BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SULLIVAN BROS., INC.

and

THE MILWAUKEE AND SOUTHERN WISCONSIN CARPENTERS DISTRICT COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO

Case 1
No. 56474
A-5682

(Saturday Overtime Pay Grievance)

Appearances:

Previant, Goldberg, Ulemen, Gratz, Miller & Brueggeman, S.C., by **Atty. Matt Robbins**, for Milwaukee and Southern Wisconsin Carpenters District Council

Atty. David A. McLean, General Counsel, Associated General Contractors of Wisconsin, Inc., Counsel for Sullivan Brothers, Inc.

ARBITRATION AWARD

The Milwaukee and Southern Wisconsin District Council of Carpenters, a labor organization, and Sullivan Brothers, Inc., an employer, are parties to a collective bargaining agreement which provides for arbitration of grievances, disputes or complaints arising thereunder. The District Council made a request, in which the employer concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance concerning payment for work performed on a Saturday. The Commission designated Stuart Levitan to serve as impartial arbitrator. Hearing in the matter was held on July 14, 1998, in Madison, Wisconsin. The parties submitted written arguments by August 14, 1998.

STATEMENT OF THE ISSUE

The District Council states the issue as follows:

Did the employer violate the collective bargaining agreement, sections 11.1 and 11.2, by failing to pay John Merritt at time-and-one-half for hours worked on March 28, 1998? If so, what is the remedy?

The Employer states the issue as follows:

Whether an employer is obligated to pay an employee time and one-half for time worked on a Saturday by an employee, where the employee had neither worked forty hours or five days during the week as a result of circumstances beyond the employer's control; namely the employee being compelled to appear in court to answer criminal charges arising from an arrest for allegedly operating a water craft while intoxicated.

I adopt the issue stated by the District Council.

RELEVANT CONTRACTUAL LANGUAGE

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ARTICLE XI
HOURS OF WORK

SECTION 11.1. WORKDAY AND WORKWEEK.

Eight (8) consecutive hours between 6:00 A.M. and 6:00 P.M., with one-half hour lunch period, shall constitute a workday. Six (6) days from Monday through Saturday, inclusive, shall constitute a workweek, however, Saturday may be used as a straight-time day if time has been lost during the week due to inclement weather or conditions beyond the contractor's control. No one is to be discriminated against for choosing not to work on Saturday. Working on a Saturday make-up day shall be an individual decision.

SECTION 11.2. OVERTIME, SATURDAY, SUNDAY AND HOLIDAY WORK

(a) All time in excess of eight (8) hours per day, all time worked before 6:00 A.M. or after 6:00 P.M. and all time worked on Saturday shall be paid at the rate of one and one-half times the established hourly rate of pay with the exception of time worked on Saturday make-up which shall be at straight-time.

(b) All time worked on Sundays and legal holidays shall be paid for at double the established hourly rate of pay. Time worked between 6:00 A.M. Sunday and 6:00 A.M. Monday is considered Sunday work. The same principle applies to Holidays.

(c) By mutual agreement between the Employer and employees on a jobsite, the workweek may consist of a four-day, forty-hour week, Monday through Saturday, consisting of four ten-hour days without overtime rates applying. However, Saturday may only be used as a straight-time day if time has been lost during a weekday due to inclement weather or conditions beyond the contractor's control. No one is to be discriminated against for choosing not to work Saturday. Working a Saturday make-up day shall be an individual decision. When working such workweek all hours worked in excess of ten hours per day shall be paid at one and one-half the hourly rate of pay. All hours worked in excess of forty hours after four work days shall be paid at one and one-half times the hourly rate of pay, and double time for Sundays and Holidays. The contractor shall advise the Union of the establishment of such workweek prior to implementation.

(d) MAKE UP DAYS. (Weather Related or Conditions Beyond the Control of the Employer). Ten hour days may be implemented at the straight-time hourly wage rate through Friday, provided there is mutual agreement between the Employer and employees. Example: Wherein the employees are unable to work because of weather or related conditions beyond the control of the Employer, ten-hour days for the remainder of the week may be used whether an eight (8) or ten (10) hour workday was previously scheduled at the start of the workweek.

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BACKGROUND

The grievant, John Merritt, has worked as a carpenter for Sullivan Brothers, Inc. for the past four years. This grievance concerns the employer's decision to pay Merritt at straight time for work performed on Saturday, March 28, 1998, rather than at time and one-half.

During the period in question, Merritt and another Sullivan Brothers carpenter, Tom Monk, were working with thermofiber insulation at the Oscar Mayer corporate offices in Madison. The Union presented hearsay evidence at hearing that Oscar Mayer officials had requested that this work be performed after working hours and on Saturday, and that a Sullivan

Brothers supervisor had authorized such Saturday work at time and one-half rates. Merritt and Monk did work, as a two-person crew, every other Saturday for a period of time, particularly on February 28 and March 14, 1998.

On Monday, March 22, 1998, Merritt did not work because he was required, under penalty of law, to appear in court in Illinois to face certain charges (which were subsequently dismissed). Monk worked that day.

Merritt and Monk worked on Saturday, March 28. Merritt was paid at straight time; Monk, who had worked 40 hours that week, was paid at time and one-half. Merritt had not personally contacted a supervisor for authorization to work that Saturday at time and one-half.

A Sullivan Brothers supervisor testified at hearing that, had Merritt worked on that Monday, he would also have been paid at time and one-half. Merritt, who testified he had previously told his supervisors he would not accept Saturday straight-time work, was not aware until he received his paycheck that the hours on March 28 were being regarded as straight-time. On at least five occasions from 1994 to 1998, Merritt received time and one-half for worked performed on a Saturday in a week in which he worked fewer than 40 hours.

POSITIONS OF THE PARTIES

Union Position

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

> In the four years that the grievant has worked for the employer, he has received overtime pay for Saturday work, even when he had not worked 40 hours during the first five days of the wee. Further, he had advised the employer that he would not work on a Saturday for straight time under any conditions
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> Here, the grievant obtained approval for work on Saturday, March 28, and was only advised after that date that the work would be paid at straight time. The other carpenter with whom he worked did receive overtime pay for the day in question.
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> During the 1993 negotiations, the District Council and the Associated General Contractors addressed the issue of application of the Saturday pay system. In unrebutted testimony, union negotiator Greg Sefcik testified that the parties mutually agreed that a Saturday make-up day could apply at straight time only where it was applicable to the whole crew and where conditions arise affecting the progress of the whole project, such as weather or machinery breakdowns. The

written correspondence of former AGC general counsel Paul Lawent corroborates that straight time could only be applied where a condition affected the entire crew, not just one employee who missed a day for individual reasons. The employer's efforts to attack Lawent's credibility fail.

It is also important to note that the employer, represented by the AGC, did not call any AGC witness to rebut the Union's understanding, leaving the arbitrator to draw the inference that an AGC negotiator would verify the Union's version.

Negotiating history from the 1990 negotiations also support the Union interpretation, in that contemporaneous notes show that the reason for the Saturday make-up was to show owners that union contractors had that option when bidding against non-union shops. As its purpose was to address project-wide problems, it would make no sense to have the clause apply to individual absences such as affected the grievant here.

The employer's interpretation also conflicts with the clear contractual clause that "working a Saturday make-up day shall be an individual decision." The employer is essentially asserting the right to pay an employe straight time any time the employe is absent, for any reason, during the week.

There is only one instance known to the Union of a contractor attempting to pay straight time under the circumstances cited here; upon the filing of a grievance, that employer settled by paying the amount in dispute.

The only reasonable interpretation of the contract language is "conditions beyond the contractor's control" refers to conditions which affect the project as a whole, such as inclement weather; the parties never could have intended that an individual employe missing working would be akin to an entire project shutting down. Finally, the fact that the employer did not notify the grievant in advance that it would treat that Saturday as straight time meant the grievant was prevented from exercising his contractual right to make a voluntary decision about working on Saturday.

Accordingly, the grievance should be sustained and the employer ordered to make the grievant whole for all losses.

Employer Position

In support of its position that the grievance should be denied, the Employer asserts and avers as follows:

The language of the collective bargaining agreement clearly and unambiguously provides that an employer is able to pay an employe straight time for Saturday

work where the employe missed time during the week due to circumstances beyond the employer's control. There are few circumstances, other than an act of God, more beyond a contractor's control that the situation where an employe is brought into court facing possible incarceration. The employer was entitled to pay the grievant at straight time when the grievant had worked neither five days nor forty hours during the week due to his need to appear in court to face pending criminal charges.

The collective bargaining agreement expressly permits an employer to schedule work on Saturday at straight time when time is lost during the week due to conditions beyond the contractor's control. Here, there is no suggestion that the grievant was compelled to work the Saturday in question since the employer was not even aware at the time that the grievant would work that day.

Because the language is clear and unambiguous, the arbitrator need not look to extrinsic evidence to determine the parties' intent. That intent, to permit Saturday make-up days at straight time, is clear. Here, the employer had no control over the circumstances which led to the grievant missing a regularly scheduled day of work. The Union interprets "conditions beyond the contractor's control" to mean only inclement weather, equipment failure or untimely delivery of materials; this makes the essential agreed-upon language mere surplusage.

Arbitrators are to apply the literal meaning of plain contractual language; contract language is not ambiguous is an arbitrator can determine its plain meaning without any other guide. Here, the plain contract language leads to the clear conclusion that the contract allows an employer to use Saturday for a make-up day when time is lost during the week due to conditions beyond the contractor's control. Had the parties meant to have the clause mean something else, such as only apply in cases of inclement weather, machinery failure or untimely delivery, they could have so written the contract.

Further, isolated unexplained incidents that may deviate from the provisions of the collective bargaining agreement do not constitute past practices. To be considered a binding, a purported past practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. The party asserting that there is a practice has the burden of persuasion and proof of its existence. Here, it is clear there is no basis for concluding a past practice exists. The Union cites a single incident of a unilateral action by one member of the AGC, in which that party determined it simply was not worth the time and effort to contest a minor grievance.

Further, the negotiations surrounding the creation and administration of the use of Saturday as a make-up day simply supports the conclusion that the parties

intended Saturday to be used as a make-up day, not that an individual employe is entitled to time and one-half if that employe works a Saturday in a week the employe has not worked a five-day, forty hour week. While arbitrators should not use bargaining history to interpret clear and unambiguous contract language, the bargaining history here does support the employer, in that the contract incorporated language about which the Union complained.

The language in the collective bargaining agreement is clear and could not reasonably be given more than one meaning by reasonable people. There is no binding past practice. The bargaining history supports the employer's application of the terms at issue. Accordingly, the arbitrator should dismiss the grievance and disallow the request for additional pay.

DISCUSSION

The Union has made several arguments in support of this grievance, including bargaining history, past practice, and that the language of the collective bargaining agreement clearly and unambiguously supports its position.

I do not accept the Union's argument that the incident involving TriNorth Builders has any bearing on this case. As the employer in the instant proceeding correctly notes, parties to grievances and other litigation often settle those controversies for reasons unrelated to the merits of the matter. That a similar grievance arose involving other parties on one occasion, and the employer agreed to pay the (relatively modest) amount in question does not establish a past practice sufficient to resolve conclusively the grievance now before me.

Nor do I find the respective arguments about negotiating history persuasive. Certainly, the Union wanted to eliminate the Saturday make-up provisions; just as certainly, the AGC wanted its widest application, to increase its members' competitiveness in the bidding process. And, given the status of the relationship between AGC and its former General Counsel, Lawent, I am reluctant to rely heavily on his testimony on this point.

The Union also argues that, because working a Saturday make-up day "shall be an individual decision," and Merritt had previously foresworn all straight-time Saturday work, by definition any work he performed on Saturday was at time and one-half. I reject this argument as well. The record is simply not conclusive that the employer had accepted as a binding condition from Merritt that any work he performed as Saturday make-up was unequivocally time and one-half.

There is an interesting element to grievances – while an arbitration award may define the interpretation and application of the terms of a collective bargaining agreement in a manner so as to affect a considerable number of employees and situations, any individual award is ultimately

driven by the particular facts involved. Such is the case here.

John Merritt's absence from work on March 22, 1998 was indeed a condition beyond the control of the contractor, Sullivan Brothers. But that does not necessarily mean that the work performed on March 28, 1998 was a "Saturday make-up" day.

Merritt testified that the customer, Oscar Mayer, had requested that the ceiling insulation work not be performed during normal working hours. Given the nature of the work (disruptive) and the location (corporate offices), it is plausible that the customer would prefer this to be done after hours and on the weekend. Under cross-examination, Merritt acknowledged that he did not personally hear the conversation between his coworker Monk and their supervisor Bill Kemnitz in which Kemnitz purportedly authorized the Saturday at time and one-half.

Kemnitz testified that it was his responsibility to schedule Merritt's hours and assignments, that he had no agreement with Merritt regarding pay rate for March 28, and that he had held no discussions with Oscar Mayer about paying time and one-half for Saturday work. On cross-examination, Kemnitz acknowledged that Monk had advised him that Oscar Mayer wished the work to be conducted outside normal hours, and that the crew had indeed worked this same job, at time and one-half, on February 28 and March 14, both Saturdays. This is consistent with Merritt's testimony that he and Monk had set a schedule of working on this job every other Saturday.

The collective bargaining agreement is clear and unambiguous in providing that "*all* time worked on Saturday" is paid at time and one-half "*with the exception* of time worked on Saturday make-up." (emphasis added). That is, if the work performed on Saturday is *not* make-up, it is done at time and one-half.

Based on the record evidence and the testimony, I conclude that the work performed on March 28, 1998 was always to be performed on that date, precisely because it was a Saturday. It was not Merritt's absence on March 22 that caused the need for Merritt and Monk to work on Saturday, but the work itself. Consistent with their practice of working this job every other Saturday, Merritt and Monk would have been on this job on March 28 regardless of whether Merritt was at work or in court on March 22.

Accordingly, because the work on March 28, 1998 was not Saturday make-up, Merritt is entitled to time and one-half for the hours he worked on that date.

On the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained.

2. The employer shall make the grievant, John Merritt, whole, so that the hours he worked on March 28, 1998 are paid at the rate of time and one-half.

Dated at Madison, Wisconsin this 12th day of November, 1998.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

SDL/gjc
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