

IN THE MATTER OF ARBITRATION BETWEEN

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UNITED FOOD & COMMERCIAL)	
WORKERS UNION, LOCAL 527,)	ARBITRATION
)	AWARD
Union,)	
)	
and)	
)	
)	OVERTIME
)	GRIEVANCE
RED WING SHOE COMPANY,)	
)	
Employer.)	FMCS CASE NO. 080103-52406-3
)	
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Arbitrator: Stephen F. Befort

Hearing Date: June 4, 2008

Post-hearing briefs received: July 15, 2008

Date of decision: August 8, 2007

APPEARANCES

For the Union: Roger A. Jensen

For the Employer: Jan D. Halverson

INTRODUCTION

UFCW Local 527 (Union) is the exclusive representative of a unit of production and maintenance employees employed by the Red Wing Shoe Company (Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by failing to provide notice to the grievant of a mandatory overtime assignment. The grievance proceeded to an arbitration hearing at

which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Did the Employer violate the parties' collective bargaining agreement by failing to notify the grievant of a mandatory overtime assignment?
- 2) If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

Article X

Hours of Work/Overtime

For those designated to a production line, overtime will be scheduled by production lines.

(Lines 1157-59).

Mandatory overtime will be worked as follows . . . with notification by the end of the previous shift.

(Lines 1165-69).

During mandatory daily overtime, for an employee designated to a production line but transferred to another line . . . said employee shall return to their designated production line for daily mandatory overtime.

(Lines 1274-1278).

Mandatory overtime scheduled . . . will be paid at a rate of time and one half for hours worked in excess of the regularly scheduled number of hours for the week.

(Lines 1285-88).

When less than the entire department is needed for voluntary overtime and it is an extension of shift, the senior qualified operator within the department shall be asked to perform the work.

(Lines 1316-19).

Article XII

Miscellaneous

The Employer agrees not to enter into any contract, written or verbal, with employees or individually or collectively, which in any ways conflicts with terms of this Agreement.

(Lines 1506-09).

FACTUAL BACKGROUND

The Employer operates a boot and shoe production facility in Red Wing, Minnesota. The grievant has worked for the Employer for approximately 28 years performing a variety of stitching jobs. Both parties agree that she is a good worker.

The Employer runs several production lines within its Fitting Department. Each line produces distinct shoe styles. For the last several years, the grievant has been assigned to the “6 & 8 inch” line that produces boots between 6 and 8 inches in height. The grievant’s usual assignment is to work the 6:00 a.m. to 3:00 p.m. shift in the “Aussie” area, a one-person assignment that performs stitching on an Australian-type boot. Although the Aussie area is physically separated from the 6 & 8 inch line, the grievant remained part of the 6 & 8 inch crew for organizational purposes.

In late November 2007, the Employer was considering a realignment of its production lines. The grievant, on November 28, asked Fitting Department Supervisor Kim Brunner whether her position would continue to be part of the 6 & 8 inch line, or if the Aussie work would be treated as a separate line. This status is important in that both overtime and vacation scheduling are determined by production line. Ms. Brunner replied that management had not yet made this decision, but that either she or Wes Hayes would get back to the grievant with that information. Wes Hayes is the supervisor of the

Cutting and Pre-Fit Department, and Brunner and Hayes frequently cover for each other during absences. Brunner testified that she specifically mentioned that Hayes might relay the requested information because she was scheduled to take vacation over the next few days.

The Employer implemented its realignment of the production lines on December 3, 2007. In Brunner's absence, Hayes called a meeting of the employees on the 6 & 8 inch line that same day to inform them of their status and to announce that one hour of mandatory overtime would be required of all line employees on the following morning prior to the start of the regular shift. It is undisputed that the grievant was working in the separate Aussie area, and that Hayes inadvertently failed to inform her of the meeting.

Late during her shift on December 3, the grievant learned from another employee that the Employer had assigned all 6 & 8 inch line employees to a mandatory one hour of overtime work on the following morning. The grievant testified that since no one had informed her of either the new line configurations or the 6 & 8 inch line meeting, she assumed that the Employer had decided to treat the Aussie area as a separate line and that she was not included in the overtime mandate. The grievant did not make any inquiries to corroborate her assumption, which turned out to be erroneous, and she did not work the mandatory hour of overtime on December 4.

Sometime on the morning of December 4, the grievant went to visit Plant Manager Chris Zylka. The grievant testified that the purpose of the meeting was to inquire about her production line status, while Zylka testified that the grievant initiated the meeting by asking whether she would be docked a point on the company's attendance policy for the missed overtime. Sometime during the discussion, the grievant also asked

whether she would be paid for the lost overtime opportunity. Both parties agree that Zylka told the grievant that she would be not penalized nor paid for the missed overtime session. Zylka instead offered that the grievant could recoup the lost pay by making up the overtime hour sometime over the next few days.

When Ms. Brunner returned from vacation on December 5, she communicated with the grievant and offered to arrange a make-up overtime assignment. The grievant replied that she wanted to discuss the matter with Union officer Arlen McKinley. McKinley advised her to decline the overtime offer and file a grievance for the lost pay. In McKinley's view, working the make-up overtime session would steal an overtime opportunity from a more senior employee and itself trigger a grievance. The grievant followed that advice, and her grievance now has proceeded to arbitration.

POSITIONS OF THE PARTIES

Union:

The Union contends that the Employer violated the parties' collective bargaining agreement by failing to notify the grievant of her mandatory overtime assignment "by the end of the previous shift." The Union claims that the proper remedy for this violation is for the Employer to make the grievant whole for the lost pay. The Union makes this assertion for two reasons. First, the Union maintains that the parties have followed a past practice of compensating employees who wrongfully have been deprived of overtime. This outcome is necessary, the Union claims, because the option of simply providing a make-up opportunity would trigger a grievance by a senior employee who was not offered the voluntary overtime opportunity. Second, the Union points to arbitral precedent establishing that the appropriate remedy for an overtime violation should be the

payment of overtime pay as opposed to allowing an employee to work additional overtime in the future.

Employer:

The Employer claims that it has not violated any express provisions of the parties' contract because the contract language only provides an entitlement to senior employees for "voluntary overtime" and the overtime at issue was mandatory in nature. Even if some contract violation is established, the Employer argues that its consistent past practice has been to remedy missed overtime opportunities by offering the employee in question an opportunity to make up the lost time. In this regard, the Employer stresses that in permitting the grievant to make up the lost time, it was not creating a new voluntary overtime opportunity denied to more senior employees, but instead offering a targeted solution by which the grievant could recoup pay for a lost mandatory overtime assignment. Finally, the Employer disputes the applicability of the Union's arbitral precedent, claiming that those cases stand only for the inapposite proposition that an employer must provide lost pay when it intentionally deprives an employee of an overtime entitlement.

DISCUSSION AND OPINION

A. The Alleged Violation

The parties focus on different portions of the collective bargaining agreement in addressing the contract violation issue. The Union points to Lines 1165-69 which obligate the Employer to notify employees about a mandatory overtime assignment. The Employer, in contrast, turns its attention to Lines 1316-19 which allocate voluntary overtime opportunities on the basis of seniority.

Taking the Employer's contention first, Lines 1316-19 provide that "when less than the entire department is needed for voluntary overtime and it is an extension of shift, the senior qualified operator within the department shall be asked to perform the work." Although this provision arguably may impact the appropriate remedy in this case, it is clear that the Employer did not violate this provision in its assignment of overtime work for the 6 & 8 inch line employees. Since the assignment in question was for *mandatory* overtime applicable to the entire production line, the seniority preference with respect to voluntary overtime opportunities simply does not come into play.

The Union's argument at the violation stage is more direct. The Union points out that Lines 1157-59 provide that "mandatory overtime will be worked as follows . . . with notification by the end of the previous shift." The Union argues that the Employer violated this provision by virtue of the fact that Supervisor Wes Hayes did not expressly notify the grievant of the mandatory overtime assignment. It is true, of course, that Hayes' notification failure was unintentional and that the grievant actually knew that the 6 & 8 inch line was required to work overtime on the next day. Nonetheless, the contract places an affirmative obligation on the Employer to provide notification of a mandatory overtime assignment, and it is undisputed that the Employer failed to provide such notification to the grievant in this instance. Accordingly, the Union has established that the Employer violated this provision of the parties' agreement.

B. The Appropriate Remedy

The parties also differ in their respective views as to the appropriate remedy. The Union contends that the Employer should be obligated to compensate the grievant for the value of the lost overtime pay. The Employer, in contrast, submits that its offer of a make-up opportunity by which the grievant could earn the amount of lost overtime pay is a sufficient and appropriate remedy.

Both parties contend that their position is supported by past practice. As the parties' acknowledge, a clear and well-established course of past practice may provide significant guidance in interpreting the terms of a collective bargaining agreement. A "past practice" arises from a pattern of conduct that is clear, consistent, long-lived, and mutually accepted by the parties. Richard Mittenthal, *Past Practice and the Administration of the Agreement*, 59 MICH. L. REV. 1017 (1961). A practice that comports with these factors generally is binding on the parties and enforceable under contract grievance procedures. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 605-30 (6th ed. 2003).

In support of the Union's past practice argument, Local 527 President Roger Spindler testified to a series of grievances challenging lost overtime opportunities that the Employer agreed to settle by paying the full amount of lost overtime pay. Meanwhile, both Plant Manager Zylka and Supervisor Brunner testified to a past practice of not paying employees for mandatory overtime periods that were not actually worked. Instead, they claim a uniform practice of offering the employee in question the opportunity to make up the lost overtime work.

I believe that both parties are correct – at least in part – in their assertions. Not one, but two, past practices are at work in the overtime context. First, when the violation

at issue is the Employer's improper assignment of voluntary overtime, the clear practice has been for the Employer to compensate the senior employee for the wrongfully denied overtime work. This resolution makes sense in this context since Lines 1316-19 of the agreement preserves this work for senior employees, and the mere offer of a future overtime opportunity might result in yet another grievance by a more senior employee claiming entitlement to the voluntary opportunity. Alternatively, however, when the violation at issue is lost mandatory overtime work, the clear practice has been for the Employer to provide the employee with the opportunity to make up the lost overtime work. This, too, makes sense, since the lost work is not a "voluntary" opportunity subject to seniority bidding, but a tailored solution available only to the individual employee who missed out on the mandatory overtime.

The arbitral precedent cited by the parties generally is consistent with this dichotomy. In situations where an employer has wrongfully denied an overtime priority established by contract, most arbitrators, as a remedy, will order the employer to compensate the aggrieved employee for the value of the lost overtime pay. *See, e.g., Dayton's*, 108 LA 113 (Jacobowski, 1997); *Cayuna Range Dist. Hosp.*, 96 LA 659 (Ver Ploeg, 1991). On the other hand, arbitration decisions have endorsed make-up opportunities in circumstances where the loss of overtime work is not the result of a clear denial of an entitlement established by contract or past practice. *See, e.g., Price Brothers*, 76 LA 10 (Shanker, 1980); *A. O. Smith Corp.*, 33 LA 365 (Updegraff, 1959).

In this case, the grievant's lost overtime was of the latter variety. The Employer's assignment did not implicate contractual bidding for a voluntary overtime opportunity, but instead mandated overtime for an entire production line. The

Employer's offer of a make-up opportunity in these circumstances is not contrary either to the terms of the parties' agreement or to past practice. In addition, the make-up offer would not trigger another grievance because it was not an offer of a generally available voluntary overtime opportunity, but an offer directed only to the grievant for the purposes of rectifying an inadvertent and arguably mutual mistake. The Employer's offer of a make-up opportunity, accordingly, was an appropriate response under the circumstances of this case and does not constitute a violation of the parties' collective bargaining agreement.

AWARD

The grievance is denied.

Dated: August 8, 2008

Stephen F. Befort
Arbitrator