BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION #43

and

J. W. PETERS & SONS, INC.

Case 11
No. 56515
A-5689

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, appearing on behalf of the Union.

Mr. Steve McCloskey, McCloskey & Associates, appearing on behalf of the Company.

ARBITRATION AWARD

Teamsters Local Union #43, hereinafter referred to as the Union, and J. W. Peters & Sons, Inc., hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The undersigned was selected from a panel of arbitrators furnished by the Wisconsin Employment Relations Commission to hear and decide a grievance over the meaning and application of the terms of the agreement. Hearing was held in Burlington, Wisconsin, on October 16, 1998. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on December 21, 1998.

BACKGROUND

The basic facts underlying the grievance are not in dispute. The grievant took vacation on Monday, December 1, 1997, to attend the Green Bay – Minnesota Monday night football game in Minneapolis, Minnesota. The grievant assumed he had no vacation left and told his supervisor that he would not be at work Tuesday as he would be traveling back that day. The

grievant did not get paid for December 2, 1997, and he was not given holiday pay for Thanksgiving Day and the Friday after Thanksgiving, November 27 and 28, 1997, which are paid holidays under the contract. The grievant was denied holiday pay because he did not work his regular scheduled work day following the holiday. The grievant filed a grievance over the denial of holiday pay asserting that December 1, 1997, was the regular scheduled work day following the holiday, and he was on vacation, thereby meeting the qualifying requirements of the holiday provision. The grievance was denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the Company violate the contract when it withheld Chad Albright's holiday pay for Thanksgiving, 1997?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 23
HOLIDAYS

Section 1. Effective upon signing of this contract, all employees who have completed probationary period (Article 4, Section 4), shall be paid eight (8) hours pay at their straight time hourly rate of the previous day, in addition to their compensation for work performed under Article 5, Section 3, if any, for the following nine (9) holidays: New Year's Day, Employees Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Friday after Thanksgiving Day, the last regular day before Christmas and Christmas Day.

In order to qualify for such holiday pay an employee must have worked the regular schedule work day which immediately precedes and follows the holiday, unless the absence is mutually agreed to in writing.

UNION'S POSITION

The Union contends that the language of the agreement clearly entitled the grievant to his holiday pay. It points out that the agreement provides holiday pay where the employe

works the regular scheduled work day which immediately precedes and follows the holiday. It notes that the agreement also provides for an extra day of pay when a vacation and a holiday coincide. It cites arbitration cases that held that employes on vacation during July 4th were entitled to pay for the holiday even though the employes reported a day or two late from vacation. It asserts that the holiday pay provisions are designed to prevent the extension of a holiday but not a vacation.

The Union argues that the parties could have drafted language to require employes to work their scheduled work days before or after vacation to receive holiday pay but they did not. It asserts that they could have also drafted language requiring an employe to work his or her next scheduled work day after a holiday rather than the next regular scheduled work day but did not. It contends that the agreement requires the employes to work the next regular work day after a holiday unless the absence is mutually agreed to in writing. It points out that the Company agreed to the grievant's absence on December 1, 1997, and therefore the grievant met the requirements and the Company cannot withhold his holiday pay.

The Union maintains that there is no past practice to support the Company's interpretation of the holiday pay language. It observes the Company cited only two examples and the first involved an employe who was absent the day after his birthday in 1995. It submits that the employe did not work nor take vacation the regular work day following the holiday and it is factually distinguishable from the instant case. The second case in 1994 is analogous to the instant case, but this isolated case was not known to the Union and one isolated case fails to establish any past practice because it was not unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

In conclusion, the Union submits that the Company failed to demonstrate a past practice of withholding holiday pay where an employe extends a post-holiday vacation. It claims that the clear contract language must govern and the language does not allow the denial of holiday pay for an employe absent following an approved vacation after a holiday. It asks that the grievant be paid his holiday pay for Thanksgiving, 1997.

COMPANY'S POSITION

The Company contends that it followed the agreement as it has in the past. It asserts that the agreement is specific as to what is required to receive holiday pay and despite being advised by his supervisor that he would lose holiday pay, the grievant chose to miss his next scheduled work day. It submits that he could have taken another vacation day to cover his trip or he could have explained the circumstances and got a written excuse but chose to take the day off and force the Company to work a man short. It claims that the Union is trying to walk a fine line on terminology. It notes that a work day is a day that work is performed by the employe and a scheduled day is a day an employe is expected to be to work.

The Company maintains that, in the past, it has not paid employes who have missed a scheduled work day before or after a holiday. It observes that this has happened so seldom because everyone knows the requirement of working the first and last scheduled work day. It states that the grievant was allowed vacation for Monday, December 1, 1997, but this did not change the requirement to work on Tuesday, December 2, 1997. It points out that the grievant had access to find out if he had vacation available and originally scheduled December 2, 1997, as vacation but cancelled it and used that day later. It insists the grievant was aware of the consequences of taking Tuesday off and he chose to do so and not worry about holiday pay. The Company admits that it initially paid the grievant and later deducted it from his pay as pay periods are a week behind and the error was found in the normal course of events. It notes that the contract language has been in the contract and understood for years and has not been changed in negotiations. It asserts that it has been violated in the same manner on two prior occasions and dealt with in the same manner as the instant case. The Company reminds the arbitrator that he must rule on the language in the contract and cannot change the language or the contract. It states the contract will be re-negotiated in May, 1999, and any suggestions the arbitrator may have regarding this language to make it more clear or understandable would be appreciated.

DISCUSSION

The precise language of the parties' agreement applied to the particular facts of a given case ordinarily determines whether holiday pay should be awarded. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS, (BNA 5TH ED.) AT 1011-1012 wherein it is stated:

> Typical of holiday pay provisions are the work requirements upon which such pay is conditioned. Thus, in order for the employee to be eligible for holiday pay, contracts commonly require both a stipulated minimum period of service and work on designated days surrounding the holiday. In the latter regard, the contract may require the employee to work *his or her* last scheduled day before and *his or her* first scheduled day after the holiday, or the last *regularly* scheduled day before and the first *regularly* scheduled day after the holiday, or the last *scheduled* workday before and the first *scheduled* workday after the holiday, or the day before *and* the day after the holiday, or the day before *or* the day after the holiday, or the *scheduled full* workday of the plant before and after the holiday, or a specified number of workdays during the period before and after the holiday. (Footnotes omitted)

Article 23 of the instant contract states as follows:

> In order to qualify for such holiday pay an employee must have worked the regular schedule work day which immediately precedes and follows the holiday, unless the absence is mutually agreed to in wiring. (Emphasis added)

In INTERPLASTICS CORP., 83 LA 612 (VER PLOEG, 1984), the arbitrator interpreted very similar language which read:

> . . . provided he did work the regularly scheduled working days next preceding and next following the holiday, unless he was absent drawing compensation under the Company sick-pay plan or excused by Management.

In INTERPLASTICS, the employe took two days of vacation after Thanksgiving and then did not report on the next day which was not excused and his holiday pay was then deducted. The arbitrator found that the Company breached the contract in denying the grievant holiday pay stating:

> First, I am persuaded that we must look to the *Company's* next regularly scheduled work day, rather than an employee's individual scheduled work day, for two reasons. First, the language of the contract itself refers to "*the* regularly scheduled working day." If the parties had intended that an employee's individual schedule determine the definition of this key term, it would have been reasonable to define that provision in more specific terms. This reasoning finds support in Elkouri and Elkouri's classic treatise *How Arbitration Works* (BNA 1973). At page 693 the authors note:
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> > The precise language used in the particular contract applied to the facts of a given case ordinarily determines whether holiday pay should be awarded. To illustrate, in the situation where the employee had been in lay-off before and after a holiday, Arbitrator Clarence M. Updegraff drew a distinction between (1) contract language requiring the employee to work on *his* last scheduled day before and *his* first scheduled day after the holiday, and (2) contract language requiring the employee to work on *the* last scheduled day before and *the* first scheduled day after the holiday. HEMP & CO., 37 LA 1010 (1962), with many citations.

In the instant case, the language of the contract does not refer to "his or her" regular schedule work day, but refers to "the" regular schedule work day. Thus, it is the Company's rather than the individual employe's next regular work day that must be worked and here the grievant was excused on that day as he was on vacation. As noted by Arbitrator Ver Ploeg, the reason for the surrounding days' requirement is to prevent employes from stretching holidays and to assure a full work force on the days surrounding a holiday. She stated:

> Thus, it is concern for the *Company's* overall work schedule which is the focus of this particular provision. If the Company feels that its overall work schedule is jeopardized by the absence of its employees, such as Brett Hansell, it has a simple remedy – it can simply deny the requested vacation leave.

The undersigned finds that INTERPLASTICS CORP., 83 LA 612 is almost identical to the instant case and is persuasive.

The Union's arguments with respect to a holiday falling within a vacation period are not persuasive. The problem with the vacation exception in Article 23 is that it states "a vacation week" and the cases cited, NORTHWESTERN STEEL & WIRE CO., 93 LA 104 (SEMBOWER, 1962) and STREITMANN SUPREME BAKERY OF CINCINNATI, 41 LA 621 (SAUGEE, 1963) do not involve the one day of vacation taken by the grievant. Thus, this case is not about the vacation exception.

The Company asserted that its denial of the grievant's holiday pay was in accord with past practice. The Company argues that this happens so seldom that everyone knows the requirement but it may happen so seldom because employes do not want to take a day off without pay. In other words, there may be other explanations of why it happens so infrequently. In the case of Jeffrey Koenig, he was absent August 15, 1995, after taking his birthday holiday on the 14th (Ex. 6). This case falls within the rule noted above and is not comparable to the instant case. The case of Charles Shilling is difficult to explain because it appears that he took vacation the week of September 5, 1994, and was absent Monday, September 12, 1994 (Ex. 5). It might be argued that his case fell within the vacation week exception but this one case is not sufficient to establish a past practice or understanding as to the interpretation of the contract especially where the language is as clear as it is.

For the above reasons, it is the undersigned's opinion that the grievant met the contractual eligibility requirements for holiday pay for Thanksgiving, 1997.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned issues the following

AWARD

The Company violated the parties' agreement when it withheld Chad Albright's holiday pay for Thanksgiving, 1997, and it shall immediately make him whole by paying him for the two days it withheld for the Thanksgiving holidays in 1997.

Dated at Madison, Wisconsin, this 7th day of January, 1999.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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