BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 2138	Case 10 No. 46930 A-4877
and	
PHOENIX STEEL, INC.	

Appearances:

Mr. Donald E. Schmitt, Staff Representative, United Steelworkers of America, 901 Marshall Street, Manitowoc, Wisconsin 54220, appearing on behalf of the Union.

Mr. Phil Hoilien, Production Manager, Phoenix Steel, Inc., 2800 Melby Street, Eau Claire, Wisconsin 54702, appearing on behalf of the Employer.

ARBITRATION AWARD

The United Steelworkers of America, hereafter the Union, and Phoenix Steel, Inc., hereafter the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission, hereafter the Commission, to appoint a staff member as single, impartial arbitrator to resolve the instant grievance. On February 7, 1992, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing was held on February 26, 1992, in Eau Claire, Wisconsin. The hearing was not transcribed and the record was closed on March 18, 1992 upon receipt of posthearing written argument.

ISSUE:

The Union frames the following issue:

> Did the Employer violate the terms of the Labor Agreement, when the Employer discontinued the practice of including the payments contained in Article XIX, Paragraphs (P) (Q) and (R), in the calculation of Vacation and Holiday Pay?
>
> If so, what is the proper remedy?

The Employer frames the issue as follows:

> Is Phoenix Steel required to pay premium rates of pay, on holidays and vacations, to particular employes who:
>
> a. Do flange to web and fracture critical web to flange work?
>
> b. Do butt welds to x-ray quality and are able to do their own layout, or
>
> c. Are able to "scarf."

The Arbitrator frames the issue as follows:

Did the Employer violate the terms of the collective bargaining agreement when the Employer did not include the payments contained in Article XIX, Paragraphs (P) (Q) and (R), in the calculation of Vacation and Holiday Pay?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE VII
WAGES

A schedule of rates is hereby established and shown in Exhibit "A", hereto attached and made a part thereof.

. . .

ARTICLE VIII
HOLIDAYS

Holiday pay will be granted for the following holidays as such at straight time:

New Years Day
Memorial Day
July Fourth
Labor Day
Thanksgiving Day
Friday after Thanksgiving Day
Day before Christmas Day
Christmas Day
Two Floating Holidays

. . .

Those employees scheduled for night shift operations during the week of a holiday shall receive the applicable shift premium rate for such holiday. For this purpose the work week shall be considered from Sunday through Saturday with the holiday being figured where it falls rather than where it may be observed.

. . .

ARTICLE IX
VACATIONS

All regular employees with one year service prior to July 1 of each year shall be entitled to one (1) week vacation pay each year the contract is in force.

All regular employees with three (3) years service prior to July 1 of each year shall be entitled to two (2) weeks vacation with two (2) weeks pay.

In both the one and two week categories, the vacation period shall be paid at the rate of forth (40) hours regular time at the employee's current hourly rate.

Employees with eight (8) years of service prior to July 1 of each year shall be entitled to three (3) weeks vacation with pay. Vacation pay shall be at the rate of forty (40) hours regular time at the employee's current hourly rate.

Employees with fifteen (15) years of service prior to July 1 of each year shall be entitled to four (4) weeks vacation with pay. Vacation pay shall be at the rate of forty (40) hours regular time at the employee's current hourly rate.

Employees with twenty (20) years of service prior to July 1 of each year shall be entitled to five (5) weeks vacation with regular time at the employee's current hourly rate.

Employees with thirty (30) years of service prior to July 1 of each year shall be entitled to six (6) weeks vacation with pay. Vacation pay shall be at the rate of (40) hours regular time at the employee's current hourly rate.

. . .

Employees whose vacation is taken during the week that they normally would be working the night shift shall be paid the shift premium rate for such period. However, the Company reserves the right to refuse vacation schedule requests if night shift operations are jeopardized due to employee efforts to obtain the premium pay. Also, there shall be no transfer from one crew to another to accomplish a night shift schedule to correspond with one's request for vacation. Any vacation scheduling conflicts or disputes shall be resolved based on seniority and production needs.

. . .

ARTICLE XIX
MISCELLANEOUS STIPULATIONS

. . .

(P) When doing 100% flange to web and fracture critical web to flange, the welder shall receive $.30/hr. above their job class rate.

(Q) Skilled fabricator who passes a four position test. Welders doing satisfactory butt welds to x-ray quality and able to do their own layout shall receive $.20/hr. above their job class rate when performing this work.

(R) When doing scarfing, the scarfer shall receive $.30/hr. above their job class rate commencing the first year of this contract.

. . .

BACKGROUND

On October 4, 1991, the Union filed a grievance alleging that the Employer violated Article IX and all other pertinent provisions of the collective bargaining agreement by failing to pay the employes' current rate of pay when the employe is off for vacation or holidays. Specifically, the Union maintained that the Employer violated the collective bargaining agreement when it failed to include the premium pay provided for in Article XIX, Paragraphs (P), (Q) and (R) in the calculation of the employe's current rate of pay when that employe had performed the work referenced in Paragraphs (P), (Q) and (R) immediately prior to the vacation or holiday.

On October 8, 1991, the Employer responded to the grievance as follows:

> Vacation pay is based on prevailing job class rate and does not include premium pay. Premium pay is only paid for time worked. See Article XIX, Paragraphs (P) (Q) and (R).

The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Article IX, Vacations, Paragraphs 3 through 7, requires that vacation payments be made at the employe's current hourly rate. An employe's current hourly rate is the hourly rate at the time the vacation is taken or when a holiday occurs. Although the holiday provision is silent as to what the pay is based on, Bill Brinkman testified that for as long as he has been an employe, some 15 years, holiday pay has been based on the employe's current hourly rate. His testimony was not contradicted at hearing. When an employe is engaged in the types of welding/scarfing operations specified in Paragraphs (P) (Q) and (R) just prior to vacation or holidays, the premium pay set forth in Paragraphs (P), (Q) and (R) are part of the employes' current hourly rate.

During the October 1987 contract negotiations, the parties added Paragraphs (P) and (Q) to Article XIX. Paragraph (R) was added during the October 1990 negotiations. In response to cross-examination, Greg Tomak testified that he did not recall any discussions between the parties in the 1987 or 1990 contract negotiations whereby the special payments in Paragraphs (P) (Q) and (R) would not apply to vacations or holidays.

Prior to September of 1991, the Employer consistently included the Paragraph (P) (Q) and (R) payments in the calculation of Vacation and Holiday Pay in instances where the employes involved were performing the special welding/scarfing operations just prior to taking vacation and when a holiday occurred. In September of 1991, contending that the calculations were made in error for almost four years, the Employer suddenly stopped including the payments of special welding/scarfing in the calculation of vacation and holiday pay. The Employer's argument, that no consistent practice existed, is not supported by the record evidence.

Some three months after the grievance was filed, the Employer began recovery procedures, going back four years. Employes should not be punished for exercising their rights to utilize the grievance procedure. The Arbitrator should sustain the position of the Union and make the employes whole for any loss incurred, including the recovery of monies the Employer has taken back from the employes involved.

Employer

Article IX expressly states that vacation pay is "paid at the rate of forty (40) hours regular time at the employe's current hourly rate." (Emphasis added) Regular time relates to the rates set forth in Exhibit "A". The contract expressly limits holiday pay to "straight time."

In Roberts Dictionary of Industrial Relations, the term "straight time pay" is defined as follows:

> Regular time or wage payments excluding overtime or other premiums. Sometimes referred to as the regular wage rate.

Straight time and regular time are used interchangeably in the contract, as well as in the labor relations field. By definition, "regular time" and "straight time" exclude premiums from the wage rate.

Paragraph's (P), (Q) and (R) provide for premium pay when "when doing" and "when performing" the work described in the Paragraphs. Work cannot be

performed when an employe is on vacation or a holiday.

At no time in any contract negotiation process were premium rates included in vacation and holiday pay. Since the contract does not stipulate such a requirement, the Employer cannot be held liable for these additional costs.

Vacation and holiday pay is based solely on the employes' permanent posted position pay rate, as established in Exhibit "A" of the current contract. Work being performed on a temporary basis that qualifies for a higher rate of pay, such as the premium pay stated in Article XIX, is not part of the employe's permanent posted position pay rate. To permit payment of vacation and holiday pay at premium rates would require an amendment to the contract. Such an amendment is contrary to Article XI, Paragraph 4. The grievance should be denied.

DISCUSSION

As the Employer argues, the language of Article XIX, Paragraphs (P), (Q) and (R) provides premium pay when an employe is "doing" or "performing" the work referenced in the Paragraphs. As the Employer further argues, an employe who is on vacation or holiday is not "doing" or "performing" the work referenced in the Paragraphs. Thus, the plain language of Article XIX does not require the Employer to include the premium pay set forth in Paragraphs (P), (Q) and (R) when calculating holiday or vacation pay.

The Employer's Superintendent, Greg Tomak, was present during the contract negotiations which created Paragraphs (P), (Q) and (R) of Article XIX. 1/ According to Tomak, he could not recall any specific negotiation discussions concerning Paragraph (R). Tomak did recall that, with respect to Paragraphs (P) and (Q), the Employer specifically stated that the premium pay provided in these Paragraphs would be paid only when performing the work. Tomak's testimony on this point was not rebutted at hearing. Thus, the evidence of bargaining history does not establish that the parties intended the language of Paragraphs (P), (Q) and (R) to be given any construction other than that required by the plain language of the Paragraphs.

As the Union argues, Tomak did not recall any negotiation discussions in which either party stated that the payments set forth in the Paragraphs (P), (Q) and (R) would not apply to vacations or holiday. As the Union does not argue, Tomak did not recall any negotiation discussions in which either party stated that the payments set forth in Paragraphs (P), (Q) and (R) would apply to vacations or holiday. Indeed, neither Tomak's testimony, nor any other record evidence, demonstrates that the calculation of vacation and holiday pay was a topic of discussion at the time that the parties agreed upon Paragraphs (P), (Q) and (R) of Article XIX. Thus, the evidence of bargaining history does not demonstrate that the parties intended to provide any vacation or holiday benefit other than that which is reflected in the plain language of the contract.

Article VIII, Holidays, provides that holiday pay is to be paid "at straight time". The term "straight time" is not defined in the contract. Absent a definition to the contrary, it is reasonable to conclude that the parties intended the term to be construed in a manner consistent with the

---

1/ Paragraphs (P) and (Q) were added to Article XIX during the 1987 negotiations and Paragraph (R) was added to Article XIX during the 1990 negotiations.

definition which is commonly recognized in the field of labor relations.

Roberts' Dictionary of Industrial Relations, relied upon by the Employer, is generally recognized to be a reliable dictionary in the field of labor relations. As the Employer argues, Roberts' defines the term "straight-time pay" as "Regular time or wage payments, excluding overtime or other premiums. Sometimes referred to as the regular wage rate." 2/ Applying this definition, the undersigned concludes that the plain language of Article VIII excludes the premium pay set forth in Article XIX, Paragraphs (P), (Q) and (R), from the calculation of holiday pay.

Paragraph Five of Article VIII states, inter alia, that "Those employes scheduled for night shift operations during the week of a holiday shall receive the applicable shift premium rate for such a holiday." This provision supports the conclusion that had the parties intended the premium pay set forth in Article XIX, Paragraphs (P), (Q) and (R), to be included in the calculation of holiday pay, the parties would have included a provision in Article VIII which clearly expressed such an intent.

Article IX, the provision governing vacations, does not provide that vacations are to be paid at "straight time". Rather, Article IX provides that vacation pay is to be paid "at the employee's current hourly rate". The term "hourly rate" is not defined in the contract. At hearing, Tomak stated that the rates set forth in Exhibit "A", Shop Wages, of the collective bargaining agreement were the rates normally used to calculate vacation wages.

Roberts' defines "hourly wage rate" as " The contract or legal rate paid to time workers under a collective bargaining or other agreement. It is not the same as the amount actually earned in an hour since it does not include overtime, or other premium and bonuses....." 3/ Applying this definition, an employee's current "hourly rate" does not include the premium pay set forth in Article XIX, Paragraphs (P), (Q) and (R).

Paragraph Thirteen of Article IX states that "Employees whose vacation is taken during the week that they normally would be working the night shift shall be paid the shift premium for such period." This provision supports the conclusion that had the parties intended the premium pay set forth in Article XIX, Paragraphs (P), (Q) and (R), to be included in the calculation of vacation pay, the parties would have included a provision in Article IX which clearly expressed such an intent.

For the reasons discussed supra, the undersigned is persuaded that the clear language of the contract does not require the Employer to include the premium pay referenced in Article XIX, Paragraphs (P), (Q) and (R) in the calculation of vacation and/or holiday pay. The undersigned turns to the question of whether the evidence of past practice, relied upon by the Union, demonstrates that the clear contract language has been amended by mutual action or agreement.

As many as 30 employes may perform the work referenced in Paragraphs (P), (Q) and (R) of Article XIX. This work, however, is normally performed by a group of eight employes. Of these, only two, Stuber and Steinke, perform the work on a consistent basis.

2/ Third Edition, BNA (1986).

3/ Id.

At hearing, Tomak stated that the premium pay referenced in Paragraphs (P), (Q) and (R) of Article XIX is normally added to the employe time card as the work is performed. According to Tomak, Stuber and Steinke performed the work referenced in Paragraphs (P), (Q) and (R) so consistently that he decided that it would be more efficient to have the payroll computer automatically credit the premium to the these employes. Tomak stated that he was under the mistaken impression that the computer would distinguish vacation pay from the hours actually worked. While acknowledging that Stuber and Steinke had received vacation pay which included the premium pay set forth in Article XIX, Paragraphs (P), (Q) and (R), Tomak maintained that the inclusion of the premium pay in the vacation pay of Stuber and Steinke was an error.

At hearing, Bill Brinkman, Union Financial Secretary, recalled that, around January of 1990, there were four employes, i.e., Robert Henneman, James Bischoff, Dale Steinke, and Warren Stuber, who complained to Tomak that they did not receive the premium pay set forth in Paragraphs (P), (Q) and (R) for vacation or holidays. Brinkman, who did not claim to have been present during the discussions with Tomak, understood that Tomak adjusted the employes' pay to include the premium pay.

At hearing, Tomak recalled that, at some point in time, he had told Henneman and Bischoff that the premium pay set forth in Article XIX, Paragraphs (P), (Q) and (R), should be included in the employes' vacation pay. According to Tomak, this was an error on his part. Tomak did not acknowledge any agreement to include the premium pay in the calculation of holiday pay. Rather, Tomak, recalled that, on one occasion, an employe asked him whether the premium pay was included in holiday pay, and that he (Tomak) said "no, that you received the premium pay only when you performed the work."

While it may be that, in January of 1990, Tomac adjusted holiday pay to include the premium provided for in Article XIX, Paragraphs (P), (Q) and (R), this fact has not been conclusively established. As stated above, Brinkman was not present at the meeting between the employes and Tomac. Tomac, who was present at the meeting, confirmed that he adjusted the vacation wages, but did not confirm that there were any adjustments to holiday pay.

Employer's Exhibit #1 indicates that, in January of 1991, both Bischoff and Henneman received holiday pay which included the premium pay in dispute. It may be that Brinkman was confused about the date of the meeting with Tomac, but the undersigned cannot assume a fact which is not in evidence.

The employes who perform the work referenced in Article XIX, Paragraphs (P), (Q) and (R) did not testify at hearing. The witnesses who testified at hearing established that, prior to September of 1991, there were times when employes who performed the work referenced in Article XIX, Paragraphs (P), (Q) and (R), immediately prior to a vacation and/or holiday, received vacation and holiday pay which included the premium pay set forth in these Paragraphs. To be persuasive, however, the evidence of past practice must be "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." 4/

Crediting Tomac's testimony concerning the circumstances which lead to the vacation payments to Stuber and Steinke, the undersigned is persuaded that some of the payments relied upon by the Union as "past practice" were made inadvertently and, as such, cannot be considered to be indicative of the

---

4/ Elkouri and Elkouri, How Arbitration Works, BNA (4th Ed., 1985), p. 439.

Employer's "acceptance" of the practice. Moreover, since Employer's Exhibit #1 identifies several instances in which employes performed the work referenced in Article XIX, Paragraphs (P), (Q) and (R), immediately prior to vacation and received vacation pay which did not include the premium pay, the evidence of past practice relied upon by the Union is not "unequivocal". 5/

It is not evident that the January, 1991 adjustments to the holiday pay of Bischoff and Henneman were inadvertent. However, these adjustment, which affected two employes in the same one month period, falls far short of meeting the requirement that a practice be "readily ascertainable over a reasonable period of time".

5/ For example, Jim Mizer during the week of 1/12/91; James Nelson during the week of 8/10/91; and James Bischoff during the week of 2/16/91.

In summary, the clear contract language does not require the Employer to include the premium pay set forth in Article XIX, Paragraphs (P), (Q) and (R), in the vacation and/or holiday pay of employes who perform the work referenced in these Paragraphs when the employe performs such work immediately prior to the vacation and/or holiday. For the reasons discussed supra, neither the evidence of negotiations history, nor the evidence of past practice, establishes that the clear language of the written contract has been amended by mutual action or agreement of the parties. 6/

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the terms of the collective bargaining agreement when the Employer did not include the payments contained in Article XIX, Paragraphs (P), (Q) and (R), in the calculation of Vacation and Holiday pay.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 16th day of April, 1992.

By _____
Coleen A. Burns, Arbitrator

6/ The issue of whether or not the Employer had the contractual right to recoup the "erroneous" holiday and vacation pay is not before the arbitrator and the arbitrator makes no determination with respect to this issue.