BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS, LOCAL 1855

and

SCAPA ROLLS NEENAH, L.P.

Case 55
No. 57881
A-5789

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Breggeman, S.C., by **Attorney Frederick Perillo**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin, 53212, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney Dennis W. Rader,** 333 Main Street, P.O. Box 13067, Green Bay, Wisconsin, 54307-3067, appearing on behalf of the Company.

ARBITRATION AWARD

International Association of Machinists and Aerospace Workers, Local 1855, hereafter Union, and Scapa Rolls Neenah, L.P., a/k/a Voith Sulzer, hereafter the Company, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the Company concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated and an arbitration hearing was held in Neenah, Wisconsin, on October 12, 1999. The hearing was transcribed. The record was closed on January 5, 2000, upon receipt of transcript and post hearing written argument.

ISSUE

The parties stipulated to the following statement of the issue:

> Does the time worked on Sunday and holidays and paid at double time count toward the over 12-hours in any 24-hour period rule, which must be paid at the double time rate?

RELEVANT CONTRACT PROVISIONS

ARTICLE II
Hours of Work and Overtime

. . .

Section 3. Time and one-half shall be paid in each or any of the following instances, and each instance shall not be dependent on any other instance:
A. All work performed in excess of eight (8) hours in any one working day.
B. All time worked in excess of forty (40) hours (for which overtime has not previously been earned) in any week.
C. All work performed up to and including nine (9) hours on Saturday. **For the third shift it is defined to mean the twenty-four (24) hour period beginning at the regular third shift starting time on Friday evening and ending at the regular third shift starting time on Saturday evening following such Friday.**
D. All work performed before or after the regular starting or quitting time of the scheduled shift.
Section 4. Double time shall be paid in any or each of the following instances, and each instance shall not depend on any other instance:
A. All work performed on Sunday, except as provided under Section 5 of this article. **For the third shift it is defined to mean the twenty-four (24) hour period beginning at the regular third shift starting time on Saturday evening and ending at the regular third shift starting time on Sunday evening following such Saturday.**
B. All hours worked in excess of twelve (12) hours in any twenty-four (24) hour period, except that when eight (8) hours are scheduled during the sixth (6^{th}) week, all hours worked in excess of nine (9) hours in any twenty-four (24) hour period.
C. All hours worked in excess on nine (9) hours on Saturday.

Section 5. Triple time shall be paid for all work performed on Easter Sunday.

. . .

ARTICLE V
Paid Holidays

. . .

Section 2. Any employee who is required to work on any of the holidays mentioned in Section 1 of this Article shall receive pay at his double time rate for his hours worked on such holiday, plus the holiday pay agreed to above.

. . .

POSITIONS OF THE PARTIES

Union

Article II, Section 4, unambiguously requires the Company to count hours worked on Sundays and holidays toward earning double time for working more than 12-hours in any 24-hour period. A cardinal rule of contract interpretation is that where, as here, the language is clear and unambiguous, that language must be applied in accordance with its ordinary meaning and intent.

Article II, Section 4, specifically requires double time in three instances – (A) Sundays, (B) hours worked over 12 in "any" 24-hour period, and (C) hours worked over nine in a day. A separate clause also requires double time on holidays, i.e. Article V, Section 2.

To make it absolutely clear that Sunday and holiday hours do count towards crossing the 12-in-24 threshold, the parties added, "each instance shall not depend on any other instance." This phrase means that the hours worked on Sundays and holidays cannot be disregarded just because they have already been paid at a premium.

The Company disregards hours on the basis that they have already been paid at a premium. To accept the Company's position would make application of instance (B) the 12-in-24-hour rule, literally "depend on" whether the hours already worked, and counted towards the 12-hour threshold, were paid double time under instance (A), for Sundays.

The Company's interpretation clearly violates Article II, Section 4. As reflected in General Manager Pearson's memo, he has added requirements to Article II, Section 4, which are found nowhere in the collective bargaining agreement. Pearson has clearly substituted "hours worked at straight time plus time and one-half" for "all hours."

Even though employes would receive all Sunday hours at double time anyway, the Company applied instance (B), the 24-hour rule, by totaling the hours worked in a 24-hour period and "covering" the hours over 12 with double time already worked on Sunday. Instead of paying employes for working more than 12-hours in 24, the Company treats the premiums as alternatives. By this conduct, the Company has effectively eliminated instance (B) from the contract on Mondays and any day after a holiday.

The Company maintains that even if an employe works 12-hours on Sunday or a holiday, followed by 12 more hours on the next day, he receives the same premium pay (12-hours at double time) as if he had not worked on the next day at all. This interpretation also changes the meaning of the phrase "all hours" in instance (B) depending upon the day of the week.

The Company acknowledges that the only reason why Sunday hours are not counted toward the 12-in-24-hour rule is that they have already been paid at double time. In other

words, these hours would be counted but for instance (A). "But for" is synonymous with "depends on". Thus, to make instance (B) depend on instance (A), is directly opposite of what the contract states.

The phrase "each instance shall not depend on any other instance" demands literal interpretation of the double time clause. To apply instance (B), the 24-hour rule, all that need be done is to count the hours worked in 24. If they exceed 12, the 13th and later hours must be paid at double time. Only the Union's interpretation satisfies the requirements that all hours over 12 be paid double time without depending on any other instance in Article II, Section 4.

The Union presented 15 examples from 1995 until 1999, when the grievance was filed. In each case, the Company counted all hours actually worked toward the 12-in-24-hour threshold.

The Company presented nine examples before the grievances were filed in February 1999. In five of these, Sunday and holiday hours were not counted towards crossing the 12-in-24 threshold.

The Union examples cannot simply be shrugged off as mistakes. On those occasions when an employe challenged a shortage in their pay, the pay was adjusted to count Sunday or holiday hours for purposes of the 24-hour rule. The resulting adjustments cannot be explained in any way except as a conscience counting of Sunday and holiday hours towards crossing the 12-in-24-hour threshold. Thus, the adjustments reflect a true practice.

There is little significance to the occasional failure of some employes to seek pay adjustments. The payroll clerk's arithmetic errors are truly irrelevant. The fact that the payroll clerk was not called as a witness is powerful evidence that the examples supporting the Union's position were no mistakes. The evidence of the parties' practices is in accord with the plain language of Article II, Section 4, and the conventional interpretation of such language by arbitrators.

Even if the Union's interpretation of Article II, Section 4, constituted "pyramiding," there is no anti-pyramiding clause in the collective bargaining agreement. Nothing in the contract prohibits hours worked at double time from creating more double time. A limitation on pyramiding cannot be implied in the absence of language that forbids pyramiding.

The Union is not attempting to obtain two different premiums for the same hours. The payment under instance (A) for the hours worked on Sundays or holidays is not intended to compensate employes for having to work a grueling schedule, it is intended to compensate them for the loss of a day of rest observed by secular or religious tradition (Sundays) or contract (holidays). Instance (B) on the other hand, is intended to compensate employes for working an arduous schedule. There are two different premiums for two different hardships, if both hardships are imposed, both premiums should apply.

Arbitrators have recognized that "for every inconvenience" an employe experiences, he is to receive a premium payment. Arbitrators have also recognized that specific anti-pyramid clauses may prevent multiple premiums from being paid on the same hours, but not on different hours in the same week.

The great weight of arbitral authority supports the literal interpretation of Article II, Section 4, to require the counting of Sunday and holiday hours worked toward the 12-in-24 threshold. Arbitrators recognize that, unless the contract specifically forbids counting certain hours worked because they already were paid at a premium, the assumption is that all hours are counted towards an overtime threshold. Moreover, the use of the word "any" in conjunction with the 24-hour rule in Article II, Section 4, removes any doubt that employes are entitled to receive both premium payments in this case.

The grievance should be sustained. The Company should be ordered to pay all affected employes the difference between double time and the pay they received for hours worked in excess of 12 in any 24-hour period, counting all hours worked to reach that threshold even if already paid at double time.

Company

To be binding, a practice must be unequivocal; clearly enunciated and acted upon by both sides; and ascertainable over a period of time as a fixed and established practice, accepted by both parties. The Union has not shown such a practice. The arbitrator must look to contract language and determine which interpretation of overtime/double time pay is accurate.

There is no evidence with respect to bargaining history as to the intent alleged by the Union. Thus, one must seek the intent from the words themselves in their proper context.

The double time pay language of Article II, Section 4, specifically states that "each instance shall not depend on any other instance." This means that each instance shall not count toward any other instance.

Article II excludes the counting of Sunday double time hours towards 1) all hours worked in excess of 12 in any 24-hour period; and 2) all hours worked in excess of 9 hours on Saturday. The contract language is clear and exclusionary on its face. Employes are paid double time when they work on Sundays and those hours are not counted toward the 12-in-24-hour rule.

There are instances in this contract where the language is clearly for clarification purposes (for example, when that language is placed in parentheses). It makes no sense, however, to view the typical language in this case as a mere clarification when there is a very reasonable meaning which can be given to it consistent with the common principals of contractual interpretation. Labor contracts do not presume surplusage, but presume giving effect to all clauses and words.

The Union says "shall not depend" means "shall count," making a negative a positive. Semantically, there is no reason why the parties would express a positive concept in negative language. If the parties were really trying to express that Sunday and holiday hours count towards the 12-in-24 threshold, they might have used the words "each instance counts towards any other instance." It is much more plausible to interpret the exclusive term "shall not depend on" in another exclusion phrase as "shall not count towards," which is exactly the Company's position in this matter.

Not one of the cases cited by the Union in support of its position is relevant to the present case because none contain the "not counting toward" or "does not depend" language in the instant case. The Union provided no evidence, no bargaining history, which would substantiate their allegation that holiday pay or Sunday pay is a premium pay to be considered separately from the other time and one-half and double time premiums paid under Article II, Sections 3 and 4. Nor does the applicable contract language reference a premium rate or premium time.

Under Article II, Section 3, with similar exclusionary language, the applicable language is interpreted as "does not count toward." There is no reason why that virtually identical language in Section 4 should not be interpreted the same. There is wide spread arbitral authority for the proposition that the same words used in different parts of the contract should be interpreted in the same fashion.

Holiday double time is governed by Article V, Section 2. Just because holiday double time is not specifically listed under Article II, Section 4, doesn't mean that it is not excluded under the language of "each instance shall not depend on any other instance." To the extent instances of double time are paid under Sections 4(A), (B) or (C), the holiday double time under Article V is an example of "and other instance" and must "not count toward" double time paid under the contract.

While the agreement must be construed as a whole, the Union cannot take words from one provision and insert them into another. Article II memorializes the parties' recognition that one instance of double time pay cannot be used in conjunction with another.

Parties are presumed to have intended all provisions to have meaning and effect. An interpretation that renders a provision meaningless must be avoided.

The Company's interpretation of the language is accurate. Employes receive double time for all hours worked on Sunday. If an employe works continuously through to Monday, he is paid double time for all hours worked during that continual period of time. Thus, those hours have already been calculated at a premium rate and must not be counted toward the accumulation of additional overtime.

The Company admits that there is no anti-pyramiding clause in the contract. Rather, the language in question is a broad exclusionary clause, a much broader type of anti-pyramiding clause, which, however, is more rare in labor contracts. To argue that, in the

absence of an anti-pyramiding clause, the question is not a restriction on double payment, but rather, is a mere clarification of a "reverse pyramiding clause" is bizarre.

In the cases cited by the Union, the focus was on whether the same hours were paid at two rates. The normal run of the mill anti-pyramiding clauses restricted those kinds of decisions as many employers have learned, thinking their anti-pyramid clauses were exclusionary clauses.

The "shall not depend on" or "shall not count toward" language not only prohibits pyramiding, but goes one step further. The exclusionary clause in the contract at issue prohibits hours coming under premium clauses from even being counted toward yet another clause.

Previously, third shift employes would begin work on Monday at 11:00 p.m. and would end their shift at 7:00 a.m. There was no 12/24-hour issue. Under the Union's interpretation, the 1997 change in the third shift starting time would create a windfall for third shift employes. The intent of the last negotiations was not to place third shift employes in a privileged position merely by moving the third shift to start on Sunday, rather to begin on Monday night. The situation is exacerbated by the fact that overtime must be distributed equally among employes (Article II, Section 2A), resulting in third shift employes working the Sunday first and second shift work available.

The Union brought nine instances supportive of the Union's interpretation of the 12-in-24-hour provision. Four instances were irrelevant because they took place after the grievance was filed; three instances are clearly explained by the continuous Sunday time rule; and three instances are ambivalent and inconclusive. The Company's exhibits have rebutted the Union's allegation of a past practice.

The Union misconstrues the evidence on how double time has been paid. The "four-hour" rule is an explicit provision, which flies in the face of the 12-in-24-hour provision. The agreement on the four-hour rule in 1993 shows the parties were discussing the issue of how employes get paid on early morning starts even into Sunday. Had the Union's interpretation of the 12-in-24-hour provision been articulated and acted upon by both parties in 1993, the four-hour rule would have been perceived as a major decrease of a benefit.

The Company has introduced exhibits in which the four-hour rule conflicts with the Union's interpretation of the 12-in-24-hour provision. The Company submits that no grievances were filed in these instances because there was no contract violation. Rather, the Company applied the four-hour rule.

Article II, Section 4, on its face and in the context of the whole contract, does not require the Company to count double time on Sundays and holidays towards double time for working more than 12-hours in any 24-hour period. The Company's interpretation is more consistent with other language in the contract and with arbitrators' interpretation of similar provisions.

The Company asks the arbitrator to forego the Union's "literal" interpretation and favor the Company's broader "correct" interpretation. The grievance should be dismissed.

DISCUSSION

The parties disagree as to the meaning of Article II, Section 4. This provision of the collective bargaining agreement states as follows:

> **Section 4.** Double time shall be paid in any or each of the following instances, and each instance shall not depend on any other instance:
> A. All work performed on Sunday, except as provided under Section 5 of this article. **For the third shift it is defined to mean the twenty-four (24) hour period beginning at the regular third shift starting time on Saturday evening and ending at the regular third shift starting time on Sunday evening following such Saturday.**
> B. All hours worked in excess of twelve (12) hours in any twenty-four (24) hour period, except that when eight (8) hours are scheduled during the sixth (6^{th}) week, all hours worked in excess of nine (9) hours in any twenty-four (24) hour period.
> C. All hours worked in excess on nine (9) hours on Saturday.

The Company argues that Sunday and holiday hours worked and paid at double time are not counted toward the over 12-in-24-hour rule enunciated in Article II, Section 4(B). According to the Company, only hours worked and paid at either straight time or time and one-half, are counted toward the over 12-in-24-hour rule. The Union argues that all hours worked, regardless of how the hours are paid, are counted toward the over 12-in-24-hour rule.

Each party has offered payroll records in support of its position. Each party has argued that any payroll record that is contrary to its stated position is a "mistake."

As the Union argues, a payroll record in which the payroll clerk made an after the fact adjustment supports the inference that the payroll clerk consciously corrected a "mistake" and, therefore, the adjustment is not a "mistake." Nonetheless, the payroll record evidence is too inconsistent to provide the arbitrator with any reasonable basis to determine what is, or is not, a mistake. The payroll clerk, who may have been able to shed light on the rationale underlying each "mistake," was not called to testify.

The evidence of past practice, while generally more supportive of the Union's position than the Company's position, is not conclusive. Nor is there evidence of bargaining history with respect to the parties' mutual intent at the time that they negotiated the language contained in Article II, generally, or Article II, Section 4, specifically. Given the absence of conclusive

evidence of past practice or bargaining history, the best evidence of the parties' mutual intent with respect to a disputed contract provision is that which is reflected in the plain language of the contract.

In the introductory sentence of Article II, Section 4, the parties stated "Double time shall be paid in any or each of the following instances, and each instance shall not depend on any other instance." This introductory sentence is immediately followed by Paragraphs A, B and C. Thus, the most reasonable construction of this language is that the "instances" referred to in the introductory sentence are found in Paragraphs A, B and C.

Holiday pay is not found in Paragraphs A, B or C of Article II, Section 4. Rather, holiday pay is found in Article V. Thus, the plain language of Article II, Section 4, does not support the Company's argument that holiday pay is an "instance" within the meaning of Article II, Section 4. Assuming arguendo, that Article II, Section 4, contained the restrictions advocated by the Company, the contract language does not provide any reasonable basis to conclude that such restrictions would extend to holiday hours.

The "instance" found in Paragraph B of Article II, Section 4, is "All hours worked in excess of twelve (12) hours in any twenty-four (24) hour period, except that when eight (8) hours are scheduled during the sixth (6^{th}) week, all hours worked in excess of nine (9) hours in any twenty-four (24) hour period." Neither party argues that the exception "that when eight (8) hours are scheduled during the sixth (6^{th}) week, all hours worked in excess of nine (9) hours in any twenty-four (24) hour period" is relevant to the disposition of this grievance.

The stated exception aside, the plain language of Paragraph B requires the payment of double time for all hours worked in excess of 12-hours in any 24-hour period. As the Union argues, the plain language of Article II, Section 4(B) provides no basis to distinguish hours worked and paid at double time from those worked and paid at straight time, or at time and one-half. Nor does it provide any basis to distinguish hours worked and paid as holidays or Sundays. Thus, it is the Union's position, and not the Company's position, which is supported by the plain language of Article II, Section 4(B).

Article II, Section 3, contains the following introductory sentence "Time and one-half shall be paid in each or any of the following instances, and each instance shall not be dependent on any other instance." As stated above, Article II, Section 4, contains the following introductory sentence: "Double time shall be paid in any or each of the following instances, and each instance shall not depend on any other instance." There is no functional difference between the clause "and each instance shall not be dependent on any other instance" and the clause "and each instance shall not depend on any other instance."

Regardless of whether or not the parties' collective bargaining agreement expressly refers to "premium pay," time and one-half and double time are "premium pay" rates. The most reasonable construction of the plain language of each "introductory sentence" is that an employe is entitled to earn premium pay in each "instance" and that each "instance" is

independent of any other "instance." Thus, under the plain language of the "introductory sentence" in Article II, Section 4, an employe's right to earn double time in Paragraph B is independent of the employe's right to earn double time in Paragraph A.

Given this "independence," the fact that an employe earned premium pay under Paragraph A is immaterial to the determination of whether or not an employe earns premium pay under Paragraph B. Thus, the most reasonable construction of the plain language of the "introductory sentence" in Article II, Section 4, supports the Union's position and provides no support to the Company's position.

Article II, Section 3, like Article II, Section 4, provides for premium pay in specified "instances." One of these "instances" is Paragraph B, which states "All time worked in excess of forty (40) hours (for which overtime has not previously been earned) in any week."

By adopting the language of Article II, Section 3(B), the parties have demonstrated that, if they intend to exclude certain time worked when computing premium pay, they expressly state the exclusion. Article II, Section 4(B), does not express any exclusion for hours that have been paid at double time. Nor does it express any exclusion for Sunday or holiday hours. Thus, construing Article II as a whole, one is compelled to conclude that the parties did not mutually intend to exclude Sunday and holiday hours paid at double time from hours worked when computing eligibility for double time under Article II, Section 4.

In the instant dispute, the Union is not seeking multiple types of premium pay for the same work hours. Inasmuch as this case does not involve the "pyramiding" of premium pay, it is irrelevant that the parties' contract does not contain an "anti-pyramiding" provision.

As the Union argues, premium pay compensates employes for working outside the normal work hours of employes, e.g., Sunday and holiday, and for working under adverse conditions, e.g., working more than 12-hours in a 24-hour period. The adverse effects of working more than 12-hours in a 24-hour period are not diminished if hours worked in the first 12-hour period are paid at double time, rather than at straight time or time and one-half. Thus, the Union's construction of Article II, Section (B), does not produce a result that is unreasonable, per se.

In summary, the Company interprets Article II, Section 4, as excluding work hours paid at Sunday and holiday double time from being counted toward the over 12-in-24-hour rule. The plain language of the collective bargaining agreement does not support the Company's interpretation of Article II. Nor does the evidence of the parties' past practices, or bargaining history, warrant such an interpretation.

The record provides no reasonable basis to conclude that the parties mutually intended Article II, Section 4, to be given any construction other than that reflected in the plain language of the agreement. The construction reflected in the plain language of the agreement is that time worked on Sunday and holidays and paid at double time does count toward the over 12-hours in any 24-hour period rule.

Apparently, the Company and the Union negotiated a language change in 1997 that provided employes with more opportunities to earn Article II, Section 4(B), overtime. It may be that the Company did not realize this fact at the time that it agreed to the change in the language. Neither this fact, nor the fact that the change in the language provided employes with overtime opportunities not previously provided to employes, provides any reasonable basis to ignore the plain language of the agreement.

The benefit sought by the Union is a benefit afforded by the collective bargaining agreement. As such, the benefit is not an undeserved windfall.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following:

AWARD

1. Time worked on Sunday and holidays and paid at double time counts toward the over 12-hours in any 24-hour period rule, which must be paid at double time.

2. The Company shall immediately make whole all employes affected by the Company's failure to count Sunday and holiday hours when determining eligibility for Article II, Section 4, double time by paying each affected employe the difference between double time and the pay that was received for hours worked in excess of 12 in any 24-hour period.

3. The remedy is retroactive to the payroll period ending January 30, 1999.

Dated in Madison, Wisconsin, this 3rd day of April, 2000.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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