BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

J.W. PETERS & SONS, INC.

and

TEAMSTERS LOCAL UNION NO. 43

Case 16
No. 56600
A-5693

(Area Wage Rate)

Appearances:

McCloskey and Associates, by **Mr. Steve McCloskey**, 3809 Vandan Road, Minneapolis, Minnesota 55345, appearing on behalf of the Company.

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Ms. Andrea F. Hoeschen**, 1555 Rivercenter Drive, Suite 203, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union

ARBITRATION AWARD

J.W. Peters & Sons, Inc., hereinafter referred to as the Company, and Teamsters Local Union No. 43, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the wage rate of employes. Hearing on the matter was held on October 7, 1998 in Burlington, Wisconsin. Post hearing arguments were received by the undersigned by November 10, 1998. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the framing of the issue and agreed to leave framing of the issue to the undersigned. The undersigned frames the issue as follows:

> "Did the Company violate the parties' collective bargaining agreement when it failed to pay employes who performed work in a jurisdiction covered by another collective bargaining agreement the area wage rate?"
>
> "If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

. . .

ARTICLE 2
SCOPE OF OPERATIONS AND RECOGNITION

> The Employer recognizes and acknowledges that Teamsters, Chauffeurs & Helpers Local Union No. 43 of I.B.T.C.W. & H. of A. is the exclusive representative of employees employed as road drivers for the prestressed operations and any other operation requested by employer operating out of Racine, Kenosha and Walworth Counties, Wisconsin, except employees employed in the production and maintenance and quarry and pit units of the Company, supervisors as defined in the Act, Guards and all other employees.

. . .

ARTICLE 33
MAINTENANCE OF STANDARDS

> Section 1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not lessthan the highest standards in effect at the time of the signing of this Agreement.
>
> Section 2. Employees assigned to perform work covered by this Agreement within the geographical jurisdiction of any Local Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, other than the Local Union of which he is a member, shall

receive all of

the benefits of the collective bargaining agreement which prevails in the area in which his work is performed. In no case shall this result in a reduction in wages, hours or working conditions for the employee.

. . .

BACKGROUND

The Company and the Union have for many years been parties to a collective bargaining agreement which covers prestress road drivers employed by the by the Company. Drivers are dispatched from the Company's Burlington, Wisconsin facility to deliver prestress concrete products to various sites in southeastern Wisconsin and northern Illinois. When drivers arrive at a delivery site they may wait anywhere from fifteen (15) minutes to two (2) hours to have the product unloaded. At one time the Company had facilities in Illinois but no longer does. However, the Company never dispatched drivers from the Illinois facilities. On September 8, 1997 the Company hired Larry Knull. Knull was routinely assigned to take the Company's product to locations in northern Illinois and does so at least once a week. During one trip to a job site in Waukegan, Illinois Knull was approached by members of Teamster Local 301 and was informed he should be receiving the standard wage rate for the Waukegan area. Knull than obtained of a copy of the collective bargaining agreement and spoke to his business agent about the matter. His business agent, Tim Wagner, who has since retired, informed Knull it was his opinion the collective bargaining agreement required the Company to pay the area wage rate. Knull then wrote the instant grievance and it was signed by all employes of the bargaining unit. On May 11, 1998 the grievance was filed with the Company. Thereafter it was processed to arbitration in accord with the parties' grievance procedure.

Union's Position

The Union contends the collective bargaining agreement requires the Company to pay the wage rate in effect in the jurisdiction where the driver's do their work. The Union argues the language went unnoticed in the collective bargaining agreement for many years until a new employe questioned the rate he was being paid when working in Illinois. The Union also argues the collective bargaining agreement is unambiguous and therefore the Company should be directed to comply with the contract in the future and should be ordered to properly compensate the employes for their work in other Teamster jurisdictions going back two years prior to the grievance. The Union also asserts the Company cannot claim it was unaware of its obligation to pay higher wages for products in other jurisdictions and points to the following letter in support of its position:

June 9, 1994

Mr. Varis Mittenberg
J.W. Peters & Sons, Inc.
34212 West Market Street
Burlington, WI 53105

RE: **McCORMICK PLACE EXPANSION PROGRAM**

Dear Mr. Mittenberg:

1. Recently we have had some problems with deliveries being made to the job site by vehicles with drivers not covered by the collective bargaining agreements.

2. You were furnished as a part of your bid documents the following:

   Volume I, 5. Form of Subcontrct Agreement including Exhibits A thru G.

   Exhibit ‘F’ “Project Labor Agreement for Navy Pier and McCormick Place”

   > Page 3, Paragraph 3 reads as follows: “Deliveries to the project site or sites of construction materials shall be made by employees covered by collective bargaining agreements providing for the payment of the prevailing wage or subject to the applicable state or federal laws providing for the payment of the prevailing wage.”

3. Please comply with the provision of paragraph 2 above, which are a part of your Subcontract Agreement.

4. Before starting to move any materials on the job site, please contact our field superintendent, Mr. Joe Salerno.

Yours truly,

McCORMICK PLACE CONTRACTORS, A JOINT VENTURE

A.R. Turpin, Jr. /s/
A.R. Turpin, Jr.
Construction Manager

The Union argues it was undisputed that the Company assigns employes to perform work in areas outside of the Union's jurisdiction. The Union points out the employes are drivers and their work is delivering concrete. The Union asserts that the Company claim the employes perform their work at the location from which they are dispatched is a tortured interpretation of the English language and even the Company's witnesses had trouble adhering to this definition. In support of this argument the Union points to the testimony of Richard Lewis, the Company's Human Relations Manager, who acknowledged he knew employes were doing work in Waukegan, Illinois and acknowledged he knew Waukegan, Illinois is outside the Union's jurisdiction. The Union also points to the testimony of Plant Manager Robert Ortscheid who testified employes perform some of their work in Illinois.

The Union also argues the collective bargaining agreement unambiguously requires the Company to pay the area standard wages for work done in other jurisdictions. The Union asserts the language of the agreement does not speak to where the employes are dispatched from, as the Company claimed at the hearing, but does speak to the performing of work in other jurisdictions.

The Union also contends to obtain the Company's desired result the Undersigned would have to strategically insert the term "dispatch" in Article 33. This result would render Article 33 meaningless as there is no possibility of employes being dispatched out of Illinois.

The Union further contends past practice cannot void unambiguous language. The Union argues the language can not be clearer in that it requires the Company to pay employes the area standard wage rate. The Union acknowledges it is unfortunate employes did not take notice of this right sooner, but stresses the right to the area standard wage rate is clearly spelled out. The Union also points out the Company does not dispute that the Area Construction Agreement for Joint Council 25 sets out the wages and benefits for work performed by Teamsters in northeastern Illinois.

The Union would have the Undersigned sustain the grievance and direct to Company to comply with Article 33 in the future and to compensate the employes with two (2) years of backpay. The Union points out the Company should have been paying these rates and that it would not be difficult to determine the backpay owed as employes are required to keep log books showing their destination and loads. The Union also argues not paying backpay would reward the Company for violating the collective bargaining agreement.

Company's Position

The Company points out it is a material supplier and not an independent trucker or contractor operating under the Davis Bacon Act. The Company delivers product to all types of projects and employes are on and off the site in a short period of time. Employes are not assigned to a project and are not there on a full time basis. The Company also points out the Union did not dispute that average unloading time was between a half hour to a hour. The Company also points out employes may go to two different sites or states in any given day. The Company also argues the McCormick Place letter relied on by the Union is for area trades working on the project and directed at Independent Owner Operators who may not be covered by a collective bargaining agreement and who subcontract their services to a contractor or subcontractor.

The Company also argues the Milwaukee Building Trades Agreement the Union introduced at the hearing is a common major market area agreement. The Company contends the Union had to demonstrate at the hearing the Company violated its agreement with employes covered by the collective bargaining agreement with the Union. The Company asserts the Union has not presented any evidence the collective bargaining agreement has been violated. The Company points out there is a long standing practice of wages and benefits and asserts this practice has not been violated. The Company also questions why after 40 years the of negotiating and 30 years under the Davis Bacon Act the Union has raised this grievance.

The Company concludes by pointing out the Undersigned can not add to, modify or change the collective bargaining agreement. The Company asserts there is no place in the collective bargaining agreement that states that prevailing wages or benefits other than those specified in the collective bargaining agreement shall be paid to employes.

The County would have the undersigned deny the grievance.

DISCUSSION

Article 2 of the parties' collective bargaining agreement describes the jurisdiction of the Union as including Racine, Kenosha and Walworth Counties. Article 33 of the parties' collective bargaining agreement clearly requires the Company to pay employes that perform work in a

jurisdiction covered by another Teamster collective bargaining agreement to receive the benefits of the collective bargaining agreement which prevails in the area in which the work is being performed. The Company argument that where the employe is assigned the work, or dispatched from, is the controlling factor in determining where work is "performed" would, as the Union has pointed out, render Article 33 meaningless. The work performed by the Company's employes is driving. If they drive outside the jurisdiction of the Union into an area covered by another union's collective bargaining agreement they are performing their job duty in the other union's area of jurisdiction. The Undersigned therefore concludes the language of Article 33 is clear and unambiguous and that the Company's failure to pay the higher wage rate complained of herein is a violation of the collective bargaining agreement.

The Company has also asserted there is a controlling past practice concerning wages and benefits. However, it presented no evidence that the Union had agreed to this practice nor is there any evidence the Union was aware prior to Knull's initiation of talks on this matter that the Company's actions were not in compliance with Article 33. For a practice to overcome clear contract language there would have to be evidence the Union was aware of the disparity in wages and mutually agreed to ignore the provisions of Article 33. The fact that the provisions of Article 33 have never been asserted by the Union is not in and of itself a demonstration that the Union had agreed to waive the clear language of Article 33. Therefore, the undersigned concludes there is insufficient evidence to conclude there is a past practice which overrides the clear language of Article 33.

The undersigned also notes that nowhere in Article 33 does it require the Company to find out if there is a higher wage rate in a different jurisdiction covered by a different Teamster collective bargaining agreement. While the Company may have entered into projects which require it to pay the prevailing wage rate there is no evidence the Company willfully violated the parties' collective bargaining agreement. The undersigned therefore concludes that there is no merit to the Union claim that the Company's actions mandate a directive that it pay two (2) years of backpay. The undersigned notes the testimony of Steward Glen Giescke that he did not know why the Union never filed the grievance sooner, that he was paid well and did not look for more money, and that he had never checked to determine if Article 33 was being violated. Thus, absent a showing that the Company willfully violated Article 33 the Undersigned finds no merit to the Union's claim that a remedy for violating Article 33 should include two (2) years of backpay.

Based upon the above and foregoing the Undersigned concludes the Company violated Article 33 when it required employes to perform driving duties in jurisdictions having a higher wage rate and it did not pay the higher wage rate. The Undersigned directs the Company to cease violating Article 33 and to make employes whole for lost wages dating back to the filing of the grievance, May 11, 1998. The Undersigned will retain jurisdiction of this matter for sixty (60) days for the sole purpose of resolving any matters concerning implementation of this award.

AWARD

The Company violated Article 33 of the parties' collective bargaining agreement when it failed to pay employes who performed work in a jurisdiction covered by another collective bargaining agreement the area wage rate. The Company is directed to make employes whole for lost wages from May 11, 1998 and is directed to cease violating the collective bargaining agreement.

Dated at Madison, Wisconsin, this 23rd day of December, 1998.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Examiner

EJB/gjc
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