BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ALGOMA NET COMPANY

and

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL UNION 215T

Case 19
No. 53974
A-5469
Bonus Payment

Appearances:

Mr. Howard Simon, Vice President, Gleason Corporation, 10474 Santa Monica Boulevard, Los Anegeles, CA 90025, appearing on behalf of Algoma Net Company.

United Food and Commercial Workers, AFL-CIO, W3620 Rock Road, Appleton, WI 54915, by Mr. Eugene L. Krull, International Representative, appearing on behalf of Local Union 215T.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, the United Food and Commercial Workers, Local Union No. 215T (hereinafter referred to as the Union) and Algoma Net Company, (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the inclusion of a lump sum bonus in the calculation of incentive rates. The undersigned was so designated. A hearing was held on August 2, 1996 at the Company's offices in Algoma, Wisconsin, at which time the parties were afforded full opportunity to present such stipulations, testimony, exhibits, other evidence and arguments as were relevant. No record was made of the hearing, and the parties waived the submission of post hearing arguments.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes and issues the following Award.

I. Issue

The issue in this case is:

> Did the Company violate the collective bargaining agreement when it refused to include the value of a $600 lump sum bonus in the calculation of "average earned rates" for the purpose of paying incentive pay? If not, what is the appropriate remedy?

VII. Relevant Contract Language

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ARTICLE III
HOURS OF EMPLOYMENT AND OVERTIME

. . .

Section 8. All Union members as of November 1, 1995, will receive a $600.00 signing bonus. It is agreed that the hourly rates of pay shall be as follows:

Periods of Employment	11/1/95 thru 10/31/96 Day Rate	11/1/96 thru 10/31/97 Day Rate	11/1/97 thru 10/31/98 Day Rate
Starting Rate	$6.20	$6.35	$6.50
Two Months	$6.42	$6.57	$6.72
Six Months	$6.49	$6.64	$6.79
	Incentive B.R.	Incentive B.R.	Incentive B.R.
Training Rate	$5.50	$5.75	$6.00
Full Rate	$5.90	$6.15	$6.40

New hired employees for incentive jobs shall have a sixty (60) calendar day training period and be paid the training rate. The maximum guaranteed rate for incentive workers shall be their incentive base rate.

. . .

Section 11. Average earned rates shall be computed every twelve (12) months, namely from January 1 to December 31 of the calendar year. Rates so computed shall be effective February 1 and

applied for the twelve (12) month period following the period for which they are computed.

III. Background

The Company makes sports bags, hammocks and other products at its Algoma, Wisconsin plant and the Union is the exclusive bargaining representative for the Company's non-exempt employees. The Company and the Union have been parties to a series of collective bargaining agreements, the most recent of which covers the period from November 1, 1995 through October 31, 1998. During negotiations over this agreement, the Company offered the Union's bargaining team a choice between hourly increases of 20¢ in each year of the contract, or a lump sum signing bonus of $600 on November 1, 1995 with no increase in the hourly rate, and an hourly increase of 25 in each of the second and third years. The Union's team chose the second alternative, and overall agreement was reached on the contract.

Twenty of the plant's thirty-seven employees are paid on an incentive basis. Average earned rates for use in incentive pay are calculated on the basis of earnings for the prior calendar year, and are effective in February of the following year. In February of 1996, the Company told employees what their incentive rates would be for 1996. The rates reflected hourly pay earned in 1995 divided by hours worked. It did not include the $600 signing bonus. The instant grievance was filed, alleging that the bonus was part of total earnings for 1995 and should have been included in the calculation of average rates. The Company denied the grievance, alleging that the bonus was offered in lieu of a wage increase for 1995-96, and therefore should not be treated as part of the "earned" rates for 1995. The grievance was not resolved in the lower steps of the grievance procedure, and was referred to arbitration.

A hearing was held on August 2, 1996, in Algoma. At the hearing, testimony was presented that established that the Company's labor negotiator had asked several times during bargaining what method was used to calculate average earned rates, and was told that it was based on the incentive workers' gross earnings for the prior year divided by total hours worked. This was the first time a bonus had ever been included in the contract, and in prior years gross earnings for workers on incentive jobs would have consisted of the incentive base rate, plus incentive earnings. In the course of negotiations, neither party specifically raised the question of how the bonus would be treated in calculating the next year's average. It was understood that payment of the full bonus did not depend upon working a particular number of hours or reaching any incentive levels. All workers on the payroll as of November 1, 1995 received the bonus. The parties agreed that non-wage items such as health insurance, holiday turkeys, attendance bonuses and safety bonuses were not included in calculating the average earned rate.

IV. Arguments of the Parties

The Union argued at the close of the hearing that, although the contract is silent on how the

bonus is to be treated, the average earned rate had always been calculated using the total earnings and the Company had not given the Union any reason to think that this would change, simply because a bonus was being in lieu of an hourly increase. The bonus is part of the employee's overall earnings. Failure to increase the average earned rate affects over half of the bargaining unit, and the Union speculates that it might have made a different choice in

bargaining if the Company had been forthcoming on how it intended to treat the bonus. The arbitrator should require the Company to follow the past practice of using all earnings to calculate the incentive pay for the first year of the contract.

The Company argues that the $600 bonus was paid in lieu of any increase in hourly wages for the first year of the contract. The bonus cannot logically be treated as part of any employee's earned rate, since it was a one-time, lump sum payment, and did not depend on working a particular number of hours or producing a particular amount of product. It does not make sense for either party to have thought that the Company was offering an hourly wage increase for all incentive workers on top of a one-time bonus for all employees. It is more reasonable to treat the bonus in the same way as other non-wage benefits are treated, and to exclude it from the calculation of the average earned rate. Thus the arbitrator should deny the grievance.

V. Discussion

The contract is silent on the treatment of the bonus money paid in settlement of the contract's first year. Calculation of incentive pay is controlled by Article III, Section 11:

> Section 11. Average earned rates shall be computed every twelve (12) months, namely from January 1 to December 31 of the calendar year. Rates so computed shall be effective February 1 and applied for the twelve (12) month period following the period for which they are computed.

The question in this case is whether a lump sum bonus may be considered to be a component of the average earned rate. The words used in the contract do not clearly answer that question. The Company argues that the use of the word "earned" precludes counting the bonus, because receipt of the bonus depends only upon being employed on November 1, 1995, no matter what or how much work the employee performs before or after that date. The term "earned" does generally connote some relationship between effort and compensation, and including a uniform bonus in the calculation of incentive rates is at odds with the notion that individual productivity is the dominant factor under an incentive system. The language of the clause tends to support the Company, but the clause was not written with signing bonuses in mind, and does not state what components of the prior year's earnings are to be considered. The support it lends to

the Company's interpretation is inferential, and is not so clear as to rule out including the bonus in the average earned rate.

Where contract language is ambiguous, the arbitrator looks to the general principles of interpretation. These principles fall into four general categories:

1. Those which look to the normal usage of language; 1/

2. Those which look to the conduct of the parties in negotiating and administering the contract; 2/

3. Those which look to the identity of the parties; 3/

4. Those which look to the effect of one permissible interpretation as compared to the effect of another permissible interpretation. 4/

I have already addressed the normal usage of language, both with respect to the usual meanings of a "bonus" and the inference to be drawn from the use of the word "earned" in describing the average rate. In addition, both parties cite the history of negotiations as a relevant factor, and the Company cites what it contends would be the absurd effect of accepting the Union's interpretation.

Looking first to bargaining history, the parties are in general agreement that the bonus was offered in lieu of a wage increase. This is consistent with the structure of the offer the Company made to the Union on wages, in which the choice was between 20¢ per hour across the board in each of three years, or the $600 bonus for the first year, and 25¢ per hour in the second and third years. The usual rationale for offering a signing bonus in lieu of wages is to avoid carrying over the cost into subsequent years of the contract. Using a standard forty hour week, $600 is worth roughly 29¢ per hour. If, as the Union believes, the bonus was to be included in the incentive

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1/ See headings entitled "Normal and Technical Usage", "Agreement to be Construed As A Whole", "To Express One Thing Is To Exclude Another", "Doctrine of 'Ejusdem Generis'", "Specific Versus General Language" and "Construction In Light Of Context" in Chapter Nine of Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985), (herein-after cited as "Elkouri") at pps. 342-365.

2/ See headings entitled Precontract Negotiations", "Custom and Past Practice of the Parties", "Prior Settlements as Aid to Interpretation", and "Interpretation Against Party Selecting the Language" in Chapter Nine of Elkouri; See also Chapter Twelve of Elkouri "Custom and Past Practice" at pps 437-456.

3/ See headings entitled "Experience and Training of Negotiators" and "Industry Practice" in Chapter Nine of Elkouri.

4/ See headings entitled "Construction in Light of Law", ""Avoidance of Harsh, Absurd, or Nonsensical Results", "Avoidance of a Forfeiture" and "Reason and Equity" in Chapter Nine of Elkouri.

rates, the Company's bonus offer for incentive workers amounts to 29¢ per hour in the first year, plus the $600 lump sum payment. Taking the 29¢ built-in hourly cost for incentive workers under this theory, and spreading it across the entire bargaining unit for comparative purposes, the Union's theory of the case is that the Company offered a choice between 20¢ per hour for three years -- a 60¢ lift in the hourly rates in the life of the contract -- and 16¢ per hour 5/ plus the $600 bonus in the first year, and 25¢ per hour in both of the succeeding years -- a 66¢ lift in the average hourly rates over the contract, plus the bonus. The following table demonstrates the per-employee cost of the rejected option, the Union's theory and the Company's theory:

Comparison of Total Per Employee Value of the Various Options

Rejected Option	**Union's Theory**	Company's Theory
20¢ x 2080 = **$ 416**	16¢ x 2080 = $333 + $600 bonus = **$ 933**	0¢ x 2080 - $0 + $600 bonus = **$ 600**
40¢ x 2080 = **$ 832**	41¢ x 2080 = **$ 853**	25¢ x 2080 = **$ 520**
60¢ x 2080 = **$1,248**	66¢ x 2080 = **$1,373**	50¢ x 2080 = **$1,040**
3 Yr. Total: **$2,496**	**$3,159**	**$2,160**

Under the Company's theory, it offered a choice between more money in the first year but lower hourly rates and a somewhat lower overall cost, or less money in the first year with higher hourly rates and a somewhat higher overall cost. Under the Union's theory, the Company offered a bonus option which was more expensive in each year of the contract than the cents per hour option, and which generated higher average hourly wage costs in the second and third years of the contract. It is always a risky proposition to try to second guess bargaining behavior, but if the interpretation suggested by the Union is correct, the Company's offer of these two options was irrational. There is no tradeoff to be made between the cents per hour offer and the bonus offer -- the bonus option was clearly superior for the bargaining unit and materially worse for the Company. More to the point, including the bonus in the average earned rate calculation is not

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5/ There are approximately thirty-seven workers in the bargaining unit, twenty of whom are incentive workers. The 16¢ average is calculated on the basis of $600 divided by 2080 hours = 28.8¢ times twenty incentive workers = $5.77, divided by a total workforce of thirty seven = 15.6¢.

consistent with the notion that it was offered in lieu of a first year wage increase, even though the parties agree that this was how the bonus was styled in negotiations. Under the Union's theory, the bonus operates as a very substantial wage increase for more than half of the employees. This aspect of the bargaining history provides strong support for the Company's position.

On the other side of the coin, the fact that the Company's negotiator asked several times how the average earned rates were calculated, and was told that it was the prior year's total gross earnings divided by hours worked, favors the Union's position. The bonus is clearly a part of overall "earnings", in the sense that it is a wage payment, not a gratuity or a fringe benefit. In prior years, the calculation would simply have included hourly earnings, since no bonus had ever been paid. The Company was obviously concerned about the possible impact of any settlement on the average earned rate, and in the face of the Union's answer to how the rate was calculated, its bargainers should have made it clear that the bonus would not be included.

I am not suggesting that the Company's negotiator acted in bad faith. The Company's internal system for calculating these rates does not depend upon W-2's or gross earning statements as such. Those are prepared by the corporate offices in California, while the average earned rates are prepared from Company records on hourly earnings. Thus if the Company's negotiator was working from the actual system used to compute the average, he could have proposed the bonus, honestly believing that it would not be part of the existing system for figuring average earned rates. However, given the fact that a bonus had never been paid before, and that the Union's view of the calculation could reasonably have been understood to include the bonus, the Company as the proponent of the bonus should have taken steps to clear up the ambiguity. One common principle of contract interpretation is that ambiguous language is to be interpreted against the party which drafted the proposal. While the bonus language itself is not ambiguous, its effect on the average earned rate is. The Company had reason to know that there could be misunderstandings and it had the burden of avoiding them if possible.

The final factor to be weighed is the practical effect of one interpretation against the other. Parties are presumed to have intended that the contract operate rationally, and if one plausible interpretation yields absurd, harsh or nonsensical results while another avoids such results, the latter should be favored. Including the signing bonus in the computation of the average earned rate for incentive work does have the potential for results that are, at the very least, odd. Since it is a flat sum, unrelated to hours worked, including it in the average produces a much greater benefit to new employees, part-time workers and junior employees who may be subject to layoffs during the year, than it does to senior full-time employees. As discussed above, the bonus would be worth 29 per hour to someone who worked a full 2,080 hours in 1995. If an employee started at mid-year and worked only 1,040 hours, his or her rate would increase by 58 per hour when the bonus is included. Under the Union's theory, the less someone worked in 1995, the more their rate would increase in 1996. A senior full-time employee who worked overtime in 1995 would

potentially receive a far smaller hourly increase than a new employee, or a part-time employee. It is not completely impossible that the parties would intend such a result, but it would run counter to most of the usual presumptions about rewarding work and service.

In an arbitration over the meaning of the contract, the Union carries the burden of proving its case by a preponderance of the credible evidence. There is some evidence in the record to support inclusion of the signing bonus in the computation of the average earned rate. However, the overall weight of the evidence does not support that interpretation. The history of negotiations demonstrates that the bonus was in lieu of a wage increase, and the Union's theory would have it be in addition to a wage increase for the majority of the bargaining unit. Moreover, the practical impact of including the bonus in the average earned rate would be to favor employees who gave comparatively little service to the Company in 1995 over those who worked long hours on the Company's behalf. For these reasons, I conclude that the Union has not carried its burden of proof, and accordingly the grievance is denied.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Company did not violate the collective bargaining agreement when it refused to include the value of a $600 lump sum bonus in the calculation of "average earned rates" for the purpose of paying incentive pay. The grievance is denied.

Dated at Racine, Wisconsin this 5th day of September, 1996.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator