

TIME REQUIRED TO  
RENDER AWARD: 33 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN

THE UNITED FOOD AND  
COMMERCIAL WORKERS,  
LOCAL 789,

FEDERAL MEDIATION AND  
CONCILIATION SERVICE  
CASE NO. 06-51507

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Union,

and

LUND FOOD HOLDINGS, INC.,

Employer.

DECISION AND AWARD  
OF  
ARBITRATOR

APPEARANCES

For the Union:

For the Employer:

Roger A. Jensen  
Jensen, Bell, Converse  
& Erickson, P.A.  
Attorneys at Law  
1500 Wells Fargo Place  
30 East Seventh Street  
St. Paul, MN 55101

John R. Sapp  
Michael, Best  
& Friedrich, L.L.P.  
Attorneys at Law  
Suite 3300  
100 East Wisconsin Avenue  
Milwaukee, WI 53202-4108

On February 23, 2006, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the parties' labor agreement when establishing the work schedules of three grievants, David E. Dillon, David J.

Cantele and Daniel E. Tierney. The last of post-hearing briefs was received by the arbitrator on April 5, 2006.

#### FACTS

The Employer operates a retail grocery business in St. Paul and Minneapolis, Minnesota, and in the area surrounding those cities. The Union, a local affiliate of the United Food and Commercial Workers Union ("UFCW"), is the collective bargaining representative of most of the non-supervisory employees of the Employer who work in the Employer's stores located in St. Paul and its suburbs, including those who are classified as Baggers, Retail Specialists and Senior Retail Specialists. Another local affiliate of the UFCW, Local 653, is the collective bargaining representative of employees in similar classifications who work in the Employer's stores located in Minneapolis and its suburbs.

The grievants have been employed by the Employer since 1984, when the Employer added to its St. Paul operations by purchasing the retail grocery store operated by a competitor, Rainbow Foods, in the Highland Park district of St. Paul (the "Highland Park store"). The grievants had worked at the Highland Park store for many years previously.

At the time the Employer bought the Highland Park store, it was a member of a multi-employer group of St. Paul grocery retailers. The multi-employer group had, for a number of years, bargained jointly with the Union about successive labor agreements setting the terms and conditions of employment of employees of each member of the group. The labor agreement

that was in effect at the time the Employer bought the Highland Park store was negotiated the previous year, in 1983.

The present grievance arose in the fall of 2005, during the term of a labor agreement effective from March 6, 2005, through March 8, 2008 (the "current labor agreement"). That agreement was also negotiated by the Union and the multi-employer group, as have been all labor agreements between the parties at least since the 1983 labor agreement.

The arguments of the parties make the following provisions of the current labor agreement relevant:

Article 2. Wages, Hours and Working Conditions.

Section 2.2: Workweek/Workday:

B. 1. The basic work week for Senior Retail Specialist employees will be forty (40) hours, to be worked in five (5) days, Monday through Saturday, exclusive of hours worked on holidays. The exception will be those employees who work less than forty (40) hours by mutual agreement between the Employer and the employee.

2. The basic work week for Retail Specialist employees will be forty (40) hours, to be worked in five (5) days, Monday through Sunday, inclusive of hours worked on Sunday but exclusive of hours worked on holidays. These employees shall be scheduled to have two consecutive days off each week, except in those weeks affected by holidays.

C. Four Ten Hour Workweek:

1. Optional, to be worked out with each Company.

2. Scheduling of a 4-10 hour day workweek with two consecutive days off. The scheduling of four (4) ten (10) hour days shall be based on employee's interest and ability of Company to cover needed hours.

Section 2.13: Scheduling Restrictions:

A. A full-time employee hired prior to May 31, 1962, need not accept a schedule which calls for

straight-time work before the hours of 7 a.m. or after 6 p.m.

- B. Night Work. It is agreed that no employee except for prime time part-time employees or those employees on the night stock crew shall be required to work more than three (3) nights per week.

Article 4. Seniority.

Section 4.6: Application of Seniority:

- C. 1. It is agreed that preference, if qualified shall be given to the more senior regular full-time employees within the store in granting the more desirable schedule of hours among Senior Retail Specialist and Retail Specialist positions, except in the case of an employee being designated for management training, and that employee may be scheduled without regard to preference for a period not to exceed one (1) year. . . Employees hired or promoted into the Senior Retail Specialist position after March 6, 2005 will not have preference of hours. Retail Specialist employees shall not have preference of hours.

Article 18. Legal Issues.

- A. Discrimination. No employee shall be discriminated against because of race, creed, sex, age, color, national origin, disability, marital status, status with regard to public assistance, religion, sexual orientation, or for engaging in protected Union activities.

Article 22. Management Rights.

The Company's right to manage is retained and preserved except as abridged or modified by the restrictive language of this Agreement.

Section 2.2.C, the four ten-hour workweek provision, was introduced to the labor agreement in 1983, when the multi-employer group proposed its addition. The parties have retained the provision in succeeding labor agreements, in substantially the same language.

Daniel E. Tierney, one of the grievants, testified that he has worked at the Highland Park store since 1969. In 1984, when the Employer purchased it, David Gerdes, a Human Resources

representative of the Employer, met with employees of the store to persuade them to continue their employment at the newly purchased store. Tierney also testified that Gerdes offered him several incentives to stay, including a four ten-hour day work schedule, and that the opportunity to work that schedule was one of the inducements that made him stay at the Highland Park store.

Other employees also chose to remain employed at the Highland Park store on a four ten-hour day schedule, including the other grievants, Dillon and Cantele. The three grievants have continued to use a four ten-hour day schedule since then -- though they sometimes vary that scheduling in the summer to accommodate vacations.

As of the summer and late fall of 2005, when the events that led to the present grievance occurred, the only employees in the Employer's St. Paul stores who still were scheduled for four ten-hour days were the three grievants. All other bargaining unit employees in the St. Paul stores are scheduled to work five days per week for eight hours per day.\*

As noted above, Local 653 of the UFCW is the collective bargaining representative of most of the Employer's non-supervisory employees who work in stores in the Minneapolis area. The terms and conditions of employment in those stores are established by a labor agreement between Local 653 and a

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\* Hereafter, for ease of reference, I may refer to employees who are scheduled for five eight-hour days per week as "five-day employees" and to those who are scheduled for four ten-hour days per week as "four-day employees."

multi-employer group of employers operating stores in the Minneapolis area (the "Local 653 labor agreement"). That labor agreement does not have provisions similar to the relevant provisions relating to four-day employees of the labor agreement covering the St. Paul area stores. Rather, the Local 653 labor agreement provides that up to 25% of employees in each Minneapolis store may elect to work a four ten-hour day schedule.

The Union presented in evidence the seniority list for Senior Retail Specialists at the Highland Park store as of September 26, 2005. It shows that, of the seventeen employees in that classification, the grievants, Tierney, Cantele and Dillon, were ranked first, second and fourth in seniority.

Tierney gave testimony, summarized as follows, about the usual hours of his schedule and the changes made by the Employer that led to the present grievance. Before the early part of 2005, Tierney usually would start work at 6:00 a.m. and work until 4:00 p.m. Sometimes, though, he would accommodate scheduling for vacations or periodic store cleaning by changing temporarily to a five-day eight-hour-per-day schedule. In addition, he would sometimes work a ten-hour schedule, from 7:00 a.m. to 5:00 p.m., or, on Saturday, from 5:00 a.m. to 3:00 p.m.

In early 2005, the Employer asked that all employees work at least one day per week until 6:00 p.m., and on those days, Tierney worked from 8:00 a.m. till 6:00 p.m. In about August of 2005, the Employer issued a document entitled, "Service Alignment Givens," (hereafter, the "new alignment") by which it made several changes in the way that its staff would be

scheduled after its effective date, October 10, 2005. The new alignment required that all staff work two days per week until 6:00 p.m. and that no one start until 7:00 a.m. Accordingly, as of October 10, 2005, Tierney's schedule was adjusted so that he worked two days per week from 8:00 a.m. till 6:00 p.m. and two days per week from 7:00 a.m. till 5:00 p.m.

In late October of 2005, the Employer made the change that led to the present grievance. Effective about October 24, 2005, it scheduled each of the three grievants to work two days per week until 8:00 p.m., thus requiring that they work from 10:00 a.m. till 8:00 p.m. on two of the four ten-hour days they work each week. Dillon gave testimony similar to that of Tierney about the changes in his schedule that led to this grievance. Both testified that they prefer to work days and not nights, i.e., not after 6:00 p.m., as "nights" are defined in the labor agreement. Though Cantele did not testify, the evidence shows that the changes made in his schedule were similar to those made in the schedules of Tierney and Dillon.

On October 24, 2005, Jennifer Christensen, Secretary Treasurer of the Union sent the following memorandum to John Majchrazk, the Employer's Director of Retail Operations, grieving the changes that required the three grievants to work two days per week until 8:00 p.m.:

The Union hereby files a grievance on behalf of all employees working the "four ten hour day work week" (Section 2.2.C of the Collective Bargaining Agreement), for the Company's decision to schedule these individuals two nights per week, while other full time employees working traditional five eight hour day work weeks and with less seniority, are not required to work any nights.

It is the Union's position that the Employer failed to comply with Section 2.2.C of the Collective Bargaining Agreement when it disregarded the requirement to base schedules on "employee's interest" as well as the "ability of the Company to cover needed hours."

Furthermore, it is the Union's position the Company is discriminating against these employees because they have chosen to exercise their contractual rights to work ten hour days by requiring them to work an adverse schedule. This is not only a violation of Section 18.A of the Agreement, but also a violation of Federal Law. The Union is prepared to file Unfair Labor Practice charges with the NLRB in objection to this targeted discrimination.

The Employer clearly outlined their scheduling needs in their "new alignment" document. Nowhere in your document did you propose to schedule any day employees with night hours (note that days end and nights begin at 6:00 p.m.). The schedules of the ten hour day employees will easily fall within the guidelines of the "new alignment" requiring all full-time day employees to start no earlier than 7:00 a.m. (except Thursdays when they can start earlier) and requiring them to work two (2) days until 6:00 p.m. . . .

On November 17, 2005, Christensen sent Tamra L. Laska, the Employer's Vice President of Human Resources, a clarification of the grievance, in which Christensen informed Laska that the grievants had a preference to work days, "meaning no night hours."

Paul A. Bergstrom, one of the Employer's three Directors of Retail Operations, testified that John Majchrazk is the Director of Retail Operations who is assigned the Highland Park store, but that, because Majchrazk was on vacation on the hearing date, he would not testify. I summarize Bergstrom's testimony as follows. In February, 2005, the Employer formed a management group to survey possible changes in staffing with the goal of improving service to customers. In recent years, customers have shifted their shopping habits so that less business is done in the morning and more in the late afternoon

and early evening. On July 15, 2005, the General Manager of each store sent the following memorandum to store employees:

Consumer shopping habits are changing. Customers are now shopping more frequently between the hours of 4 and 7 p.m. to accommodate their busy lives. As a result of this shopping change, it is clear that we need to shift our staffing and scheduled tasks in order to provide the best customer service possible during those times. . .

The ultimate goal is to provide the best service possible to our customers. In order to accomplish this, our operational practices need to reflect our customers' changing needs to maintain our competitive advantage in the marketplace. Exceptional service continues to be a primary differentiator from our competitors and is critical to the success of our business.

Our plan is to have all departments adjust work schedules to reflect and better support the high traffic times. We do understand how any type of schedule change can affect family and other personal commitments, which is why the new schedules will officially begin October 10th. We hoped to give everyone enough time to adjust and plan accordingly. In the next few weeks, your department manager or myself will sit down with each of you to better clarify specifically how this will affect your existing schedule. . .

Bergstrom testified that the change implemented on October 10, 2005, increased to two days per week the number of days when five-day employees would be required to work from 10:00 a.m. till 6:00 p.m. -- a change from their usual schedule of 8:00 a.m. to 3:00 p.m. The five-day employees were not required to work until 8:00 p.m., as were the three four-day employees, the grievants.

Bergstrom also testified that, for two reasons, the four-day employees were required to work two days per week until 8:00 p.m., even though no five-day employees were required to do so -- 1) that requiring all employees to start work at 10:00 a.m. on two days per week would serve fairness, and 2) that

having the grievants' experience available after 6:00 p.m., when the store is staffed with less experienced part-time employees, would benefit operations. On cross-examination, Bergstrom conceded that there are experienced five-day employees who could have been scheduled to work after 6:00 p.m., thereby achieving the goal of having experienced employees available after 6:00 p.m. Bergstrom conceded that the primary reason for scheduling the grievants to work until 8:00 p.m. two days per week was to be fair by having all start at 10:00 a.m. twice a week.

Tamra L. Laska, Vice President for Human Resources, gave testimony similar to that of Bergstrom with respect to the reasons for scheduling the grievants to work two days per week until 8:00 p.m. She testified that the primary reason was to have experienced employees available after 6:00 p.m. to advise less experienced employees. In addition, she testified that it would be consistent and fair to have all start at 10:00 a.m. two days per week.

Laska also testified to the following interpretation of Section 4.6.C.1 of the labor agreement, which gives a preference "to the more senior regular full-time employees within the store in granting the more desirable schedule of hours." In this provision, management does not surrender its right to determine the work schedules that will be used to staff the store, so long as those schedules meet the requirements of the labor agreement. In the present case, management has established weekly work schedules for all employees that require them all to start work at 10:00 a.m. on two days per week. The grievants,

as the first, second and fourth ranked Senior Retail Specialists on the seniority list, have a right under Section 4.6.C.1 to claim the work schedule of any junior employee, but the provision does not give the grievants the right to create a work schedule that has not been established by the Employer, i.e., one that is different from their own schedules or from that of any other employee. Therefore, the grievants have the right under Section 4.6.C.1 to claim the work schedule of another employee, but not to change it.

Thus, as Laska interprets Section 4.6.C.1, the grievants could avoid working until 8:00 p.m. by claiming the schedule of any junior employee, all of whom are five-day employees who work two days a week from 10:00 a.m. till 6:00 p.m. The grievants could not, however, retain a four-day schedule and avoid working twice a week until 8:00 p.m. -- because no four-day employee has a work schedule that does not require work from 10:00 a.m. till 8:00 p.m. on two days per week.

On rebuttal, Christensen testified that, in the past, Section 4.6.C.1 has been implemented by permitting senior employees to exercise a "general preference" for the work schedule they prefer, i.e., without restricting the preference to the claim of a particular work schedule of a junior employee, as already determined by the Employer.

#### DECISION

First. The Union points out that, despite the grievants' seniority ranking, they are the only full-time employees who have been scheduled to work "night" hours -- hours after 6:00 p.m.

The Union argues that, by thus scheduling the grievants, the Employer has discriminated against them in violation of Section 18.A of the labor agreement, which prohibits discrimination "for engaging in protected Union activities."

The Employer responds that the reason for requiring the grievants to work from 10:00 a.m. till 8:00 p.m. two days a week is that, as four-day employees who work ten-hour days, they must necessarily work till 8:00 p.m., if they start at 10:00 a.m. twice a week as do all other employees.

I rule that the scheduling of the grievants to work twice a week after 6:00 p.m. did not violate Section 18.A of the labor agreement. Section 18.A does not prohibit all kinds of discrimination. It does prohibit discrimination based upon engagement in Union activities, but there is no evidence that the grievants are or have been Union officers or stewards or have otherwise engaged in activities that advance the cause of the Union.

I agree with the Union that scheduling only the grievants to work till 8:00 p.m. is "discrimination" in the sense that they and they alone are so scheduled. It is clear, however, that the reason for distinguishing their schedule from that of the other full-time employees, all of whom work five eight-hour days, is that the grievants are four-day employees who work two additional hours per day. The Employer's determination of the grievants' schedule is based on their election to work a four-day schedule. That election is not a protected Union activity, and the Employer's determination of the grievants'

schedule because of that election is not a distinction protected by Section 18.A.

Second. The Union argues that the grievants, because of their seniority ranking, are entitled to the preference established by the first sentence of Section 4.6.C.1 of the labor agreement:

1. It is agreed that preference, if qualified shall be given to the more senior regular full-time employees within the store in granting the more desirable schedule of hours among Senior Retail Specialist and Retail Specialist positions, . . .

As the Union interprets this provision, the grievants, because of their seniority ranking, should have a preference for a "more desirable schedule of hours" -- one that does not include any "night" hours. The Union argues that the Employer can easily create such a schedule and still schedule the grievants to work four ten-hour days, as they prefer, merely by adjusting their starting time to 8:00 a.m. so that they always conclude work before 6:00 p.m.

The Employer argues that the first sentence of Section 4.6.C.1 should be interpreted as follows. The provision does not establish the right of any employee to create his or her own schedule, as the Union seeks in this case. It does give each employee a right, exercised by seniority, to claim the work schedule of any junior employee, but it does not negate the Employer's management right to determine all work schedules by which its stores will be staffed. Here, the Employer has exercised its right to establish all work schedules for full-time employees who work at the Highland Park store -- three work

schedules for four-day employees and a larger number for five-day employees. All work schedules for four-day employees require work from 10:00 a.m. till 8:00 p.m. on two days per week, and though none of the work schedules for five-day employees require work after 6:00 p.m., they all require work from 10:00 a.m. till 6:00 p.m. on two days per week.

The Employer argues that, as Laska testified, the grievants, because of their seniority, are entitled under Section 4.6.C.1 to claim the work schedule of junior five-day employees if the grievants do not want to work after 6:00 p.m., but they cannot avoid working till 8:00 p.m. two days a week if they want to continue to work four ten-hour days -- because there is no work schedule in the store that is both a four-day schedule and a schedule without work till 8:00 p.m. on two days per week.

I interpret Section 4.6.C.1 as the Employer does. Under the Union's interpretation, the Employer's right to establish work schedules would be limited in such a way that it could set the schedule of only one employee in the store -- the most junior employee. All other employees would have some seniority preference over at least one other employee and, if the provision means what the Union proposes, all of them could create their own work schedule. Such a result would, in effect, turn scheduling entirely over to employees, with potentially chaotic consequences to operations. Though it is possible that an employer might agree to such a result, it seems so unlikely that I do not adopt that interpretation.

Indeed, the use of the definite article "the" rather than the indefinite article "a" in the phrase used to describe what schedule a senior employee can prefer -- "the more desirable schedule of hours among Senior Retail Specialist[s]" -- implies that only schedules already established can be claimed.

Christensen testified that some employees have been permitted to express a general preference for hours rather than being required to claim the established schedule of a junior employee. I recognize that, as the Union argues, that testimony can be read as in conflict with the interpretation adopted here -- that the preference given is restricted to the right to claim the existing schedule of a junior employee. Nevertheless, I adopt that interpretation for the compelling reasons given above, and infer that when the Employer did permit an employee to change his or her schedule rather than require the claiming of an existing schedule, it did so as an accommodation to the employee, not required by Section 4.6.C.1.

Third. The Union argues that the schedules at issue violate Section 2.2.C of the labor agreement, which I repeat:

Four Ten Hour Workweek:

1. Optional, to be worked out with each Company.
2. Scheduling of a 4-10 hour day workweek with two consecutive days off. The scheduling of four (4) ten (10) hour days shall be based on employee's interest and ability of Company to cover needed hours.

The Union interprets Section 2.2.C as follows. Both its subparagraphs indicate that the employee who is on a four-day schedule is to have input into its daily starting and ending times (hereafter, the "particulars of the schedule"). Thus, for

the Union, Subparagraph 1 means that the particulars of the schedule of a four-day employee are "optional, to be worked out" with the Employer, and the second sentence of Subparagraph 2 means that the particulars of the schedule of a four-day employee "shall be based on employee's interest and ability of Company to cover needed hours."

The Employer interprets Section 2.2.C differently. For the Employer, what is to be "worked out" are not the particulars of an employee's schedule, but, in discussions between the Union and each "Company" in the multi-employer group, whether that employer will use a four-day schedule at all. Similarly, the Employer interprets the second sentence of Subparagraph 2 to mean that the two criteria described there -- "based on employee's interest and ability of Company to cover needed hours" -- are to be used to determine the member of the multi-employer group will make a four-day schedule available to an employee, and not to determine the particulars of the employee's schedule.

I interpret Section 2.2.C, Subparagraph 1, as the Employer does. The language could be clearer, but Subparagraph 1 seems to take its subject from the Paragraph's heading -- the "Four Ten Hour Workweek." Thus, Subparagraph 1 means that each member of the multi-employer group may or may not use a four-day schedule -- something to be worked out with the Union.

Subparagraph 2 of Section 2.2.C, however, is structured differently. The subject of the first sentence is "scheduling of a 4-10 hour day workweek." Though the sentence does not include an express verb, it appears to mean that the scheduling

of all 4-10 hour day workweeks must provide two consecutive days off. This is a general requirement that applies to the workweek of all four-day employees.

The subject of the second sentence of Subparagraph 2 is "the scheduling of four (4) ten (10) hour days." This sentence does not state a general requirement that defines the scheduling of all four-day employees, as does the first sentence. Rather, its requirement that "the scheduling of four (4) ten (10) hour days" must be based on "employee's interest and ability of Company to cover needed hours" appears to state a two-part standard for determining the particulars of the schedule of individual employees.

Certainly, one part of this standard requires consideration of the operational needs of an employer. The other part of the standard uses the singular possessive, "employee's interest," to state the consideration that is to be balanced against the operational needs of an employer. This use of the singular implies that the interest of an individual employee is to be considered and that the two criteria are to be balanced in determining the particulars of the schedule of the individual employee's "four (4) ten (10) hour days."

In the present case, the evidence relevant to the two criteria established by the second sentence of Section 2.2.C, Subparagraph 2, is the following. The Employer needs experienced employees to work after 6:00 p.m. The grievants are experienced employees. The Employer has other experienced employees, less senior than the grievants, who could be scheduled to work after

6:00 p.m. rather than the grievants. For the Employer, considerations of fairness indicate that the grievants should start at 10:00 a.m. on two days per week, just as five-day employees are required to do. For the grievants, it is unfair to require them, the most senior employees, and no others to work after 6:00 p.m. Each of the grievants has an interest in working only till 6:00 p.m. because of the inconvenience of "night" work.

The evidence shows that, when the Employer established the schedules of the grievants, it did not consider their "interest" -- that, as senior employees, they not be required to work after 6:00 p.m. I rule that, by that omission, the Employer violated Section 2.2.C of the labor agreement. Accordingly, the award directs the Employer to establish the work schedules of the grievants by following the requirements of the second sentence of Section 2.2.C.2 -- basing the particulars of their schedules on the "employee's interest and [the] ability of Company to cover needed hours."

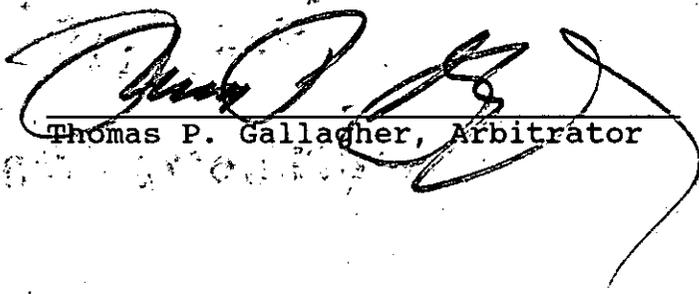
The evidence presented at the hearing indicates that the Employer could "cover needed hours" with experienced employees, thereby meeting its operational needs, without assigning the grievants exclusively to work night hours. Nevertheless, the award does not direct the Employer to establish any specific schedule, because the scheduling of work should remain changeable, free of the inflexibility that such an award would create. I do, however, reserve jurisdiction to determine whether the Employer, in its reconsideration of the grievants' schedules, has made a good faith effort to comply

with the requirements of the second sentence of Section 2.2.C.2 -- by basing the particulars of their schedules on the "employee's interest and [the] ability of Company to cover needed hours."

AWARD

The grievance is sustained. The Employer shall establish work schedules for the grievants in compliance with the requirements of Section 2.2.C.2 of the labor agreement, by considering the "employee's interest and [the] ability of Company to cover needed hours." I reserve jurisdiction to determine whether the Employer, in establishing the grievants' work schedules, has complied with this provision.

May 8, 2006



Thomas P. Gallagher, Arbitrator