FILE NO. AA92-03-004

EMPLOYER: Gateway Industries

UNION: Retail, Wholesale & Department Store Union, Local 467

ARBITRATOR: B. Schwartz

APPEARANCES: G. Mitchell, for the Employer
D. Oswald, for the Union

GRIEVOR: M. Shields

DECISION RENDERED: March 9, 1992

EXPEDITED ARBITRATION: Yes

ISSUE: WORK SCHEDULING - Shifts - changes in shift schedule - The Grievor, who worked in the boiler room, and 3 co-workers had been working 12-hour shifts, three days a week. The Employer notified the Union that the boiler room employees would be put on 8-hour shifts. It did not seek the advice of the Union on whether the change should take place, but did invite input on what should be the exact hours of work. Two weeks later, the Employer changed the shifts from 12-hour to 8-hour shifts. As a result, the Union filed a grievance claiming that under Article 7.03 it had a right to have 12-hour shifts continue for the boiler room employees. Article 7.03 stated that "for 7 day continuous operation the schedule will be 12-hour shifts provided that ... (c) A majority of affected employees indicate a preference for 12-hour shifts rather than 8-hour shifts."

AWARD: GRIEVANCE DENIED. The Arbitrator found that Article 7.03(c) operated on the assumption that it is questionable whether employees will want 12-hour shifts; it sought a positive indication from employees that they do. Although the agreement did not outline how employees should indicate their preference for 12-hour shifts, the Arbitrator noted that no other boiler room employee appeared at the hearing to indicate a preference; the Union did not conduct a vote to establish a preference; the employees did not sign a letter of protest; nor, did any other employee complain about the proposed change in shifts. Therefore, the Arbitrator found that the evidence presented did not establish that a majority of employees in the boiler room had indicated a preference for 12-hour shifts. As a result, he ruled that the Union had failed to demonstrate a factual basis for concluding that its rights had been violated and that the Employer was entitled to change the shift.

AWARD

GATEWAY INDUSTRIES

and

RETAIL, WHOLESALE & DEPARTMENT STORE UNION, Local 467

Re: Mr. Mike Shields, grievor.

Expedited Arbitration,
Case No. 126/92/LRA.

Arbitrator: Dr. Bryan Schwartz

Date of Hearing: February 28. 1992

Place of Hearing: Charter House Hotel, Winnipeg, Manitoba

Appearances: Mr. G. Mitchell, for Gateway Industries
Mr. D. Oswald, for the Union
Mr. M. Shields, grievor.

Award dated: 4 March 1992

AWARD

Re Gateway Industries and Retail, Wholesale and Department Store Union, Local 467

The employer has recently transferred boiler room employees from twelve-hour shifts to eight-hour shifts. The union contends that in doing so, the employer has breached employee rights under the collective agreement, and has sought expedited arbitration under the Manitoba Labour Relations Act.

At the beginning of the hearing, both sides accepted that I had jurisdiction over this matter.

Only the union called witnesses. They were Mr. Shields, the boiler room employee who is grieving, Mr. Jacques, the union president, and Mr. Blank, the owner.

The grievor works in a plant with about twenty employees. He has three full-time co-workers. For about four years, the employees have been working twelve-hour shifts, three days a week. A part-time employee attends the boiler room when the full-time employees are off duty.(Neither side addressed the issue of whether the part-time employee is to be considered an "affected employee" for the purpose of Article 7:03, but it turns out that his or her status would not change my conclusion.) Except perhaps at times during the summer, the boiler room operation is kept going on a continuous basis because it supplies heat to the rest of the plant, including offices.

In the past, when orders were heavy, other parts of the plant have also been in continuous operation - that is, going non-stop seven days a week. For over a year, however, employees in most or all other departments have been working day shifts of eight hours, five days a week.

Article 7:03 of the Collective Agreement includes a new provision on twelve-hour shifts that was inserted in the last round of collective bargaining. I have underlined the new language in reproducing the subarticle as a whole:

> The standard quitting and starting time for rotating shift employees will be:
>
> 11:00 p.m. to 7:00 a.m.
> 7:00 a.m. to 3:00 p.m.
> 3:00 p.m. to 11:00 p.m.
>
> or
>
> 7:30 a.m. to 7:30 p.m.

7:30 p.m. to 7:30 a.m.

It is agreed that for seven (7) day continuous operation the schedule will be twelve (12) hour shifts provided that:

(a) Statutory Holiday pay of eight (8) hours for those days indicated in Article 16.02(b) will apply.

(b) Serious reasons, mutually agreed between the Company and the Union, exist to schedule employees on eight (8) hour shifts such as for health and safety, legal considerations, etc.

(c) A majority of affected employees indicate a preference for twelve (12) hour shifts rather than eight (8) hour shifts.

In mid-January, 1991, management announced that the boiler room employees would be placed on eight-hour shifts. It did not seek the union's advice on whether the change from twelve to eight hours should take place, but did invite the union's input on what the exact hours of work should be. Mr. Jacques, the union president, told the employer he did not like the change in type of shift. With respect to exact hours, he informed the employer that there was no practical alternative to the employer's proposal.

The two sides agree that at least two weeks elapsed before the change to eight-hour shifts was implemented.

Article 7:04 of the collective agreement states that:

> The Company will notify the Union two (2) weeks in advance of any shift changes and discuss said changes with the Union except in cases of emergency, or circumstances beyond the reasonable control of the Company, such as cancellation of orders, unavailability of required raw material, machinery breakdown, unavailability of key operation personal.

The first step grievance was initiated on January 22 by "Mike Shields and the Union" on the basis of "violation of 7:03 and any relevant sections of the contract". In light of the employer's response - that the union should grieve if not satisfied - steps two and three of the grievance process were not pursued, and the union sought expedited arbitration.

The request for expedited arbitration was signed by a union representative, Mr. Oswald, who also appeared on behalf of the union at the hearing. The referral request cites as the basis of the grievance that "12-hour shifts replaced with 8-hour shifts - violation of contract". At the conclusion of the hearing, I indicated that I was under the impression that the quality of

discussion might be at issue; both sides clarified for me that it was not. The union rested its grievance on no wider basis than this: that under Article 7:03 of the collective agreement the union had a right to have twelve-hour shifts continue for boiler room employees.

In interpreting Article 7:03, there were two main areas of disagreement between the parties:

(1) The union and the employer disagree on the meaning of "continuous operation" in Article 7:03. The union argues that it can refer to a department that is in continuous operation, the employer submits that it refers to a situation in which the plant as a whole is in continuous operation;

(2) The employer contends that the right to twelve-hour shifts is subject to certain conditions, as set out in article 7:03, and that the union has not proved that these conditions have been met. In particular, the union has not established that the majority of "affected employees" have indicated a preference for twelve-hour shifts.

I will begin by analyzing the second main areas of disagreement. For the purposes of that analysis only, I will assume that the union's position on the first issue is correct; that is, I will assume (without actually deciding) that rights to a twelve-hour shift can extend to a particular department.

Article 3:01 provides that the employer retains "all the customary and normal functions of Management except as they may be expressly restricted by the terms of this Agreement". Scheduling hours of work is unquestionably such a customary and normal function. The employer's discretion must, of course, be exercised fairly, reasonably and in good faith; Labour Relations Act, s. 80. The employer's discretion is also subject to provincial laws. The Employment Standards Act R.S.M. 1987, c.E110, provides in section 32(1)(a) that:

> 32(1) Standard hours of work for any employee are:
>
> (a) 40 hours in any week and eight hours in any day; or
>
> (b) in the case of an employee to whom the order or collective agreement applies, 40 hours in any week and the number of hours in any day prescribed as the maximum number of working hours for that day under an order of the [Manitoba Labour] board made under subsection 33(1) or under a collective agreement described under subsection 33(1).

Subsection 33(1) authorizes the Labour Board to approve shifts whereby employees work longer than eight-hour shifts (although not more than forty hours a week) without being paid overtime. In

response to a joint application brought by the employer and the union, the Manitoba Labour Board has authorized the employees to work a rotating twelve-hour shift averaging forty hours a week. The authorization is effective from 25 April 1991 to 24 April 1992 and so covers the period of this dispute.

Subsection 33(2.1), which is a recent amendment to the Labour Relations Act, provides that employees who are represented by a bargaining agent may, even without Labour Board authorization, agree to a schedule that involves more than eight-hour shifts.

In approaching Article 7:03, I have not set out to give a narrow and restrictive interpretation of the union's rights to insist on a twelve-hour shift. It is true that the eight-hour shift used to be the legal norm, but the Employment Standards Act now accepts that unions are entrusted to bargain for different arrangements. It is true that a management rights clause should be give its proper due, but so should a clause, like Article 7:03, that in some respects limits management's rights. The task for me is to interpret article 7:03 fairly in accordance with the words that have been used.

The "new" language in Article 7:03 begins by stating that "there will be twelve (12) hour shifts...". The term "provided that" appears immediately after that opening phrase, without even a comma in between. The conditions stated in (a), (b) and (c) are just as much a part of the terms of Article 7:03 as the opening phrase. These conditions should not be viewed as any less weighty merely because they appear after the words "provided that", rather than before.

While unions have the right to bargain for longer shifts if they choose, it cannot be assumed that most or all of the employees in a particular union actually do want to work twelve-hour shifts. The collective agreement in this case certainly does not establish any presumption that employees would prefer twelve hour shifts. On the contrary; for the terms of article 7:03 to be met, "a majority of affected employees must indicate a preference for twelve (12) hour shifts, rather than eight (8) hour shifts." Paragraph (c) does not say that employees have the right to work twelve-hour shifts unless they indicate a preference for eight-hour shifts. Paragraph (c) operates on the assumption that it is questionable whether employees will want twelve-hour shifts; it seeks a positive indication from employees that they do.

Paragraph (c) has the potential to protect both the union and the employee from management efforts to impose twelve-hour shifts. In this particular case, it is the employer that is citing paragraph (c) to resist a union effort to maintain twelve-hour shifts. I do not find this situation irrational; an employer may have a legitimate interest in avoiding a situation in which a majority of affected employees are unhappy about working

conditions.

The agreement does not spell out exactly when and how employees should "indicate" their preference for twelve-hour shifts. The term "indicate" does imply that the employees must say or do something (such as sign a letter of protest, take part in a vote) that makes their view apparent to others. I would think that for the union to validly assert its right under article 7:03 to twelve-hour shifts, it must also make sure that the employer is aware of the expressed opinion of the majority of affected employees. In practice, it should not be unduly difficult for the union to consult its employees and inform the employer of the results.

The evidence that was presented to me does not establish that a majority of employees in the boiler room operation have, at any time reasonably close to the present, indicated a preference for twelve-hour shifts.

The grievor, Mr. Shields, did indeed testify that he certainly would have preferred a twelve-hour shift. By bringing a grievance, if nothing else, he most assuredly did indicate his preference for twelve-hour shifts. No other employee in the boiler room, however, is specifically mentioned in any of the grievance documents. None of them appeared at the arbitral hearing. As mentioned earlier, Mr. Jacques, the union president, testified that he told management that he did not like the change. Mr. Jacque's testimony did not, however, include any specific statement that around the time of the proposed change, a majority of employees in the boiler room indicated a preference for twelve-hour shifts.

The union called the owner, Mr. Blank to testify. He said that he spoke to one of the other employees in the boiler room, and that the other employee did not object to moving to eight-hour shifts. Mr. Blank further testified that no other employee complained. It is possible, of course, that a majority of employees did indicate a preference for twelve-hour shifts, to the union or even to a lower-level manager, and that Mr. Blank was not aware that they did so. The burden of proof, however, is on the union to show that a majority of employees actually did indicate a preference for twelve-hour shifts. Mr. Blank's testimony did not advance that cause at all.

During closing argument, the union representative emphasized that the status quo in the boiler room, prior to management's initiative, was twelve-hour shifts. I am not convinced, however, that the past state of affairs is a reliable indication of the majority preference of the employees in January, 1992, in the face of the proposal for moving to eight-hour shifts. Even if I were to assume that some time ago - say, about a year ago, when the 1990-92 collective agreement was actually signed - the employees actually were consulted and did express a preference for twelve-hour shifts,

the majority view may have changed for a variety of reasons. Some employees may have been replaced by others. Some employees may have changed their attitude in response to changing conditions at the plant. Others might now indicate a different preference in light of changes in their personal lives, their thinking or their experience with working twelve-hour shifts.

The employer has to give the employees at least two weeks notice of any potential shift changes. It is not unreasonable to expect the union, if it wishes to oppose such a change, to consult with four or five employees and to inform the employer of the indicated preference of the majority.

Again, the employer must administer the contract fairly, reasonably and in good faith, and it would not be reasonable for the employer to begin each day or week with a proposed shift change, and thereby force the employees to constantly re-affirm their preferences. I would think, though, that at reasonable intervals, or in response to a specific new business situation, the employer could properly propose a change - which it might have to abandon if the majority of affected employees indicate a preference for retaining the status quo.

My conclusion is that on the evidence and contractual provisions that were argued before me, and in context of the actual dispute that arisen, the union has failed to demonstrate a factual basis for concluding that its rights have been violated. I would offer no further comment about any hypothetical disputes that may arise in the future if, under whatever circumstances, the employer or the employees attempt to secure a return to twelve-hour shifts for boiler room workers.

I have found myself able to dispose of this grievance without deciding whether "continuous operation" in Article 7:03 (b) can extend to the boiler room operations if the rest of the plant working on day shifts. I will again refrain my making any comment on this issue, on which I have not even formed a definite opinion, let alone rendered a binding decision.

The grievance is denied.

Bryan Schwartz,
Arbitrator

9 March 1992