BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS UNION LOCAL 43 and PROMOTIONS UNLIMITED CORPORATION	Case 12 No. 54387 A-5506

Appearances:

Larry Greenfield, General Manager, Ellen Phelps, Director of Customer Services and Employe Relations (and an owner of the Company), and Wayne Lazenby, Warehouse Manager, for the Company.

Ray Dehahn, Secretary-Treasurer, Teamsters Local 43, Cindi Vance-Smith, Local Teamsters Union 43 Steward, Dave Drissell, and Brandon Hauck, for the Union, with Frederick Miner of Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., submitting a brief on behalf of the Union.

ARBITRATION AWARD

Teamsters Local Union No. 43 (the Union) and Promotions Unlimited Corporation (the Company) are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances on which the Company and Union are unable to agree as to settlement. On August 21, 1996, the Wisconsin Employment Relations Commission received a request from the Union to appoint either a Commissioner or a member of its staff to serve as the sole arbitrator to issue a final and binding arbitration award in the above-entitled matter. The Commission designated the undersigned A. Henry Hempe to hear and decide this matter. An evidentiary hearing was conducted on November 19, 1996 in Racine, Wisconsin. The proceedings were not transcribed. Briefs were to be submitted to the arbitrator by the parties not later than December 19, 1996.

BACKGROUND:

The facts of this case are undisputed. Since at least December, 1991, the Company has credited employees with paid holidays, vacation time, and personal days as time worked in calculating overtime pay, even though employees did not work holidays, vacations, and personal time. In February, 1996, the Company unilaterally terminated this method of calculating overtime and resumed its previous overtime computation method. Under this method, apparently without objection by the Union employees were credited only for actual hours worked over forty hours per week. The Company claimed its action is justified by the plain words of the contract.

The Union filed two grievances dated July, 16, 1996, and September 13, 1996, on behalf of all affected bargaining unit employees. The grievances challenge the Company's action as violating what the Union believes to be a well-established past practice which has been followed since at least December, 1991.

At hearing, the Union asserted that the contract language on which the company relies, although clear, is overcome by the past practice. According to the Union, the past practice is controlling, and the company should credit employees with paid holidays, vacations and personal time as time worked for the purpose of overtime computations, even though employees did not work during those periods. The Union's remedy seeks to make whole all employees adversely affected by the Company's change of course.

In its brief the Union contends that the Company is attempting improperly to alter without bargaining a well-established practice. The Union continues to urge ". . . that overtime is owed employees who work in excess of forty hours per week pursuant to Article 6 of the labor contract, notwithstanding that some portion of those hours are credited holiday hours earned in accordance with Article 8." The Union argues that the Company is attempting ". . .to engraft onto the language of Article 6 the following restriction: 'unless holiday hours are credited in the relevant week.'"

Neither at hearing nor in subsequent brief has the Company attempted to deny its use of the overtime calculation method alleged by the Union. But the Company asserts that the method originated not in collective bargaining, but rather through the apparent error of a payroll clerk. The Company claims the error remained uncorrected through the consecutive employment terms of four additional payroll clerks until February, 1996 only because Company management had been unaware of it. According to the Company, its correction was consistent with 1) current contract language, and 2) how overtime pay had been previously and routinely calculated by the predecessor payroll clerk under identical contract language. The Company finds this language to be clear, unambiguous, and controlling.

The Company explains that for several years its payrolls (and paychecks) have been prepared by a succession of several outside agencies which based their payroll preparations on initial in-house payroll calculations by the Company's payroll clerk. According to the Company, it was only the last of the outside payroll preparation agencies which saw fit to question the erroneous method of calculating overtime which had developed. At hearing, the Company indicated a willingness to bargain collectively on the matter when the current labor agreement expires, but does not believe it should lose any remaining benefit of its original bargain with the Union merely because the error remained undetected for several years. The Company also stated it is not seeking restitution of what it believes to have been inadvertent windfalls received by those bargaining unit members who were benefited by the error of the payroll clerk,

The term of the current labor agreement runs from March 1, 1994 to March 1, 1997. The

applicable current contract language is identical to the language of the predecessor labor agreement which was in effect when the above-described practice began.

RELEVANT CONTRACT LANGUAGE:

> ARTICLE 6: HOURS OF WORK AND OVERTIME
>
> The basic hours of work shall be eight (8) hours per day and forty (40) hours per week; however, this is not a limitation on nor a guarantee of hours of work per day or days per week.
>
> Time and one-half shall be paid for all time worked in excess of forty (40) hours per week, provided that employees shall not be paid both weekly and holiday overtime for the same hours worked.* * *
>
> ARTICLE 8. HOLIDAYS
> * * * All employees who are in (sic) the active payroll on said holidays shall receive eight (8) hours holiday pay at the individual employee's regular straight time for the week in which the holiday occurred * * *
>
> ARTICLE 16. COMPLETE AGREEMENT
> This agreement represents complete collective bargaining and full agreement by the parties with respect to rates of pay, wages, hours of employment, and other conditions of employment, and except as changed and modified by the provisions hereof all rates of pay, wages and other terms of employment including the managerial rights of the company as heretofore exercised, shall, during the term hereof, remain as they were on the date hereof.

ISSUE

While the parties were in general agreement in framing the issue, they did not agree to the wording of the issue.

The Union offered its wording of the issue: "did the Company violate the labor agreement by refusing to count 8 hours for holiday/vacation and/or personal days in the accumulation of 40 hours worked in a pay period for the employer to pay overtime?".

The Union answers this question "yes," and demands all bargaining unit employees adversely affected by the Company's refusal be made whole.

The Company suggested a different wording of the issue: "Are holidays/vacation and/or

personal days considered hours worked under the terms of the labor agreement?"

The Company answers this question "no."

I find the issue to be "Did the Company violate the labor agreement by refusing to credit employees with paid holidays, vacation time and personal days as time worked for purposes of calculating overtime, even though employees did not work during said periods. If so, what is the appropriate remedy?"

DISCUSSION

The Union has credibly demonstrated the existence of a certain practice relating to the computation of overtime since at least December, 1991: since at least late 1991 the Company has credited employees with paid holidays, vacation time and personal days as time worked for purposes of calculating overtime, even though employees did not actually work those times. This apparently occurred without reference to the then-existing labor contract language which has remained unchanged.

Precisely how or why the practice arose can be only a matter of speculation. It seems clear, however, that collective bargaining was not its genesis. Instead, the practice appears to have been initiated by a new payroll clerk who began her duties in mid-term of the parties' previous agreement. It is also clear that the practice she initiated was inconsistent with the method of overtime calculation used (without apparent Union objection) by her predecessor who had functioned as payroll clerk for eight years.

The Company posits that the genesis of the overtime calculation method which the Union favors is simply a payroll clerk's error. That the practice was perpetuated through four successor payroll clerks is attributed by the Company to its use of a succession of outside paycheck-preparation agencies which were presumably unfamiliar with the pertinent language of the parties' labor contract as well as sloppy supervision by Company executives.

Doubtless, the origin of the practice is of more than academic interest to Company management. But for purposes of resolving this grievance how the practice started is largely irrelevant. Indeed, until the pertinent contract language is examined and found ambiguous, the practice asserted here by the Union cannot be used as a basis for granting the relief it seeks.

This is because "(i)t is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probable intent, and to putative intent, always governs. Clear language is the arbitrator's lodestar, his guiding light. He can neither

ignore it, nor modify it. On the contrary, he must give it its full force and effect." 1/

1/ Hecla Mining Co., 81 LA 193, 194 *(LaCugna,* 1983); also see Elkouri & Elkouri, How Arbitration Works, 4th ed. (1985) at 348: "If the language of an agreement is clear and unequivocal, an arbitrator will not give it a meaning other than that expressed."

Arbitrator Harry H. Platt was just as emphatic:

> "It is, of course, an established arbitral as well as legal rule of construction that when contract language is clear and unambiguous the intent of the parties is to be found in its clear language and not in the parties' conduct although they are supposedly acting under its terms. To be sure, the parties themselves may act under its terms as they see fit and even contrary to its terms. But this does not justify an arbitrator, at the request of one of the parties, to interpret the contract otherwise than as written." 2/

Put another way, where the language of the labor agreement speaks clearly and unequivocally on an issue in question, past practices of the parties may not be used to contravene it. Thus, the question which must first be determined is whether or not the pertinent language of the contract is ambiguous.

"Ambiguous language" has been defined as "language which could be given more than one meaning by reasonable men." 3/ It is language for which " . . .plausible contentions can be made for conflicting interpretations." 4/

Absent some clear indication to the contrary, the words of the contract should be given their normal, everyday meaning. 5/ An arbitrator may not search for doubt. Thus, if the meaning of the contractual words is reasonably plain, it must be held to be unambiguous.

In the instant case, the section governing overtime provides that "(t)ime and one-half shall be paid for all hours *worked* in excess of 40 hours per week . . ." (Emphasis provided) The meaning of this provision is unmistakably clear. "Worked" is not a difficult term, and its meaning is obvious, particularly in the context in which it is used.

In its brief the Union argues that the company is, in effect, trying to augment the Article 6

2/ Gibson Refrigerator Company (Platt, 1951) 17 LA 313, 317.

3/ American Oil Co., 62-1 ARB para. 8073, 3279 (Boles, 1961).

4/ City of Highland Park, 76 LA 811, 816 (McDonald, 1981).

5/ See Elkouri & Elkouri, supra, at 351.

language by adding the phrase ". . .unless holiday hours are credited in the relevant week." This argument is not persuasive, however, for the provisions of Article 6 are already clear and require no embellishment for the sake of clarity.

In effect the interpretation favored by the Union seeks to substitute the word "credited" for "worked." But given the unequivocal meaning of the original word, this magic cannot be performed by invoking "past practice." Moreover, Article 16 (commonly referred to as a "zipper clause") does not permit this sort of legerdemain. If the change the Union seeks is to be made it must be done through collective bargaining.

Under these circumstances, I find no violation of the parties' labor agreement by the Company.

AWARD

Based on the aforesaid, the grievances dated July 16, 1996, and September 13, 1996, on which this proceeding focused are dismissed.

Dated at Madison, Wisconsin this 12th day of February, 1997.

By A. Henry Hempe /s/
A. Henry Hempe, Arbitrator