

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

WIS-PAK, INC.

Case 17
No. 53394
A-5426

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. John L. Brennan, on behalf of the Union.
Lindner & Marsack, S.C., by Mr. Dennis G. Lindner, on behalf of the Company.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Watertown, Wisconsin, on June 21, 1996. The hearing was not transcribed and both parties thereafter filed briefs which were received by August 8, 1996. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Has the Company violated the contract by refusing to pay 12 hours of straight time pay and 8 hours of holiday pay in cases of holiday shutdowns to employees scheduled to work 12 hours a day on the days of the shutdowns and, if so, what is the appropriate remedy?

DISCUSSION

The Company produces and bottles soda and other products at its Watertown, Wisconsin, plant. Up until recently, its production facilities normally ran on a standard eight-hour day, Monday-Friday, forty-hour week. Its prior 1990-1993 contract with the Union thus stated:

ARTICLE 12 - HOURS OF WORK

12.1 The normal workday shall begin at the employee's assigned starting time. The normal schedule of hours of work in the plant shall be eight (8) hours per day and forty (40) hours per week Monday through Friday, except for the third shift employees whose normal workweek will begin with their shift on Sunday and end with their shift on Thursday.

The normal starting time for the first shift shall be between the hours of 6:00 a.m. and 7:00 a.m. or between the hours of 5:00 a.m. and 6:00 a.m. if it is a nine (9) or ten (10) hour day, except that start-up personnel may be brought in one-half (1/2) hour before the normal starting time.

12.2 The Employer will guarantee each regular employee forty (40) hours of pay in each workweek, except that if a natural disaster occurs, the Employer will be released from the forty (40) hour guarantee for that week. For pay purposes, the workweek shall begin on Monday and end on Sunday. Hours worked on Saturday to fulfill the guarantee will be paid at time and one-half (1-1/2).

...

Prior to the current agreement, holiday pay counted towards the weekly guarantee of 40 hours pay provided for in Article 12.

The parties in 1993-1994 negotiations over a successor contract bargained over the Company's plan to convert to a 24 hour, 7 day a week continuous operation to meet the Company's heavy production needs. They ultimately agreed to a June 1, 1993 - September 30, 1998, contract which provided in Article 12, entitled "Hours of Work":

12.1 The normal workday shall consist of eight (8) or twelve (12) hours. The normal week shall consist of five (5) consecutive eight (8) hour days or alternating weeks of three (3) twelve (12) hour days and four (4) twelve (12) hour days. Continuous shift schedules are set forth in Appendix A.

The normal starting time for the third (3rd) shift shall be 10:00 p.m., except that start-up personnel may be brought in one (1) hour before the normal starting time.

12.2 The Employer will guarantee each regular full-time employee working eight (8) hour shifts forty (40) hours of pay in each workweek, except that if a natural disaster occurs, the

Employer will be released from the forty (40) hour guarantee for that week. Hours worked on Saturday to fulfill the guarantee for eight (8) hour employees shall be paid at time and one-half (1-1/2). The Employer will guarantee each regular full-time employee working twelve (12) hour shifts the hours generated in Appendix A, except that if a natural disaster occurs, the Employer will be released from the guarantee for that week. For pay purposes, the workweek shall begin on Monday and end on Sunday for eight (8) hour personnel. For pay purposes, the workweek shall begin on Sunday 6:00 a.m. and end on Sunday 6:00 a.m. for twelve (12) hour personnel.

. . .

The contract also provides in Article 14, entitled "Holiday Pay":

ARTICLE 14 - HOLIDAY PAY

14.1 Whenever no work is performed on one of the following holidays listed below, eight (8) hours at the employee's straight time rate will be paid for:

New Year's Day	Thanksgiving Day
Good Friday (8 hour shifts)	Day following Thanksgiving Day
Easter Sunday (12 hour shifts)	Full Day before Christmas
Memorial Day	Christmas Day
Independence Day	Full Day before New Year's Day
Labor Day	

Company and Union negotiators thereafter met on March 9, 1995, 1/ for the purpose of addressing the Company's plans to change to a continuous, around the clock operation. Union Business Agent Joseph P. Ashworth, who headed the Union's negotiations, testified here that the Union "reluctantly" agreed to the Company's plans and that Company representatives then stated that while the Company sold a lot of pop on the holidays, it would try to close the plant on Thanksgiving, the day after Thanksgiving, Christmas, and the day after Christmas. 2/

The Company subsequently prepared written minutes of that meeting, (Joint Exhibit 3),

1/ Unless otherwise stated, all dates hereinafter refer to 1995.

2/ For purposes of simplicity, these four contractual holidays will be simply referred to as the Thanksgiving and Christmas holidays.

which it sent to the Union and which stated, inter alia:

"If an employee is scheduled to work on a holiday and the plant shuts down, that employee will receive 12 hours straight time pay and 8 hours holiday pay. Part of the guaranteed hours."

Ashworth testified without contradiction that the above quoted sentence from the March 9 minutes accurately reflected what the parties agreed to at that time. Employee Rodger J. Annen - who also was a member of the Union's bargaining team and who also attended the March 9 bargaining session - corroborated Ashworth's testimony. No Company representatives at the hearing disputed that these minutes were accurate.

The parties also discussed this issue at a July 11 meeting. The Company's minutes for that meeting, (Joint Exhibit 4), were sent to the Union and stated, inter alia:

"If a 12 hour employee is scheduled to work on a holiday and the plant shuts down, that employee will receive 12 hours straight time pay and 8 hour [sic] holiday pay."

Both Ashworth and Annen testified without contradiction that they attended the July 11 meeting and that those minutes accurately reflected what the parties then discussed. No Company representatives at the hearing disputed that these minutes were accurate.

The Company switched over to a 24 hour, 7 day a week continuous operation. As a result, about 150 production employees now work that schedule by working alternating weeks of three 12 hour days and four 12 hour days or 36 hours one week and 48 hours the next, Monday-Friday. The remaining 50 or so employees in shipping and receiving work a standard 8 hour day. The Company kept its plant open on the July 4 and Labor Day holidays. The employees on the continuous operation who actually worked twelve hour shifts on either of those holidays got 12 hours pay at time and a half and another 8 hours holiday pay, thereby resulting in them receiving 26 hours pay.

Production Manager Dave Magnan via a September 26 memo entitled "Thanksgiving and Christmas Holidays" announced to "All Watertown Employees" that:

. . .

Eligible 12 hour employees scheduled to work on the above days the plant will be shut down will receive 12 hours of pay at their straight time rate for their scheduled work day in addition to the 8 hours of holiday pay for 11/23/95, 11/24/95, 12/24/95 and 12/25/95.

12 hour employees scheduled for vacation during the Thanksgiving or Christmas weeks will not receive additional days off.

...

This memo was posted by the plant's time clock for several days.

By memo dated October 23 and entitled "Holiday Compensation", Facility Manager Mark Kimmel informed all Watertown employees:

...

Compensation during holiday weeks in which the plant shuts down will be as follows:

A. Full time employees that are **NOT** scheduled to normally work that day will receive eight (8) hours of holiday pay.

B. Full time employees that **ARE** scheduled to normally work that day will receive eight (8) hours of holiday pay and the balance, if there is any, to meet the twelve (12) hour continuous guarantee of either 36 or 48 hours per scheduled work week.

Examples of how the A, B, C and D crews will be compensated for during the Thanksgiving and Christmas work weeks are attached.

This is different from what We [sic] had posted and We [sic] apologize for the mistake. The main difference is that the hours of Holiday Pay have always counted toward the scheduled work week of the guarantee of hours paid. The intent of the language in the contract is to make employees whole for their guaranteed work schedule if the plant shuts down for a holiday.

...

The parties subsequently met and discussed this issue on October 25.

Ashworth by letter dated October 27 informed Human Resources Manager Dave Tervola that the parties at the March 9 meeting had:

"agreed that if an employee was scheduled to work on a holiday

occurring during the shutdown, the employee would receive 12 hours straight time pay along with 8 hours of holiday pay. This agreement appears on page 2 of the minutes of that meeting and forwarded to my office for review."

Kimmel by memo dated November 1, and entitled "Compensation for holidays when the plant shuts down", informed all Watertown employees:

. . .

In March of this year we held our first meeting to begin the implementation of the 12 hour continuous operation. During this initial meeting there was an error made by Management regarding the interpretation of the contract relating to compensation for holidays in the event the plant shut down. This mistake was carried through to the last memo posted on 9-26-95.

The intention of holiday pay is to "MAKE WHOLE" your compensation during a holiday shutdown. The eight (8) hours of holiday pay has always counted toward the guaranteed 40 hour work week in the past. The intent remains the same when applying the holiday pay towards the guarantee of either 36 or 48 hour work week as illustrated in the 12 hour continuous operation.

The purpose of this memo is to be sure each employee understands what their compensation will be during the holiday shutdowns and to correct any misinformation posted in the past.

. . .

Compensation during holiday weeks in which the plant shuts down will be as follows:

A. Full time employees that are **NOT** scheduled to normally work that day will receive eight (8) hours of holiday pay.

B. Full time employees that **ARE** scheduled to normally work that day will receive eight (8) hours of holiday pay and the balance, if there is any, to meet the twelve (12) hour continuous guarantee of either 36 or 48 hours per scheduled work week.

Examples of how the A, B, C and D crews will be compensated during the Thanksgiving and Christmas work weeks are attached.

This is different from what we had posted and we apologize for any confusion. If you have any questions, please see me or Dave Magnan.

. . .

The Company closed the plant on the Thanksgiving and Christmas holidays and it paid its 12 hour continuous operation employees scheduled to work on those holidays either 8 or 12 hours pay, depending on how many hours they needed to meet the 40 hour guaranteed work week provided for in Article 12 of the contract.

Earlier, the Union on November 8 grieved the Company's holiday pay policy, hence leading to the instant proceeding.

In support of the grievance, the Union contends that "There remains today no explanation for the Company's apparent inability to grasp" what the parties had agreed to in their earlier March 9 and July 11 meetings and that the Company's subsequent October 23 "reneg letter" flies in the face of the "plain language and admitted intent of the parties. . ." The Union also maintains that employees who work their full weekly guaranteed hours in a week in which a holiday falls still get holiday pay and that such payments therefore show that "The forty hour guarantee has nothing to do with holiday pay; they are separate benefits."

The Company, in turn, asserts that they are separate benefits and that "while the guarantee language regarding 12-hour shift employees may not have been drawn exactly the same as the guarantee language covering 8-hour shift employees, the intent and purpose of the guarantee was clearly the same, that is, the employees should receive a weekly pay guarantee based on their work schedule". It also claims that in the subsequent March 5 and July 11 discussions, "The parties mistakenly agreed that if a 12-hour employee was scheduled to work on a holiday and the plant shuts down, the employee would receive 12 hours straight time pay as part of the weekly guarantee and 8 hours holiday pay." The Company goes on to assert that there was "no expectancy on the part of employees at that time. . ."to receive more than that even though, in its words: "Admittedly, the mistaken interpretation was reflected in minutes of the meetings on March 9, 1995, and July 11, 1995, which were prepared by the Company and furnished to the Union."

Those minutes do support the Union's position and reveal that the parties clearly understood exactly what the Company was proposing on both of those meeting dates. Thus, Company negotiators throughout this time were highly skilled and experienced, thereby showing that they willingly agreed to the representations referenced in the March 5 and July 11 minutes.

All this was not a "mistake" as now asserted by the Company: it represented the exact deal that the Company offered in order to win over the Union and those employees opposed to its continuous operation and the insistence that they might have to work 12 hour days on holidays.

That was the deal agreed to then and that is the deal that must be honored now. That is why the grievance must be sustained.

As for the Company's claim that employees could not reasonably expect this benefit because the Union never told its members about it, the record shows that employees were paid this way for the July 4 and Labor Day holidays. Having been paid this way at that time, it is reasonable to assume that they expect to be paid this same way in the future, particularly after Production Manager Magnan told them via his September 26 memo that they would be paid this way.

Moreover, even assuming arguendo that there were no such expectancy on the part of the employees, the fact remains that the agreed-upon language on this issue as measured by the March 9 and July 11 minutes clearly and unambiguously support the Union's grievance. As a result, the Union has the right to insist that this language be followed irrespective of whether employees knew about it at the time since the Union is a signatory to the contract and therefore entitled to see that all of its provisions have been complied with.

The Company may well be right in pointing out "Business acumen and financial responsibility would dictate that a Company achieve 12 hours production for 26 hours pay as compared to zero production for 20 hours' pay" and that sustaining the grievance may lead it to always schedule holiday work. But, that is a result which is outside my limited jurisdiction to address and it apparently also is a price which the Union itself recognizes may have to be paid if it prevails. My authority under the contract is limited only to the question of whether the contract has been violated and it thus does not allow me to override clear contractual agreements merely because certain perceived unpleasant consequences may follow.

In light of the above, it is my

AWARD

1. That the Company violated the contract by refusing to pay 12 hours of straight time pay and 8 hours of holiday pay to those 12 hour employees otherwise scheduled to work on holiday shutdowns.
2. That to rectify that contractual violation, the Company shall pay such 12-hour employees a total of 20 hours pay for those holidays that they otherwise were scheduled to work during holiday shutdowns.
3. That the Company under the contract is required in the future to pay 20 hours pay to those 12-hour employees who are otherwise scheduled to work during holiday shutdowns.
4. That I shall retain my jurisdiction for at least sixty (60) days to resolve any questions relating to the application of this Award.

Dated at Madison, Wisconsin, this 24th day of September, 1996.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator