BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

RAYOVAC CORPORATION

and

TEAMSTERS LOCAL 695

Case 171
No. 59276
A-5884

(Overtime Grievance)

Appearances:

Mr. Michael Auen, Foley & Lardner, Attorneys at Law, P.O. Box 1497, Madison, Wisconsin 53701-1497, appearing on behalf of Rayovac Corporation.

Mr. Scott D. Soldon, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local 695.

ARBITRATION AWARD

On October 12, 2000, the Rayovac Corporation and Teamsters Local 695 selected William C. Houlihan from a panel of staff arbitrators supplied by the Wisconsin Employment Relations Commission, to hear and decide a grievance between the parties. A hearing was conducted on January 29, 2001 in Portage, Wisconsin. A transcript of the hearing was made, and distributed by February 5, 2001. Post-hearing briefs were filed and exchanged by March 26, 2001.

This Award addresses the question of whether unscheduled, paid holiday time counts toward the computation of overtime within the same pay period.

BACKGROUND AND FACTS

The Rayovac Company manufactures batteries at its Portage, Wisconsin location. It has a collective bargaining agreement with Teamsters Local 695, covering production employees of the facility. That contract has provisions regulating overtime pay and holidays, each of which is set forth below.

Certain continuous shift operation (Continuous Operating Mode) employees work schedules which require 12 hour days. The schedules rotate such that an employee will work 3 days one week and four days the next. The parties have negotiated a specific addition to their agreement to address matters specific to the Continuous Operation Mode. A diagram of the work schedules is set forth among the contract provisions set forth below.

During the week which included the fourth of July, 2000, a contractual holiday, employees of "A" crew worked 12 hours on Sunday, July 2, were off on Monday, July 3, were paid for the holiday which fell on Tuesday, July 4, worked 12 hours Wednesday, July 5, and 12 hours on Thursday, July 6. The employees were paid for 12 hours for Sunday, 8 hours holiday pay, 12 hours for Wednesday, and 12 hours for Thursday. Their paychecks totaled 44 hours pay. The Union contends that holiday pay should count in the computation of overtime, and that all employees are entitled to 48 hours of pay, since the last 8 hours worked are in excess of 40 hours.

The Company and Union are also signatories to a collective bargaining agreement applicable to employees of the Company's Fennimore, Wisconsin plant. Employees at the Fennimore plant worked in a continuous operating mode, under language developed under that agreement, before the continuous schedule was introduced at the Portage plant. The continuous operation mode addendum language, set forth below, was taken intact from the Fennimore agreement. In the negotiations leading to the inclusion of this provision, Company negotiators proposed the language, drawn verbatim from the Fennimore agreement. The language was included in the Portage agreement, without modification. It was the testimony of Jane Jahn, Personnel Manager, that in negotiations the Company indicated that employees would be paid for holidays and overtime the same as in Fennimore.

The Company produced witnesses and exhibits which established that in the Fennimore plant, holiday pay has not been counted toward the computation of overtime. Payroll record summaries were produced, and Company Personnel Managers from Fennimore testified that holiday pay had never been counted toward overtime for continuous shift employees. The Company introduced a grievance filed over this same matter in 1997 at the Fennimore plant. The Company denied the grievance, and it was withdrawn.

The 12 hour shifts were introduced in Portage in October, 1999. The Company introduced testimony, and payroll record summaries which show that for the 1999 Thanksgiving and Christmas holidays, holiday pay did not count in the calculation of overtime pay. Similarly, employees are entitled to a birthday holiday, which consists of two consecutive days off with pay. Company records indicate that those holidays have not been counted in the calculation of overtime. New Year's, Easter, and Memorial Day, 2000 holidays also occurred before the holiday giving rise to this grievance. No grievances were filed in any of those instances.

ISSUE

The parties were unable to stipulate the issue. I believe the issue to be:

In a Continuous operation mode is paid holiday time, falling on an unscheduled day, counted toward the computation of overtime within the same pay period?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 9 – OVERTIME

Section 1. Hours in Excess of Normal

Hours worked in excess of eight (8) hours in any one day or forty (40) hours in any one week shall be considered overtime and shall be paid for at time and one-half the regular rate of pay. Paid holidays, funeral leave, jury duty, and vacation shall be considered as time worked.

. . .

ARTICLE 13 – HOLIDAYS

Section 1. Holiday Benefits

Employees covered by this Agreement will be granted a holiday benefit for each of the following designated holidays not worked regardless of the day of the week on which the holiday falls of eight (8) hours pay at their regular rate of pay (base hourly rate including shift differential).

. . .

Section 4. Designated Holidays

The following days shall be paid holidays under this Agreement:

1.	New Year's Day	7.	Friday after Thanksgiving Day
2.	Good Friday	8.	Day before Christmas
3.	Memorial Day	9.	Christmas Day
4.	July 4th	10.	Employee's Birthday
5.	Labor Day	11.	One floating holiday to be taken
6.	Thanksgiving Day		with employee's Birthday Holiday

Section 5. Day Observed as Holiday

In case any of the holidays designated herein falls on a Sunday, and by proclamation of State and other political authority another day shall be observed as the holiday, such other day shall be considered the holiday for the purpose of this Agreement.

. . .

ARTICLE 19 – GRIEVANCE AND ARBITRATION PROCEDURE

. . .

The arbitrator shall have no power to change, modify, or add to or detract from any of the terms of this agreement. The award of the arbitrator within the terms of authority conferred upon him by this agreement shall be final and binding upon both parties.

. . .

CONTINUOUS OPERATING MODE

Production and sales requirements may require a seven (7) day, twenty-four (24) hour continuous operating mode in certain production areas.

. . .

A "Continuous Operating Mode" as referred to in this agreement, shall utilize the following shift schedule:

	WEEK 1							**WEEK 2**						
Crew	SU	M	T	W	TH	F	SA	SU	M	T	W	TH	F	SA
A	Off	D	D	Off	Off	D	D	D	Off	Off	D	D	Off	Off
B	D	Off	Off	D	D	Off	Off	Off	D	D	Off	Off	D	D
C	Off	N	N	Off	Off	N	N	N	Off	Off	N	N	Off	Off
D	N	Off	Off	N	N	Off	Off	Off	N	N	Off	Off	N	N

The labor agreement shall be amended, as follows to apply to shift workers working the twelve (12) hour shift schedule:

ARTICLE 8 – HOUR OF WORK

The normal hours of work shall be twelve (12) hours in any one day of twenty-four (24) hours. The work week begins Sunday morning at 6:00 a.m. and ends the following Sunday morning at 6:00 a.m. Starting and ending times for some positions may vary depending upon production schedule. During Daylight Savings Time changes, employees will be paid for actual hours worked.

ARTICLE 9 – OVERTIME

Hours worked in excess of twelve (12) in any one day or forty (40) hours in any one week shall be considered overtime and shall be paid for at time and one half the regular hourly rate of pay. For employees on a 36 hour normally scheduled week, overtime is computed after 36 hours. Paid holidays, bereavement leave, jury duty and vacation shall be considered as time worked. Time and a half, as such, for Saturdays and double time, as such, for hours worked on Sundays shall not apply. All hours worked in excess of sixty (60) in any one work week will be paid at double time.

. . .

ARTICLE 13 – HOLIDAYS

For continuous operations, all holidays will be observed from 6:00 a.m. on the designated day to 6:00 a.m. of the following day.

Double time will be paid for all hours worked on recognized holidays under this agreement, in addition to the eight (8) hour holiday benefit.

If the plant is closed on an employee's scheduled work day, the employee will receive holiday pay for his normal schedule of hours, not to exceed twelve (12), for one day at this regular rate.

If a recognized holiday falls on an employee's normal scheduled day off, the employee will receive a holiday benefit equal to eight (8) hours at his regular rate.

For Floating holidays scheduled on a Friday preceding a recognized Monday holiday, continuous operations will recognize the Floating holiday on the Sunday preceding the Monday holiday.

POSITIONS OF THE PARTIES

The Union takes the position that the language of the agreement is clear and unambiguous. Article 9 of the continuous operation language indicates that "paid holidays… shall be considered as time worked." The language is not limited to employees scheduled to work on the holiday. The Union argues that the Company violated the contract when it failed to pay "A" crew members overtime during the week of July 4. That week "A" crew members were paid 8 hours of holiday pay, and worked 36 additional hours. Counting the 8 holiday hours, the week encompassed 44 hours. Article 9 requires overtime after 36 hours in continuous operation mode.

In the Union's view, any consideration of past practice is inappropriate. The Union cites authority for the proposition that first consideration must be given to the language of the agreement. If the language is clear and unambiguous the contract must be enforced as written. The clear language of the agreement requires payment of overtime.

The Union contends that there was no past practice at the Portage facility, since the continuous operation mode was new and no grievances had ever been filed. The Union argues that the continuous operation mode had not been in effect at the Portage facility for a sufficient period of time to establish a practice. The Continuous Operation Mode had been in effect at Portage for less than one year, and had not yet been applied to all of the holidays designated by

the contract. Additionally, there was no implied mutual agreement between the parties as to calculation of overtime at the Portage facility. The fact that no grievances had been filed does not bar the union from insisting upon compliance with the clear contract requirement in the future.

The Union argues that past practice at the Fennimore plant is irrelevant to the Portage facility. The plants have separate bargaining units and separate contracts. All applications of the practice doctrine are predicated on the existence of a written contract. The practice at the Fennimore plant surrounds the Fennimore contract. The contract under interpretation in this proceeding is that involving Portage. It would be inappropriate to transport a practice from one contract to another.

The Company notes the overtime language in question and argues that its purpose and intent is plain. The common element to "paid holidays, bereavement leave, jury duty and vacation" is time missed from work. On a Monday – Friday work schedule each of these events would result in a missed workday. Counting such missed time as hours worked for overtime purposes is consistent with keeping the employee whole as to overtime pay. In the Continuous Operation schedule a holiday could fall on an unscheduled workday. The employee works his or her full schedule that week and, in addition, would get what the contract calls a "holiday benefit equal to eight (8) hours at his regular rate." Paying overtime on holiday pay paid for an unscheduled workday would be inconsistent with the purpose of the contract, and give an advantage to 12 hour employees not given to 8 hour shift employees.

The Company cites a number of principles of contract construction, potentially applicable in this dispute. The first is that past practice is available to ascertain the parties intent when a contract provision is unclear or ambiguous, but past practice may not be used to vary a clear and unambiguous contract term. A second principle is that the duty of an arbitrator is to honor the parties intent, and that this principle has far greater force than other contract interpretation principles. A third principle is that past practice, particularly when acquiesced in and continued from one contract to another, creates a binding interpretation. A fourth principle is that an established and accepted past practice can constitute an amendment to the contract. A fifth principle is to avoid a literal reading which ignores the object of the document. Ultimately, these principles exist to help resolve the ultimate question – what did the parties agree upon or what was their intent.

The Company claims there exists ambiguity in the provision at issue. The Company argues that ambiguity cannot be determined by reading a single sentence from a collective bargaining agreement. In support of its claim, the Company notes the past practice, and the dropped grievance, each of which argue for a different meaning. The Company points to the structure of the agreement, specifically the Continuous Operation Mode language, which exists as an amendment to the main contract. The Company notes that the Amendment is not self

contained, i.e. it does not address what holidays will be observed or paid, what conditions have to be met for holiday pay or other holiday pay details. The main contract is applicable where the amendment is silent. This fact alone precludes reading a single sentence in isolation.

The Company points to the method by which overtime and holidays for 8 hour employees are provided, and concludes that given the celebration of weekend holidays on a workday, no 8 hour employee would ever get time and one half for a holiday which did not result in the loss of a work opportunity. The Continuous Operation Mode was drafted to provide 12 hour employees with equal holiday and overtime benefits. In each situation, an employee who misses work because of a holiday is made whole and thus holiday pay is counted for overtime purposes because work time was missed.

The parties specifically addressed the holiday pay benefit, in Article 13. That provision results in 8 hours pay, the same benefit received by 8 hour employees. The language is specific, and deals with the specific question of holiday pay, and should control this award.

For all of the foregoing reasons, the Company contends that the uncontested evidence here is that Article 9 does not mean what it appears to say, based on the parties conduct. The Company cites arbitral and Judicial authority for the propositions that such ambiguity exists, and that the intent of the parties should be enforced.

The Company notes that the Fennimore grievance was raised and resolved before this contract was negotiated. The parties are the same. If this were a civil or criminal litigation in the courts there would be claims of issue preclusion. Accepting the Company's answer at Fennimore and then agreeing to the same language in the Portage contract involves concepts of reliance, acceptance, misrepresentation and amendment. The Company cites authority for each of these concepts.

DISCUSSION

The Collective Bargaining Agreement has a provision, Article 9, Sec. 1 which treats paid holidays as "time worked" for purposes of overtime. Article 13, Sec. 1 of the contract grants a holiday benefit of 8 hours pay for a designated holiday not worked. Article 13, Sec. 4 identifies the holidays, including July 4, which are treated as holidays by the contracting parties. These are provisions of general applicability relative to the bargaining unit, and on their face, appear to provide for a Fourth of July holiday, which if not worked is considered 8 hours time worked, for purposes of computation of overtime during the pay period in which the holiday falls. The Company points to evidence suggesting that, as a practical matter, an eight hour employee will not be in a position to have the time meaningfully count toward the overtime standard, but on its face the contract provisions appear relatively straightforward.

The general provisions of the agreement have been modified to specifically address the company's continuous operation production schedule. Employees who work under such a schedule work a day and week which are significantly different from the Monday – Friday, 8 hour day schedule which forms the basis for the general provisions noted above. The Continuing Operation Mode addendum modifies the general provisions of the Agreement to reflect the modified work schedule.

The Continuous operation Mode addendum has its own Article 9, Overtime provision, tailored to the 24 hour per day, 7 day per week work schedule. The addendum modifies certain provisions contained in the main agreement. It is silent with respect to most provisions. Where the addendum is silent, the provisions of the main agreement remain operative, and control. The parties repeated the topic of paid holidays being considered time worked for overtime purposes in language which is virtually identical to the language of the main agreement (the term bereavement is substituted for funeral, a difference of no consequence in this proceeding). Article 13 of the addendum makes reference to the " eight (8) hour holiday benefit". The origin of the 8 hour benefit is Article 13 of the main agreement. Similarly, the addendum has no specific enumeration of celebrated holidays. One must turn to Article 13, Sec. 4 of the main agreement find the holidays celebrated under this contract.

The net effect of this addendum is, for purposes of this grievance, to leave the provisions of the main agreement intact. This is particularly noteworthy in that the parties went to the trouble to address the status of holiday pay in an overtime setting, and repeated the provisions of the main agreement. On its face the provisions of the Continuous Operation Mode addendum yield the same result as do the provisions of the main body of the contract. The Company admits as much. This is the essence of the Union's argument in this matter.

The Company argues for a different result, citing the origin of the language, and the practice. The Company argues that the purpose of the provision is to keep the employee whole for a missed workday, and that paying overtime for the holiday is inconsistent with that purpose. The Company argues further that holidays are non work days with pay under the terms of the main agreement, as applied to 8hour/day 40 hour week employees. Those employees do not work a full schedule, in addition to a paid holiday. It is only the Continuous Operation employee who has the potential to work a full schedule in addition to receiving holiday pay in the same pay period. The Company contends that due to these schedule induced differences the Union's construction of the provision would give inappropriate advantage to the 12 hour shift employees and create divisions and inequities. This argument would be more attractive if this grievance involved the thoughtless application of a provision designed for an 8 hour shift. That is not the case here. The addendum was specifically designed to address the 12 hour schedule. The provisions were designed to address distinctions between the 8 and 12 hour shifts.

The Company cites a series of interpretive principles, and argues that the purpose of all such rules, and the role of this Arbitrator is to determine and apply the intent of the parties. I agree with the sentiment, but also believe that the best evidence of the parties intent is reflected in the words they use to craft their agreement.

It is the Company's view that there exists ambiguity in the Agreement, read as a whole. The single sentence relied upon by the Union cannot be read in isolation. The Company points to the past practice and the dropped grievance in support of this contention. The Company further notes that nothing in the Continuous Operation Mode amendment identifies what holidays will be observed or paid, what conditions have to be met for holiday pay or other holiday pay details. Reference back to the main contract is required.

The Company argument relative to the practice and grievance is no indication of ambiguity, *per se*. It is a bootstrap argument as related to contract construction. Practice is commonly used as a device to clarify language which is ambiguous on its face. Here, the Company urges an examination into extrinsic evidence in order to cast ambiguity on a provision that appears clear on its face. I agree with the contention that the contract must be read as a whole. However, as noted above, the plain meaning of the words used in Article 9, are compatible when read in the context of the balance of the agreement.

The Company argues that by agreeing that holidays result in 8 hours pay, under both the main and addendum provisions of the agreement, the parties intended that the 8 hours constitute the entire holiday benefit. Eight hours is the entire holiday benefit. The question presented in this proceeding is how the paid holiday (8 hours) relates to the computation of overtime within the week. The answer is clear: it must be considered as time worked.

The Company argues that the Fennimore contract was the origin of the language. The language has an established interpretation in Fennimore. The Company contends that by agreeing to the same language in Portage, the Union has agreed to transplant the interpretation of that language as well. To find to the contrary would involve concepts of reliance, acceptance, misrepresentation and amendment. There is merit to the claim that two institutional signatories to this contract should be held to the mutually developed meaning attributed to words they borrowed from another facility. The Union and Company own and administer the contract. This is reinforced by the existence of a dropped grievance at the Fennimore plant.

However, I don't believe this is sufficient to overcome the plain meaning of the contractual clause in dispute. The Continuous Operating Mode language was taken from the Fennimore contract. The addendum covers several pages of contract language, only a portion of which has been excerpted. The sentence in question is but a small piece of the overall provision. Nothing about the sentence flags the practice. Nothing in the record suggests that

any member of the Union negotiating team, with the possible exception of the Business Agent, was positioned to know of the practice. Paragraphs in the addendum are numbered to correspond to their main contract body counterparts. The operative sentence is virtually identical to the parallel sentence in Article 9 of the main agreement. That sentence formed a portion of the interpretive background for Article 9 of the Continuous Operating Mode addendum.

There is not an established practice at the Portage plant. The practice lasted less than one year. The longevity and repetition that would cause this to be regarded as a workplace custom never had time to develop.

Finally, the interpretation urged by the Company leaves the sentence with no meaning. Article 9-OVERTIME mandates that "Paid holidays, …be considered as time worked." The context is the computation of overtime. Under the Company's interpretation the hours would not be treated as hours worked. The effect would be to delete or modify the contract, something that Article 19 forbids.

AWARD

The grievance is sustained.

REMEDY

The Company is directed to treat paid holidays as time worked for purposes of computing overtime, and to pay grievant Paskey an additional four hours pay for the week which included July 4, 2000.

Dated at Madison, Wisconsin this 23rd day of May, 2001.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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