BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

SILGAN CONTAINERS CORPORATION

Case 8
No. 56746
A-5710

Appearances:

Foley & Lardner, by **Attorney Thomas Pence**, Firstar Center, 777 East Wisconsin Avenue, Milwaukee, WI 53202-5367, appearing on behalf of Lloyd Transportation.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney Frederick Perillo**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Local 695.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 695 (hereinafter referred to as the Union) and Silgan Containers Corporation (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute over the Holiday Pay benefits. A hearing was held on November 16, 1998, in Menomonee Falls, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and argument as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the arbitrator on December 16, 1998, whereupon the record was closed.

Now, having considered the arguments of the parties, and the representations of fact contained in the pre-hearing submissions, and being fully advised in the premises, the undersigned makes the following rulings:

ISSUES

The parties stipulated that the issue before the arbitrator is:

Did the Company pay employes properly for overtime during the holiday weeks of June 28, 1998 and July 5, 1998? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

A. Collective Bargaining Agreement

ARTICLE 12. HOLIDAYS

12.1 The following shall be recognized as holidays for the purposes of this Agreement:

Day before New Year's Day	Thanksgiving Day
New Year's Day	Friday after Thanksgiving
Decoration Day	Day before Christmas Day
Independence Day	Christmas Day
Labor Day	Two (2) Floating Holidays

Selection and scheduling of such floating holidays shall be made by the employees prior to February 1st of each calendar year.

All employees shall receive eight (8) hours' pay at the straight time rate plus the applicable shift premium on each of the above holidays, provided they have completed thirty (30) days of employment since their most recent date of hire or rehire and they work their regularly scheduled workday prior to and report for work on the holiday if scheduled, and their regularly scheduled workday immediately following the holiday. If absent on any of the above scheduled days, eligibility may be established by presenting a medical certificate acceptable to the Company showing inability to work on any such days when not present. An employee who leaves work due to a disability shall continue to receive holiday pay for any of the above holidays that may occur within ninety (90) calendar days from the date last worked, provided the employee presents satisfactory medical certification of his continuing disability.

Employees who are laid off because of lack of work shall receive holiday pay for any and all holidays that may occur within fifteen (15) calendar days from the date of their layoff.

12.2 Employees required to work on such holidays, or any day celebrated as such, in addition to the eight (8) hours at straight time rate shall receive double time (2X) for all hours actually worked on the holiday or date celebrated as such. There shall be no pyramiding of premium pay and overtime for any such hours of work.

12.3 In the event of an employee being absent on his vacation for a period including one of the named holidays, he shall be entitled to eight (8) hours' pay at the straight time rate plus the applicable shift premium in addition to his regular vacation pay.

12.4 Holiday hours not worked count as time worked for the purpose of weekly overtime in a holiday week.

. . .

B. Continuous Operations Agreement

ARTICLE 1. CONTINUOUS OPERATIONS

. . .

1.8 Holidays

Holidays not worked will be calculated at 12 hours of straight time pay. If an employee works on a Holiday, whether scheduled or not, the employee will be paid 24 straight time hours for working the Holiday, in addition to the Holiday Pay. Holidays will be counted as hours worked, for the purpose of computing overtime.

. . .

1.13 Vacation Pay and Scheduling

A week of vacation will be paid at forty-three (43) straight time hours for each week of vacation. "A" and "C" will start their vacation on Sunday, and "B" and "D" will start their vacation on Thursday. IF the Company requests and (sic) employee to work during their seven days scheduled for vacation, and the employee agrees, he will be paid 2X the straight time pay for hours worked in that pay period. Vacation hours will not be counted as hours worked for the purpose of computing overtime.

. . .

To the extent that this Continuous Operations schedule and its provisions are inconsistent or in conflict with any other provision of the collective bargaining agreement relative to hours of work, overtime, shift premium, relief, holiday, or Saturday or Sunday pay, the provisions of this outline of the Continuous Operations will be in control only while the plant is operating continuously.

BACKGROUND

Three years ago, the Company negotiated an agreement with the Union to deviate from a traditional five day per week schedule to a continuous operations schedule. The continuous operations system the parties agreed to features four 12 hour shifts -- designated the "A", "B", "C" and "D" shifts -- on a 4 on - 4 off / 3 on - 3 off alternating schedule:

Day of the week	S	M	T	W	T	F	S	S	M	T	W	T	F	S	
Day Shift 6 a.m. - 6 p.m.	A	A	A	A	B	B	B	B	A	A	A	B	B	B	(Repeat)
Night Shift 6 p.m. - 6 a.m.	C	C	C	C	D	D	D	D	C	C	C	D	D	D	(Repeat)

This schedule was implemented in March of 1998. Because of the staggered nature of the work weeks, employes have 8 hours of overtime built in to the schedule every other week, while earning only 36 hours of pay in the alternating week.

The first holiday after the continuous operating schedule went into effect was Memorial Day, Monday, May 25th. That Monday would have been a scheduled work day for employes on the "A" and "C" shifts, and an off day for the "B" and "D" shifts:

Day of the week	S	M	T	W	T	F	S	S	M	T	W	T	F	S
Date in May 1998	17	18	19	20	21	22	23	24	25	26	27	28	29	30
H=Holiday	X	X	X	X	X	X	X	X	H	X	X	X	X	X
Day Shift 6 a.m. - 6 p.m.	B	A	A	A	B	B	B	A	A	A	A	B	B	B
Night Shift 6 p.m. - 6 a.m.	D	C	C	C	D	D	D	C	C	C	C	D	D	D
Actual Work Hrs.-S.Kaczor-A shift								12	H	12	12	0	0	6
Actual Work Hrs.-K.Lindner-B shift							0	H	0	0	12	12	12	

For the Memorial Day holiday, the Company counted the 12 holiday hours as time worked for the purpose of computing overtime, without regard to whether the employes were scheduled to work that day. Thus, Stanley Kaczor was assigned to the "A" shift and would normally have worked on Monday, May 25th, but for the Memorial Day holiday. Kaczor actually worked 42 hours that week, plus the 12 hours of holiday pay, for a total of 54 hours in pay status. He was paid for 14 hours of overtime at time and one-half. Kenneth Lindner was assigned to the "B" shift, and would not normally have worked on Monday, May 25th. Lindner actually worked 36 hours that week, plus the 12 hours of holiday pay, for a total of 48 hours in pay status. He was paid for 8 hours of overtime at time and one-half.

In the week of June 28th through July 4th, 1998, Friday, July 3rd was designated as a floating holiday, and Saturday, July 4th was the Independence Day holiday. In the week of July 5th through July 11th, Sunday, July 5th was designated as a floating holiday:

Day of the week	S	M	T	W	T	F	S	S	M	T	W	T	F	S
Date in June/July 1998	28	29	30	1	2	3	4	5	6	7	8	9	10	11
H=Holiday	X	X	X	X	X	H	H	H	X	X	X	X	X	X
Day Shift 6 a.m. - 6 p.m.	B	A	A	A	B	B	B	A	A	A	A	B	B	B
Night Shift 6 p.m. - 6 a.m.	D	C	C	C	D	D	D	C	C	C	C	D	D	D
Actual Work Hrs.-S.Kaczor-A shift	0	12	12	12	12	H	H	H	12	12	14	0	0	0
Actual Work Hrs.-Gerds-A shift	0	12	12	12	0	H	H	H	12	12	12	0	0	0
Actual Work Hrs.-J.Kaczor-B shift	12	0	0	0	12	H	H	H	0	0	0	12	12	12
Actual Work Hrs.-Demiec-B shift								H	7	0	0	12	12	12

For the holidays surrounding Independence Day, the Company counted the holiday hours as hours worked for overtime purposes only for those employes who were scheduled to work on those holidays. For the employes who were not scheduled to work on the holidays, the Company paid the holidays at straight time, and did not count those hours for overtime calculations. Thus, in the week of June 28th, Stanley Kaczor actually worked 48 hours, plus the 24 hours of holiday pay, for a total of 72 hours in pay status. The 12 hours worked on Thursday, July 2nd were on his day off, so he was paid time and one-half for those hours. He received straight time pay for the other 36 hours of work and the 24 hours of holiday pay, for a total of 60 straight time hours' pay and 12 hours' pay at time and one-half. Russell Gerds actually worked 36 hours, plus 24 hours of holiday pay, for a total of 60 hours in pay status. He was paid 60 hours of straight time pay. John Kaczor actually worked 24 hours, plus 24 hours of holiday pay, for 48 hours in pay status. He was paid 48 hours of straight time pay.

In the week of July 5th, Robert Demiec actually worked 43 hours, plus the 12 hours of holiday pay, for a total of 55 hours in pay status. The 7 hours worked on Monday, July 6th were on his day off, so he was paid time and one-half for those hours. He received straight time pay for the other 36 hours of work and the 12 hours of holiday pay, for a total of 48 straight time hours' pay and 7 hours' pay at time and one-half. Russell Gerds actually worked 36 hours, plus 12 hours of holiday pay, for 48 hours in pay status. He was paid 40 straight time hours and 8 hours at time and one-half. Stanley Kaczor actually worked 38 hours, plus the 12 hours of holiday pay, for a total of 50 hours in pay status. The two hours in excess of 12 worked on Wednesday were paid at double time, because the contract calls for that rate for hours over 12 in a day. He received those 2 hours at double time, 8 hours at time and one-half and 40 hours at straight time.

The Union filed the instant grievances, contending that the Company should have credited all employes with twelve hours of work for overtime calculations, without regard to whether they were normally scheduled to work on the holidays. The Company denied the grievances, asserting that holiday hours could only be counted for overtime purposes if the employes would normally have worked those hours. The grievances were not resolved in the lower steps of the grievance procedure, and the dispute was referred to arbitration.

At the arbitration hearing, the Union presented the testimony of Chief Steward Stanley Kaczor and Steward Greg Radloff. Kaczor testified to the hours worked and the pay practices for the Memorial Day and Independence Day holidays, as outlined above. Kaczor also testified as to the negotiations over the Continuous Operations agreement. He recalled that the Company originally proposed Section 1.8 of the Addendum without the final sentence, and that the Union countered with language drawn from the existing contract: "Holidays will be counted as hours worked, for the purpose of computing overtime." He acknowledged that, prior to 1996, the contract was premised on non-continuous operations, and that holidays falling on weekends were observed on either the adjoining Friday or Monday. Thus under the prior agreement, all holidays fell on normally scheduled work days. Kaczor also noted that, while the parties did not have extensive discussions of the holiday language, they did draw a distinction between holidays and vacations. Specifically, even though they agreed that holidays would be treated as hours worked for overtime, they also agreed that vacation days would not be treated as time worked. Radloff provided testimony consistent with that of Kaczor about the hours worked and the pay practices on Memorial Day and Independence Day. He also testified that the Company applied the same system to Labor Day 1998 as it had to Memorial Day, in that it counted the holiday as hours worked for computing overtime for all employes, whether or not they were scheduled to work.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Arguments of the Union

The Union takes the position that the grievances must be granted under the clear and unambiguous language of the Continuous Operations Addendum. The final sentence of Section 1.8 of the Addendum specifies that "Holidays will be counted as hours worked, for the purpose of computing overtime." The meaning of this language is obvious. It is fundamental that clear language is to be applied, not interpreted, and arbitrators have routinely held that hours paid for unworked holidays must be included in overtime calculations. The Company itself recognized the correctness of this position when it counted overtime hours for Memorial Day and Labor Day as hours worked. Accordingly the grievances over the Independence Day holidays must be granted.

The arbitrator must reject the Company's attempt to evade the clear language of the contract and have some sort of exception inferred where none is suggested by the parties' own words. The Company claims that Section 1.8 contains an implicit exclusion of holidays falling on unscheduled work days. Beyond this bare assertion, there is absolutely nothing to support the Company's claim. No such exception existed in the prior collective bargaining agreement and no such exception is even suggested by the language of the current contract. Arbitrators have made it clear that the answer to clear language which proves to be cumbersome or unexpectedly expensive due to changed circumstances is to negotiate new language, not to excise the existing language under the guise of interpretation.

The Union notes that the Company's interpretation of the holiday language radically changes the existing benefit. Because of the manner in which the schedule is structured, employes on the "A" and "C" shifts never work on Thursdays or Fridays. If the Company is successful in this arbitration, those workers will never receive credit for hours worked on Thanksgiving or the Day after Thanksgiving, even though they have always received such credit in the past. Likewise, the "B" and "D" shifts will never receive credit for holidays like Memorial Day and Labor Day, which always fall on Monday. Given that the other holidays will rotate through the week year by year, the employes will on average receive credit for overtime on only half of the holidays, whereas they used to receive credit for all of them. Such a momentous change in an existing benefit cannot be lightly inferred, especially in the absence of any evidence that it was ever contemplated or discussed in bargaining.

Finally, the Union notes that this case is controlled by the prior award issued by Arbitrator Schurke in CARNATION COMPANY (8/3/72). CARNATION was a distant predecessor to Silgan, but the contractual obligations to the Union have been assumed by each of the intervening owners and by Silgan itself. That case arose when the Company worked the employes 8 hours on Monday, Tuesday, Wednesday and Thursday. Friday was Christmas Eve and Saturday was Christmas Day. The employes did not work either holiday. They were paid

for 48 straight time hours. The same thing happened the following week, for the New Year's Eve and New Year's holidays. The Union grieved, citing contract language very similar to the current Section 1.8: "Holiday hours not worked count as time worked for the purpose of weekly overtime in a holiday week." In his Award, Arbitrator Schurke rejected the Company's contention that holidays falling on a Saturday or a Sunday should not be counted for overtime calculations because they fell outside the normal work week. For 26 years this contract has been understood by both parties to mean that all holidays in a week count for overtime. That precedent cannot be ignored. For all of these reasons, the arbitrator should grant the grievances and make the affected employes whole for their losses.

The Arguments of the Company

The Company takes the position that the Addendum must be read as a whole. The first sentence of Section 1.8 specifies the compensation for holidays that are not worked: "Holidays not worked will be calculated at 12 hours of straight time pay." That is precisely what the Company has done. There is a direct conflict between this sentence and the final sentence of the Section, which allows holiday hours to be counted as hours worked for overtime purposes. However that conflict must be resolved in the Company's favor. There are two reasons for this. First, the Company notes, it was the Union that proposed the language of the final sentence of Section 1.8. It is a basic principle of contract interpretation that the party proposing ambiguous language bears the burden of the ambiguity, and that ambiguous language should be construed against the party who proposed it. The second reason for denying these grievances lies in the history of this language. The language of the Addendum was drawn from the prior collective bargaining agreement. Since that agreement was premised upon a standard 5 day schedule, all holiday observances fell on normally scheduled work days, and all employes lost work time on holidays. Thus it made sense to say that the holiday hours would be counted as hours worked for overtime calculations. The clear intent of the language was to avoid a loss of overtime pay due to hours missed to a holiday. That same interpretation should be carried forward and applied to the Addendum. Only hours missed to holiday observances should be credited for overtime.

This is a language dispute and the Union bears the burden of proof. In addition to the general burden, as the drafter of the ambiguous language it faces a presumption against its position. It has failed to carry its burden or to rebut the presumption. Accordingly the grievances must be denied.

DISCUSSION

The question presented here is whether holiday hours must be counted as hours worked in calculating overtime, even if the employe is not normally scheduled to work on the day the holiday occurs. At first glance, the clear language of the final sentence of Section 1.8 would

appear to answer this grievance: "Holidays will be counted as hours worked, for the purpose of computing overtime." However, the Company argues that this seemingly clear language contains latent ambiguity for two reasons. First, it irreconcilably conflicts with the equally clear language of the Section's first sentence: "Holidays not worked will be calculated at 12 hours of straight time pay." Second, it has its genesis in a contract that was premised on a five day work week and a system where all holidays were observed on scheduled work days, but is now being applied to a continuous operations schedule, a material change in circumstances. Neither of these arguments is persuasive.

The conflict between the two sentences of Section 1.8 is more apparent than real, since it is possible to give meaning to both sentences. The first sentence does not, on its face, concern itself with overtime. It speaks to the normal compensation for a holiday not worked, exclusive of other considerations. As demonstrated below, if, for example, a holiday falls on a Thursday in the first week of the cycle, during which the "B" and "D" shifts are scheduled for only three days, it is compensated at 12 hours of straight time pay. Likewise, a Monday holiday for the "A" and "C" shifts in the second week of the cycle:

Day of the week	S	M	T	W	T	F	S	S	M	T	W	T	F	S
Day Shift 6 a.m. - 6 p.m.	A	A	A	A	B	B	B	B	A	A	A	B	B	B
H=Holiday	X	X	X	X	H	X	X	X	H	X	X	X	X	X
Night Shift 6 p.m. - 6 a.m.	C	C	C	C	D	D	D	D	C	C	C	D	D	D

In fact, there is no conflict between the two sentences except in those cases where the holiday falls after the third paid day in a week and it is the holiday itself that compromises part or all of the hours in excess of 40. If the holiday hours are included in the first forty paid hours of the week, whether those are scheduled work days or not, they are being compensated at straight time. That cannot be the distinguishing point that resolves the conflict, since that interpretation would prevent the payment of overtime for holidays that fall on the fourth scheduled work day, a result that is both inconsistent with the Company's own theory of the case, and that may fairly be termed nonsensical.

The alleged conflict between the thought expressed in the first sentence and that expressed in the third sentence would also have existed in the case before Arbitrator Schurke, where the contract included similar provisions:

> All employees shall receive eight (8) hours' pay at the straight time rate plus the applicable shift premium on each of the above holidays . . .
>
> . . .

> Holiday hours not worked count as time worked for the purpose of weekly overtime in a holiday week.

Notwithstanding this, Arbitrator Schurke ruled that weekend holidays were hours worked for overtime purposes and should be paid as overtime. This has been the law of the contract for 26 years prior to these grievances. In short, while it is possible to conjure up situations where the first sentence of Section 1.8 appears to conflict with the final sentence, the parties have not actually recognized any such conflict in this case or under the prior contracts.

Turning to the second basis on which the Company alleges latent ambiguity in the contract -- that the prior agreement which is the source of the language only contemplated holidays on regularly scheduled work days -- this is neither correct as a factual matter nor is it sufficient to prove ambiguity. The practice of observing weekend holidays on a Friday or Monday clearly evolved after the Schurke Award, perhaps in response to that Award. Whatever the reason for the change, in 1972 there clearly were holidays that fell on non-scheduled work days. That was the entire point of the Award, and the relevant language of the contract is essentially unchanged. The Schurke Award makes it clear that, under the prior agreements, holidays on non-scheduled work days would be included in the computation of overtime hours. The fact that the parties changed the observance of holidays after the Award does not change the meaning of the underlying contract language.

Even if it were true that the counting of holiday hours as hours worked for overtime computations evolved under a system where all holidays fell on scheduled work days, the change to continuous operations would not render the clear language ambiguous. Holidays falling on non-scheduled work days are an inevitable feature of this type of staggered work schedule. It may well be that the Company's bargainers did not recognize the impact of the language when they agreed to add the final sentence of Section 1.8, but the remedy for that is to bargain different language.

As it stands, the final sentence of Section 1.8 is clear, consistent with the remainder of the COA Addendum, and readily applicable to the continuous operations schedule. Neither the Company nor the arbitrator is free to amend or ignore this language. Accordingly, I conclude that the Company violated the COA Addendum when it failed to count holiday hours as hours worked for the purpose of computing overtime. The appropriate remedy is to make employes whole for their losses.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Company did not pay employes properly for overtime during the holiday weeks of June 28, 1998 and July 5, 1998. The COA Addendum requires that holiday hours be counted as hours worked for the purpose of computing overtime, without regard to whether the holiday falls on a normally scheduled work day. The appropriate remedy is to make employes whole for any underpayments resulting from the failure to count holiday hours as hours worked.

Dated at Racine, Wisconsin, this 14th day of April, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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