Popular II #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

BACKGROUND

Pursuant to a demand for arbitration under the terms of the applicable collective bargaining agreement between Employer and the Union, an arbitration hearing was held November 18, 1997 concerning the issue of compulsory overtime. The undersigned arbitrator was selected by the parties by mutual consent.

The November 18, 1997 arbitration hearing provided both parties the opportunity to present their respective positions supported by sworn testimony and such evidence as they deemed appropriate. At the close of the hearing, both parties agreed to submit post hearing briefs September 12, 1997, and such briefs were received by the arbitrator prior to that date.

ISSUE

Does the Employer have the right to require compulsory overtime under the terms of the applicable collective bargaining agreement?

RELEVANT CONTRACT LANGUAGE

1. Article 4: Management Rights: "Subject to the provisions contained herein, the right to manage the Company and direct its operation is vested in and retained by the Employer."

2. Article 5: Hours of Service, (a) "The standard work week shall consist of forty (40) hours, from midnight Sunday to midnight Sunday; and a regular work day shall consist of eight (8) consecutive hours..."

> (d) “If an employee is required to work either scheduled day off in a work week and who reports for duty shall be assured of no less than eight (8) hours of work at the applicable overtime rate.”
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> (e) “It is agreed that under normal conditions, supervisory personnel will not perform the work of any classification covered hereunder ... however, under abnormal conditions when it becomes necessary for supervisors to perform such work”

3. Article 6: Overtime and Holidays

> (e) "When employees work overtime, they shall not be laid off during regular working hours to equalize the time, and all overtime will be distributed as equally as possible, and in accordance with established overtime rules. Overtime shall not be offered to probationary employees until the list of regular employees has been exhausted."

"An employee who is due and eligible for overtime in accordance with the established rules, and who is not asked to work the overtime offered (is bypassed), shall be offered the opportunity to work another period of overtime.... If the employee refuses the overtime offer, he will be charged for a refusal (R), and if he accepts, he will be charged (A)."

4. Appendix 9: Overtime Rules and Procedures: "Listed below is the procedure that has been developed for the calling of overtime. This has been developed by the Employer, in consultation with the Union, and the objective is to provide the most simple, logical system possible for the distribution of overtime. Basically, the idea is to reach the employee who wants overtime, with the minimum of effort by the Employer, without involving an employee who may not want overtime...."

> 4."Names may be catered on the Overtime Availability Lists no earlier than one week in advance of the date on which overtime is wanted, and no later than 16 hours before the start of the shift for which the overtime is desired…”
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> 5. "Names may be removed from the Overtime Availability Lists up to four hours before the start of the shift…"
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> 8. "An employee who accepts overtime will be charged with the number of hours of overtime for which he will be paid. An employee whose name is on the Overtime Availability List and who refuses overtime will be charged with the number of hours for which he would have been paid ...."

14. "Overtime requirements shall be fulfilled in accordance with Table 1. If the needed overtime is not obtained in this manner, the Duty Supervisor may ask probationary employees to work the required overtime. Employees in any classification who are signed up for overtime and who accept overtime in any classification will be charged and marked in the usual manner."

Table 1: Overtime Procedures to be Followed (Page 44) If personnel from the overtime list are insufficient, contract states if OT still needed use best judgment'.

5. Article 12, Grievances: (g) "...the Arbitrator shall not have the power to delete from, add to, or in any way modify the provisions of this Agreement...."

(j) "Pending the result of the grievance and arbitration procedure specified in this Article, no action in the matter of a work stoppage, slow-down, or any action of that nature shall be taken."

FACTS OF THE CASE

The Employer is a contractor which provides fueling services to all commercial aircraft at Airport 1 and Airport 2. Over the past decade, there has been a substantial increase in domestic and international air traffic and the number of commercial flights into Airport 1. Services provided by the Employer include delivery of fuel to aircraft, fueling of ground equipment in certain instances and the maintenance and operation of the fuel tank farm facility.

This is a seven day round the clock operation which has seven different shift starting times for full time employees and three different shifts for "part time" employees. Of the 110 employees at Airport 1, 58 are full time "Fuelers" and 12 are "Lead Fuel Men". The peak period of fueling is during the late afternoon, coincident with the arrival of international flights which require more time and fuel for transoceanic flights. The Employer's staffing level of qualified "Fuelers" has not kept up with the increased activity at Airport 1 over the past decade, with the result that overtime is necessary to assure adequate manning levels to fuel aircraft. An episode in mid-August prompted the dispute between the parties as to whether the Employer had the right to

schedule and compel mandatory overtime. The undisputed facts presented through witness testimony and evidence is as follows.

1. There has been a collective bargaining agreement at Airport 2 since 1947 and since the inception of Airport 1(Union Exhibit 3). Management's Rights language was negotiated in 1966 and that language is in the applicable agreement between the parties. Union Exhibit 1 demonstrated that the earlier labor agreements had contract language in Article 4, Section (c) which pertained to change of work schedules during emergencies, however that language is no longer in the applicable agreement. There is a separate labor agreement for "Part-Time Employees". (Union Exhibit 4)

2. Overtime rules were negotiated in 1988 and incorporated into the applicable labor agreement on pages 40-44 under the heading "Appendix 9, Overtime Rules and Procedures". Reference is made to "established overtime rules" in Article 6, Section (e).

3. A separate collective bargaining agreement was negotiated for Part Time employees in 1991 which includes the following overtime language:

> 10. "When all available full time employees on duty have refused any overtime offer that is available, the Employer may offer such overtime to its part time employees. If such part-time employees refuse the offer the Employer shall have the right require the pan-timer remain on duty." (Union Exhibit 4).

4. The Employer has experienced a labor shortage for a number of years. Despite management's best efforts to recruit and hire more full time employees, the operation lacks a full complement of "Fuelers" with the result that overtime is utilized to compensate for the labor shortage. In past years, employees signing up for voluntary overtime has provided adequate coverage to fulfill the manning requirements for fueling services.

5. Full time employees have first preference for overtime and may exercise those rights through the overtime procedure outlined under the terms of Appendix 9. If there are an insufficient number of full time employees who have signed up for overtime under the overtime procedure, the Employer has the option of assigning part-time employees, probationary employees and/or supervisors to work overtime.

The Employer may also utilize others who accrue seniority as a "Fuelers" (Union Exhibit 7), however, it was stipulated that Person 1 and Person 2) are the only two on the list who are qualified and available to perform the job. Although four employees from Airport 2 are listed on Union Exhibit 7; it was acknowledged that in the absence of required Airport 1 "identification", and the security logistics involved, it is impractical to utilize these employees on short notice for overtime at Airport 1.

6. Over a period of years, a practice evolved wherein employees, who had completed their work tasks before the end of their regular 8 hour work schedule, were given permission by their respective supervisors to leave the job early before the end of their shift. They were paid 8 hours straight time pay as if they had completed their regular shift. This practice also extended to overtime hours. Employees were allowed to leave the job before the completion of the number of overtime hours they had signed up for and were paid for all scheduled overtime hours at the applicable overtime rate of pay.

7. In mid August 1997, a situation arose wherein there were insufficient personnel available to perform fueling services because employees had been allowed by supervision to leave work early. Further inquiry by management led to discovery of the practice whereby supervisors were releasing employees before the end of their shift and/or scheduled overtime and paying them full pay as described in item 6 above. As a result that, the Employer served notice by memo dated

August 18 1997, of its intent to terminate the practice of allowing employees to leave prior to the end of their regular shift.

> "Effective immediately employees will stay until the end of their shift. No longer can we allow any Fueling personnel to leave before their shift is over. It is causing problems with delays and also friction among employees. If you leave your shill early you will be charged with abandonment and dealt with accordingly. The excuse of another employee and or Supervisor was covering me will no longer be accepted." (Employer Exhibit 1)

The August 18th memo resulted in negative reaction among bargaining unit personnel. Seven employees "voided off" and declined to work overtime on the evening shifts of August 18th (Employer Exhibit 2 b.), seventeen "voided off" on August 19 (Employer Exhibit 2 c.), and eleven "voided oft" August 20th (Employer Exhibit 2 d.). The Employer assigned supervisors to work overtime that afternoon to cover for those who withdrew from accepting overtime. A repetition of "voiding off" on August 20th occurred resulting in the Employer's decision to make overtime compulsory as a means to assure adequate manning for fueling aircraft in a timely manner.

9. On August 23, 1997, a policy memo on "Emergency Leave" was issued by Person 3, Manager. He testified that employees could be excused from overtime work for legitimate reasons (e.g. child care) and that this memo was intended to reaffirm that policy.

> "Effective immediately, the Employer will require written proof to support any request for emergency leave. The documentation must be received by the Employer within 24 hours of the request. It must be signed by someone other than a family member, and be an individual in an official capacity such as a Doctor, Lawyer, Police Officer, Day Care Provider, Counselor or Clergyman..... Failure to provide this information will result in a charge of insubordination and a disciplinary hearing, jeopardizing your continued employment."(Employer Exhibit 3)

10. In response to questioning by the arbitrator, the parties acknowledged that the problem of large numbers of employees "voiding off" is no longer a major concern and that most employees

are signing up for overtime on the "Overtime Availability List". "Mandatory Overtime Notification" notices were issued to several employees which required them to work overtime in September, October and November (Union Exhibits 6 a. and h.). Most of the compulsory overtime affected employees on the 6:30 a.m. to 1:30 p.m. shift and the 7:00 a.m. to 3:00 p.m. dayshift personnel.

11. In response to questioning by the arbitrator, the parties acknowledged that this was the first instance where the issue of compulsory vs. voluntary overtime has surfaced as a test case. Person 4 testified she recalled one occasion when an employee was required to remain for overtime work when the employee had indicated a desire not to work. Aside from that one instance, neither party could recall a grievance, dispute, or discipline on the issue of compulsory vs. voluntary overtime which would have surfaced this issue as a disagreement under the applicable labor contract.

Notwithstanding the above listed uncontroversial facts, there was testimony and evidence on three other matters which was disputed.

1.The Union offered the collective bargaining agreement covering the Ground Services bargaining unit into evidence (Union Exhibit 5), The labor agreement contained mandatory overtime contract language (i.e., Section 6 C. "No employee will be expected, nor required to work overtime against his wishes except when necessary to maintain service to the Employer's customers."). The Employer objected on the basis that (1) the ground services labor agreement expired July 31, 1996 and is no longer in effect, and (2) the agreement bears no relationship to the applicable collective bargaining agreement before the arbitrator.

2. Union witness Person 5 testified that he was a member of the Union's negotiating committee during 1991 negotiations. He testified that during those negotiations the Employer's spokesman, Person 6 discussed the prospect of contract language intended to require overtime. He stated that Person 7, General Manager advised Person 6 that compulsory overtime language was unnecessary because overtime was not a problem, consequently, the proposal was withdrawn. On cross examination, Person 5 acknowledged that the overtime issue was discussed on one occasion, however there was no written proposal advanced by the Employer, nor were there any notes or minutes from 1991 negotiations available.

3. Union witness Person 8 testified that it was common for the Employer to schedule 8 hours of overtime on a daily basis with the result that employees worked 16 hours each day and accumulated between 300-400 overtime hours each month (Union Exhibit 3). It was his contention that repetitious 16 hour days constituted excessive overtime which could adversely affect the health and safety of employees. On cross examination, Person 8 acknowledged that the overtime hours of employees documented in Union Exhibit 3 was voluntary overtime worked prior to August 20, 1997.

UNION POSITION

1. Since the inception of the collective bargaining relationship between the Employer and Union, the presumption and practice has been that overtime is voluntary. Contract language pertaining to overtime is confined to Article 6 and Appendix 9 of the applicable collective bargaining agreement. Appendix 9 was negotiated as a voluntary overtime procedure which governs the assignment of overtime.

2. The Employer's demand for compulsory overtime during 1991 negotiations is indicative that management intended to effectuate a change from voluntary to compulsory overtime. The failure to secure Union agreement to accept "compulsory" overtime during negotiations must be construed to mean that the Union retained “voluntary" overtime. "Compulsory" overtime language was included in the Part Time labor agreement (Union Exhibit 4) and the expired Ground Crew labor agreement (Union Exhibit 5).

3. The terminology "use best judgment" (i.e., Appendix 2, Table 1, page 44) provides management the option to require overtime of pan-time and probationary employees, and/or to utilize other qualified employees (i.e., Union Exhibit 7) or supervisors if an insufficient number of classified "Fuelers" are available for overtime. The words "use best judgment" were not intended to empower management to require compulsory overtime.

EMPLOYER POSITION

1. The Employer must be able to fulfill its contractual obligation to the appropriate authority and airlines at Airport 1 to provide fueling services for aircraft promptly and efficiently. To do so, the Employer must exercise the right to schedule overtime and, if necessary, to be in a position to require overtime in order to assure that it has the requisite number of personnel to staff its fueling responsibilities.

2. The Managements Rights clause empowers the Employer to direct its operations "subject to the provisions contained herein" in the applicable labor agreement. The contract is silent on the matter of compulsory vs. voluntary overtime, or any other "provisions" restrictive of management's right to schedule and require overtime work.

3. The assignment of part-time employees, probationary employees, Airport 2 employees, or other employees qualified as "Fuelers" to perform overtime work is not a procedural prerequisite before requiring overtime among classified "Fuelers" and "Lead" fueling personnel. The term "use best judgment" provides management the option to assign personnel to overtime work as it deems necessary after the procedure outlined in Table I has been followed and exhausted.

4. The Employer retains the right to require overtime work from qualified employees when the voluntary process outlined in Appendix 9 fails to provide sufficient staffing to perform necessary overtime work. Due to the labor shortage of qualified personnel to staff the fueling operation, overtime work is a necessary requirement.

5. Arbitral authority cited in the Employer's post hearing brief (i.e., Elkouri, Bow Arbitration Works. pp 532,533) underscores and affirms the management's rights clause as a basis to require overtime when the labor agreement is silent, and/or absent any language restricting the exercise of those rights.

OPINION AND AWARD

A key issue before the arbitrator is whether the right of management to require compulsory overtime must be based on explicit language in the contract. The gist of the Employer's position is that in the absence of contract language explicitly restricting those rights, the Management's Rights clause provides the basis for requiring overtime. The Union's position is that (1) such restrictive contract language does exist in the form of Appendix 9, which is referred to as "established overtime rules" in Article 6 (e) of the labor agreement, and (2) that voluntary overtime has been the accepted practice. The Union also contends significance should be accorded to the fact that the Part-Time labor agreement contains contract language empowering

management to require overtime whereas the applicable labor agreement does not. In considering the respective positions of both parties, the arbitrator has reviewed contract language, past practice and arbitral authority on the issue.

Contract Language

Article 5 (a) defines the standard work week as forty (40) hours and the regular work day as eight (8) consecutive hours. Article 5 (d) provides that employees "required to work...a scheduled day off., shall be assured of no less than eight (8) hours of work at the applicable overtime rate." Article 5 (e) recognizes the right of supervisory employees; to perform bargaining unit work under "abnormal conditions," Article 6 is the only contract language pertaining to overtime. Although specific reference to "Appendix 9" does not appear in the text of Article 6, it is the arbitrator's understanding that the words "established overtime rules" which appear in Article 6(e) refer to Appendix 9. As such, Article 6(e) and Appendix 9 must be considered in context with each other. Article 6 (e) is the agreement between the parties to equalize of overtime and Appendix 9 is the procedural process to implement the intent of Article 6(e).

Article 6(e) "When employees work overtime...all overtime will be distributed as equally as possible, and in accordance with established overtime rules....if the employee refuses the overtime offer, he will be charged for a refusal (R), and if he accepts, he will be charged (A)."

Appendix 9 "Listed below is the procedure that has been developed for the calling of overtime. This has been developed by the Employer, in consultation with the Union, and the objective is to provide the most simple, logical system possible for the distribution of overtime. Basically, the

idea is to reach the employee who wants overtime, with a minimum of effort by the Employer, and without involving an employee who may not want overtime."

The stated objective of Appendix 9 "...is to reach the employee who wants overtime…" and the balance of the text on pages 40-44 is the process which the parties have agreed to use as a means to implement equalization of overtime under the terms of Article 6 (e). Appendix 9 is the contractual means by which employees who want overtime may volunteer for available overtime and details the process which governs that voluntary overtime system.

Section 3 pertains to those situations where an employee desires "an exact work period" and provides that "he will not be charged if he rejects the overtime offered" on a different schedule "other than the one ... specified". Section 8 deals with the record keeping of charging hours to those employees "whose name is on the Overtime Availability List and who refuses overtime...."

The Union contends that the language of Appendix 9 shows that the parties agreed to "voluntary overtime" which thus restricts the Employer from compelling overtime.

In the arbitrator's judgment, Article 6 (e) and Appendix 9 reflects no more than a system intended to equalize overtime among those employees who desire to work overtime. It is voluntary in that it provides "the employee who wants overtime" a process to sign up for overtime on the Overtime Availability List. While Appendix 9 constitutes "established overtime rules" for equalization of overtime under Article 6 (e), those overtime rules do not confer a contract right for employees, or a restriction on management, which confines overtime assignments only to those who volunteer for overtime when circumstances dictate the need for additional overtime. As such, Appendix 9 is not deemed a contract "provision" which operates as a restriction on Article 4, Management's Rights.

Another matter in dispute is whether there is contract language or practice which supports the contention that part time, probationary or supervisory employees must be assigned overtime as a prerequisite to assigning classified employees after the "Overtime Availability List" is exhausted. While the Part Time labor agreement states that the Employer may offer overtime to part time employees if full time employees have refused overtime, the words "may offer" indicate that the decision to do so is at management's discretion. Article 5 (e) allows management to assign supervisors to classified work in "abnormal conditions," Article 6(e) provides that "overtime shall not be offered to probationary employees until the list of regular employees has been exhausted" and Appendix 9, Section 13 excludes probationary employees from placing their name on the Overtime Availability List. Both the Part Time contract and the applicable labor agreement are silent on any prerequisite requirement as to who should first be assigned overtime and no evidence was introduced to prove existence of a past practice.

Past Practice

Both parties acknowledged that no prior grievances have been filed or settled on the issue in dispute. The Union contends that "voluntary overtime" has been accepted as practice in the administration of Appendix 9 and assignment of overtime, thus a past practice gives meaning to "established overtime rules" in Article 6 (e). In the absence of "mandatory overtime" language in the contract, it is argued that past practice must be considered as it applies to labor-management relations in the interpretation and administration of the labor agreement.

In order for an alleged practice to be deemed a controlling past practice, it must pass the test of mutual acceptance and consistency in its application. Was the other party aware of the practice? Has the other party contested the practice when initiated, or has it acquiesced and therefore

indicated acceptance of the practice? If for example, the Union had cited numerous incidents over a period of time whereby employees had routinely refused overtime without negative consequences that would have indicated that management accepted the premise of “voluntary overtime”. Had management consistently acquiesced to such refused overtime, it could be construed to demonstrate that "voluntary overtime” was a mutually acceptable past practice in the administration of the labor agreement. No testimony or evidence was introduced by the Union to support the premise that a mutually accepted practice existed which restricted the Employer to voluntary overtime as the sole means to secure overtime work from classified employees, or otherwise restricted management's right to require overtime under the applicable labor agreement.

The arbitrator takes note of Union witness, Person 5’s testimony that compulsory overtime was discussed during 1991 negotiations. If the evidence had shown there was a written proposal and uncontroversial testimony that "compulsory overtime” was a critical issue which remained on the bargaining table throughout negotiations, that scenario might have been persuasive. But Person 5’s testimony does not reflect that a crisis scenario focused around "compulsory overtime". Indeed, Person 5 testified that Person 6 discussed the matter in a negotiating session and it was subsequently dropped in response to General Manager Person 7's comments. Open discussion of questions and concerns during contract negotiations should not deemed prejudicial to the respective rights of the parties. Given the scenario described by Person 5, it is the arbitrator's opinion that the disposition of the overtime matter discussed in the 1991 negotiations is not prejudicial to the Employer's position, nor does it constitute proof in support of the Union's contention.

Arbitration Authority

The preponderance of arbitration authority supports the premise that where the labor agreement is silent on the subject of compulsory overtime, management has the right to make reasonable demands for overtime work from its employees. The authoritative text on labor relations practice and arbitration is How Arbitration Works, by Elkouri and Elkouri which states as follows:

> "Even apart from the frequent recognition of the right to require overtime work as an inherent or residual right of management, arbitrators have often found implied contractual support for or confirmation of the right in provisions recognizing management's right to direct the working forces, in scheduling provisions, in provisions for the distribution of over time and the like". (e.g.. 55 LA 31,32; 52 LA 493, 496; 48 LA 1077, 1081, etc., footnote 431, page 741, 5th Edition)
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> "Also, there was no implied prohibition of management's right to require overtime in a contract provision stating the 'employees refusing overtime will be charged with such overtime for purposes of equalization', the provision being deemed merely to provide a guide for management in administering overtime and not to give employees the right to refuse overtime." (e.g., 53 LA 703, 705; 50 LA 181, 183-184; 45 LA 738, 741; footnote 434, page 741, Sth Edition).
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> "The thinking of many arbitrators in this regard appears to be that management may require overtime in the absence of contract prohibition provided that it is of reasonable duration, commensurate with employee health, safety and endurance, and the direction is issued under reasonable circumstances." (e.g., 84 LA 1085, , 1090; 55 LA 1185, 1186-1187; etc.; footnote 428, page 741, 5th Edition).

With reference to the above cited third quote, it is noted that mandatory overtime is conditional "...provided that it is of reasonable duration, commensurate with employee health, safety and endurance, and the direction is issued under reasonable circumstances." The only evidence showing the frequency and duration of overtime hours was Union Exhibit 3 and Person 8's testimony. Although Union testimony and exhibits demonstrated that employees were being paid 300 to 400 overtime hours per month, the fact remains that the overtime cited in Union Exhibit 3 was voluntary overtime worked under the auspices of Appendix 9.

Based on the foregoing discussion of the facts and issues the arbitrator's finding and award is:

1. Established overtime rules specified in Appendix 9 are not a restriction on the right of the Employer to schedule and require a reasonable amount of overtime.

2. No provisions exist in the applicable collective bargaining agreement which prohibit the Employer from requiting compulsory overtime under Article 4, Managements Rights.

3. The Employer has the right to require compulsory overtime provided it is of reasonable duration, commensurate with employee health, safety and endurance and the direction is issued under reasonable circumstances.

4. The grievance in denied.