In The Matter Of The Arbitration Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,AFL-CIO, LOCAL 1317, Union, and HOWARD INDUSTRIES, INC., Employer.	:	FMCS Case No. 120723-56085-8 Grievance: Robert Pruitt, Jr., (Overtime)

Hearing held on September 19, 2012, in Laurel, MS.

Before: Stephen E. Alpern, Arbitrator

Appearances

For the Union	For the Employer
Clarence Larkin President/Business Manager Local 1317	Elmer E. White III, Esq. The Kullman Firm

OPINION AND AWARD

Statement of the Case

As parties to a collective bargaining agreement ("the Agreement"), IBEW, Local 1317 and Howard Industries, Inc. ("the Company") submitted

this matter to arbitration. The dispute involves the Company's right to assign overtime under the Agreement.

Issues Presented

Although the parties did not stipulate to the issues, the Arbitrator finds that the following issues are presented:

1. Whether the grievance was timely filed; and,

2. Whether the Company violated the Agreement by requiring employees to work more than twelve hours in a given workday except on a workday when they are assigned a double shift.

Facts

The Company manufactures electric transformers at one of its plants located in Laurel, Mississippi. The Union represents the production and maintenance employees working at that plant. During the parties' negotiations for a new collective bargaining agreement in 1999, the Union expressed concerns about employees being required to work excessive overtime. The Union made a proposal that apparently would have eliminated all required overtime. There were continuing discussions regarding overtime, which resulted in various proposals and finally agreement on language restricting, to some degree, the assignment of required overtime. The degree of those restrictions is what is at issue in this case. The language agreed to in 1999 has remained unchanged in the parties' agreements since.

On at least three occasions, once in 2008, once in 2009, and once in 2010, the Union filed grievances challenging the assignment of more than twelve hours of work to employees in the same workday. In the 2008 grievance, filed on October 24, 2008, the Union contended that the Company was violating the Agreement by scheduling employees on line #1 to work more than twelve hours in a day. The Company denied the grievance at the second step of the grievance procedure because "[t]he Company has been unable to identify anyone who has been required to work more time than what is listed in the contract." The Union appealed the grievance to Step 3, but the record gives no indication that the parties resolved the grievance or that the Union further pursued it. The 2009 grievance, filed on July 9, asserted that the Company was requiring employees on line #1 to work more than twelve hours each day. The Company denied the grievance at each step of the grievance procedure on the ground that it had not violated the Agreement. There is no evidence that the Union pursued the matter to arbitration. The 2010 grievance, filed on September 16, contended that the Company was requiring employees to work more than twelve hours, but less than sixteen hours in a day. The Company denied the grievance through Step 3 on the ground that it had not violated the Agreement, and there is no evidence in the record that the Union pursued the matter to arbitration.

The instant grievance was filed on April 19, 2012, by Union representative Robert Pruitt, Jr. The grievance contended that the Company was requiring employees on Pruitt's shift to work more than twelve hours in a day but less than sixteen hours. The Company denied the grievance on the ground that the grievant had not been required to work a

double shift, nor had the grievant worked a double shift "during the relevant time period." The parties were unable to resolve the grievance and the Union invoked arbitration.

Relevant Provisions of the Agreement

ARTICLE III, MANAGEMENT RIGHTS

Section 1. Except as specifically abridged, delegated, granted, or modified by this Agreement, or any supplementary agreements that may hereafter be made, all the rights, powers, and authority the Company possessed prior to the signing of this Agreement are retained by the Company and remain exclusively and without limitation within the rights of management, nor does the exercise thereof require any prior discussion or negotiation with the Union. Such rights of management include, among other things, but are not necessarily limited to, the right to: *** determine the number of hours per day or per week operations shall be carried on, including the starting and stopping times and rotation of shifts and jobs; select and determine the number and type of employees required; assign work to its employees in accordance with requirements determined by management; establish and change work schedules and assignments, ***.

Section 2. The management rights as set forth above are retained solely by the Company and shall not be impaired by an arbitration award under Article V or any other provision of this Agreement.

ARTICLE V, GRIEVANCE PROCEDURE

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Section 3(A). Any grievance to be considered under the above procedure must be filed within four (4) working days after the occurrence of the event giving rise thereto, or within four (4) working days after the aggrieved employee has knowledge of such event or could reasonably be charged with knowledge of such event.

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Section 5. The arbitrator shall be bound by the facts and the evidence submitted to him in the hearing and the issues involved in the

grievance. The decision of the arbitrator shall be final and binding upon both parties, provided the arbitrator shall have no authority to add to, subtract from, nullify, or modify any of the terms or provisions of this Agreement, or to impair any of the rights reserved to the Company or the Union by the terms thereof, either directly or indirectly; nor shall he have the power to substitute his discretion for that of the Company in any matter where the Company has not contracted away its right to exercise such discretion.

ARTICLE VIII, HOURS OF WORK, OVERTIME AND SHIFT PREMIUMS

Section l. The payroll week shall begin with the first shift that begins on Monday and end with the last shift that starts the following Sunday.
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Section 9. Whenever there is an insufficient number of employees who volunteer to cover overtime requirements, the Company may require employees to work overtime starting with the most junior qualified employee in the classification, present in the department, per shift. All employees will work a reasonable amount of overtime when requested or scheduled to do so by the Company unless excused by their supervisor. Upon request by an employee, the Company will allow an eight (8) hour break from the end of his required overtime until he is required to report back to work. Whenever employees not at work are required to report early, the Company will first telephone qualified employees who have volunteered and then call employees in reverse order of seniority. The Company will maintain a seniority roster and a volunteer list for each department. Upon request stewards will have access to these lists. No employee will be required to work more than one (1) double shift during a workweek or more than twelve (12) hours on any other day.

Contentions of the Parties

A. The Union

The Union first contends that the grievance was timely filed. The alleged violation of the Agreement occurred on April 17, 2012, and a timely grievance discussion took place on the following day. Thereafter the Union processed the grievance at every level of the grievance procedure in a timely manner. The Company's argument that the grievance is untimely,

based on the fact that previous grievances were filed on the same issue, is predicated on the assumption that the same issue can never rise again.

As to the merits of the grievance, the Union argues that the language of the Agreement is clear and unambiguous. The Union notes that the Company's interpretation is that the twelve hour limitation is only triggered after the employee has worked a double shift. Thus the Company could require an employee to work fifteen hours and fifty-nine minutes (presumably every work day) without triggering the twelve hour limitation. The Company's argument would clearly circumvent the clear intent of the Agreement to limit overtime hours. There is nothing in the language of Article VIII, Section 9 that states that the twelve hour limitation applies only after an employee has worked a double shift.

B. The Company

The Agreement clearly requires that a grievance must be filed within four days after the occurrence of the event giving rise to the grievance or after the grievant has knowledge of such event or could reasonably be charged with such knowledge. The Union has known of the practice being challenged in this grievance since at least October 27, 2008. Therefor the grievance is untimely.

Regarding the merits, nothing in the Agreement limits the Company from requiring an employee to work for more than twelve hours in a workday, except when the employee has already worked a double shift during that workweek. That the Union may have intended the twelve hour

limitation to apply, even if a double shift had not yet been worked is irrelevant. The language drafted by the Union was not consistent with its supposed intent. The Company's interpretation of the Agreement has been applied since at least 2004, and the Union was aware of the interpretation at least no later than 2008. The Union's acceptance of the Company's behavior over a period of years clearly shows that the Union knew full well that the Company had the right to take this action. Finally, the Company's interpretation of the language is the more logical of the two interpretations. The language of Section 9 first establishes that no employee can be required to work more than one (1) double shift in a work week. Then, in the context of this same double shift prohibition, it prohibits the employer from working an employee more than twelve (12) hours on any other day. While the draftsman of this language omitted the clause "in the same work week," this meaning is implicit from the context of the sentence.

Discussion

A. Timeliness

The Company did not raise the timeliness issue during the grievance processing, but the Agreement does not preclude either party from raising a procedural issue for the first time in arbitration. The Union did file at least three prior grievances regarding alleged violations of Section 9. But in attempting to preclude the Union from filing additional grievances regarding this issue, the Company is making too much of too little. The general rule is that acquiescence by one party to violations of the Agreement by the other precludes action about the past transactions. It does not preclude a

challenge to future actions.[1] In cases such as this the general rule is a good one. A party may have many reasons for not pursuing a grievance – poor facts in the specific case, weak or uncooperative witnesses, lack of resources, or other more pressing issues. Nothing in the Agreement forever bars either party from raising issues in a grievance which were raised in a previous grievance but not pursued to arbitration or resolved through a binding settlement. Because the Union filed this grievance within four days of the specific incident which gave rise to the grievance, the Arbitrator finds that the grievance is timely.

B. The Merits

The first place to begin when interpreting the Agreement is the language of the Agreement itself. There is really only one sentence of the Agreement at issue. It states, "No employee will be required to work more than one (1) double shift during a workweek or more than twelve (12) hours on any other day." The Company would read this language to mean, "No employee will be required to work more than one (1) double shift during a workweek or more than twelve (12) hours on any ~~other~~ **subsequent** day." Unlike the Company's interpretation, the Union's does not place limits on the phrase "any other day" in Section 9. This phrase does not place the limitations only on days worked after a double shift. Instead it applies the twelve hour limits to <u>any other day</u> in the workweek. However, even if the Company's interpretation were equally as plausible as the Union's, the Arbitrator would reject it because it would have illogical results and would

[1] See generally, Elkouri & Elkouri, *How Arbitration Works*, 448-450 (6th ed.2003).

not further the obvious intent of the Agreement to limit, at least to some degree, the amount of mandatory overtime assigned to employees.

The illogical results are obvious. The amount of mandatory overtime that could be assigned to an employee during a workweek under the Company's interpretation would be largely dependent upon when during the workweek the employee was assigned to work a double shift. If the employee were assigned to work a double shift on the first day of the workweek, the employee could not be assigned more than twelve hours work on any other workday. In contrast a co-worker could be assigned to work up to 15 hours and fifty-nine minutes every day of the week until the last day, and then could be assigned a double shift. Thus, assuming a five-day work week, the first employee could only be required to work sixty-four hours, while the second could be required to work seventy-nine hours and fifty-six minutes during the same workweek. The Company provided no evidence or argument that this result was logical, or that there was a clear intent of the parties to adopt it. In addition, this interpretation would do little to further the intent of the parties to limit mandatory overtime, because at its extreme, employees would receive almost no relief from the burdens of daily double shifts. In sum, the Arbitrator finds that the language prohibits the Company from requiring employees from working more than twelve hours a day, with the exception of one double shift assignment during a workweek.

The Company further argues that there is a long-standing past practice supporting its interpretation. The Company's support for the existence of such a practice is not especially strong. Although the

Company's Vice President for Human Resources testified that this practice existed at least since 2004, the only evidence of employees actually being assigned more than twelve hours work in a workday were the three Union grievances discussed above. These three incidents do not demonstrate a clear, consistent, frequently repeated, and longstanding practice.[2] Moreover there was no evidence that this practice was regarded by the Union as the correct and customary application of the Agreement. Indeed, in the three instances shown to have occurred the Union protested the Company's conduct through the early steps of the grievance procedure. Under these circumstances the Company has failed to prove that a binding past practice sufficient to overcome the language of the Agreement exists.

AWARD

1. The Grievance is granted.

2. The Employer shall not require employees to work more than twelve hours in a workday, with the exception of one double shift in a workweek.

Dated this 24th day of October, 2012

Stephen E. Alpern

Arbitrator

[2] See, generally, "Past Practice And The Administration Of Collective Bargaining Agreements," Proceedings of the Annual Meetings of the National Academy of Arbitrators, 30-68 (Mittenthal, 1961).