BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PINELAWN MEMORIAL PARK

and

WISCONSIN LABORERS' DISTRICT COUNCIL, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 113

Case 3
No. 60446
A-5966

(Overtime Grievance)

Appearances:

Ms. Christne Hentges, General Manager, Pinelawn Memorial Park, 10700 West Capital Drive, Milwaukee, WI 53222, on behalf of the Employer.

Mr. John J. Schmitt, Business Manager, Laborers' Local No. 113, 6310 West Appleton Avenue, Milwaukee, WI 53210, on behalf of the Union.

ARBITRATION AWARD

According to the terms of the 2001-2003 labor agreement between Pinelawn Memorial Park (Employer) and Wisconsin Laborers' District Council, Laborers' International of Union of North America, AFL-CIO and its affiliated Local No. 113 (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as impartial arbitrator to resolve a dispute between them regarding whether the Employer should have paid overtime pay to two employees on August 4, 2001. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. A hearing was scheduled and held on December 10, 2001, at Milwaukee, Wisconsin, where both parties were represented. No stenographic transcript of the proceedings was made. The Union requested to make an oral argument at the close of the case and the Employer requested to submit a letter brief in lieu of oral argument. Both of these requests were granted by the Arbitrator and the Employer submitted its letter brief on December 12, 2001, whereupon the record herein was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties stipulated that the following issues should be determined by the Arbitrator in this case:

Did the Employer violate the collective bargaining agreement by failing to pay the two Grievants time and one-half pay for work on Saturday, August 4, 2001? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

SECTION 1. STEADY WORKER, definition of: A steady worker is an employee who carries on the regular work of the cemetery and is listed as such by the Employer. The employee shall possess sufficient experience, skill, ability, mental and physical vigor to perform all of the usual and regular types of work carried on in the cemetery in accordance with the established work standards.

SECTION 2. HOURS OF WORK. The normal work day shall consist of eight (8) hours in a twenty-four (24) hour period. The normal work week shall consist of forty (40) hours which shall be between seven-thirty (7:30) o'clock a.m. and four (4:00) o'clock p.m. Monday through Friday. Starting time may be changed by mutual agreement of the parties. In the event of an emergency, accident or sickness of the immediate family or such emergency as may be mutually agreed upon between the Employer and the Union, the Employer may alter the starting and quitting time of the employees involved.

SECTION 3. TIME OFF. Any employee who requests time off during the week to which he is not entitled by this Contract, and who is then asked by the Employer to make up said time on a Saturday and agrees to do so, shall receive his regular hourly wages for said time worked on Saturday as if he were working his regular schedule. If said employee refuses the Employer's make-up request, it shall be deemed sufficient cause to deny the employee's request for time off during his regular work schedule.

SECTION 4. OVERTIME PAYMENT. (A) Steady workers shall be paid one and one-half (1 and ½) times their straight pay for all hours in excess of forty (40) hours per week.

Steady workers shall be paid one and one-half (1 and ½) times their straight pay for all hours worked before seven-thirty (7:30) o'clock a.m. and after four (4:00) o'clock p.m., unless shift time is mutually agreed upon.

(B) Steady workers shall be paid double their straight hourly rate for all hours worked on Sunday.

(C) Steady workers shall have preference over seasonal workers for all available overtime.

ARTICLE V

SICK LEAVE

SECTION 1. The Employer shall pay steady workers who have completed one (1) year of service for six (6) days of sick leave per year at their straight time hourly rate. Sick leave shall be cumulative from one calendar year to another with a maximum of thirty (30) days. Against the sick leave herein provided, the employee will be permitted to charge time off from work due to illness beginning with the first (1st) day of illness. The Employer shall have the right to satisfy itself of the bona fide nature of a claim for paid sick leave prior to making payment. An employee will be required to submit to the Employer a written work release from an attending physician when the employee claims five (5) ore more consecutive sick days of leave.

The Employer agrees to pay 50% of unused sick leave to be paid at the end of the year for steady workers with thirty (30) days of accumulated leave.

The Employer will provide each steady worker who qualifies for coverage pursuant to medical underwriting requirements of the insurance carrier, a long term disability plan entitling the qualified employee to one-thousand ($1,000.00) dollars per month of benefits for a maximum of [sic] twenty-four (24) month period of time. Steady workers may apply for this benefit after they have successfully completed their probationary period.

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ARTICLE VI

VACATION AND DAYS OFF

SECTION 1. (A) Steady workers shall be granted vacations in accordance with the following schedule: One (1) Year or more of service will entitle the employee to five (5) days of vacation. Three (3) Years or more of service will entitle the employee to ten (10) days of vacation. Ten (10) Years or more of service will entitle the employee to fifteen (15**)** days of vacation.

(B) The steady workers who are presently employed and who were hired prior to August 1, 1990 shall be entitled to vacation time off as follows: One (1) Year or more of service entitles the employee to ten (10) days of vacation. Ten (10) Years or more of service entitles the employee to fifteen (15) days of vacation. Fifteen (15) Years of service entitles the employee to one (1) day of vacation each year after fifteen (15) years with a maximum of twenty-five (25) days of vacation.

(C) Vacation pay shall be figures [sic] on the basis of straight-time salary.

SECTION 2. All full-time employees with one (1) or more years of service shall be granted one (1) additional day off per year with pay for personal reasons. This day shall be requested in advance of the day off, subject to approval by the Employer.

SECTION 3. All vacation schedules shall be submitted by employees to the Employer between January I and April 1 of each year. Vacation shall be granted in favor of seniority by the Employer. Vacation schedules may be altered after they have been submitted only, with the mutual consent of the employee and Employer. If the employee does not request vacation time off as herein provided, said time may be se [sic] by the Employer at his option. Vacation time may not be accumulated from one calendar year to the next and must be taken on [sic] terms of time off.

SECTION 4. No vacation requests shall be made for time off during the months of April and May, except in cases of accident or sickness of the immediate family, or such emergency as may be mutually agreed upon between the Employer and the Union.

SECTION 5. In compliance with the terms of seniority, no more than one (1) employee will be granted vacation at any one time, except in accident or sickness of the immediate family or such emergency as may be mutually agreed upon between the employer and the Union.

SECTION 6. Any individual's days off shall be requested by the employee at least one (1) week in advance of the day sought, except for cases of emergencies, the determination of which shall be the Employer's.

SECTION 7. Individual days off shall be restricted to one employee off at any one time, including employees absent because of vacation or sickness, except in cases of accident or sickness of the immediate family, or such emergency as may be mutually agreed upon between the Employer and the Union.

FACTS

The two Grievants, Curtis Swanson and Daniel McAloon, 1/ are laborers employed as "steady workers" under the parties' labor agreement. Swanson has been employed by the Employer since 1974. On August 1, 2001, in the afternoon, General Manager Christne Hentges had a conversation with McAloon and Swanson. As the day was extremely hot, Hentges asked McAloon and Swanson if they would like to leave work a couple of hours early that day. (Hentges was concerned that August 1st was such a hot day, that doing further work in the afternoon might subject these employees to heat stroke.) Swanson and McAloon asked how they could leave early on that day — whether the Employer would pay for their time. Hentges stated that they would have to take vacation time off or take unpaid leave. McAloon and Swanson agreed to take vacation time for the remainder of that day, 2.25 hours each.

1/ McAloon did not testify herein.

Some time thereafter, Hentges asked McAloon and Swanson if they would work the following Saturday, August 4, 2001. During this conversation, Swanson stated that no mention was made whether they would be paid time and one-half for the Saturday work, although Swanson stated that he thought he would be paid time and one-half for the hours worked on Saturday. 2/ McAloon and Swanson agreed to work on Saturday, August 4, 2001.

2/ These employees had also used vacation time earlier in the year to get off on Good Friday afternoon. Both employees had vacation time left as of August 1, 2001.

Hentges stated that it has been the Employer's position that vacation does not count as time worked in a 40-hour week under the contract. Both the Employer's President, Mr. Toson, and General Manager Hentges indicated that the Employer has never paid time and one-half for any hours unless the employee had actually already worked at least 40 hours in the week. 3/ Therefore, on August 4, 2001, Swanson and McAloon, who worked a total of 3.25 hours each, received 1 hour of overtime pay at time and one-half and 2.25 hours at straight time, the latter straight time was to make up for the 2.25 hours Swanson and McAloon took off on August 1st.

3/ Mr. Toson has owned the cemetery for the past 13 years and stated that he has been consistent on this point. The Union offered no evidence to contradict Mr. Toson's or Ms. Hentges' testimony.

Hentges stated that this issue has come up in the past and that during negotiations for the effective labor agreement, the Employer asked the Union if it would consider changing Article II, Section 3, to reflect the Employer's past practice of not counting sick leave and vacation time as time worked under Article II. Initially, the Union agreed that they would consider making a change in Article II, Section 3. However, toward the end of negotiations, Union Representative Schmitt stated that the Union would not agree to any change in Article II, Section 3; and that there would be a grievance regarding the Employer's interpretation of that section if problems occurred in the future. The Employer never made a written proposal regarding any change to Article II, Section 3, and the language thereof remained unchanged in the effective labor agreement.

The Employer offered records regarding the amount of time unit employees have taken off and the make-up time employees worked at straight time in the year 2001. The evidence indicated that Grievant Swanson took vacation on May 4, 23 and October 31, 2001, all of which violated Article VI, Sections 4 or 6 of the contract, yet the Employer allowed Swanson the time off. Swanson also worked 2.5 hours of Saturday make-up time at regular straight pay pursuant to Article II, Section 3, to make-up for some of the regular hours of work he missed in May and October. In addition, on 11 occasions during 2001, senior employee Robert Brehmer also used vacation time in violation of Article VI, Sections 4 or 6, and he was asked and agreed to make-up some of that time at regular straight pay on 4 occasions for a total of 8.5 hours of Saturday work paid at straight time pay during 2001, pursuant to Article II, Section 3.

POSITIONS OF THE PARTIES

The Union

The Union chose to give oral argument following the close of the hearing in this case. The Union stated that it has had a contract with the Employer since 1957. The Union urged that as the contract contains vacation and sick leave entitlements for employees, they should be able to use both vacation and sick time for "all hours" up to 40, entitling them to overtime thereafter. The Union noted that the Employer can refuse to grant an employee time off; and that there is at least one employee (Brehmer) who has used both his vacation and sick leave in order to take care of his doctor appointments. The Union argued that an employee should not have to work if he does not wish to or cannot do so and that employees should be entitled to unfettered sick leave and vacation, per the contract. The Union also argued that the Employer was merely attempting to receive through this arbitration case, what it could not achieve in collective bargaining because the Union refused to change the language of the effective labor agreement at Article II, Section 3.

Therefore, the Union urged that the Grievants should be paid time and one-half for the 3.25 hours that they worked beyond their regular work week on Saturday, August 4, 2001. This would require that the Employer pay Swanson and McAloon time and one-half pay for 2.25 hours each.

The Employer

On December 12, 2001, the Employer submitted a written brief which can be summarized as follows. The Employer urged that it was within its rights to pay the Grievants 2.25 hours at straight time for work they performed on Saturday, August 4, 2001. The Employer noted that State and Federal laws indicate that an employee must actually work all hours up to 40 in order to be entitled under law to overtime pay. Therefore, the Employer was within its statutory rights in refusing to count the 2.25 hours that McAloon and Swanson took off during the day on August 1st as time "actually worked" during the work week ending August 4th.

In addition, the Employer noted that the contract specifically states at Article II, Section 4, that steady workers "shall be paid one and one-half (1 and ½) times their straight pay for all hours in excess of forty (40) hours per week." This language, the Employer urged, supported its arguments in this case. In addition, the Employer contended that it has consistently required employees to actually work 40 hours in a week before they are paid any overtime payment. The Employer stated, "we do not, and have not, counted any time off for calculating time 'actually worked.'"

The Employer noted that its union employees have violated their contract countless times regarding vacation usage (Article VI, Sections 4 and 6) and that the Employer has never made an issue of it; that this case should never have come to arbitration; and that the Employer has not violated the contract, as alleged, in any manner by paying the Grievants 2.25 hours at straight time rates for work performed on August 4th, as such pay was consistent with the Employer's past practice. The Employer, therefore, sought dismissal of the grievance.

DISCUSSION

Article II, Section 2, states that the normal work week "shall be . . . Monday through Friday" and it defines the length of the normal work day as 8 hours and the normal work week as 40 hours. Article II, Section 4, states that employees shall be paid time and one-half "for all hours in excess of forty (40) per week." However, Article II fails to define "all hours" — to state whether hours other than work hours can be counted toward the total of 40 hours per week required by Article II, Section 4.

Thus, Article II, Section 4 of the contract is ambiguous. It is axiomatic in labor arbitration that where contractual ambiguity exists, other contractual provisions as well as evidence of past practice and bargaining history may become relevant to fill in the blanks in the ambiguous provisions of the contract.

There are two types of past practices recognized in labor law which are separate and distinct. One type of practice is not addressed in the labor agreement; it exists apart from any provision of the labor agreement. This type of practice may be revoked by either party upon timely notice of repudiation. The other type of practice, a "contract-based" past practice,

concerns subject matter covered by the contract; it exists to clarify some contractual ambiguity. Such contract-based practices are essential to an understanding of ambiguous contractual provisions. Over time the contract-based past practice becomes an integral part of the ambiguous provision; and it will be binding on the parties during the life of the agreement even though the practice is not explicitly stated anywhere in the contract. "Contract-based" past practices cannot be revoked by mere timely repudiation. Rather, such a practice can only be terminated by mutual agreement of the parties to rewrite the ambiguous provision to clearly eliminate the practice or to eliminate the ambiguous provision entirely.

The clearest, most persuasive description of the operation of a contract-based past practice *vis a vis* one parties' attempted repudiation thereof was written by Arbitrator Richard Mittenthal 4/ That description reads in relevant part as follows:

. . .

> Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of the provision. As such it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.
>
> It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc.

. . .

In addition, WERC arbitrators have adopted Mittenthal's analysis in cases involving the attempted repudiation of a contract-based past practice by one party to a labor agreement. BROWN COUNTY (SHERIFF'S DEPARTMENT), CASE 567, NO. 52381, MA-8942 (BUFFETT, 12/95); BARRON COUNTY (SHERIFF'S DEPARTMENT), CASE 118, NO. 50790, MA-8382 (MCLAUGHLIN, 6/95). These cases hold that a contract-based past practice which fills in the blanks in an ambiguous contract provision cannot be eliminated except by mutual agreement to change the contract language. See also, WOOD COUNTY (NURSES), CASE 113, NO. 48253, MA-7555 (GRECO, 6/93); DOUGLAS COUNTY (MIDDLE RIVER HEALTH CARE CENTER), CASE 177, NO. 44909, MA-6453 (ENGMANN, 8/91).

4/ Past Practice and the Administration of Collective Bargaining Agreements, 14th Annual Meeting of the National Academy of Arbitrators, pp. 30-58, 56 (BNA, 1961).

In the instant case, the evidence was undisputed herein that for at least the past 13 years, the Employer has had a past practice of only paying overtime pay to employees who have actually worked at least 40 hours in the work week and that the Union has never before filed a grievance on this issue. The business records offered by the Employer herein also support its assertions in this case, that employees have made up regular hours in a 40-hour week under Article II, Section 3, as the Grievants did on August 4th. Thus, the Employer's long-standing, mutually agreed upon past practice regarding the administration of Article II, Sections 2 and 3, support a conclusion that "all hours" as used in Article II, Section 4, must be read to mean hours actually worked by the employee.

Article II, Section 3, provides a procedure whereby an employee who has taken time off in violation of the contract (i.e., Article VI, Sections 4 or 6), can agree to "make up said time on a Saturday" if requested by the employer. In that event, the employee "shall receive his regular hourly wages for said time worked on Saturday, as if he were working his regular schedule." It is undisputed on this record that under the provision, employees have been consistently paid straight time for all hours made up. In the Arbitrator's view, the language of Article II, Section 3, and its application over time by the Employer provide strong evidence that the parties intended the term "all hours" in Article II, Section 4, to mean hours actually worked by the employee.

The Union argued that the Employer was attempting to gain through grievance arbitration what it had failed to achieve during collective bargaining negotiations over the effective labor agreement. In this regard, I note that the facts demonstrated that the Employer attempted to gain a clarification of the labor agreement, essentially to codify the past practice that it had been applying over at least the last 13 years, to make it clear that the reference to "all hours in excess of forty (40) hours per week" in Article II, Section 4, meant hours actually worked by the employee, not hours taken off for vacation or sick leave. The Union refused to modify the 2001-2003 labor agreement to accommodate the Employer on this point.

I have found above that the labor agreement at Article II, Section 4, is ambiguous but that ambiguity regarding what constitutes a 40-hour week has been filled in in the past by both the Employer's practice of paying straight time pay to employees making up time they took off during the work week under Article II, Section 3, as well as by the Employer's consistently paying time and one-half only after 40 hours of actual work in the week. The Union did not offer any evidence to the contrary, to support its argument that the work week should include hours taken off for sick leave and vacation for purposes of overtime pay.

In these circumstances, the Employer was not required to codify the past practice surrounding Article II, Sections 2, 3 and 4, in order to gain a clarification thereof. Here, the Employer could, without gaining the Union's agreement to modify the contract, continue its practice of paying overtime only after 40 hours of actual work in a work week, as the Employer's approach is supported not only by a contract-based past practice but also by the clear language of Article II, Section 3. Therefore, the Union's argument regarding bargaining history must fail along with its attempt to repudiate the practice.

The Union has argued that because the contract contains vacation and sick leave provisions, employees should be able to take the vacation and sick leave to which they are entitled and that these hours taken off should count toward the 40-hour per week threshold necessary for hours worked after 40 to be paid at time and one-half. Based on the above analysis of Article II, Sections 2 through 4, as well as the Employer's practice of paying overtime only after 40 hours are worked and its submitted records herein showing straight time payments, the Union's argument must fail. The Union offered no documentary or testimonial evidence to support this argument and it did not contest contrary evidence proffered by the Employer. Furthermore, the contract does not otherwise support the Union's assertions herein.

Finally, the facts surrounding the grievance also support denial of this grievance. Here, the Grievants agreed to take vacation time rather than non-paid time on August 1st in order to take 2.25 hours off on that hot afternoon. The Grievants also agreed to work the following Saturday, August 4th, and did so without getting any guarantee or having any conversation to indicate that they would be paid overtime for the Saturday work. I note that one of the Grievants, Swanson, had made up work time he had missed under Article II, Section 3, in the past so that he must have been aware of the Employer's past practice of paying straight time pay for made-up work on Saturdays.

Based upon the relevant evidence and argument in this case, I issue the following

AWARD

The Employer did not violate the collective bargaining agreement by failing to pay Grievants Swanson and McAloon time and one-half for 2.25 hours of work on Saturday, August 4, 2001. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 18th, day of January, 2002.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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