

IN RE ARBITRATION BETWEEN:

IBEW #949

and

HICKORY TECH CORPORATION

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 070618-57685-3

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February 4, 2008

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DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 070618-57685-3
Overtime Grievance matters

Hickory Tech Corporation.

APPEARANCES:

FOR THE UNION:

Connie Howard, Metcalf, Kaspari, Howard, Engdahl,
& Lazarus
Rick Oakes, Bus. Representative IBEW #949
Mike Kaufman, Bus. Representative IBEW #949
Justin Anderson, Chief Steward IBEW #949
Anna Brush, Facilities Clerk, Hickory Tech
John Johanssen, Cable Department, Hickory Tech

FOR THE EMPLOYER:

Robert Hobbins, Dorsey & Whitney
Joel Anderson, Dorsey & Whitney
Mary Jacobs, Vice Pres. of HR, Hickory Tech
Scott Walker, Hickory Tech
Kari Juni, Hickory Tech
Damon Dutz, Pres. Network and Consumer
Solutions
Janet McCullough, Human Resources Mgr.

PRELIMINARY STATEMENT

The hearing in the matter was held on December 6, 2007 at 9:00 a.m. at the Hilton Garden Inn, in Mankato, MN. The parties presented oral and documentary evidence at that time and submitted post hearing Briefs on January 22, 2008 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated April 1, 2007 through March 31, 2010. The grievance procedure is contained at Article IV. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator. The parties also agreed that the instant grievance was to be treated as a class action grievance for all similarly situated employees after April 17, 2007.

ISSUE

The parties stipulated to the issue as follows: Has the Company violated any provisions of the collective bargaining agreement by treating assignments to work different hours than an employee's regularly scheduled shift or work day for a single day as a change in the employee's posted schedule, pursuant to Article VII, sec. 7.14, rather than as overtime/call out pursuant to Article VII, sec. 7.04 or 7.05, in cases where the employee is notified of the assignment by noon of the Friday of the preceding week? If so what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article II, Section 2.02 - Management Rights Clause

(a) The Company shall have the exclusive control, direction and supervision of operations and working forces and shall have the right to change, eliminate and establish jobs as required.

(c) (1) All employees in the Plant Department can be scheduled at any time to do and perform any and all telephony work provided no employee of the Plant Department is deprived of any regular employment.

(e) Except to the extent specially abridged by a specific provision of this Agreement, the Company reserves and retains solely and exclusively all of its inherent rights to manage the business as such rights existed prior to the execution of the Union Agreement.

Article VII - Hours and Wage Payments

Section 7.02 Forty hours consisting of five eight-hour days within the calendar week shall be the normal work week, regardless of the hours of the day or the day of the week, payments which are covered in the current wage agreement, hereinafter set forth. (A shift shall be considered as falling on the calendar day in which it begins, and any continuous work period extending through midnight shall be considered as part of the calendar day in which the shift started.)

Section 7.03 No shift shall be scheduled to work more than eight hours in any one twenty-four hour period or longer than 40 hours in a calendar week. The Union agrees that this Article in no way restricts or prohibits the Company from scheduling overtime when and if required.

Section 7.04 (a) If any employee continues to work after his regular work day or shift has ended, he shall be paid at the rate of 1½ times the regular rate for the first five hours of overtime worked, thereafter he will be paid at the double time rate until he is released for an eight hour rest period.

If the eight hour rest period includes a portion of the employee's next regularly scheduled work day or shift, the employee shall be paid straight time for that portion of the rest period falling within his scheduled work day or shift.

An employee called back during his rest period shall be paid double time for the hours worked until released for an eight hour rest period.

(b) If the Company has informed the employee of overtime with at least 24 hours advance notice and such overtime will occur four (4) hours or less prior to the employee's regular work day or shift, they shall be paid at the rate of 1½ times the regular rate for only such overtime hours worked prior to the employee's regular work day or shift.

For overtime prior to the employee's regularly scheduled work day or shift, Section 7.05 will apply if the employee is informed of the overtime with less than 24 hours advance notice of the start of such overtime or if the scheduled overtime is more than four hours prior to his regular work day or shift.

Section 7.05 A call out shall be defined as any call to return to work after an employee has been released from his regular work day or shift. All call out time shall be paid at 1½ times the regular rate for the first five hours and double time for all hours thereafter, except as provided in Section 7.06. All call out time occurring after midnight shall be at double the regular rate.

If an employee has worked five hours or more on call out and does not have an eight hour rest period before the start of his regular work day or shift, he shall continue to receive double time for all hours worked until released for an eight hour rest period.

An employee called back during his rest period shall be paid double time for the hours worked until released for an eight hour rest period.

If the eight hour rest period includes any portion of the employee's next scheduled work day or shift, the employee shall be paid straight time for that portion of the rest period falling within his scheduled work day or shift.

The minimum to be paid for any call out time shall not be less than two hours at the applicable rate. However, the two hour minimum for call out shall not apply when an employee is called out less than two hours preceding his work day or scheduled shift and continues working into his shift or regular work day.

Section 7.06 Work performed on the sixth day succeeding any regularly scheduled five day work week shall be paid for at the rate of 1½ times the regular rate for a period of eight hours and double time thereafter. The Plant Department will receive two times the regular rate for hours worked on Sunday, provided that where Sunday is a scheduled day for a plant employee, he shall be paid time and one-half for the first eight hours worked on Sunday and double time thereafter, provided, further, that not more than three (3) employees from the Central Office occupational group shall be so scheduled for Sunday work. Not more than two (2) employees from the occupational groups of Customer Service Technicians, Service Clerk, Construction and Cable Splicers shall be so scheduled for Sunday work. In no event will overtime be pyramided on overtime.

Section 7.07 Work performed on the seventh day succeeding any regularly scheduled five day work week in which eight hours work were performed on the sixth day shall be paid for at the rate of two times the regular rate, and such double time payment shall continue until a relief of at least eight hours has been provided.

Section 7.11 Employees shall not be required to take time off for the purpose of off-setting overtime worked.

Section 7.14 The Company will determine work schedules for the Plant Department covering one (1) calendar year from January 1 to December 31, which schedules will be posted by the first of December. In all cases, including employees scheduled for non-consecutive work days within a work week, the employee's first scheduled day off following Sunday shall be deemed to be his sixth day, and his second scheduled day off (which may fall in the following calendar week) shall be deemed to be his seventh day off for the purpose of computing overtime pay as provided by Article VII, Section 7.05 and 7.06 of the labor contract. If a sixth or seventh day is worked, no overtime shall be paid for work during the regular shift scheduled in the first through fifth work days of the work week as posted.

When made necessary by service requirements, the Company may change the posted schedule. If the employee is notified of a schedule change by 12:00 noon on the Friday preceding the calendar week in which the change is to be effective, the employee's new schedule will be considered the posted schedule for overtime pay purposes. If less notice is given, and the employee directed to work on a scheduled day off may, if service requirements permit, choose another day off during the week affected, in which case the new schedule selected by the employee will be considered to be the posted schedule for overtime purposes. If the employee does not select another day, or if service requirements do not permit another day off, the employees shall work the posted schedule, including the scheduled day off, which shall be deemed to be his sixth or seventh day for overtime pay purposes as the case may be.

Section 7.15 An employee's scheduled work hours may be adjusted one hour earlier or later with 24 hour advance notification of such change, unless otherwise mutually agreed. Employee will be paid at the appropriate straight time rate, or if over eight hours worked in that day or forty hours in that week, will be paid at the appropriate overtime rate.

UNION'S POSITION

The Union took the position that the Employer may not alter individual days of a posted schedule by giving the employee notice of a shift change even if the notification is done prior to Friday of the preceding week. The Union argued that the provision and practice of changing shifts applies only to changes in an entire week and is not intended to apply to changes in period of less than a week. In support of this position the Union made the following contentions:

1. The Union and Employer have had a long bargaining relationship going back many decades. Prior to Local 949, Local 292 of the IBEW represented these employees. Prior to 1967 there was no contract language controlling shift and schedule changes nor was there any language requiring the Employer to post schedules in advance.

2. In 1967, in response to grievances filed by Union members at the time, the parties agreed to include the following language in the labor agreement:

Article VII, Section 12.

The Company will determine work schedules for the Plant Department covering two calendar weeks, which schedules will be posted two weeks in advance of the schedule's effective date.

3. The Union also pointed out that the language now relied up by the Employer providing that "when made necessary by service requirements the Company may change the posted schedule" was in that contract as well.

4. This language stayed in the labor agreement with only non-substantive numbering changes until the 1997-2000 contract. At that time, the parties agreed to change the language above to require the Employer to determine the work schedules from January 1 to December 31 and to post those by December 1st. Since the inception in approximately 1967 of the requirement to post those schedules the Employer has always posted them as weekly schedules. The employees would then know what their weekly shifts would be for the year. Any changes would be subject to the provisions of Article VII providing for overtime and premium pay for call outs or requests to work more than eight hours in a day or more than 40 hours in a week.

5. The Union pointed to several attempts to change that language to give the Employer greater flexibility in schedules. The Union pointed to the 2000, 2004 and 2007 negotiations and argued that in all of those the Employer made proposals that would have, if they had been agreed to, given the Employer exactly what it seeks here.

6. The Union argued most strenuously that these bargaining proposals show that the Employer must therefore have known that the Union's interpretation of the language of Article 7 was correct otherwise they would not have sought to change it.

7. The Union pointed to a long line of arbitral precedent for the proposition that a party cannot gain in grievance arbitration what it failed to get in negotiations. Here the Union claimed that the language of Article 7.05 and 7.06 limited the Employer's right to change shifts without payment of overtime pay.

8. The Union asserted that at about the time of the close of negotiations for the 2007 contract, and the consequent failure to gain certain language that would have allowed the Employer to change shifts on a daily basis, the Employer began changing the employee's shifts by noon on Friday of the preceding week but would not change the entire shift. The Employer began changing the shifts for periods of less than week in an express attempt to avoid payment of overtime.

9. The Union cited several examples of these failed requests. In 2000 one Employer proposal would have deleted the language of Article 7.14 that had read: "When made necessary by service requirements, the Company may change the posted schedule" and replaced it with language that would have allowed the Employer to change a regular scheduled work week with 48 hours notice only. The proposal provided in relevant part as follows: "A regular scheduled work week may be changed by the end of the regular day shift 48 hours in advance of the posted schedule change, ... "

10. The Employer also proposed a change that would have allowed it to change scheduled work hours with 24 hours advance notice. This was eventually incorporated in the contract and became Article 7.15. The Union argued that it agreed to this in exchange for the Employer dropping its proposal to change the weekly work schedules as set forth above. The Union claimed that the agreement to change the daily schedules with 24 hours notice was a quid pro quo for the Employer's agreement to drop its request to amend the language of 7.14 as set forth in paragraph 9 above. .

11. During the 2004-2007 contract negotiations, the Employer sought to change Article 7.05 to limit and even eliminate certain double pay requirements for overtime. Further, the Employer sought to change 7.15 to allow for two hour changes in daily work schedules rather than one hour. Finally it asked the Union to agree to change Article 7.14 to allow a change in schedule up to the end of the employee's regularly scheduled shift on Friday of the preceding week. The latter provision had required the notification to be at the end the employee's shift on Thursday.

12. The Employer dropped the first two request for changes in exchange for a change in Article 7.14 allowing a change in the posted shift up to noon on Friday of the preceding week. The Union asserted that the Employer would not have asked for the changes to allow it greater flexibility in altering daily schedules if the language it relies on in Article 7.14 already gave it that right. The Union argued that in fact that language does not give the Employer that right, thus the request to change it. Since those proposals were not adopted, and were specifically rejected by the Union, they should not be allowed now.

13. In 2007, as Union exhibit 9 shows, the Employer attempted to change Article 7.06 to remove all double time and time and one half requirements for regularly scheduled Sunday work. This was rejected. The Employer again attempted to change Article 7.15 to allow for up to a two hour adjustment in an employee's schedule with 24 hour notice. This was the same proposal that had been rejected in 2004 and was rejected again in 2007. See Union exhibit 10.

14. Finally, in 2007 the Employer tried to change Article 7.05 to allow for changes in work schedule prior to the regularly scheduled work day and eliminate double time after the first five hours of call-out time. The Employers proposal would have altered Article 7.05 as follows: "A call out shall be defined as any call to return to work after an employee has been released from his regular work day or shift. **If the Company has informed the employee of a change in their regular work day or work week prior to the end of the previous work day or work shift, it will not be considered a call out.** All call out time shall be paid at 1½ times the regular rate." (Proposed changes in bold).

15. The proposal would have allowed the Employer to tell the employee of a change in work schedule prior to the end of the employee's work day and avoid paying the call out pay called for in Article 7.05. This is precisely the sort of change the Employer is seeking to implement now and the Union argued, essentially similar to changing the posted schedule for periods of less than a week. The Union did not agree to the proposed change in Article 7.05.

16. The Employer modified its proposals and through the process of collective bargaining the parties eventually agreed on the language that now appears in Article 7.05. The current language has no reference to changes in employees' shifts or work days and characterizes assignments outside of the regular work day as call outs for overtime. See Article 7.04 and 7.05.

17. Despite this negotiation history, at the close of the 2007 negotiations the Employer began notifying employees by Friday of the preceding week of changes in their shifts and work days for the coming week. This was done individually and the Union filed individual grievances at first but these were consolidated to a class grievance for purposes of this hearing.

18. The Union provided multiple examples, see Union Exhibit 12, but the scenario was essentially the same. One employee's schedule had been posted as Monday through Friday, 8:00 a.m. to 5:00 p.m. This was changed and the employee was assigned to work from 5:00 a.m. to 1:00 p.m. on Tuesday of the succeeding week. He was not paid overtime pursuant to the provisions of Article 7.04 and 7.05 and the Union contends that he should have been since the Employer did not have the right to change one day of the schedule pursuant to the provisions of Article 7.14 and past practice here.

19. The Union noted that if the parties had intended to allow the sort of change in schedule now sought by the Employer they could simply have included language specifically allowing that in the contract as they had done with a now defunct work group, the Operator Services department. That language had specifically allowed for changes in "hours and shifts" where service requirements made that necessary. There is no such corresponding language in this agreement.

20. The Union chafed at the Employer's argument that it has made these types of changes in the past without objection by the Union. It pointed out that there was perhaps one instance where this has happened and it was for non-dues paying members who did not inform the Union of the change in their schedule. A party cannot be held responsible where it has no knowledge of a contract violation. The Union argued that it did not acquiesce in this practice and would have challenged it if it had known of it when it occurred.

21. The essence of the Union's argument is that the contract language in light of the bargaining history shows that the language relied upon by the Employer is not and was never intended to allow changes to the employees' schedules for less than a week. Moreover, the longstanding practice of the parties to change only a week schedule further supports this interpretation of the language.

The Union seeks an award sustaining the grievance, ordering payment of all overtime/call out premium pay to any affected employees and requests the arbitrator to retain jurisdiction to determine any disputes regarding payment of such overtime and call out pay.

EMPLOYER'S POSITION:

The Employer took the position that there was no contract violation here. In support of this the Employer made the following contentions:

1. The Employer pointed to the Management Rights clause cited above as well as the same provisions in Article VII but had a very different conclusion based on those provisions. The Employer's primary argument was that the Management Rights clause gave it the unlimited right to manage the business, including changing schedules except as specifically limited by the terms of the agreement. There is no language limiting the right of the Employer to change shifts or the days of the week employee's work in the way they are doing now.

2. The Employer further pointed out that not only is there no language limiting its right to change schedules, there is specific language *allowing* it. The Employer pointed to the express language in Article 7.14 as follows: "When made necessary by service requirements, the Company may change the posted schedule." The Employer argued that this language could not be clearer and specifically allows the change of any part of the shift as long as the requisite notice is given, including the days and the hours. Moreover, since Article 7.14 specifically deals with changes in schedules and shifts it would take precedent over other more general provisions pursuant to well-established contract interpretation principles.

3. The Employer pointed out that this language was placed in the contract in response to three grievances filed in the mid-1960's. One of these grievances involved changing an employee's schedule for one day of the following week and the other two involved demands for non-payment of overtime. The third such grievance involved a claim by the employee that he should have been provided premium pay as the result of a schedule change.

4. The Employer asserted that the settlement of these grievances resulted in the placement of the language cited above in the agreement and that this language made it crystal clear that the Employer retained the right to change any part of the schedule as long as proper notice was given. The concession by the Employer was the notice, not the right to change the schedule. The Employer argued in the most ardent terms that the Union's argument is misplaced and misconstrues what that settlement was about.

5. The Employer also argued that the Union's reliance on Articles 7.04 and 7.05 is misplaced since those provisions govern rates of pay for overtime and call out situations and do not govern schedule changes. Article 7.14 governs schedule changes.

6. The Employer argued that there is no inherent inconsistency in the language of these provisions since Article 7.04 and 7.05 provide for certain premium pay under certain circumstances where changes occur to the employee's posted schedule. Article 7.14 specifically allows for the Employer to change any part of the posted schedule and is not limited to a week only change. Moreover, Article 7.14 provides that "if the employee is notified of a schedule change by 12:00 noon on the Friday preceding the calendar week in which the change is to be effective, the employee's new schedule will be considered the posted schedule for overtime pay purposes." Thus if the Employer does change the posted schedule pursuant to the provisions of Article 7.14 and then makes further changes that fit within the provisions of Article 7.04 or 7.05 or some other provision calling for premium pay, then the appropriate premium pay is due.

7. The Employer also countered the Union's argument that there is a violation of Article 7.15 by asserting that this language was primarily introduced into the contract to deal with necessary employee meetings. Over time there has been some effort to allow for greater flexibility by amending the language from one hour to two hours. While the language has stayed the same over time and allows the Employer to change an employee's schedule for up to one hour earlier or later than the posted schedule with 24 hour advanced notice, the language has nothing to do with the basic right to change the posted schedule. The Employer asserted that it has the right to change the hours or the days of the schedule and that all Article 7.15 does is to limit that right by requiring 24 hours advance notice in order to avoid overtime.

8. The Employer countered the Union's argument that the Employer is changing schedules for the purpose of avoiding overtime by pointing to two facts. First, overtime has actually gone up over time rather than down. The Employer introduced evidence to suggest that the actual hours of available overtime and other premium pay has not in fact diminished over the past few years.

9. Second, the needs of the business have changed significantly over the course of the past few years. The nature of the business has gone from largely providing telephone service to broadband and Internet based services. These latter factors have altered the customer service needs of the business. These needs have coincided with the need to change schedules. The Employer denied that the changes in scheduling that gave rise to this grievance were precipitated by the negotiations nor did it have anything to do with what was negotiated or what was not negotiated into the parties' current collective bargaining agreement.

10. The Employer pointed out that the Union did not dispute that the service requirements of the Employer have changed over time. This is as one might expect given the changing nature of technology and wireless telephone and Internet services. The Company must change with the time and needs the flexibility to schedule its personnel to meet these customer demands to stay competitive.

11. The Employer further disputed the Union's version of the negotiation history and argued that the changes made in the last several contracts did not alter the basic right of the Employer to change shifts.

12. Regarding the proposal to change the language of Article 7.14 the Employer simply argued that the request was to change the notice requirement to only 48 hours notice to give the Employer greater flexibility in the notice requirement. There was no proposal regarding the underlying right to change the schedule, merely the amount of notice. The Employer argued thus that there is not "attempt to regain something in arbitration a party could not gain in negotiation" as asserted by the Union. The Employer never sought to "gain" its right to change any part of the schedule. It always had that right, as limited by the terms of Article 7.14.

13. Regarding the 2004-2007 negotiations, the Employer essentially agreed that it sought to change Article 7.05 to limit certain double pay requirements for overtime and sought to change Article 7.15 to allow for two-hour changes in daily work schedules rather than one hour. Finally it asked the Union to agree to change Article 7.14 to allow a change in schedule up to the end of the employee's regularly scheduled shift on Friday of the preceding week. The latter provision had required the notification to be at the end the employee's shift on Thursday.

14. What was agreed to in the 2004-2007 negotiation however again did not alter or affect the underlying right of the Employer to change any part of employees' shifts. The changes outlined above to Article 7.05 would have eliminated the double time *pay* for certain call out hours but would not have altered the right of the Employer to change shifts with appropriate notice provided for in Article 7.14.

15. Likewise, the changes it sought to Article 7.15 would have allowed for more flexibility in scheduling for meetings but would not have altered or given the Employer any greater right to change schedules. The Employer asserted that it already had that right and wanted simply to expand the limitation in Article 7.15.

16. The Employer again asserted that this change to Article 7.15 would not have been inconsistent with the Employer's existing right to alter schedules pursuant to Article 7.14. Since the Employer has the right to alter the posted schedules pursuant to that language, any subsequent change to it would be subject to the call out or overtime provisions of Articles 7. There was no attempt to "gain" the right to alter shifts on a less than one-week basis.

17. Further, the parties' did agree in the 2004-2007 to change the notice requirement for the change in schedules from the end of the employee's shift on Thursday to noon on Friday of the preceding week. The Employer pointed out that these changes simply gave it some more flexibility in changing schedules.

18. Finally, the Employer pointed out that in the 2004-2007 negotiations, there was specific discussion about change in employee schedules. In the bargaining notes and as testified to by Mr. Dutz, during the discussions about the changes to Article 7.14 Union negotiators specifically asked what did the term "changes in schedule" mean. They were told that it meant "any schedule change – hours or days of week, both or either." See Employer exhibit 8. The Employer asserted that this was not objected to by the Union at that time and that one could scarcely envision a clearer statement of contractual intent than that.

19. The Employer also asserted that it has changed schedules for less than one week several times in the past without complaint by the Union. The Employer pointed to multiple instances in 2006 where employee's schedules were changed as provided for by Article 7.14 for less than one week. There was no grievance filed or issue raised at that time. The Employer thus argues that there is certainly no binding past practice in favor of the Union's position and that if there is a past practice at all it favors the Employer's position since it has been done without objection in the past.

20. The essence of the Employer's argument is that the clear language of Article 7.14 gives it the right to change any part of an employee's schedule, whether that is for less than a week or not. The negotiation history not only does not support the Union's claim it supports the Employer's position since there was specific discussion about what Article 7.14 meant and the Union clearly was told and understood that it meant the Employer could change the shift or any part of it as long as proper notice was given as provided for in Article 7.14. Here there is no question that proper notice to the affected employees was given and that there is further no dispute that the service requirements of the Company dictate that these changes be made. Finally, the Employer asserted that it has done this in the past without objection from the Union thus showing the Union's acquiescence in the practice.

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

MEMORANDUM AND DISCUSSION

Underlying facts – There were few disputes about the underlying facts that gave rise to the grievance but there were some disputes about the history of the various contractual provisions and how they came to be in the contract and what they meant. First, we deal with the undisputed facts.

The Employer, Mankato Citizens Telephone Company, does business under the name Hickory Tech Corporation and is a public telecommunications company based in Mankato, Minnesota. The parties have a longstanding bargaining relationship going back at least 40 or more years. The predecessor to IBEW #949, Local #292, represented the employees at the Employer in the 1960's.

There was further no dispute that the service and customer service requirements of the Employer have changed as technology have changed. The evidence showed that the Employer is no longer merely "the telephone company" but is now involved in telephone, broadband and Internet services. This expansion of their business has changed the nature of the customer service requirements and have necessitated the need to schedule employees at varying hours and shifts in order to meet the demands of today's customer in this industry. The Union did not dispute this.

The Union disputed whether the Employer has the right under the contract to alter these shifts as it began doing in 2007 without payment of overtime or other premium time. The Union pointed to the provisions of Article 7 as noted above and essentially argued that the Employer did not have the right to change portions of a weekly shift pursuant to Article 7.14. It argued that since 1967 the Employer has been required to post the employee's shifts prior to them working their shifts and that since 1997 the Employer has been required to post the shifts for the entire calendar year by December 1 of the preceding year. The evidence showed that with some minor exceptions they have in fact been doing that and that the posted shifts have been weekly shifts.

In 2007, the Employer began using Article 7.14 to change only portions of the employee's weekly posted shift to change it for less than a whole week. For example, the posted shift might be a Monday through Friday 8:00 a.m. to 5:00 p.m. shift. The Employer would then alter perhaps one or two days of that shift and do so by noon on Friday of the preceding week. The evidence showed that a great many variations on this theme occurred and that different employees have different posted shifts. The underlying question though remains the same – does Article 7.14 allow the Employer to change the shift for less than a week. The Union contends that it does not and that changes in shifts must be for an entire week. Otherwise, while the Employer may certainly alter the shift it must pay overtime and/or premium time as called for by the remainder of Article 7.

The contract language - The issue as stipulated above entails a review of the language of the contract and a determination of its intent and meaning. The case boils down to the interpretation of Article 7 and whether there is a limitation on the Employer's right to change shifts for less than a week. As always, the starting point for this is the language itself. At first blush the language itself seems to support the Employer.

The relevant language of the agreement reads as follows:

Article 2.02 – Management Rights: (c) (1) All employees in the Plant Department can be scheduled at any time to do and perform any and all telephony work provided no employee of the Plant Department is deprived of any regular employment. . . .

(e) Except to the extent specially abridged by a specific provision of this Agreement, the Company reserves and retains solely and exclusively all of its inherent rights to manage the business as such rights existed prior to the execution of the Union Agreement.

This is a standard management rights clause that grants to the Employer all inherent rights reserved by an Employer to select and direct the workforce, including the right to set and establish and change employee schedules. There is certainly nothing here that would limit the right of the Employer to alter the shifts in any way it saw fit. The question is thus whether there is something else in the labor agreement that limits or alters that inherent right.

The Union relies on various provisions of Article 7, most specifically, 7.04, 7.05 and 7.06 for the proposition that the agreement limits the right of the Employer to change shifts in the way it as doing in 2007. As cited above, Article 7.04 essentially provides for overtime if the employee works after the end of the shift and for double time under various circumstances involving work during a rest period. As will be discussed below, the Employer is required to post the employees' shifts for the year by December 1st and the evidence showed they have been doing that. There is nothing in the language of Article 7.04 that on its face limits the right of the Employer to change the posted shift. As will be discussed further below, there is also nothing inherently inconsistent between the language of Article 7.04 and the Employer's right to change shift as found in Article 7.14. As Article 7.14 provides, the "new" shift is to be considered the posted schedule for purposes of the overtime provisions. So if the shift is changed pursuant to the provision of Article 7.14 and one of the events provided for in Article 7.04 occurs there would still be the obligation to pay overtime.

Likewise, Article 7.05 provides for overtime and premium pay for call outs; defined as a request to return to work after the employee has been released from their regular work day or shift. There are provisions calling for double time under certain circumstances if the call out occurs during a rest period or they work for more than 5 hours on a call out. As with the provisions of Article 7.04, there is again nothing that on its face limits the right to change shifts. If a call out occurs within the meaning of this language even where the “new” shift is posted, there would presumably be the obligation to pay overtime or premium time.

Finally, the provisions of Article 7.06 show the same lack of any limitation on management’s right to change the shifts in whatever way it deems necessary as long as notice under Article 7.14 is proper. Article 7.06 calls for overtime for work on the sixth day of the work week and for other premium time under certain specific circumstances. As with the other provisions, there is no limitation on the right of management to change the shifts nor anything inconsistent with Article 7.14. If the shift is changed pursuant to Article 7.14 and the employee is required to work and that change in work hours meets the requirements of Article 7.06, there will again presumably be the obligation to pay overtime. The limitations in Article 7.04, 7.05 and 7.06 provide for premium pay if the employee is called out or required to work but do not provide any basis for the claim that there is a limitation on the inherent right to schedule the employees or change those schedules as service requirements dictate.

The provisions of Article 7 do not provide much support for the Union’s case here. When read individually or together they appear to provide a clear picture of the meaning of the language used. The Employer must post the schedules by December 1st for the calendar year. The Employer can change those shifts pursuant to the notification provisions of Article 7.14 and that then becomes the “new” shift for purposes of calculating overtime if anything else changes in those schedules, pursuant to the other provisions of Article 7. (There was no dispute about whether or how those apply in this matter. The sole dispute appeared to be whether the Employer was allowed to change shifts for periods of less than one week.)

There was some merit to the Employer's further argument on this point that the original reason for placing the language of Article 7.14 supported the Employer's claims here. A review of the grievances filed in 1966 by members of the predecessor Union shows that there were many similarities in those grievances to the instant grievance. While no one who was involved in the settlement of those grievances testified at this hearing, the documentary evidence showed that what was added to the agreement was the notification provision requiring a posted schedule (In 1967 it was for two weeks. That requirement was changed to provide for posting schedules for a year at a time but the underlying requirement of posting with the ability to change the schedules has not changed) and a notification to the affected employees if the service requirements of the company made it necessary to change the schedule. Once changed the new schedule became the posted schedule for overtime calculation purposes. That essential feature of the language has not changed either in over 40 years. Thus it was apparent too that the underlying rationale for inclusion of this language in the first place was to require posting of a schedule and certain notification of any changes in it but did not limit the right of the Employer to change any portion of the schedule.

The Union further alleges that Article 7.14 does not grant the Employer the right to change shifts for less than one week. The basis for this is essentially that the Employer must know that its rights to do that is limited or this language would not be here. However a close reading of the language of Article 7 shows that there is nothing inconsistent in the language of the various provisions. As the Employer asserted in its position, Article VII, Sections 7.04, 7.05 and 7.06 provide for the pay to be given under certain circumstances. Nothing in those provisions limit the right to change the shifts for less than one week.

Clearly, the language that mostly closely applies to the issue in this case is Article 7.14. That specifically provides in relevant that “When made necessary by service requirements, the Company may change the posted schedule. If the employee is notified of a schedule change by 12:00 noon on the Friday preceding the calendar week in which the change is to be effective, the employee’s new schedule will be considered the posted schedule for overtime pay purposes.”

At first blush this appears to end the case. This language on its face grants to the Employer the right to change the posted shift. The only limitation on this is the requirement in Article 7.14 to notify the employee by noon on the Friday preceding the week in which the change is to be effective. There is nothing in this language that limits the right to alter the hours or the days of that shift

The Union’s main point appeared to be based on the bargaining history and what it termed were various attempts to get the very limitation the Employer now seeks in bargaining. The argument is a familiar one: if the party seeking to get something in negotiations already felt it had the right to something why would they try to get it in negotiations? The essence of the Union’s claim here is that the Employer tried to gain something in negotiations that would have allowed it to change shifts on a less than one week basis, therefore it could not have already had it in the first place. Having failed to gain those concessions they cannot get them now.

While some arbitrators have held that clear language on its face does not allow for further inquiry, this is too simplistic a view. What appears to be clear contract language to an arbitrator who did not negotiate it may not be at all what the parties intended when they negotiated. The inquiry is thus never what the arbitrator thinks it means but rather the arbitrator’s determination of what the parties intended for it to mean when they negotiated it. See, Elkouri and Elkouri, *How Arbitration Works*, 5th Ed, at Page 51. (Precontract negotiations frequently provide a valuable aid in the interpretation of ambiguous language). Even though the language here appears clear the bargaining history is almost always a valuable tool to determine its meaning as expressed by the parties. For this reasons a review of the bargaining history of these clauses is appropriate.

Bargaining history - The Union is attempting to prove what the language says by proving what it does not say and what the Employer tried to make it say but couldn't. The difficulty inherent in doing this was never made more evident than in this case.

As noted herein, the various changes to Article 7.14 did not alter the underlying right of management to change the shifts. Further, the negotiation history does not show that the Employer was trying to get language that would allow it to change the schedules for less than a week but rather would require less notice of that change. They were essentially trying to alter what had been negotiated in 1966 by trying to get a 48 hour notice and then one that would have required notice by the end of the employee's shift on Friday. This piece did not aid the Union here.

Further, the argument regarding attempted changes to Article 7.04 and 7.05 were likewise unresponsive of the Union's claims. The requested changes to Article 7.05 to eliminate certain double time requirements would only have changed the pay for those kinds of call outs. The evidence did not show that there would have been an alteration of the process or the ability to change the shifts.

Moreover, the requested change to Article 7.15 in 2004 would have allowed the Employer to change an employee's schedule for up to two hours rather than one hour with a 24 advance notice to avoid the requirement of paying overtime. The Employer apparently tried to get this changed in 2007 as well but both proposals were rejected by the Union. The evidence showed this proposal was limited to Article 7.15 alone and would not have changed the ability to change shifts found in Article 7.14.

In 2007 the Employer attempted to change Article 7.06 to eliminate certain double time pay for Sunday work. The Employer also attempted to change Article 7.05 to give it greater flexibility to call out employees and avoid payment of overtime. The relevant change proposed was as follows: "If the Company has informed the employee of a change in their regular work day or work week prior to the end of the previous work day or work shift, it will not be considered a call out." Those changes would have required greater flexibility for call outs but again did not effect the ability to change shifts.

This change was also quite consistent with the notion that the shift could be changed but once changed and the employee was called out pursuant to Article 7.06 the overtime pay requirements would apply. The fact that the Employer introduced these changes unsuccessfully did not establish that there was any sort of clear understanding that the language of Article 7.14 meant anything other than precisely what it said.

Finally, the Employer introduced very credible evidence both from Mr. Dutz as well as in the documents that there was a specific discussion about the provisions of Article 7.14. The evidence showed that the parties discussed the term “schedule changes” and it was clearly stated at the time that the term meant any schedule change, including hours or days or the week. The evidence did not show that there was any objection to this interpretation at the time nor any language introduced by the Union that would have countered it.

Thus, taking the evidence as a whole, the bargaining history does not support the Union’s claim here. The changes proposed by the Employer were consistent, or at least not inconsistent with, the language of Articles 2.02 and 7.14 granting the Employer the right to change the shifts to meet service requirements as long as there is proper notice.

Past practice – The Union raised in a somewhat oblique fashion the argument that there is a binding practice at work here that obligates the Employer to post weekly schedule and to only change those shifts in weekly amounts and not to change them for portions of the week as was done here. The parties disputed whether this had been done before and there was some dispute about whether this same thing was done before in 2006. The Union claimed that even if it was, the employees involved did not advise the Union of what had happened. The Union argues that the mere failure to file a grievance cannot be held to bind the Union now.

Parties are free to enforce the contract as they see fit and the mere failure of the Union to file a grievance under these circumstances did not deprive it of nor constitute a waiver of the right to do so in the future. Accordingly, even if this was done in the past on one or two occasions that fact alone would not bar the Union from making this argument now.

The next question is whether there was a past practice affording the Union the relief it seeks and binding the Employer to change the schedules only on a weekly basis and not to change them as was done in this instance for these affected employees. Elkouri notes that “Evidence of custom and past practice may be introduced for any of the following major purposes: 1. to provide the basis of rules governing matters not covered in the written contract; 2. to indicate the proper interpretation of ambiguous contract language , or 3. to support the allegations that the clear language of the written contract has been amended by mutual action or representing the intent of the parties to make their written agreement consistent with what they regularly do in practice in the administration of their labor agreement.” *How Arbitration Works*, 5th Ed. At page 630. Much has been written about the elements of past practice and what does and does not constitute a binding practice necessary to override clear contract language.

On these facts it is unnecessary to launch into an exhaustive analysis of past practice and whether the elements were met here. The basis of the Union’s claim is that the Employer has virtually always posted a weekly schedule and when it has changed them in the past it has done so only for a whole week and never for anything less than that.

This scenario is best covered by the eminent arbitrator Harry Shulman who wrote,

“ ... there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. ... Being the product of managerial determination in it permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.” *How Arbitration Works*, 5th Ed. at 636, citing *Ford Motor Co.*, 19 LA 237, 241-242 (Shulman 1952).

Thus even if it could be shown that at no time since 1966 had the Employer ever changed the shift pursuant to Article 7.14 for anything less than one week, the quotation by Arbitrator Shulman would apply. The applicable contract language in this case grants the Employer the right to change shifts to meet service requirements.

On this record and under these circumstances, there was insufficient evidence of any clearly stated mutual intent to limit that language beyond the provisions of Article 7.14. Accordingly, the grievance must be denied.

AWARD

The grievance is DENIED.

Dated: February 4, 2008

Jeffrey W. Jacobs, arbitrator

IBEW 949 and Hickory Tech