thursday at the West Plant. The Union recognizes that this is neither a guarantee of hours of work nor a limitation on the Company's right to schedule and assign work and the workweek in the most efficient, cost effective manner possible. Schedule changes may be necessary due to customer requirements, operational needs, unscheduled vacancies, and other reasons.

When a change in the weekly or daily overtime schedule becomes necessary, the Company will give the employee(s) affected by such changes one calendar day notice of change (two days for a Saturday schedule) except in cases of breakdown. If such notice is posted prior to the mid-shift lunch break on the shift effected [sic] by the change on any day, that day shall count as one calendar days notice for employees on that shift; otherwise not. There is no posting requirement for returning to normal working hours.

When a long-term change in the regular weekly or hourly schedule becomes necessary, the Company will give the Union 30-days advance notice and opportunity to negotiate over the effects of the decision such as premiums for alternate schedules.

When economic conditions dictate, and a reduction in work hours is required, which lasts more than four (4) weeks in a quarter, the Company will seek employees willing to volunteer for a lay off in order to maintain a forty (40) hour schedule for the remaining employees. When working reduced hours, the Company will meet with the Union to discuss ways to maintain a minimum of a thirty-two (32) hour work week. If enough volunteers are not found, the Company will meet with the Union and give the Union the chance to discuss alternate solutions.

. . .

ARTICLE XVI
Management

The Management of the Company and the direction of the working forces, including the right to hire, suspend, discipline, or discharge or demote for proper cause, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons is vested exclusively in the Company, provided that in exercising these rights the Company will not use them for the purpose of discriminating against any employee for Union activities. Unless specifically exempted in this agreement, the conduct of all other phases of operations of the Company are reserved exclusively to the Company.

The parties agree that their decision not to list other rights above is not and shall not be construed as a limitation on the Company's ability to unilaterally exercise

> such rights. This Agreement shall be interpreted as if all such reserved rights were listed in detail herein. The Union shall have the right to lodge a grievance when the unilateral exercise of such express or reserved rights violates a provision of this agreement and to grieve the reasonableness of changes in work rules, policies, and practices.

BACKGROUND

Eggers Industries, Inc. (herein the Company) is a manufacturing company that produces architectural plywood and doors at two plants in Two Rivers, Wisconsin. Its represented employees are members of United Brotherhood of Carpenters Local 1349 (herein the Union). For many years the parties' contract has included language in Article VIII that permits the Company to designate up to 40 hours of shutdown time in the forthcoming year, at its discretion, and requiring the Company to notify the employees of that fact on or before December 1 of the preceding year. Once notice is given, the employees are required to reserve to 40 hours of their vacation for the upcoming year to cover the planned shutdown days. Originally, the Company typically used the language for planned maintenance shutdowns would inform the employees on December 1, when the holiday schedule was released, when the shutdown would occur. At some point, the Company built a new plant in Two Rivers and the maintenance shutdown was not utilized for a period of several years.

In 2007, the parties negotiated their current contract, which included a number of provisions that are relevant to this arbitration. First, language was included in Article II extinguishing and replacing all past practices. Second, language was added to Article XII identifying the regular workweek as being a minimum of forty hours, but including a stipulation that the Union "…recognizes that this is neither a guarantee of hours of work nor a limitation upon the Company's right to schedule and assign work and the workweek in the most efficient, cost effective manner possible." The contract also retained language in Article XVII permitting the Union to "…grieve the reasonableness of changes in work rules, policies and practices."

In December 2008 the Company gave notice to the employees that there would be a plant shutdown during July 2009 for the first time since the opening of the new plant. The shutdown was scheduled for July 5 and the employees were instructed to reserve one day of vacation for that purpose, which they did. Inasmuch as this shutdown followed the process by which shutdowns had been scheduled and announced in the past, the Union did not object.

On November 30, 2009, Hartley Arsta, the Company's Director of Human Resources, issued a memo to all employees regarding the 2010 holiday schedule and shutdowns. After listing the scheduled holidays for 2010, Arsta added the following:

> "NOTE: The Company is also notifying all union employees that there will be five shutdown days, maximum of 40 hours, which will be designated throughout the year. All union employees are required to use vacation days when the

designated shutdown days are applied. Union employees must reserve five (5) days/40 hours vacation for shutdown days."

Upon receiving the memo, the Union asked for a meeting with management to discuss the concerns of employees surrounding the Company's failure to identify the specific dates upon which the shutdowns were to occur. At the Union's request, the parties met on December 2, 2009, at which time the Union expressed its concerns. The Company indicated the reason it did not specify the dates of the shutdown was that 2010 would be a difficult year due to the slow economy and it could not predict when the shutdown would be needed. The Union agreed to give the Company flexibility in scheduling the shutdown days, but asked for consideration in giving as much advance notice as possible and an understanding that 2010 would be the only year this process would be used. The result of the meeting was a joint memo issued by management and union representatives on December 2, as follows:

To: All Bargaining Unit Employees

Subject: Holiday Schedule 2010

In order to clarify the statement on the Holiday Schedule, "All union employees are required to use vacation days when the designated shutdown days are applied. Union employees must reserve five days/40 hours vacation for shutdown days." the Company and union have discussed this issue. We are in agreement that the most important asset of the Company is its people and we acknowledge the need for time off with family.

Therefore, we have agreed:

- Based on the information shared with all employees at the quarterly meetings, 2010 will be a very financially difficult year for the Company.

- The Company is asking for your cooperation during the year 2010. This is **NOT** meant to be a new policy going forward.

- The Company will give notice as far in advance as possible of a shutdown in order to take the employees need [sic] into consideration.

We feel that if we work together as a team, we will be able to succeed as a team and make it through the difficulties of the upcoming year!

During the first half of 2010, the Company had difficulty maintaining a full work schedule, despite efforts to obtain contracts from customers by offering deep discounts. As a result, it scheduled a number of 32 hour weeks due to reduced orders, but did not schedule a plant shutdown.

During the last week of June, 2010, the Company had some potential orders involving significant amounts of product that were waiting for final authorization from the customers. If authorization was received the Company would be expected to produce the materials and fill the orders in a fairly short time due to the competitiveness of the industry. If authorization was not received, however, there would be insufficient work for the employees the following week. On June 30, 2010, therefore, the Director of Manufacturing, Charlie Phillipps, issued the following memo to all employees:

> **Re:** Work Hours for Two Rivers and Non Union Hourly Mfg. related Employees
>
> The East Plant and West Plant work schedules for the week of July 4th are undetermined at this time. It is the Company's intention to meet customer requests whenever possible. Therefore, a decision as to the working hours will be made by **10 AM the day before each work day.**
>
> Union employees (and hourly manufacturing employees) are to call into a call number to find out the work hours for the subsequent day. If the day is deemed as a shut-down day, union employees will be using their **shutdown reserved vacation day(s).**
>
> As a reminder, Monday is a holiday observance day and the work week would begin on Tuesday. The message for Tuesday's work decision will be available by 10:00 AM on Monday. If Tuesday is a vacation shutdown day, the message for Wednesday's work decision will be available by 10:00 AM on Tuesday. This process will continue up to 5 working days.
>
> The call center number is:
>
> XXX-XXXX
>
> /S/ Charlie A. Phillipps

A recorded message was then prepared for the call center line to inform employees on a daily basis whether the following day would be a workday or a shutdown day, commencing Tuesday, July 6, 2010.

On July 1, 2010, the Union filed a grievance challenging the Company's process for handling the shutdown days and, specifically, the alleged insufficiency of advance notice. The Company denied the grievance and the matter moved through the steps of the contractual grievance process to arbitration. There are no procedural objections to the grievance. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that always in the past the Company, in employing the shutdown language, would tell the employees on December 1 which days in the coming year were designated for shutdown. The employees could then make vacation plans for the year, knowing which dates had been set aside for shutdown. In 2009, for the first time, the Company did not designate the shutdown days, but merely told the employees that five undesignated shutdown days would be scheduled later in the year.

The Union asked for a meeting on December 2, 2009, after which the parties issued a joint statement in which the Company acknowledged the importance of its employees and their need for time off with their families and promised to give the employees as much advance notice as possible in order to honor their needs. Nonetheless, the Company did not reveal its shutdown plans for the week of July 4 until June 30. Not only was the notice tardy, but the call-in procedure it described was unreasonable because it required the employees to call in each day to find out whether there would be a shutdown the next day.

The Company's action was unreasonable on its face and also violated the commitments made in the December 2 agreement to honor the employees' need for family time and give them as much advance notice as possible. This is especially true as to Tuesday, July 6. The employees were off the previous three days for a holiday weekend, but had to call in on the 5th to find out if they could extend the weekend. Thus, employees were unable to take full advantage of their vacation days because they had to stay home calling in every day to find out if the next day was a workday or not. The Company repudiated its December 2 commitments by taking the benefit of the agreement without honoring the needs of the employees and their families.

The Company offered no factual evidence to show that it could not have given notice earlier for the week of July 4, nor of any steps it took to give as early notice as possible. There is no explanation for why the Company could not have known before July 5 that there would be a shutdown on July 6. There is no evidence of anything occurring over the weekend that indicated there would be a need to work on the 6th, only a vague reference to needing to honor customer requirements.

The arbitrator should find that the Company took the benefit of the bargain by not designating the shutdown days on December 1, but did not give the *quid pro quo* of providing advance notice so that the employees' needs for family time would be honored. The arbitrator must fashion a remedy appropriate to the offense, which could be some form of cal-in pay for the affected employees.

The Company

The Company asserts that the Union offered no evidence of a violation of Article XVII by acting unreasonably. It only offered the opinion of Robert Reel that the call-in procedure interfered with his ability to enjoy time at his cottage in Door County, 60 miles away. This does not meet the Union's burden.

The Company acknowledges that the call-in procedure was inconvenient for some employees, but the Company could not keep the plan open without some purchase orders being released to production, the orders could have been released with little or not warning and the Company risked losing business if it wasn't in a position to go into production on a moment's notice. It was not possible to give the employees more notice and still be in a position to fill the orders if they were released. The contract did not require the Company to jeopardize its business and the future of the workforce in order to provide more notice of shutdown to the employees.

The grievance alleges a violation of Article XVII, the Management clause. That provision permits the Union to grieve the exercise of management's express or implied powers which violate another provision in the contract or to challenge the reasonableness of a change in work rules, policies and practices. Thus the Union must prove, by clear and convincing evidence, that the Company's call-in policy was either a violation of a specific provision of the contract or was an unreasonable change in work rules, policies, or practices. The Union failed to meet its burden.

The grievance does not allege the violation of any specific provision of the contract outside of Article XVII. At the December 2 meeting, Union Representative Greg Coenen admitted that the Company's notice of the need to reserve vacation days for shutdown was within its rights. Robert Reel also testified that the Company had the right to require the Union members to reserve up to 40 hours of vacation for shutdown, that the Company had the right to schedule shutdown time at its discretion, that the Company gave the employees the contractually required notice for 2010 and that nothing in the contract prohibits the call-in process used by the Company.

The Company also did not change a work rule, policy, or practice. Article XVII does not, however, permit the Union to challenge the reasonableness of the Company's exercise of management rights generally or the reasonableness of its exercise of a contractual right found elsewhere in the contract. The language of Article VIII(3)(a) gives the Company the ability to schedule up to 40 hours of shutdown in its discretion. Further, Article XII, which was amended in 2007 specifically to give the Company more flexibility in scheduling, allows the Company to schedule work "in the most efficient, cost effective manner possible." There is no evidence of a past practice of scheduling specific days, and even if there were, the current contract specifically terminates any practices that may have existed under prior contracts. In short, the Union has failed to show that the Company's action here was a change in any previous practice. Further, it has been held that the failure of an employer to exercise a

management right over a period of years does not terminate the right or prohibit the employer from exercising it in the future.

Assuming that the Company's action was subject to some reasonableness standard, there is no evidence that the Company acted unreasonably. Reel testified that the action was unreasonable because it prevented him from taking full advantage of his vacation. He explained that he was unable to go to his cottage in Door County because he was required to call in every day to see if he had to work the next day, so he felt as if he was on call all week. The fact that Reel found the call-in procedure "inconvenient" does not make it *per se* unreasonable, otherwise the Company's management rights would be meaningless. Further, his cottage was only an hour away, so it is not clear why having to call in each day inconvenienced him. Reasonableness is not determined by some balancing test between management's needs and the convenience of the employees. The standard is whether to Company had a legitimate business purpose for the decision it made, whether there was a rational relationship between the facts found and the decision made and whether the decision was unduly burdensome on the employees. Here, the decision had a rational basis. The Company needed to be able to make a "game time" decision as to whether it had to go into production to meet pending orders. Management reasonably concluded that anything other than the call-in procedure used would have jeopardized relationships with customers and would have placed the business and the jobs of employees at risk. Further, even if some balancing test were applied, the Union produced no evidence that the call-in procedure worked a great hardship on the employees. In fact, any inconvenience to the employees pales in comparison to the possibility of them losing their jobs if the Company had not been able to meet customer requirements that week. Even Reel acknowledged that the Company operates in a competitive environment and that its success and the security of its employees depends on its ability to attract and satisfy its customers. The Union is asking the arbitrator to substitute his judgment as to the Company's needs and the best way to meet them for that of the managers who made the decision, which is not supported by Article XVII.

Contrary to the Union's position, the joint letter issued on December 2 was not an "agreement" between the parties, but was done to clarify the Company's actions for the employees. Coenen admitted that the letter did not alter the Company's right under Article VIII. The Company was serious about its commitment to give employees as much notice of shutdown as possible, but any such decision must be evaluated under all the facts and circumstances. The testimony of Ann Deubner was clear that Company was not in a position to make any decision about shutdown before June 30. Reel, in fact, testified that he had no evidence that the Company could have given more notice than it did, nor could he say that the Company did not consider the needs of employees in making its decisions. The Company acknowledges that its decision was not ideal for all employees, but submits that it there was nothing else it could have done. The grievance should, therefore, be denied.

DISCUSSION

In this case, the Union is challenging the reasonableness of the method employed by the Company in scheduling shutdown days during the week of July 4, 2010. In addressing this question, it seems logical at the outset to make some initial observations and findings that will aid in crystallizing the ultimate issue in this case.

First, I find that the December 2, 2009 letter issued by the parties about the process for scheduling shutdowns in 2010 was an agreement between the parties. The letter makes this clear when it says, "Therefore, we have agreed" and then sets out the bullet points identifying the Company's concerns and commitments, including that it "will give notice as far in advance as possible of a shutdown in order to take the employees need into consideration." It seems to me, therefore, that whether this agreement was intended to apply to the Company's exercise of its management rights, or its rights to schedule work under Article VIII, or whether it was a separate letter of agreement between the parties, in any event it empowers the arbitrator to evaluate and determine whether, in scheduling the shutdown days, the Company honored its commitment to give notice as far in advance as possible.

Further, by entering into the agreement, the Union conceded, at least for 2010, that it was within the Company's discretion to schedule shutdowns as it determined need required, without having to designate specific shutdown dates on December 1, 2009, or by any other date specific in 2010. There is also nothing in this record or the contract that required the Company to use up available shutdown time before it could make other scheduling determinations, such as reducing workweeks to 32 hours during periods of slower production. That said, the question remaining is whether the manner in which the Company scheduled the shutdown during the week of July 4, 2010 violated its commitments to the Union reflected in the December 2 letter. I find that it did not.

The testimony of Ann Deubner made it clear that the Company operates within a very volatile market where it competes with a number of other manufacturers for available orders and that this was particularly so in 2010, when the economy was slow and the ability to service customers was even more critical than usual. Also, because of the nature of the business and the requirements of customers, there is often a lag time between the time the Company makes an initial agreement to produce goods and when those orders are released to production and, once orders are released, the Company must often expedite production to satisfy customer requirements. The Union does not contest this general statement of the framework within which the Company operates.

At the time of the shutdown in question, that is to say on June 30, 2010, the Company had potential orders for $600,000 worth of product, which could have been released to production at any time, if approval was received from the customer. There was an additional $380,000 of work that had been promised, but no purchase order had yet been received. This work could also have been scheduled on short notice if the order was placed and the Company had no way of knowing when that might occur. Given the slow economy, the Company felt it

needed to be in a position to go into production on a moment's notice with regard to these orders. Further, much of the ordering process is handled by customers logging on to the Company's order entry system, which could occur at any time, including weekends and holidays.

There is no question that, operating in a vacuum, the Company could have scheduled the shutdown days at any time, going back to December 2, 2009, if the sole concern was providing for the employees' desires to schedule their vacation days in the most advantageous way. The decision was not made in a vacuum, however, so it is necessary to consider, as well, the Company's responsibilities to its customers and the effect the failure to meet those requirements might have on the future interests of the Company, as well as those of the employees. The question then is whether the Company honored its commitment to consider the interests of the employees in scheduling the shutdown to the extent it was able under the circumstances.

It is clear that the Company's decision to implement the call-in procedure it used during the week of July 4 was founded upon legitimate business concerns. There were significant orders pending, which the Company could have been required to meet on a moment's notice. Failure to do so would have had detrimental effects on the Company and, by extension, the employees, if loss of future business necessitated layoffs. There is no evidence contradicting the Company's assertion that it had no control over when the orders would be released to production. There is also no evidence that the Company chose the method it did out of any desire to inconvenience the employees, although the employees were clearly inconvenienced by not being able to schedule their time off more than a day ahead. Nevertheless, the Company was not required to schedule the shutdown in such a way as to not inconvenience the employees, but only to provide as much advance notice of shutdown as it was able under the circumstances in order to mitigate the inconvenience. It is understandable that the employees would not be happy about the process that was adopted, but no alternative has been advanced that would have been more employee friendly and yet provided the Company the ability to meet its business requirements. As it happens, the orders were not released to production until the week of July 12, but the Company did not know this would occur on June 30 or on any day during the week of July 4 and I must base my analysis on the knowledge the Company had when the decision was made. Given the Company's operational requirements, I cannot say on this record that the Company did not give as much advance notice of the shutdown as was possible under the circumstances.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The Company did not violate its agreement with the Union by the manner in which it scheduled shutdown days in July 2010. The grievance is dismissed.

Dated at Fond du Lac, Wisconsin, this 8th day of June, 2011.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
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