BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**UPIU, LOCAL 131**

and

**CASTLE ROCK CONTAINER CORPORATION,**
**a Division of CONSOLIDATED PAPERS, INC.**

Case 3
No. 56527
A-5691

*(Grievance of Leo R. Lynch)*

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Appearances:

Franczek, Sullivan, P.C., by **Mr. Robert E. Mann**, for the Company.

**Mr. Michael H. Bolton**, International Representative, U.P.I.U. Region Ten, on behalf of the Union.

## ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Adams, Wisconsin, on June 11, 1998. There, the parties agreed that I should retain my jurisdiction to resolve any questions that may arise over application of my award if the grievance is sustained. The hearing was not transcribed and both parties filed briefs that were received by July 21, 1998. Based upon the entire record and arguments of the parties, I issue the following Award.

## ISSUE

The parties have agreed to the following issue:

Whether the grievance should be sustained and, if so, what is the appropriate remedy?

## BACKGROUND

The Company manufactures corrugated cartons at its Adams, Wisconsin, facility.

The collective bargaining contracts between the Company and the Union for a number of years contained the same language found in Article 9, Section 3, of the parties' 1990-1994 contract which stated in pertinent part:

. . .

3. Hours of work on Saturday shall be paid at the rate of time and one-half unless the employee has been off due to disciplinary action during the normal workweek hours. The hours worked on Sunday shall be paid at the rate of double time unless the employee has been off due to disciplinary action during the normal workweek hours. If any employee has been absent from work during the workweek for justifiable cause shown to the satisfaction of the Company, if requested, such absence will not be deemed to have broken the employee's workweek for the purpose of computing pay rates for Saturday and Sunday work. An employee shall be considered absent for justifiable cause if their absence is due to any of the reasons set forth in Article 16 herein, entitled Definition of Justifiable Absence.

. . .

Article 16 of said contract, entitled "Definition of Justifiable Absence" provided:

. . .

1. The necessary absence of an employee will include all absences due to the following conditions:

   A. Illness, accident, or death in the immediate family.

   B. Weddings in the immediate family.

   C. Jury duty.

   D. Approved leave of absence.

   E. Authorized business in connection with the Union or the Company.

2. When employees are absent from work or when a question arises as to whether employees are entitled to holiday pay, such employees shall be considered as being absent with justifiable excuse only if they are:

   A. On their vacation, serving on a jury, or absent on paid funeral leave.

   B. So sick that they are unable to report for work and are able to prove such sickness if the Company requests proof. This does not cover illness or injury resulting directly or indirectly from the use of intoxicants, hallucinogenic or illegal drugs, marijuana, or narcotics.

   C. Absent because the serious illness of some member of the family necessitates their personal attendance upon the ill person during the employee's scheduled working hours. In all such cases, the employee must be prepared to furnish satisfactory proof to the Company if requested to do so. Satisfactory proof shall consist of a statement from the attending physician identifying the patient and setting forth the nature and seriousness of the illness.

   D. Advised by the supervisor that their services are not required because of breakdown or lack of work, or is otherwise absent because of direct action initiated by the Company, except that an employee who is absent on disciplinary layoff shall not be considered as having a justifiable excuse.

   E. Absent because of the occurrence of acts of God such as fires, floods, earthquakes, or tornadoes, which make it impossible for the employee to report for work.

3. For the purpose of this Article, when employees are absent from work under circumstances where the reasons therefore are known only by them, the employee shall have the burden or proving "justifiable absence" as herein defined. Waiver of proof by the company in any particular instance will constitute waiver in no other instance.

. . .

The Company under that and prior contracts thus paid time and a half for Saturday work whenever employes at its Adams facility missed work and were on paid sick leave during the Monday-Friday workweek. Hence, employes could be on paid sick leave during the week, yet still receive overtime pay for working on Saturdays even though they did not actually work more than 40 hours in that week. This practice apparently was not followed at the Company's other facilities. In addition, Union Vice-President Burton Moore, former General Manager Donald H. Williams and Union President Leo R. Lynch all testified without contradiction that employes for years were paid Saturday overtime whenever they worked on a Saturday in a week that had a paid, unworked holiday.

The Company believed that employes were exploiting this situation by deliberately calling in sick during the regular Monday-Friday workweek just so they could receive time and a half pay for working Saturdays. The Company in 1994 contract negotiations with the Union thus proposed that Article 16 of the former contract be replaced with the following language:

***Definition of Justifiable Absence***

1. The necessary absence of an employee will include all absences due to the following conditions:

   A. Weddings in the immediate family.
   B. Jury Duty
   C. Approved leave of absence
   D. Authorized business in connection with the Union or the Company
   E. Vacation
   F. Banked/Floating Holiday
   G. Attending approved job-related courses
   H. Funeral leave
   I. Acts of God, such as fires, floods, earthquakes, or tornadoes which prevent the employee from reporting to work
   J. Approved personal time off
   K. Military absences

2. These absences will not be counted against an employee's attendance record.

> 3. For the purpose of this Article, when employees are absent from work under circumstances where the reasons therefore are known only by them, the employee shall have the burden of proving "justifiable absence". Waiver of proof by the company in any particular instance will constitute waiver in no other instance.

Labor Relations Representative Jean Matthews was the Company's chief negotiator in the 1994 negotiations. Matthews testified that the Union negotiators then agreed to the Company's proposal. Union President Lynch, who sat in on the 1994 negotiations, also testified that the Union agreed to said proposal.

However, both Lynch and Matthews testified without contradiction that the Company in those negotiations never specifically proposed that employes no longer would receive Saturday overtime in weeks that contained a paid, nonworked holiday. Furthermore, Matthews admitted that no Union negotiator in negotiations ever expressly agreed that holidays no longer would be counted for purposes of paying time and a half on Saturday.

The parties eventually agreed on the aforementioned new language and it now is incorporated into the contract as Article 16. The parties also agreed on new language for Article 9, Section 3, which now provides:

> . . .
>
> Hours of work on Saturday shall be paid at the rate of time and one-half unless the employee has been off due to disciplinary action during the normal workweek hours. The hours worked on Sunday shall be paid at the rate of double time unless the employe has been off due to disciplinary action during the normal workweek hours. If any employee has been absent from work during the workweek for justifiable cause as defined in Article 16 and documented, if requested, by the Company, such absence will not be deemed to have broken the employee's workweek for the purpose of computing pay rates for Saturday and Sunday work except as otherwise provided for in this labor agreement.
>
> . . .

After the new contract was signed, employes at the Company's Adams facility continued to receive time and a half for Saturday work even if they missed work during the regular Monday-Friday work week because of a paid, unworked holiday. That practice, which was unbeknownst to other Company officials, continued because the prior bookkeeper at the facility continued to pay such time and a half and because she apparently trained her successor to do the same.

Once the Company learned about said payment, General Manager Richard J. Schweitzer by letter dated May 27, 1997 (unless otherwise stated, all dates hereinafter refer to 1997), informed plant personnel:

. . .

> As you may already be aware, it was recently discovered that the divisional pay procedure for processing time and one-half for Saturday work was not in concert with the labor agreement. Specifically, if an employee was off work in a given week for a reason not identified in Article 16i (Definition of Justifiable Absence) such as being sick, and then worked on that Saturday, that employee was inappropriately paid time and one-half for those Saturday hours. This overpayment, of which you received a part, is in excess of $33,000 and dates back to the end of 1994.
>
> I have spent considerable time with my staff reviewing the error and the potential for corrective action to recover this overpayment. Castle Rock clearly has the right to recovery. But equally clear is the cooperation that has been building among employees and between labor and management. I believe the imposition of hardship on our employees at this late date would only prove to be counterproductive. We need to focus our energy on improving our value to customers, as well as to gaining new customers.
>
> Therefore, in the spirit of cooperation, and in recognition of the improvement in attitude I see growing, I have decided not to recover the overpayment.
>
> I am writing to each of you personally so you will understand this decision and the reason it was made.

. . .

The Company subsequently refused to pay time and a half for Saturday work that was performed during the work week that contained Memorial Day, a paid holiday.

The Union then filed the instant grievance on June 10, 1997, in which it complained, *inter alia*: "Overtime pay on Saturday when a holiday falls within that week."

## POSITIONS OF THE PARTIES

The Union contends that its negotiators in the 1994 contract negotiations never intended to change the Company's practice of paying time and a half for Saturday work that fell during a week that contained a non-worked paid holiday and that Article 16 should now be interpreted just as it has been in the past.

The Company claims that there is no contractual provision requiring it to continue such a past practice; that Articles 9 and 16 of the present contract fully support its position because they do not refer to paid, unworked holidays as one of the justifiable reasons excusing an absence; and that the Union's arguments "based on parol evidence and unilateral mistake" are without merit because the contract is clear and unambiguous on this issue.

## DISCUSSION

It is undisputed that the Company up until General Manager Schweitzer's May 27 letter referenced above always paid time and a half at its Adams facility for Saturday work that fell during a week that had a paid, unworked holiday; that the Company in the 1994 negotiations never proposed to change that practice; that Company negotiators at that time wanted to end the abuse that occurred when some employes took sick leave during the week just so they could get time and a half for their Saturday work; and that the Union in those negotiations never agreed to the interpretation the Company is advancing here – a point conceded by Company negotiator Matthews.

The Company, however, asserts that such parol evidence cannot be considered because Articles 9 and 16 of the contract are clear and unambiguous in providing that Saturday overtime is to be paid only when employes have a "justifiable absence" that is expressly listed in Article 16. Since paid holidays are not listed in Article 16, the Company asserts that it did not need to pay time and a half for the Saturday work here. It therefore cites *How Arbitration Works*, Elkouri and Elkouri, pp. 598-99, (5th Ed., BNA, 1997), in support of its claim that the parol evidence rule "forecloses inquiry into the give and take of negotiations leading to an agreement that was ultimately reduced to writing for the purpose of varying the meaning of that written agreement."

There are several major problems with this claim.

The first is that the contract does not clearly and unambiguously state that Saturday overtime is not to be paid whenever a paid, non-worked holiday falls within that week. Instead, Article 16 only lists those justifiable absences that generate Saturday overtime with paid, unworked holidays not being one of them. This certainly is a good argument and it in

many cases would prevail absent any other countervailing factors. However, the Company is really arguing that the contractual principle *expressio unius est exclusio alterius* should be applied here – i.e., that the listing of certain items in Article 16 means that any other unlisted items therein - such as paid, unworked holidays - are not covered by Article 9's grant of Saturday overtime. See *How Arbitration Works*, supra, p. 497.

This argument, however, leads to a rather tortured interpretation of Article 16. For by stating in section 2 therein that the listed "absences will not be counted against an employee's attendance record", the Company's interpretation means that non-listed absences caused by contractually-provided holidays such as Memorial Day, July 4, Labor Day, etc. will count, because they are not among the absences listed in section 1. That construction, though, can hardly be correct because – absent clear language to the contrary – it is universally understood that employes cannot be disciplined for taking their contractually-mandated holidays. Such an interpretation hence must be avoided because:

> "When one interpretation of an ambiguous contract would lead to harshly absurd, or nonsensical result, while an alternative interpretation equally consistent, would lead to just and reasonable results, the latter interpretation will be used." *How Arbitration Works*, supra, p. 495. (footnote citations omitted).

Furthermore, the parol evidence rule is not the only canon of construction that must be considered in ascertaining a contract's meaning. There are other canons in the arbitration arsenal that must be considered, the most important of which is to always ascertain – to the greatest extent possible – what the parties did and did not intend when they either added contract language, deleted contract language, modified contract language, and/or left contract language alone.

That is why: "The primary goal of the 'rights' arbitrator is to determine and carry out the mutual intent of the parties." *How Arbitration Works*, supra, p. 471. Hence, "the standards of construction as used by arbitrators are not inflexible. They are but 'aids to the finding of intent, not hard and fast rules to be used to defeat intent.'" Id, at 474.

That is why:

> "Arbitrators seek to interpret collective agreements to reflect the intent of the parties. They determine the intent of the parties from various sources, including the express language of the agreement, statements made at pre-contract negotiations, bargaining history, and past practice. Constructions favoring the purpose of the provision are to be favored over constructions which tend to conflict with the purpose of the provision. Moreover, the terms of the

> collective bargaining agreement are to be applied in a logical manner consistent with the language, intent of the parties, and with the entire agreement. The collective bargaining agreement should be construed, not narrowly and technically, but broadly so as to accomplish its evident aims." Id., at 479-480. (footnote citations omitted).

What, then, are the "evident aims" here?

It is undisputed that the Company for years paid Saturday overtime when a work week had a paid, unworked holiday. The Company certainly cannot be faulted for trying to change that practice, just as it was entitled to try to change any other part of the contract, or practice, it no longer found desirable. However, if any such change is to come about, it must be mutually agreed to by the Union.

Here, Company negotiator Matthews admitted that the Union in the 1994 contract negotiations never agreed to the construction the Company advances here. His testimony was not surprising because he also acknowledged that Company negotiators in 1994 never told the Union about the change it is advancing here. Absent any such agreement from the Union, it is clear that the Union in the 1994 negotiations never intended for the prior practice to change. Moreover, since the Company itself admits that it then never made any specific contract proposals that expressly eliminated time and a half Saturday pay whenever a paid, unworked holiday occurred in that week, it also is clear that the Company itself never communicated to the Union that it intended to change this long-standing practice.

It thus is the Company, and not the Union, which must bear the price for any ambiguity or confusion created by the Company's contract proposal because: "ambiguous language will be considered against the party who proposed or drafted it. Enforcement of this rule is practical because it promotes careful drafting of language and careful disclosure of what the drafter intends by his language." Id, at 509-510.

Hence, there was no clearly communicated intent by either side in the 1994 negotiations to alter this practice.

If one presupposes, as I do, that an arbitrator's primary duty is to ascertain what the parties intended when they agreed to certain contract language, it therefore follows that there is no merit to the Company's claim here that bargaining history and past practice cannot be considered in determining whether said practice should continue.

Arbitrator Richard Mittenthal explained why past practices must be considered alongside contract language in his seminal article on past practices when he wrote:

. . .

> By relying on practice, the burden of the decision may be shifted from the arbitrator back to the parties. For to the extent to which the arbitrator adopts the interpretation given by the parties themselves as shown by their acts, he minimizes his own role in the construction process. The real significance of practice as an interpretive aid lies in the fact that the arbitrator is responsive to the values and standards of the parties. A decision based on past practice emphasizes not the personal viewpoint of the arbitrator but rather the parties' own history, what they have found to be proper and agreeable over the years. Because such a decision is bound to reflect the parties' concept of rightness, it is more likely to resolve the underlying dispute and more likely to be acceptable. A solution created from within is always preferable to one which is imposed from without. (footnote citation omitted) "*Past Practice and the Administration of Collective Bargaining Agreements" from Arbitration and Public Policy, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators"*, (BNA, 1961), p. 38.

. . .

He added: "The practice, in short, amounts to an amendment of the agreement". Id, at 42.

He therefore concluded that:

> Thus, the union-management contract includes not just the written provisions stated therein but also the understandings and mutually acceptable practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force. By their silence, the parties have given assent to "existing modes of procedure." In this way, the practices may *by implication* become an integral part of the contract. Id., at 37.

As a result, stated he:

> "Those responsible for the administration of the agreement can no more overlook these practices than they can the express provisions of the agreement. For the established way of doing things is usually the contractually correct way of doing things. And what has become a mutually acceptable interpretation of

> the agreement is likely to remain so. Hence, the full meaning of the agreement may frequently depend upon how it has been applied in the past." Id., at 37.

The United States Supreme Court also has explained that:

> "the labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the past practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." UNITED STEELWORKERS OF AMERICA V. WARRIOR AND GULF NAVIGATION CO., 363 U.S. 574, 581-582 (1960).

Here, the parties for years effectively amended their prior contracts by providing for Saturday time and a half in a work week that contained an unworked, paid holiday even though paid, unworked holidays were not listed as one of the justifiable absences set forth in Article 16. It thus is not surprising that Article 16 of the present contract also does not list paid, unworked holidays as a justifiable absence since: (1), the prior contract did not do so; (2), the Company in the 1994 negotiations never told the Union it wanted to change that practice; (3), the Union in fact never agreed to that change; and (4), there was never any mutual agreement by the parties to stop said practice.

Because it is the parties' intent that is controlling in ascertaining what rights and obligations are covered in a particular collective bargaining agreement, it follows that the instant contract – like the prior ones entered into by the parties over the years – provides for Saturday overtime in a work week that has a paid, unworked holiday.

Contrary to the Company's claim, this finding is not violative of Article 39, Section C's, admonition that: "The Arbitrator shall have no authority to add to, detract from, alter, amend, or modify any provision of this Agreement or impose on any party hereto a limitation or obligation not explicitly provided for in this Agreement." For here, all that is being done is to recognize that: (1), the parties have a well-developed past practice of paying the Saturday overtime in question; (2), the parties in the last contract negotiations never even discussed – let alone agreed – on stopping this practice; and (3), said practice – absent mutual agreement to the contrary – remains in effect, just as it remained in effect during prior contracts.

Hence, it is the Company, not the Union, that now seeks to alter the manner in which the Saturday overtime provision of Article 9 always has been administered. That, it cannot do.

The Company cites PILLOWTEX CORP., 92 LA 321 (Goldstein, 1989), in support of its additional claim that "a unilateral mistake of one party will not serve to void an agreement."

Mistake really has little to do with this case because: (1), the Company never specifically proposed to discontinue this practice in the 1994 negotiations; and (2), the Union in those negotiations never voiced its mutual agreement to change said practice. If there was any mistake here, it thus was the Company's mistake in believing that this practice could be discontinued even though it never expressly proposed that it be discontinued and even though there never was any mutual agreement to do so in the parties' 1994 negotiations.

Having determined that the Company violated the contract as amended by the parties' past practice, the Company is now required to make whole all affected employes by paying to them the difference between what they earned in straight time for working on Saturdays that had a paid, unworked holiday in the workweek and what they should have earned in overtime for said Saturday work under the parties' well-developed past practice. In addition, the Company must pay employes Saturday overtime in the future whenever they work on Saturdays in weeks that have a paid, unworked holiday. Pursuant to the agreement of the parties, I shall retain my jurisdiction for at least sixty (60) days to resolve any questions that may arise over application of this Award.

In light of the above, it is my

**AWARD**

1. That the grievance is hereby sustained.

2. That the Company shall undertake the remedial and corrective backpay action ordered above.

3. That the Company for the duration of the contract shall continue to pay time and a half for Saturday work that is performed in a week that has a paid, unworked holiday.

4. That to resolve any questions that may arise over application of my Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 1st day of September, 1998.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

AAG/gjc
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