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**In Re the Arbitration between:**

**FMCS No. 07-53252-3**

The Dotson Company,

Employer,

**GRIEVANCE ARBITRATION  
OPINION AND AWARD**

and

Glass, Molders, Pottery, Plastics and Allied  
Workers International Union,  
AFL-CIO-CLC, (GMP), Local 142B,

Union.

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Pursuant to **Article 11** of the Collective Bargaining Agreement, the parties have submitted the above captioned matter to arbitration.

The parties selected James A. Lundberg as their neutral Arbitrator from a Federal Mediation and Conciliation Service list of Arbitrators.

The parties waived the requirement of a three Arbitrator panel.

The grievance is properly before the single Arbitrator for a final and binding determination and there are no procedural issues before the Arbitrator.

The grievance was filed on October 3, 2006.

The hearing was conducted on April 16, 2007.

Briefs were posted April 30, 2007.

**APPEARANCES:**

**FOR THE EMPLOYER**

Richard Dryg  
Employers Association, Inc.  
9805 45<sup>th</sup> Avenue North  
Plymouth, MN 55442

**FOR THE UNION**

Dale Jeter  
GMP- Executive Officer  
8530 N.W. 26<sup>th</sup> Street  
Ankeny, IA 50021

**ISSUE:**

*Whether the Employer violated the Collective Bargaining Agreement, when it created a permanent flex time position for Ed Ruter that included a thirty six (36) hour schedule of twelve (12) hour shifts on Sunday, Monday and Tuesday?*

**FACTUAL BACKGROUND:**

The Dotson Company operates a foundry in Mankato, Minnesota for producing iron castings. The Company is organized by Glass, Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO-CLC, Local 142B. The parties have collective bargaining history that dates back to 1944.

The Company has a maintenance department that works a regular Monday through Friday work week, which is established in **Article 9** of the Collective Bargaining Agreement. According to the Collective Bargaining Agreement, work performed on Saturday is paid at one and one half times straight time and work performed on Sunday is paid at a rate of two times straight time. Hours worked in excess of eight hours on a shift are paid overtime at a rate of one and one half straight time.

In September of 2006 a newly hired and recently trained full time Maintenance Worker, Ed Ruter, was scheduled to work on a Saturday. Rather than work the Saturday shift, Mr. Ruter resigned.

After his resignation, Mr. Ruter was contacted by management and asked whether he would be interested in working a flex time schedule. Management and Mr. Ruter negotiated the terms of the flex time schedule over a short period of time. On October 1, 2006 Mr. Ruter was rehired by the Company to work a three day per week maintenance

schedule, which included twelve hour shifts from 10:00 AM to 10:00 PM on Sunday, Monday and Tuesday.<sup>1</sup>

The Union grieved the decision to hire Mr. Ruter into a new weekend schedule on October 3, 2006. The grievance alleges that “the Company opened a new shift and changed work hours in maintenance without posting the changes for job bidding.” As a remedy the grievance form requests that the Company “open the position for bidding for the rest of the department.”

During contract negotiations in 2003 and 2006, the Company raised the issue of creating regular schedules over weekends. The proposals made by the Company were not accepted by the Union and were withdrawn in the course of both bargaining sessions.

After this grievance was raised with the Company a second employee, Mr. Udie, requested and was granted a flex time weekend schedule, which included three days of twelve hour shifts. The three twelve hour shifts were established on Friday, Saturday and Sunday from 10:00 AM through 10:00 PM. The employee who was allowed to work the new thirty six hour weekend schedule, was a recent addition to the maintenance department, who bid into the department from the molding department. The second weekend schedule was not posted and opened for bid.

In addition to seeking the relief requested in the grievance form, the Union asks that the Employer be required to pay 50% of the cost of obtaining a list of Arbitrators from the Federal Mediation and Conciliation Service. In the past the parties have split the cost of obtaining a list of Arbitrators.

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<sup>1</sup> Neither party informed the Arbitrator of the rate of pay to be received by Mr. Ruter for his 36 hour schedule.

The Company did not address the \$25.00 dispute by offering counter evidence of argument at hearing. Since the existence of a \$50.00 fee is undisputed and the practice of splitting the fee is undisputed, the Arbitrator will require the Company to pay the Union \$25.00 for obtaining the list of Arbitrators from the FMCS.

**SUMMARY OF UNION'S POSITION:**

The grievance should be sustained because the Employer violated the NLRA by circumventing the Union and bargaining over terms and conditions of employment with an individual employee. The Company contacted Mr. Ruter, after he resigned, and negotiated a weekend schedule that included twelve hour shifts. How weekend work shall be assigned and divided for maintenance workers was negotiated between the Company and the Union in the Collective Bargaining Agreement. The Union contends that it is an unfair labor practice for the Employer to bargain new terms and conditions of employment with a single employee. The Union did not consent to negotiations by the Company with a single employee. Similarly, the Collective Bargaining Agreement contains language regarding rate of pay for shifts in excess of eight hours and language relating to shifts that include weekend work. The Employer engaged in an unfair labor practice when it negotiated the new position with an individual employee.

The new weekend schedule unilaterally created by the Employer had a negative impact upon the amount of overtime available to bargaining unit employees under the terms of the Collective Bargaining Agreement. By creating the 36 hour flex schedule over the weekend, the Employer reduced the number of overtime hours available to maintenance employees who were scheduled to work the normal work week. The Collective Bargaining Agreement established the regular work week, established a

schedule for overtime premium pay on weekends and established procedures for staffing the plant on weekends. The 36 hour flex schedule circumvents the weekend overtime section of the Collective Bargaining Agreement.

During negotiations in 2003 and 2006 the Employer proposed weekend schedules. The proposals were not accepted by the Union. The Employer dropped the proposal in both bargaining sessions. The Employer is attempting to obtain through Arbitration what it was unable to obtain through negotiations. The Employers' proposals relating to weekend scheduling were new contract terms not terms intended to clarify the existing language of the Collective Bargaining Agreement. The parties did not agree upon any weekend scheduling language other than the language that establishes a normal five day per week schedule, overtime premium pay for weekend work and the manner in which weekend work shall be staffed. The weekend flex time schedule unilaterally established by the Employer violates both the letter and the spirit of the Collective Bargaining Agreement.

The Employer unilaterally created a new permanent position for weekend work but did not post the opening as required by **Article 10, Section 9** of the Collective Bargaining Agreement. The parties agreed at **Article 10, Section 9** that "Notice of permanent job openings and newly created jobs available in the plant shall be posted at either a designated posting location and /or the computer displays." The Company never posted the position that it offered Mr. Ruter, despite the fact that it clearly was designed to be a permanent position.

**Article 20 (A)** (2<sup>nd</sup> paragraph, last sentence) the Employer is prohibited from having flex time employees work at times when short work weeks are scheduled due to

lack of work. Jim Ganzel, the Local President, and an employee for 17 years testified that the plant had short work weeks at times when Mr. Ruter was working. The Employer also violated **Article 20** of the Collective Bargaining Agreement.

**SUMMARY OF EMPLOYER’S POSITION:**

The Employer used the flex time provision of the Collective Bargaining Agreement found in **Article 20**, when it established the flex time schedule for Mr. Ruter. The purpose of the flex time provision is to give the Company greater ability to train and retain employees. Since 1999 the Company has classified forty four (44) employees as flex time employees. The Company currently has six flex time classified employees. The Company did nothing unusual when it negotiated directly with Mr. Ruter. As Mr. Ganzel, Local President, testified, the Union has no involvement in arranging flex time schedules, it is “between the individual and the Company.” Furthermore, the Collective Bargaining Agreement does not require the Employer to give notice to the Union when establishing a flex time schedule.

The Employer denies the allegation made by the Union that Mr. Ruter was allowed to continue working during short work weeks. Jean Bye, Senior Vice President, testified that the Company did not have a short work week during the period that Mr. Ruter has been on flex time. Historically, the Company has always followed the contract language relating to flextime employees during short work weeks.

Nothing in the flex time article of the Collective Bargaining Agreement prevents weekend scheduling. The Employer simply applied the flex time contract provisions as it has in the past to Mr. Ruter’s flex time plan. The Company was not opening a new shift in the Maintenance Department. The Company merely exercised its right under the

contract to schedule work for flex time employees when it arranged the work schedule for Mr. Ruter.

The Company only posts jobs, when it is adding new employees to the fulltime department seniority list. The Company does not post for movement on shifts within a department. In this situation, the Company was able to retain a trained and qualified employee by working out a flex schedule.

If the Company is required to post a flex time schedule after it has worked out the flex time schedule with an employee, the purpose of flex time scheduling will be defeated. The grievance should be denied.

**OPINION:**

The thirty six (36) hour flex time schedule that the Employer negotiated with Mr. Ruter violates the plain meaning of provisions found in both **Article 9** and **Article 10** of the Collective Bargaining Agreement.

Since neither party produced evidence of Mr. Ruter's pay rate during the hearing, the Arbitrator will address the contractual problems that arise from:

1. Creating a permanent job for the most junior member of the bargaining unit that incorporates a large premium pay component.
2. The problems that arise from creating a permanent straight time pay schedule, during times that the parties have agreed should be compensated by premium pay.

If Mr. Ruter is being paid straight time for his thirty six (36) hour schedule, the rate of pay violates the Collective Bargaining Agreement. The thirty six (36) hours that comprise Mr. Ruter's permanent schedule include 20 hours that call for premium pay

under the contract. Sunday is a double time shift pursuant to **Article 9, Section 1** “Double time shall be paid for all work performed on Sundays and holidays as set forth in **Section 3** of this Article.” Also, “Time and one-half shall be paid for all time worked in excess of eight (8) hours in any one workday ...” If Mr. Ruter is being paid at straight time, he is being paid straight time for hours that the Employer agreed to pay bargaining unit employees premium rates. The number of hours of premium pay available to other bargaining unit employees who have a contractual claim to premium pay for weekend hours is reduced as a directed result of Mr. Ruter’s permanent weekend schedule.

If Mr. Ruter is being paid premium pay based on **Article 9** of the contract, he is being compensated at a much higher rate than other employees for his normal schedule. If he is being paid premium pay for his shift, he is receiving premium pay for hours that should have been distributed throughout the work force in accordance with **Article 9, Section 6** of the Collective Bargaining Agreement.

At **Article 9, Section 5** of the Collective Bargaining Agreement, the parties recognize that it is often necessary for maintenance employees to work weekends. The parties negotiated how weekend work will be managed and how employees will be paid for weekend work. In fact, at **Article 9, Section 6** the parties agreed “Overtime shall be distributed among all employees within the classification where work is available, as equitably as possible. By permanently scheduling a single employee for twelve hours on Sunday, the Employer has clearly violated **Article 9, Section 6** of the Collective Bargaining Agreement by denying the contractual right to premium pay for weekend work distributed pursuant to **Article 9, Section 6**.

Mr. Ruter was hired into a permanent position. The Employer did not post the position, which is required by **Article 10, Section 9** of the Collective Bargaining Agreement. Furthermore, the Collective Bargaining Agreement provides at **Article 10, Section 9** that “Senior employees have the right to sign and have preference on lateral or down grade jobs for the purpose of shift preference.” In this situation the Employer created a permanent job without posting the position and without allowing senior employees to exercise their rights under **Article 10** of the Collective Bargaining Agreement. The Employer correctly observes that opening the position to the bid process would defeat the flex time schedule. However, the structure of the flex time schedule subverts already negotiated terms of the Collective Bargaining Agreement.

The Employer has a right to hire an employee into a flexible schedule. However, the flex time schedule may not be created in derogation of **Articles 9** and **Article 10** of the Collective Bargaining Agreement. In this instance, the Employer attempted to negotiate weekend schedules during negotiations in both 2003 and 2006. Clearly, the Employer knows and understands that creating permanent weekend schedules is a change in the Collective Bargaining Agreement that must be accomplished through negotiation in order to create a negotiated exception to the plain language of **Articles 9 and 10**. The use of permanent maintenance weekend work schedules violates the Collective Bargaining Agreement. The Employer is not prohibited from negotiating a flex time schedule with Mr. Ruter but the flex time schedule may not constitute a permanent weekend work schedule.

**AWARD:**

- 1. The grievance is hereby upheld.*

2. *The Company is directed to discontinue the use of permanent weekend work schedule, including flex time schedules that conflict with the plain language of Article 9 and Article 10 of the Collective Bargaining Agreement.*
3. *This decision does not prohibit the Company and Union from negotiating permanent weekend work schedules nor does it prohibit the Employer from creating flex time schedules that are consistent with the terms and conditions of the Collective Bargaining Agreement.*
4. *The Company is directed to pay \$25.00 to the Union as 50% of the cost of obtaining a list of Arbitrators from the FMCS.*
5. *The Arbitrator shall maintain jurisdiction over the above remedy.*

**Dated: May 15, 2007**

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**James A. Lundberg, Arbitrator**