BEFORE THE ARBITRATOR

IN THE MATTER OF THE ARBITRATION OF A
DISPUTE BETWEEN

DUO-SAFETY LADDER CORPORATION

and

UNITED STEELWORKERS OF AMERICA AFL-CIO, CLC UPHOLSTERY & ALLIED INDUSTRIES DIVISION LOCAL 352 U

Case 28 No. 54624 A-5539

APPEARANCES

Mr. Philip W. Schwab, President, for the Company.

Mr. David L. Martin, Representative, for the Union.

ARBITRATION AWARD

Pursuant to the terms of the parties' 1995-1998 contract, the Wisconsin Employment Relations Commission assigned Peter G. Davis as arbitrator for the Lewis vacation grievance.

Hearing was held in Oshkosh, Wisconsin, on June 2, 1997. No transcript was made of the hearing, and the parties made oral argument at the conclusion of the hearing.

ISSUES

The parties agreed that the issues to be resolved by this Award are:

1. Was grievance #68 WERC Case 26, No. 54063, A-5481 filed timely with the WERC?

Did the Employer violate the agreement when it denied Dean Lewis' request for 1997 vacation?

CONTRACT PROVISIONS

ARTICLE VII - VACATIONS

Section 1

Employees who have one (1) year of continuous service with the Company shall be granted one week's vacation with pay. After the employee's first (1st) year of service, his employment anniversary date shall become the date for vacation period calculations. The vacation year shall be January 1 through December 31. Vacation must be taken during this period, there shall be no carryover of vacation into the next year.

The vacation week shall be the average scheduled work week for the fifty-one (51) weeks preceding the annual vacation period each year. A vacation week day shall consist of eight (8) hours. Vacation pay shall be at the regular straight time hours rate in the following manner and vacation requests of 32 hours or more will be paid prior to a vacation period as long as a 2 week written notice has been given. . . .

Section 2

Requests for vacation weeks must be submitted thirty (30) days prior to qualify for a full weeks vacation. Any additional vacation may be taken by mutual agreement with the Company any time after it is earned. Vacation time must be taken to receive pay. . . .

Section 3

In order to qualify for the vacation defined in the foregoing sections, an employee must have worked not less than ninety percent (90%) of the available days of work during the twelve (12) months immediately preceding the beginning date of his vacation. . . .

Section 4

Any employee eligible for vacation who resigns or is discharged for cause prior to the date of his vacation shall receive no vacation or vacation pay, unless reasonable notice is given to the satisfaction of the Company. . . .

ARTICLE X - ADJUSTMENT OF GRIEVANCES . . .

Section 1

The Company will afford the members of the Shop Committee and the Shop Stewards time off with pay, provided such time does not exceed two (2) hours per month, for the purpose of participating in the adjustment of grievances in their respective jurisdiction with the designated representatives

of Management at the specified steps in the grievance procedure.

Section 2 - GRIEVANCE PROCEDURE

(A) For the purpose of this agreement the term "Grievance" means any dispute between the Company and the Union or between the Company and any employee(s) concerning the effect, interpretation, application, claim of breach or violation of this Agreement.
(B) No employee or former employee shall have any right under this Agreement in any claim, proceeding, action or otherwise on the basis, or by reason, of any claim that the Union or any Union officer or representative has acted or failed to act relative to presentation, prosecution or settlement of any grievance or other matter as to which the Union or any Union officer or representative has authority or discretion to act or not to act under their terms of this Agreement.
(C) An employee or Union representative who claims to have a grievance shall present it to the foreman involved within four (4) working days.
(D) In the event of such grievance, the steps hereinafter set forth shall be followed:

Step 1. The employee(s) or the employee(s) and his steward shall present the grievance orally to the immediate foreman or supervisor. The immediate foreman or supervisor will verbally answer the grievance within four (4) working days following the day in which the grievance was presented.

Step 2. If not settled in Step 1, to be considered further, the grievance must be reduced to writing and dated and signed by the employee and may be signed by his steward, and submitted in quadruplicate to the immediate foreman or supervisor within four (4) working days after receiving the Step 1 answer from the immediate foreman or supervisor. The written grievance will describe the subject matter of the grievance and specify the contract provision or provisions at issue. The Company will give its answer in writing within four (4) working days after receipt of such written grievance. If a grievance is to be submitted to Step 3, the shop Committed (sic) *Chairman or his designate will reply in writing, explaining why the Company's second step answer was not satisfactory within four (4) working days after receipt of the Company's second step answer, or the grievance will be considered dropped.*

Step 3. If not settled in Step 2, the Union Shop Committee and the Company representative will meet within four (4) working days after the date of the receipt of the Unions second step reply to discuss the grievance. The Company shall give its answer in writing within four (4) working days after such meeting. If a grievance(s) is to be submitted to Step 4, the Union will reply in writing, explaining why the Company's third step answer was not satisfactory within four (4) working days after receipt of the Company's third step answer, or the grievance will be considered dropped.

Step 4. If not settled in Step 3, the Union Shop Committee shall meet with the Company President within four (4) working days after the date of receipt of the Union's third step reply to discuss the grievance. The President shall give his answer in writing within four (4) days after such meeting.

(E) Any of the time limits referred to in the Article X, may be varied by mutual agreement of the parties (Union and Company).

Section 3 - METHOD OF ARBITRATION

. . . (b) Any grievance submitted to arbitration must be scheduled for hearing within sixty (60) days of the last answer given in step 4 under Section 1, or the answer given in step 4 shall become final and binding on both parties.

TIMELINESS

The Company denied the Lewis grievance at step 4 by letter dated March 1, 1996.

By letter dated March 13, 1996, the Union advised the Company that the Union would be notifying the Wisconsin Employment Relations Commission that it wanted to arbitrate the grievance.

On March 22, 1996, the Commission received an arbitration request and a $25 filing fee from the Union regarding the Lewis grievance.

By a filing fee invoice dated March 27, 1996, the Commission advised the Union that effective January 1, 1996, the filing fee for grievance arbitration had increased to $250 and that the Commission would not begin to act on the request until it had received the Union's half of the fee.

On April 23, 1996, the Commission received the Union's $125 share of the filing fee.

On May 2, 1996, the Commission mailed a filing fee invoice to the Company seeking payment of the Company's share of the filing fee.

On May 8, 1996, the Commission received a handwritten note from Company President Schwab dated May 7, 1996, which stated:

see copy enclosed - not filed timely. case closed per contract.

Enclosed with the note was a copy of a May 2, 1996, letter from Schwab to the Union which stated:

Attn: USWA-352-U

Ref: Grievance #68 - Dean Lewis

Notice: As of 5/2/96 we have received no record of any schedule for hearing in the grievance. 60 (sixty) plus days have now elapsed since this grievance

Ref: Present contract August 1995 - August 1998. Article X, Section 3, paragraph 13:

"Any grievance submitted to arbitration must be scheduled for hearing within sixty (60) days of the

last answer given in step 4 under section 1, or the answer given in step 4 shall become final and binding on both parties."

Under the terms of the present contract grievance #68 has now become final and binding as answered on 3/l/96, Grievance denied.

By letter dated May 10, 1996, in my capacity as Commission General Counsel, I advised the Union and the Company as follows:

On May 8, 1996, we received a note from Mr. Schwab written on a copy of our filing fee invoice in the above matter. I have enclosed a copy of that note for Mr. Henschel.

On May 10, 1996, 1 had a telephone conversation with Mr. Schwab asking whether his note should be understood as a refusal to proceed to arbitration or whether he wished to proceed to arbitration and raise timeliness as a defense. Mr. Schwab advised me that he did not wish to proceed to arbitration. I explained to him that under those circumstances, he did not owe us the $125.00 filing fee and that we would be returning the Union's share of the filing fee to Mr. Henschel. I further explained that it would then be up to the Union to decide whether it wished to try to compel the Employer to proceed to arbitration.

Mr. Schwab further advised me that, on May 9, he had talked to Arbitrator Greco, a member of our staff, about hearing dates but now wished to refuse to proceed to arbitration.

Given my May 10, 1996, conversation with Mr. Schwab, we will be returning the Union's filing fee and closing our file.

Should you have any questions or concerns about the above matter, please feel free to contact me.

As indicated in its May 2, 1996, letter to the Union, the Company argues that the 60-day period created by Article X had expired before any hearing date had been established and thus that its March 1 answer denying the grievance is binding.

The Union responds by asserting that: it was unaware of the increase in filing fees and should not be faulted for the delay which was produced by the need to file a second time with the Commission; the Company's interpretation of the contract language would allow the Company to intentionally avoid establishing a firm hearing date and thereby take unfair advantage of the 60-day limit; there is no "*step 4 under Section 1*" of the contract so the Company's argument must be rejected; and the Union honored the intent of the language by moving the grievance to the arbitration stage promptly.

The parties' contract establishes a specific time frame within which an unresolved grievance must be "scheduled for hearing" 1/ ("*60 days of the last answer given in step 4 under Section 1*") 2/ and a specific penalty if the time frame is not honored ("*the answer given in step 4 shall become final and binding on both parties*.").

The 60-day period began in this case on March 1, 1996, the date of the Company's answer and

ended with the close of business on April 30, 1996, (i.e., day 1 of the period ended March 2, 1996, and day 60 ended April 30). I turn to the question of whether the grievance was "*scheduled for hearing*" within that period.

The Union points out that it filed its arbitration request within 60 days and argues that this action can be viewed as compliance with the contractual "*scheduled for hearing*" requirement. I reject this argument. If the parties had only intended that the arbitration request be filed within 60 days, they would have so stated. Clearly, they intended that more than filing occur.

The Union also points out that part of the 60 days was consumed by the need to file the arbitration request a second time with the Commission because it was unaware of the increase in the filing fee from $25 to $125 (the Union share). I do not find this fact to be a persuasive basis for excusing any failure to comply with the 60-day standard. Particularly, where, as here, there is a time limit with significant consequences for non-compliance, the Union has the burden of making sure it is aware of any change in procedures or costs which might cause delay. In addition, when the Union learned of the problem in March, it still had roughly 30 days to meet the time limit.

Given all of the foregoing, resolution of the timeliness issue boils down to a consideration of what occurred within the 60-day time limit and whether those actions meet the contractual standard of "*scheduled for hearing*."

Joint Exhibit 10 indicates the request for arbitration with the correct fee was received in the Commission's offices on April 23 (the 53rd day of the 60-day period established by the contract). The Union presented testimony that Arbitrator Greco called the Union to discuss potential hearing dates, but there is no evidence as to when that call took place. Joint Exhibit 11 indicates that Greco and Company President Schwab talked about potential hearing dates on May 9, 1996. Given these facts, it is clear (as asserted by the Company in its May 2 letter to the Union) that no agreement had been reached on a hearing date during the 60-day period. At best, it is possible that Greco called the Union within the 60 days to begin the process of scheduling the hearing date.

The normal understanding of the phrase "*scheduled for hearing*" would be that the Company, Union, and arbitrator had reached agreement on a specific hearing date. There is no reason for me to conclude that these parties intended a different meaning. Because no agreement had been reached on a hearing date with the 60-day time period, I conclude the Company's step 4 answer denying the grievance must stand.

The Union correctly argues that the contract language is subject to abuse by the Company if, for instance, the Company fails to return calls from the arbitrator or is vague about its availability for hearing. However, I have no evidence of any Company abuse in this case. Further, should the Company be tempted to abuse the scheduling process, it would run a substantial risk that an arbitrator would find the Company had thereby lost the right to rely on the language.

Given all of the foregoing, the grievance is dismissed based on Article X, Section 3(B).

Dated at Madison, Wisconsin, this 7th day of August 1997.

Peter G. Davis /s/

ENDNOTES

1/ The Company does not argue and I do not find that the language requires that the hearing actually take place during the 60-day period.

2/ The Union notes that step 4 is found in Section 2 - not "*section 1*" - and argues that this error should translate into some flexibility on the calculation of the time limit in question. I disagree. The typographical error does not alter the parties' intent that there be compliance with the 60-day standard.

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