

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
WIS-PAK OF WATERTOWN, INC. : Case 13
and : No. 46178
: A-4827
DRIVERS, SALESMEN, WAREHOUSEMEN, :
MILK PROCESSORS, CANNERY, DAIRY :
EMPLOYEES AND HELPERS UNION :
LOCAL 695 :

Appearances:

Lindner & Marsack, S.C., by Mr. Dennis G. Lindner, on behalf of the Employer
Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by Mr. Scott D. Soldon, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Employer and the Union respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration. Pursuant to said agreement, the undersigned was appointed by the Wisconsin Employment Relations Commission to hear the instant dispute. Hearing was held on November 13, 1991, in Watertown, Wisconsin. A stenographic transcript was made and received on November 29, 1991. After extension of the briefing schedule was granted at the parties' request, the parties completed their briefing on January 15, 1992. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties at hearing stipulated to the following issue:

Did the Employer violate the collective bargaining agreement by its usage of the part-time employees? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 9 - PART-TIME EMPLOYEES (PLANT)

9.1 The Union and the Company agree that part-time employees may be used to supplement the work force with the following restrictions:

- a) The part-time employees may not be used to replace regular employees.
- b) The part-time employees shall be used only after consultation with the chief steward.
- c) Part-time employees may be used at any time from April 1 through the week inclusive of August 31.
- d) If a part-time employee becomes a regular

employee, his seniority date will be established as of the first day of employment as a regular employee.

- e) Regular full-time second and third shift employees will have preference over part-time employees to fill in for full weeks of absence on the first shift if such absences can be accounted for in advance in the Company's work schedule for such weeks.
- f) Part-time employees may work on the first shift to cover unscheduled absences including absences caused by illness, injury, funeral, jury duty or floating holidays.

9.2 It is further agreed that these part-time employees shall become members of the Union on this thirty-first (31st) day of employment and shall not be entitled to any fringe benefits unless mandated by law.

9.3 The pay rate for part-time employees shall be thirty percent (30%) below the applicable probationary rates in Exhibit 'A.'

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ARTICLE 13 - OVERTIME

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13.5 No employee will be required to take time off during his regular working schedule solely to equalize any overtime he may have been required to work.

13.6 When necessary, the Company will expect employees to work a reasonable amount of overtime; however, no employee shall be required to work more than two (2) twelve (12) hour workdays during a workweek nor more than ten (10) hours per day during any other workday that week nor more than fifty-six (56) hours per week. All work on the seventh (7th) day of the employee's workweek as such and holidays will be voluntary.

13.7 Overtime opportunity will first be offered by low overtime among employees performing the same primary job on the same shift. In the absence of volunteers, the overtime will be offered by seniority to qualified employees within the department on the shift. In the absence of volunteers, the work shall be assigned to the junior employees performing the primary job on that shift. The recognized departments are: Production, Technical Services, Warehouse and Maintenance.

Unscheduled weekend overtime work not associated with planned weekend production, which involves specialized clean-up, will be offered by low overtime

to employees in the utility classification (primary job). In the absence of qualified volunteers, the overtime will be offered to other qualified production department employees by seniority. In the absence of qualified volunteers, the work will be assigned to the junior employees in the utility classification. If there are not enough employees available in this classification to perform the required work, any remaining overtime will be assigned to the junior qualified production employees.

Unscheduled weekend overtime work opportunity, not associated with planned weekend production, which involves non-specialized tasks, will be posted in accord with 13.8. The overtime will be offered to employees who sign the posting or authorize their assent if not immediately available through their steward on a plant-wide seniority basis. In the absence of volunteers, the junior employees in the plant will be assigned the work. The application of this paragraph shall not be subject to Section 13.9.

13.8 The Employer will give at least three (3) hours notice on all daily overtime and will notify employees by noon on Thursday for all available weekend overtime when known. The notice requirements apply to all departments.

13.9 In determining low overtime under 13.7 above, an employee shall only be charged with overtime opportunities on his primary job, it being understood that if an employee declines any overtime on his primary job he shall be charged for all such hours.

FACTS:

The facts are by and large undisputed. The Employer, Wis-Pak of Watertown, Inc., is engaged in the production and filling of cans and bottles of Pepsi-Cola products from its production facility located in Watertown, Wisconsin. On May 18, 1991, the Employer utilized two part-time employees to work overtime on the Alvey Takeaway job on the third shift. During certain times of the year, primarily the spring and summer months, the Employer employs part-time employees in its operation due to increased production needs. Usually these part-time employees work the second and/or third shifts. The regular hours for the third shift run from 10:00 p.m. to 6:00 a.m. The first shift runs from 6:00 a.m. until 2:00 p.m.

The Employer knew about a day before the overtime was required that overtime would be needed. The complement of part-time and full-time employees working on the various shifts for the week in dispute was as follows: first shift - four regular full-time employees on the Alvey Takeaway classification; second shift - two regular full-time and two part-time employees in the Alvey Takeaway classification; and third shift - on regular full-time employee and two part-time employees on the Alvey Takeaway operation plus two regular full-time employees in the shipping area and one other regular full-time employee in the M/T Can warehouse.

The overtime work schedule for Saturday, May 18, 1991, was posted that Friday morning. The Warehouse Manager determined that four employees were needed in the Alvey Takeaway operation on the May 18, 1991 third shift. The regular full-time employees working on the third shift were asked first. One regular full-time employee on that shift accepted, the other qualified full-time

employees declining. A full-time employee who normally worked the first shift also accepted because he could not work his regular first shift assignment. The Warehouse Manager then assigned the remaining to overtime slots to the two part-time employees working on the third shift. He did not offer said overtime to qualified first shift regular full-time employees who could have come in early or to second shift regular full-time employees who could have stayed later. Tod Grulke, a qualified full-time, first shift employee grieved the Employer's failure to offer the overtime to the qualified first and/or second shift regular full-time employees prior to assigning it to the third shift part-time employees.

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13.7 Overtime opportunity will first be offered by low overtime among employees performing the same primary job on the same shift. In the absence of volunteers, the overtime will be offered by seniority to qualified employees within the department on the shift. In the absence of volunteers, the work shall be assigned to the junior employees performing the primary job on that shift. The recognized departments are: Production, Technical Services, Warehouse and Maintenance.

Unscheduled weekend overtime work not associated with planned weekend production, which involves specialized clean-up, will be offered by low overtime to employees in the utility classification (primary job). In the absence of qualified volunteers, the overtime will be offered to other qualified production department employees by seniority. In the absence of qualified volunteers, the work will be assigned to the junior employees in the utility classification. If there are not enough employees available in this classification to perform the required work, any remaining overtime will be assigned to the junior qualified production employees.

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POSITION OF THE PARTIES:

Union

The Union argues that the Employer has never offered overtime to part-time employes without offering it first to the full-time employes on other shifts. It also points out that the Chief Steward was not consulted prior to the utilization of the part-time employes in this fashion. Because there was no consultation, Article 9, Section 9.1(b) was violated.

Noting that the Employer knew in advance that overtime would be necessary, the Union stresses that the Employer does not keep track of part-time employe overtime because it is not required to equalize their overtime. This, it suggests, undercuts the Employer's assertion that part-time employes are to be included within the group which is entitled to receive overtime opportunities under Section 13.7 of the contract. The Union argues that this Section does not apply to part-time employes for two reasons. First, part-time employes have no seniority and cannot by definition be junior employes. Second, for purposes of overtime equalization, the Employer concedes that part-time employes are not covered by Section 13.7 when it does not keep track of their overtime opportunities.

Stressing that the Warehouse Manager testified that the Employer had not utilized part-time employes for overtime without first offering said overtime to full-time employes on other shifts, the Union argues that the contract severely restricts the Employer's right to use part-time employes. They may be used only to supplement the workforce. According to the Union, the obvious intent of Article 9 is to provide for utilization of part-time employes in only very limited circumstances.

Moreover, the Union urges the arbitrator to consider the consequences of an adverse ruling. It submits that should the Employer prevail it will be able to flood the bargaining unit with cheap cut-rate help to the exclusion of overtime opportunities for regular full-time employes. It seeks a make whole remedy for affected employes, an order directing the Employer to discontinue its practice in this respect; and retention of jurisdiction with remand to the parties to work the specifics of the remedy.

Employer

The Employer disputes any Union claims that overtime is a fringe benefit to which part-time employes are not entitled. The Employer asserts that Article 9 has nothing to do with the instant dispute but rather than Article 13 properly governs the controversy, specifically the first paragraph of Section 13.7. The Employer does not dispute that its initial offer of overtime is to be made to regular full-time employes and not part-time employes. It further admits that overtime equalization language under Section 13.7 and 13.9 is only applicable to full-time regular employes.

The Employer, however, strenuously maintains that it is only required to offer overtime opportunities to qualified regular full-time employes on an intra-shift basis pursuant to Section 13.7. It notes that there is no express contractual language which would support the Union's contention that regular full-time employes have legitimate claim to overtime on another shift.

The Employer stresses that if the parties had intended to have production overtime distributed to all full-time employes regardless of shift, the language would have clearly manifested such intent as the language in the second and third paragraphs under 13.7 reflects with respect to unscheduled weekend overtime not associated with planned weekend production.

Insisting that the Employer did not force the most junior regular full-time employe to work the overtime, the Employer argues that if it could not resort to use of part-time employes to work this overtime, it would have to compel the junior regular full-time employes to work overtime every Saturday for 22 weeks from April to August. The fact that the Employer does not force the full-time junior employes to work the overtime but assigns it to part-time employes does not create a right on the part of full-time employes on other shifts to work the overtime.

The Employer also maintains that the only authority which the arbitrator possesses is to compel the junior full-time employe to work the overtime, an untoward result which no one is seeking.

According to the Employer, consistent past practice does not support the Union's argument but reinforces the intent and express language of the first paragraph under Section 13.7. It has, it submits, been a consistent past practice of utilizing available part-time employes on a shift rather than forcing junior regular full-time employes on that shift to work the overtime.

Noting the problematic ramifications of seeking full-time employes from other shifts to volunteer because they might then be unavailable for overtime occurring on their own shift, the Employer maintains that this is the reason for reliance on available part-time employes. Moreover, the Employer if obligated to use full-time employes from other shifts, would have to accommodate a difficult burden in the soliciting and scheduling of full-time employes to overlap a shift.

The Employer emphasizes that the first paragraph of Section 13.7 supports assignment of overtime strictly by shift and does not require any intershift assignment of full-time volunteers. It respects that the grievance be denied and dismissed.

DISCUSSION: