

**IN RE ARBITRATION BETWEEN:**

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**GLASS MOLDERS POTTERY PLASTICS AND ALLIED WORKERS INTERNATIONAL  
UNION LOCAL 63B**

**and**

**PROGRESS CASTINGS GROUP, INC.**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 070608-57415-3**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**February 4, 2008**

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Glass Molders, Pottery, Plastics and Allied  
Workers International Union Local 63B,

and

DECISION AND AWARD OF ARBITRATOR  
FMCS CASE # 070608-57415-3  
Elimination of the four 10-hour shifts

Progress Castings Group.

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**APPEARANCES:**

**FOR THE UNION:**

Roger Jensen, Jensen, Bell, Converse & Erickson,  
Dale Jeter, Business Representative  
Richard Ross, Business Representative Retired  
Nicholas Hill, Union Steward

**FOR THE EMPLOYER:**

Richard Ross, Frederickson and Byron  
Linda De Rosa, Human Resources Manager

**PRELIMINARY STATEMENT**

The hearing in the matter was held on November 20, 2007 at 9:30 a.m. at the Federal Mediation and Conciliation Service in Minneapolis, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on January 4, 2008 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement dated October 1, 2005 through September 30, 2008. The grievance procedure is contained at Article 6. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties also waived the 5 day requirement found in Article 6 Step 6 for the issuance of a decision in the matter.

**ISSUES**

The issues are determined to be as follows:

1. Whether the grievance is timely?
2. Whether the Company violated the collective bargaining agreement when it unilaterally eliminated all four 10-hour day shifts for some employees effective March 5, 2007 and for all other employees effective May 7, 2007? If so what shall the remedy be?

## **UNION'S POSITION**

The Union took the position that the matter was timely filed and that the contract and the Letter of Intent attached to the contract calls for employees to select either 8- hour or 10-hour shifts. In support of this position the Union made the following contentions:

1. On the question of procedural arbitrability and timeliness, the Union noted that while the first announcement of the elimination of 10-hour shifts may have come as early as January 23, 2007, the actual elimination of these 10-hour shifts was not done until March 5, 2007. The grievance involved in that matter was filed on February 12, 2007, prior to the effective date of the elimination of the shifts announced in January. The Company announced that it would unilaterally eliminate all of the four 10-hour shifts for the rest of the employees on or about April 1, 2007 effective May 7, 2007. The grievance on that announcement was filed on April 4, 2007, again prior to the actual date of the implementation of the Company's decision

2. The Union noted that these two grievances were thus both timely and were consolidated by letter date May 18, 2007. There was no objection raised by the Company to the consolidation of these grievances up to the arbitration hearing.

3. The grievance procedure calls for six steps. If the initial attempt at resolution of the dispute is not reached then within one business day the matter is taken to the shop committee. If no resolution is possible there the matter is taken to the manager within two business days. If no resolution is possible there the matter is reduced to writing within two business days setting forth the nature of the grievance and the provisions allegedly violated. That is to be presented to the Director of Operations or the General Manager within five business days. If it is not resolved at that step arbitration must be requested within 10 business days.

4. Here the grievances were actually filed weeks *before* the actual implementation of the decisions to eliminate the 10-hour shifts. The Union cited several lines of arbitral authority and cases that hold that the time for filing a grievance does not run until the actual event occurs. The simple announcement of the decision does not start the time clock running.

5. On the merits, the Union pointed to the language of Article 7 Section 1 that provides in relevant part: “Hours of operation for a standard workweek will consist of either eight-hour shifts, five days per week (Monday – Friday) or ten-hour shifts, four days per week (Monday – Thursday). ... “

6. The Union argued that the Letter of Intent signed by the parties and attached to the agreement as an addendum. That provides as follows: “We will honor the existing contract to staff these cells (Article 7, Section 1, paragraph 3. Each employee hired prior to June 1, 1998 will be allowed to select either eight (8) hour or ten (10) hour shifts as their standard work week.”

7. The Union asserted that the above language is clear and unambiguous and requires that employees hired prior to June 1, 1998 have the option of selecting 8-hour or 10-hour shifts.

8. The Union also asserted that the language of Article 7, Section 1 defines the standard workweek as follows: “Seven (7) days, up to twenty four (24) hours each, will constitute the standard work week for all shifts.” The language also provides that “in the case of a reduction of work, the Company reserves the right to adjust the standard work week to meet the needs of the business.” The Union argued further that the latter language that the term “standard work week” is defined by the first sentence of Article 7 Section 1 and that the number of hours per shift or the number of shifts per week is not contained in that definition. Thus while the Company can certainly decide not to operate on a 24/7 basis due to the needs of the business, the language of the Letter of Intent and the contract does not allow it to unilaterally change the contractually guaranteed 4 10-hour shifts.

9. The Union pointed to the Letter of Intent that specifically allows for the creation of five 8-hour shifts for the 355 and 356 cells but limits that number to less than 80 employees. More importantly, the Union argued most strenuously that the language of the Letter of Intent specifically promises that the Company will *not* change the work times for employees working in: HD Heads, HD Crankcases, Sand Foundry, M & A (All products except for Teledyne, Teledyne will be moved to 355 cell), Maintenance, Shipping and Receiving and Cores (Except for the 355/356 cell).

10. The Union pointed to the extensive bargaining history between these parties and noted that the Company has tried without success to change this language to give it the right to schedule all employees on a five 8-hour shift basis. The Union has rejected that proposal every time. In fact, the Union notes, the Company first proposed the four 10-hours shifts initially in order to decrease the amount of overtime it was paying. The Union accepted this proposal during negotiations for a prior contract and the Company is now simply seeking to go back on that agreement unilaterally.

11. The Union offered as an alternative only, that in fact there has been no real downturn in the Company's business. The Union asserted that what is really happening to cause the drop in hours and number of employees at the Plymouth, Minnesota plant is the transfer of work from the Union shop there to the non-Union shop now located in Iowa. The Union asserted that the claim by the Company is merely a subterfuge to send work to its non-Union facility.

12. Further, the Union argued that the Company sought to change the language of Article 7 to delete the requirement that certain employees be allowed to select their shifts but were unsuccessful. Thus, the bargaining history supports the Union's claim that the parties were well aware of what this language meant or the Company would not have attempted to change it to delete the selection of shift language from it. The Union asserted that the Company is now simply trying to get through arbitration what it was unsuccessful in gaining in bargaining.

13. The Union countered the Company's claim that the language was deleted from this contract by pointing out that the language allowing the selection of shifts for employees hired prior to June 1, 1998 was already in several of the prior agreements in the Letter of Intent. There was no reason to have it in the contract twice. Accordingly, it was taken out of Article 7 but retained in the Letter of Intent.

14. The Union also asserted that the Company has not in reality been facing the sort of dire competitive consequences it claimed and that what in fact is happening is that the Company is simply sending work that had been done at its Union plant to one that is not Unionized.

15. The essence of the Union's claim is that the grievance was timely filed and that the contract is clear on its face in its requirement that certain employees be allowed to select their shift. The Company tried to get the Union to agree to delete this language; they were unsuccessful and the arbitrator must enforce the requirement.

The Union seeks an award ruling that the grievances were timely filed and procedurally proper. On the merits, the Union seeks an award ordering the Company to reinstate the four 10-hour shifts pursuant to the Letter of Intent for all employees except those in the 355 and 356 cells. The Union did not seek back pay or other monetary damages in any way. Further the Union conceded that the Company could be given up to 30 days to implement the arbitrator's award in this matter.

**COMPANY'S POSITION:**

The Company took the position that the grievance is untimely and should be dismissed on the basis of procedural arbitrability. The Company further took the position that the grievance was defective on the merits based on the language of the contract. In support of this the Employer made the following contentions:

1. The Company first asserted that the grievance was untimely and should be dismissed. The Company pointed to the first grievance filed in this matter dated February 1, 2007. That grievance alleged that “The Company is forcing Union members to change hours of work in violation of the CBA and letter of intent.”

2. The Company pointed out that the Company made the Union aware of the change to 8-hour shifts on several occasions and as early as January 23, 2007, See Company Exhibit 1. It also advised the Union of the Company’s intent to move away from the 10-hour shifts to 8-hour shifts in labor management meetings in January and February of 2007 as well. See Company Exhibits 2 and 3.

3. The grievance dated 2-12-07 is thus untimely filed as it was outside of the time deadlines provided for in Article 6 of the contract. The Company also asserted that the Union’s attempt to place the first grievance “in abeyance” should similarly be rejected. There is no provision in the labor agreement to do this and the Union’s unilateral attempt to hold this grievance pending the re-filing of a second grievance alleging the same thing is outside of the provisions of the parties’ grievance procedure.

4. The Company further pointed out the grievance dated April 4, 2007 is for the same alleged contract violation See Joint Exhibit 5, which provides the “management is eliminating the 4-10’s shift.” That grievance also seeks the same remedy as the earlier February 12, 2007 grievance and the Union’s attempt to essentially re-file the grievance date April 4, 2007 should be rejected.

5. On the merits, the Company pointed to the language of Article 7, Section 1 as well but cites to a different provision as follows: Seven (7) days, up to twenty-four (24) hours each, will constitute the standard workweek for all shifts. In the case of a reduction of work, the Company reserves the right to adjust the standard work week to meet the needs of the business.” The Company argued that this provision gives it the right to change any aspect of the workweek, including the shifts, to meet the need of the business.

6. The Company further pointed out that it has been in a reduction in force mode for some time and that the number of hours and Union personnel has been reduced since the first quarter of 2006. See Company Exhibits 7 and 8. Thus the provisions of the language cited above give it the right to alter any part of the workweek, including the right to change the shifts. The Company further argued that the needs of production now dictate that it must go to 5 8-hour shifts to stay competitive.

7. Moreover, in response to the Union's claim that the Company tried to change this language in negotiations, the Company pointed out that the Union attempted to delete the "hired prior to June 1, 1998" out of the agreement. The Company did not agree to this as it would have given all employees the right to change shifts, not simply those hired before June 1, 1998 and that language was not deleted from the agreement. The Company argued that what was changed was the paragraph that had been in the June 1, 2004 through September 30, 2005 agreement at Article 7 Section 1 providing that "each employee (hired prior to June 1, 1998) will be allowed or select either eight-hour (8) or ten-hour (10) shifts as their 'standard work week.' "

8. The Company noted that Article 7 contains new language that deleted the specific reference to the workweek and that this language should take precedence over the Letter of Intent found at the end of the agreement. Moreover, the business conditions present at the time that was negotiated have now changed necessitating that the 10-hour shifts be eliminated.

9. The Company further argued that it is not trying to gain something in arbitration that it was unable to gain through negotiations since the question of the 10-hour shifts was not brought up during the 2005 negotiations. At best the question of the 10-hour shift was a minor topic of conversation and was quickly dropped. The Union offered to drop certain language from Article 7 and the Company simply accepted that offer.

10. The essence of the Company's claim on the merits is that the needs of the business have changed and that the language of Article 7 clearly allows it to change shifts as needed.

The Company seeks an award denying the grievance in its entirety.

## MEMORANDUM AND DISCUSSION

Initially it must be determined whether the grievance can even be addressed on the merits. The Company alleged that this matter is untimely and must be dismissed on that basis. The Company pointed out that it began discussing the elimination of the 10-hour shifts for certain employees as early as January 23, 2007 and over the next few weeks in labor management meetings. The Company alleged that the grievance filed February 12, 2007 was not done within the time frames found in the grievance procedure in Article since it was not filed in writing within 5 days of the Company's first announcement of the elimination of the 4 10-hour shifts for certain employees on January 23, 2007.

The Company announced on or about April 1, 2007 that it would eliminate the 4 10-hour shifts for the remainder of the employees effective May 7, 2007. The grievance over this announcement was filed on April 4, 2007.

The grievance dated February 12, 2007 alleging that the Company was "forcing Union members to change hours of work in violation of the CBA and Letter of Intent" was denied on several grounds, including timeliness. See Company Exhibit 5. This was based on the fact that the Union was first notified of the Company's intent to change the shifts on January 23, 2007 and the written grievance was filed outside of the 5 day time frame provided for in Article 6. The evidence however also showed that while this was announced on January 23, 2007 it was to be further discussed later on. The evidence also showed that there were several subsequent meetings between the parties where this subject was also discussed. More importantly, the evidence showed that the actual implementation of the Company's decision to eliminate the four 10-hour shifts for the employees listed on the February 12, 2007 grievance was not actually done until March 5, 2007.

The Company also raised a procedural objection to the placing of the first grievance in abeyance in the matter and argued that the only matter before the arbitrator is the April 4, 2007 grievance. The Company further argued that there was no agreement to consolidate these two grievances and that the arbitrator's jurisdiction extends to the 50 or so employees covered by the April 4, 2007 grievance.

The evidence showed that the Union filed the grievance but then sent a letter dated May 18, 2007, several weeks after the filing of the second grievance over this apparent same issue, indicating that grievance 63B-03-07 (the 2-12-07 grievance) would be "left open" in reference to grievance 63B-24-07 (the 4-4-07 grievance.) There was no evidence of a formal response to this nor was there any evidence of an objection to the May 18, 2007 letter.

The evidence showed that the Company announced the change for some employees in January and for a second set of employees in April. The evidence further showed that the decision to change the shifts for some of the employees, while announced on or about April 1, 2007, was not implemented until May 5, 2007. The Company argued that the grievance filed April 4, 2007 over the April 1, 2007 announcement must be untimely since it was filed 17 days after the first announcement of the decision to implement this change on January 23, 2007. This argument is unpersuasive.

Elkouri notes that "A party sometimes announces its intention to do a given act but does not do or culminate the act until a later date. Similarly, a party may do an act whose adverse effect upon another does not result until a later date. In some such situations arbitrators have held that the 'occurrence' for purposes of applying time limits is at the later date." See, Elkouri, and Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed, at page 280. Here this appears to be the most reasonable theory as well.

Clearly, this grievance was filed well prior to the effective date of the implementation of the change in dispute. To require the Union to file a formal grievance on something that has not actually happened yet places a chilling effect on efforts to resolve issues before they become grievances in the first place. Similarly, to deny this grievance on the basis that there was an announcement made in January to change schedules for different employees than those covered by the instant matter, which was grieved in February for a change that actually took place in March would be unduly harsh and bordering on the absurd.

The Union also cited several persuasive awards in its Brief for this proposition as well. Arbitrator Solomon's statements on this point in *Wisconsin Bridge and Iron Company and Iron Workers Union Local 471*, 46 LA 993, 997 (Solomon 1966) are most cogent and are certainly persuasive here. The mere announcement by a party of its intention to act does not necessarily obligate the other party to grieve the anticipatory breach at once. As Arbitrator Solomon notes, the rights of the non-defaulting party are in the alternative. That party may bring the grievance immediately or wait until the actual implementation of the act itself.

Here the grievance procedure speaks only in terms of a "dispute" and contains certain time frames within which the formal grievance must be filed. The greater weight of arbitral authority here is persuasive that the dispute occurred either when the announcement was made or when the implementation of the decision was done. Allowing the latter date does no harm to either the Company or to the parties' grievance procedure. Through further discussions, as was anticipated with the January 2007 announcement anyway, the parties could well have negotiated or agreed to something that would obviate the need for a grievance. While that did not occur here, that prospect is always open and is part and parcel of the notion of a living document called the collective bargaining agreement.

The final issue deals with the question of which employees are covered by the respective grievances here and whether it is procedurally proper to have consolidated the grievance for hearing in this matter.

The Company argued that the only grievance at issue in this matter is the April 4, 2007 grievance. The Union indicated at the hearing that this was the case, yet in its Brief asks the arbitrator to consider all the employees, i.e. those covered by the February 12, 2007 grievance and the April 4, 2007 grievance. See, Joint Exhibit 5.

While the parties may have a continuing dispute about whether the February 12, 2007 grievance is still open that will have to await another day and perhaps another arbitration to determine that. The arbitrator's jurisdiction in this matter is limited to the April 4, 2007 grievance as that was the one submitted by the parties themselves for determination. Thus any remedy or award will pertain only to those employees covered by that grievance. Obviously no opinion or determination is made with regard to the earlier grievance as that is not before me at this time. Given these facts, it is determined that the April 4, 2007 grievance is not untimely nor procedurally improper and should proceed on the merits.

On the merits, the parties diverged greatly not only to the meaning of the relevant contract language but also on some cogent facts regarding the negotiation history of the language involved in this case. As always in a case involving contract interpretation the first place to start is with the language itself. Here that entails a review of the language of Article 7 and the Letter of Intent attached to and made part of the parties' labor agreement.

As noted above, Article 7 Section 1 states in relevant part as follows:

Seven (7) days, up to twenty four (24) hours each will constitute the standard workweek for all shifts. In the case of a reduction of work, the Company reserves the right to adjust the standard workweek to meet the needs of the business.

Hours of operation for a standard workweek will consist of either eight-hour (8) shifts, five days per week (Monday – Friday), or ten-hour (10) shifts, four days per week (Monday – Thursday), or twelve-hour (12) hour shifts, three days per week. In the event of emergency situations, the Company will accommodate change in “standard work week” as they are presented.”

The Company argued that the last sentence of the first paragraph allows the Company to change virtually anything about the standard work week, including either the number of hours in the shift or the shifts themselves, as a part of the reservation of the right to “adjust the standard work week” as the needs of the business dictate. The Company asserted that it is currently experiencing a downturn in the amount of work and that this is thus a “reduction of work” within the definition of the language. This gives the Company the right to change the total hours in the work week or the shifts to meet the needs of the business.

The Union on the other hand argued that the term “standard work week” is defined by this language as the “7 days up to 24 hours per day work week.” While the Company has the right to reduce the number of hours in a work week where there is a reduction of work it does not have the right to change number of hours per shift or the number of shifts per week since those are not contained in the definition of “standard work week.” The Union argued that the second paragraph of Article 7 Section 1, actually supports this view since it uses the term “hours of operation” as a modifier to the term “standard work week” clearly implying that the two terms are separate and not one in the same.

This argument boils down to what the parties meant by the term “standard work week.” Does it include only the number of hours as set forth in the language of the first paragraph or does it include the number and hours of the shifts that may fall within the standard work week? This could well be the sort of esoteric argument that only a high school English teacher could love and would be a most difficult proposition were it not for the Letter of Intent and the other evidence in the matter.

If the only language pertaining to this issue were the first paragraph of Article 7 the Company's argument would have greater merit. It is not the only language relevant to this issue however. There is also the second paragraph of Article 7 Section 1 that appears to treat the *standard work week* separately from the *hours of operation* for the standard work week. The language of the first paragraph appears to grant to the Company only the right to adjust the standard work week, which here is defined as 7 days up to 24 hours each. However, there generally must be some language limiting the general right of management to set the schedules and work hour of the employees. Here there is.

The Letter of Intent gives guidance as to what the parties intended with this language and with regard to the right of the Company to adjust the shifts as a part of its right to adjust the standard work week. That language is far clearer and provides ample support for the Union's claims here.

The evidence revealed that the parties have been negotiating over the shifts for several rounds of bargaining. Prior to 1998 the contract contained only a provision for 5 8-hour shifts. See, Joint Exhibit 4, the 1998-2001 contract. In 1998 the parties negotiated a 10-hour 4 day shift as well as the 12 hour 3 day shift. See Joint Exhibit 3, the 2001-2004 contract. This was done at the behest of the employer. The Union had concerns about this cutting into overtime but agreed to the provision. That contract also contained an "escape" clause stating essentially that the starting point for negotiation for the next contract would be the 5 day 8-hour shift found in the prior agreements. Neither party chose to use this language in the 2001-2004 negotiations and it was dropped from the contract.

The evidence showed that the Company raised the question of eliminating the 10-hour shifts at the very beginning of the 2004-2008 negotiations. The Company argued that this was not truly a bargaining proposal and that it was simply made in passing. It was not clear exactly how this was brought up but the Union's witness on this point testified credibly that it was in fact raised by the Company's negotiator at bargaining and was flatly rejected by the Union. No evidence to the contrary was adduced at the hearing by the Company and the Union's version of what occurred during bargaining for the most recent contract is therefore accepted as credible and probative.

More importantly, the language pertaining to the rights of certain employees to exercise the right to retain their 10-hour shift was removed from the language of Article 7 but remained in the Letter of Intent. The Union witnesses again testified credibly that they agreed to this because the parties agreed at the bargaining table that the Letter of Intent would continue to cover the remainder of the employees and allow them to lock in their 10-hour shifts. Indeed, the evidence showed that the Letter of Intent was retained with a minor change to the hours listed at the end of it to reflect the actual hours the employees were working. Significantly, the language of the Letter of Intent contained at page 43 of the parties' current agreement clearly contains the language "we will not change the work times for employees working in: HD Heads, HD Crankcases, Sand Foundry, M & A (All products except for Teledyne, Teledyne will be moved to 355 cell), Maintenance, Shipping and Receiving and Cores (Except for the 355/356 cell)." Based on this assurance the parties signed the current agreement.

Both the language and the negotiation history amply support the Union's claims that the Company agreed to that limitation language in the agreement and may not change the work time for the employees listed in the Letter of Intent. One can scarcely imagine a clearer pronouncement of the parties' intent. When coupled with the negotiation history this conclusion becomes even clearer.

The Company argued in its Brief that the specific language of the Letter of Intent cannot be used to trump the more general language of Article 7. Basic concepts of contract interpretation dictate that the more specific language does indeed trump general language. Here the specific language of the Letter of Intent gives very real meaning to Article 7 and what the Company has negotiated here.

The Company further argued that the Letter of Intent was negotiated in response to an opportunity for an increase in work. There was no evidence of that allegation made at the hearing however. Further, clear contract language and agreements signed by the parties giving meaning to their intent and their contract language it cannot be simply abrogated when one party believes that it is no longer advantageous to continue to live under it. The Company must negotiate its way out of this. The arbitrator cannot impose different language on the parties simply because times have changed.

Having determined that the Union's argument regarding the meaning of the language Article 7 and the Letter of Intent have merit, it is unnecessary to determine the remainder of the Union's claims that the Company did not in fact facing a true reduction in force and was simply transferring work to its non-Union facility under the cover of a reduction in force. That question is moot given these prior determinations.

Accordingly, the grievance is sustained for the employees covered by the April 4, 2007 grievance. The Company is ordered to reinstate the 4 day 10-hour shifts for all employees covered by the April 4, 2007 grievance within 30 days of this Award. As noted herein, no decision is made with regard to the February 12, 2007 as the arbitrator was without jurisdiction to hear that matter.

### **AWARD**

The Grievance is SUSTAINED. The Company is ordered to reinstate the 4 day 10-hour shifts for all employees covered by the April 4, 2007 grievance within 30 days of this award.

Dated: February 4, 2008

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Jeffrey W. Jacobs, arbitrator

GMP and Progress Castings Group