

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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LABORERS' INTERNATIONAL UNION OF : Case 28
NORTH AMERICA, LOCAL UNION NO. 140 : No. 49965
 : A-5140
and :
 :
SPARTA MANUFACTURING COMPANY :
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Appearances:

Mr. Kevin D. Lee, Business Manager, Laborers' International Union of
North America, Local Union No. 140, appearing on behalf of the
Union.
Gleiss, Locante & Gleiss, Attorneys at Law, by Ms. Shari LePage Locante,
appearing on behalf of the Company.

ARBITRATION AWARD

Laborers' International Union of North America, Local Union No. 140, hereinafter referred to as the Union, and Sparta Manufacturing Company, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Company, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Sparta, Wisconsin, on November 17, 1993. The hearing was not transcribed and the parties made oral arguments after the presentation of evidence.

BACKGROUND:

The basic facts underlying the grievance are not in dispute. The grievant, Bernard Esser, was asked to work overtime on Saturday, September 4, 1993. It is undisputed that Esser could have declined the offer, but Esser accepted the offer and agreed to work. On Saturday, September 4, 1993, Esser did not show up for the overtime work nor did he call in. Esser was originally paid for Labor Day, September 6, 1993. However, on his September 17, 1993 pay check, holiday pay for Labor Day was deducted. Esser filed a grievance which was processed to the instant arbitration.

ISSUE:

The Company stated the issue as follows:

Whether or not the Saturday was a qualifying day
for holiday pay?

The Union added the following:

What is the disciplinary action for missing an optional Saturday?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE IV

HOURS OF WORK

Section 1.

(a) The workday shall consist of eight (8) hours. The work week shall consist of forty (40) hours.

. . .

ARTICLE VII

PAID HOLIDAYS

. . .

(d) To receive a paid holiday the eligible employee, (sic) must work the last work day before such holiday and the first work day after such holiday, except when excused because of illness and verified by a physician's certificate so stating. For an employee to be eligible for holiday pay, he must have to work the last six (6) hours. Under no circumstances other than employees off for vacation or workers' compensation will any employee qualify for holiday pay if they have performed no work for the Company within the seven (7) day period immediately preceding the holiday.

. . .

ARTICLE X

WAGES

. . .

Section 4.

(a) . . . Employees agreeing to work overtime and their name appears on the overtime list but do not report to work for the scheduled overtime period shall automatically not be asked again to work overtime until two (2) complete rotations occur.

UNION'S POSITION:

The Union contends that Esser worked the last work day before and the first work day after the holiday so he is eligible for holiday pay. It submits that the penalty for missing an optional Saturday is spelled out in the contract and that is the only penalty applicable and Esser did miss two rotations. It asserts that holidays are a fringe benefit and Saturday overtime is a fringe benefit and the discipline for infractions is spelled out precisely in each place and nowhere does it say penalties can be compounded. The Union claims that the contract is precise and Esser worked the last work day on Friday and met the eligibility for holiday pay, and it asks that the Company be ordered to pay Esser for Labor Day.

COMPANY'S POSITION:

The Company contends that "work day" is not precisely defined and the contract does not say a work day is a particular day of the week. The Company argues that if an employee voluntarily agrees to work an optional Saturday that becomes a "work day." The Company further asserts that there is no prohibition on stacking penalties and, in such a case, the issue would be whether the penalty is appropriate. The Company insists that an employee who fails to report for overtime that he had volunteered for could be penalized by missing two rotations as well as incur an unexcused absence and could also lose holiday pay. It recognizes there are specific penalties for specific violations, but these are not mutually exclusive. It maintains that Esser did not work on the Saturday before Labor Day, so forfeiture of holiday pay is appropriate.

DISCUSSION:

Although both parties argued the holiday pay issue in terms of discipline, the issue here is whether Esser met the eligibility requirements for holiday pay. Arbitrators have indicated that the withholding of holiday pay from employees who have met the eligibility requirements for such pay is not an appropriate option for meting out discipline. 1/ The undersigned does not view the instant case as involving discipline, and the only issue is whether Esser

1/ Dillingham Mfg. Co., 91 LA 816 (Nicholas, 1988).

met the requirements for holiday pay for Labor Day, 1993. Article VII (d) provides that to receive a paid holiday, the eligible employee must work the last work day before such holiday. 2/ Article IV, Section 1 (a) states simply that the work day shall consist of eight (8) hours. 3/ Arbitrators have held that where the contract provides that to be eligible for holiday pay, an employee must work the last "regular work day" or last "regularly scheduled work day," an employee who does not work overtime on Saturday is still eligible for the holiday pay. 4/ On the other hand, where the contract merely refers to "work day" or "scheduled work day," arbitrators have held that employees who fail to work overtime on Saturday without any excuse are not eligible for holiday pay. 5/

Although the parties were in agreement that the regular schedule of work days was Monday through Friday for Esser's shift, the agreement does not define a regularly scheduled work day, and Article VII, Section 4 (d) merely refers to "work day." Under such circumstances, arbitrators have held that a scheduled work day is a day on which an employee is scheduled to work. 6/ In a case similar to the instant case, the arbitrator, in denying holiday pay for an employee who failed to work overtime scheduled for the Saturday before the holiday, stated with respect to the work day before the holiday:

It need not be a normal work or a regular work day. The apparent reason for requiring employees as a condition for receiving holiday pay, to be at work on their scheduled work days immediately and following a holiday is to discourage them from taking extra time when the company needs their services. 7/

2/ Ex. 1.

3/ Id.

4/ A. O. Smith, 47 LA 659 (Dworken, 1966); Corhart Refractories Co., 47 648 (McCoy, 1966); Amron Corp., 47 LA 582 (Kelliher, 1966).

5/ Youngstown Steel Door Co., 46 LA 323 (Marshall, 1966); Peerless Mfg. Co., 38 LA 746 (Larson, 1962).

6/ Goodyear Tire & Rubber Co., 44 LA 1212 at 1214 (Begley, 1965).

7/ Greif Bros. Cooperage Corp., 35 LA 389 at 390 (Crane, 1960).

In the instant case, Esser had the right to refuse the Company's request to work overtime on Saturday. He acceded to the request and at this point Saturday became a work day under the contract for holiday pay eligibility purposes. Esser did not work this work day before Labor Day and thus did not meet the eligibility requirements for holiday pay. It must be emphasized that the loss of holiday pay was not disciplinary in nature. Esser did not meet the qualifying requirements for holiday pay and therefore was not eligible for it.

The Company's subsequent pay deduction for the holiday was appropriate because Esser was not eligible for it and had received pay when he should not have been paid.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 29th day of November, 1993.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator