BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LABORERS' INTERNATIONAL UNION OF NORTH AMERICA and HARBOR CITY MASONRY	Case 1 No. 51949 A-5317

Appearances:

Mr. Paul R. DeBeir, 1213 Tower Avenue, Superior, Wisconsin, representing the Union.

Mr. Roger Anderson, 814 West Fifth Street, Duluth, Minnesota, representing the Employer.

ARBITRATION AWARD

The Laborer's International Union of North America, "the Union," and Harbor City Masonry, "the Employer," are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes arising thereunder. On December 15, 1994, the Union made a request, in which the Employer concurred, for the Wisconsin Employment Relations Commission to appoint an Arbitrator to resolve a dispute over the application and interpretation of the terms of the agreement relating to hours and pay. The Commission appointed Stuart D. Levitan, a member of its staff. Hearing on the matter was held on April 26, 1995, in Duluth, Minnesota. The hearing was not transcribed. The parties waived their right to file briefs.

ISSUE:

The parties stipulated to the following issue:

> *Did the Employer violate the collective bargaining agreement on November 18, 1994, when it did not pay the five-person concrete crew?*
>
> *If so, what is the remedy?*

RELEVANT CONTRACT PROVISIONS

Schedule 2

CALL IN PAY

> Employees shall receive full time pay for all the time spent in the service of the Employers. There shall be no split shifts. When an Employee is called to work, he shall receive two (2) hours pay if not put to work. If he is called to work and commences work, he shall be guaranteed a minimum of four (4) hours pay. These provisions, however, not to be effective when work is unable to proceed because (1) railroads or common carriers fail to make deliveries as scheduled; (2) the Engineer refuses to permit work; (3) Acts of God including weather conditions will not permit work.

BACKGROUND

On Friday, November 18, 1994, the five members of the concrete crew working for the Employer at the Northwoods School in Minong, Wisconsin, reported to work in time for their 7:00 a.m. shift. As they were reporting, and prior to 7:00 a.m., the Employer, having determined that the temperature was likely to be at or below 32 degrees, with a high likelihood of snow, cancelled the delivery of concrete scheduled for that day. At approximately 7:10 a.m. - 7:15 a.m., the Employer's supervisor informed the crew that their work was cancelled until further notice; the Employer then formally issued lay-off notices, dated November 17. The remaining concrete work was not completed until the following March.

The Union grieved, stating as follows:

> On Friday, November 18, 1994, the 5 employees went to work at 7:00 A.M. At 7:15 A.M. the employer came out and informed them he was laying them off effective immediately. The employer failed to pay the employees four (4) hours pay as per Schedule 2 of the current working agreement.

On December 1, 1994, the Employer responded as follows:

> In regards to the show-up time at the above referenced project on 11/18/94, as per the Union Contract (enclosed) no show-up time shall be paid for Acts of God including weather conditions that will not permit work. On this day we had planned to pour concrete floors but it was too cold to pour so everybody went home. No

> show-up time is going to be paid because of the weather (cold conditions).
>
> Would you have liked it better if I told everyone to continue coming to work each morning until its warm enough to pour. Had I done this instead of laying them off they would have had to come to work each day until sometime in February when the roof is on or they could have quit. Then they wouldn't be eligible for unemployment benefits. When I started pouring the floors I made it clear that we would continue until the weather turned cold, which is exactly what I did.

THE PARTIES' POSITIONS

As expressed at hearing, the parties' positions are essentially as stated in the communications quoted above. The Union says the cold weather did not constitute an Act of God, and that the workers, having commenced work, are entitled to four (4) hours pay. The Employer contends that, the job having been cancelled due to cold weather, the Act of God exclusion becomes operative, and the workers are not contractually entitled to any compensation.

DISCUSSION

The parties have entered into a collective bargaining agreement which provides for call-in pay, except under three conditions. One of those exclusionary conditions is for Acts of God, which is specifically defined as including "weather conditions (which) will not permit work."

The employer and the employees all anticipated that work would proceed on November 18, 1994. However, while the employees were on their way to the job site, the employer's job supervisor determine that weather (below-freezing temperatures, and a possibility of snow) would preclude the pouring of concrete; accordingly, he cancelled both the delivery of the concrete, and the day's work for the concrete crew. That cancellation would last until sufficiently warm weather returned the following March.

There is no evidence that the employer acted in bad faith in cancelling the work; the record evidence supports the conclusion that the employer cancelled the work simply and clearly because weather conditions would not permit the pouring of concrete. Under the terms of the collective bargaining agreement, weather conditions are an Act of God which suspend the effectiveness of Schedule 2, Call In Pay. Those provisions not being effective, there is no Call In Pay due and owing to the employes.

This does not address, however, the question of whether any pay is due and owing to the employes for the period between 7:00 and 7:15, when the day was officially cancelled. The

collective bargaining agreement provides that employees "shall receive full time pay for all time spent in the service of the Employer." That morning, the employes were in such service for approximately 15 minutes. Subsequently, however, the official lay-off notice established that their last day was the 17th. It is my understanding that certain employes have filed for, and received, unemployment benefits based on a last day of work of November 17.

My interpretation of Schedule 2 is that the three listed exclusions (concerning railroad, the engineer, and Acts of God) apply to the provisions for two and/or four hours call in pay, and that the exclusions of effectiveness do not apply to the provision for employes to receive full pay for all time spent in service. However, because the parties neither argued nor briefed the issue of the implications of the receipt of unemployment compensation, I am reluctant to issue an award addressing that aspect. Accordingly, I have stated my general interpretation of the provision (that it was in effect in this instance), and will retain jurisdiction to enable the parties to consider whether an award relating to 15 minutes of pay on November 18, 1994 is appropriate.

On the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

AWARD

That, as to the issue of Call In pay on November 18, 1994, the grievance is denied and dismissed.

That, as to the issue of 15 minutes' pay for time spent by the employes in the employer's service on November 18, 1994, I shall retain jurisdiction for 45 days from the date of this Award, to enable the parties to submit supplemental arguments on the appropriateness of any further award.

Dated at Madison, Wisconsin this 22nd day of May, 1995.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator