

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
TEAMSTERS GENERAL LOCAL UNION NO. 200

and

WBC CORPORATION, THE SPANCRETE GROUP, INC.

Case 2
No. 68978
A- 6369

(Premium Pay Grievance)

Appearances:

Attorney Kyle A. McCoy, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, P.O. Box 12933, Milwaukee, Wisconsin 53212, appearing on behalf of Local 200.

Attorney Gregory B. Gill, Sr., Gill & Gill S.C., 128 North Durkee Street, Appleton, Wisconsin 54911, appearing on behalf of WBC Corporation, The Spancrete Group, Inc.

ARBITRATION AWARD

Local No. 200, hereinafter referred to as the Union, and WBC Corporation, The Spancrete Group, Inc. hereinafter referred to as the Employer or Company, are parties to a Collective Bargaining Agreement (Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. On June 8, 2009 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the alleged failure of the Employer to pay the proper amount of premium pay to Scott Greene (Grievant). The parties requested a panel of seven Commission Arbitrators and the undersigned was selected by the parties from that panel and appointed as the Arbitrator to hear and decide the matter. Hearing was held on January 13, 2010 in Waukesha, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was not transcribed. The parties filed initial post-hearing briefs and replies by February 22, 2010 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were able to stipulate to the issue to be decided by the Arbitrator as follows:

1. Did the failure of WBC Corporation to pay Scott Greene premium pay for over- weight, over-size or over-dimensional loads for his trip hours violate Article 36, Section 2 of the parties' June 1, 2008 to May 31, 2011 Agreement?
2. If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 37

(JUNE 1, 2005 - MAY 31, 2008 COLLECTIVE BARGAINING AGREEMENT)

...

Section 2. The driver of any vehicle whose load requires flagging or dimensional banners (except those loads referenced below) shall receive the Over-Dimensional Premium of Seventy-five Cents (\$0.75) added to their straight time hourly wage rate. The Over-Dimensional Premium shall be paid for all time worked on any day when any such Over-dimensional load or loads are hauled.

...

ARTICLE 36

(JUNE 1, 2008 TO MAY 31, 2011 COLLECTIVE BARGAINING AGREEMENT)

...

Section 2. The driver of any vehicle whose load requires flagging or dimensional banners (except those loads referenced below) shall receive the Over-Dimension Premium of Seventy-five Cents (\$0.75) added to their straight time hourly wage rate. The Over-Dimensional Premium shall be paid for the actual hours when any such Over-Dimensional load or loads are hauled.

BACKGROUND

WBC Corporation operates a fleet of large trucks and employs a number of drivers to operate those trucks to deliver various construction related products manufactured by the Corporation to various locations throughout the area. From time to time drivers are required to deliver loads which are over-sized or over-dimensional and, when so required, drivers are paid a

premium wage for delivering these over-sized loads. Prior to the parties' current Agreement which runs from June 1, 2008 through May 31, 2011, the Agreement provided for premium pay to be paid to drivers pursuant to the terms set forth in Article 37 of that Agreement. Those terms provided that premium pay in the amount of seventy-five cents per hour would be paid to each driver who carried such an over-sized load on any given day and that the premium pay would be paid for the entire day regardless of how long it may have taken to actually deliver the over-sized load.

With the execution of the June 1, 2008 through May 31, 2011 Agreement the parties agreed to modify the terms of their Agreement as it related to, among other things, the payment of premium pay and over-sized loads. Article 37 of the prior Agreement became Article 36 of the new Agreement. The new Agreement provided for the payment of premium pay for over-sized loads to be paid only for the actual hours during which a driver carried an over-sized load as opposed to premium pay for the entire day as had been the case in the prior Agreement.

Following the implementation of the new Agreement the Employer, contrary to the new terms of the Agreement relating to premium pay for over-sized loads, continued to pay the premium for the entire day a driver carried an over-sized load. In other words, the Employer continued to apply the terms of the prior Agreement failing to modify the premium payments to conform to the terms of the new Agreement. These payments continued for roughly eight months when a company employee, Steve DeBrozzo, discovered the mistake while learning the payroll system. At this time the Union was notified of the Employer's mistake and its intention to henceforth conform to the terms of the new Agreement resulting in the denial of premium pay to Scott Greene on February 24, 2009. This grievance followed in due course.

THE PARTIES' POSITIONS

The Union

The Company is violating Article 36 of the parties' Agreement by not paying return trip premium pay. The language of the Agreement mandates premium pay be paid for return trips. The parties have used the word "load" to define when premium pay was due under Article 36. The testimony of the Grievant was that a driver does not complete a "load" until he returns to the yard to begin another "load." The fact that the Company paid the premium pay until this grievance was filed proves that it was clear to the Company that "load" meant delivery and return trip.

If the language of the Agreement is ambiguous then past practice mandates premium pay for return trips. Ambiguous language is that language which could reasonably be given more than one meaning by reasonable men. Citing AMERICAN OIL CO., 62-1 ARB 8073, 3279 (Boles, 1961). For a past practice to have binding effect it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable time period as a fixed and established practice accepted by both parties. Citing WHEATLAND UNION HIGH SCHOOL DISTRICT, 125 LA 1518, 1527 (Koh, 2008) In this case the parties have evidenced the practice over a period of about

six months and, if the Arbitrator finds the language to be ambiguous, he must give that practice meaning and enforce it.

The practice used here is the best interpretative standard for use toward ascertaining what Article 36 requires. The parties specifically bargained new language, discussed and reduced application of premium pay to include “ticket to ticket” return trips and then applied that understanding for over six months. “As the parties specifically bargained changes to Article 36, and the Company has continually articulated a concern over economic issues, it is no “mistake” to apply language fresh on the Company’s mind in agreement with the Union’s interpretation. This employee benefit is clear and the parties’ practice has always been to pay for return trips.”

The Employer

The parties, through good faith bargaining, reached an agreement to modify Article 37 of Section 2 in the parties’ previous Agreement and replace it with Article 36, Section 2 of the current Agreement. The parties agreed to this modification to lessen the costs of trucking expenses for the employer. The modification provided that the over-dimensional premium pay was to be paid only for the actual hours the drivers hauled an over-dimensional load as opposed to paying it throughout the day as it had been paid under the prior Agreement. The language contained in Article 36, Section 2 sets forth the exact language which had been proposed by the Company in the initial proposal during bargaining and became effective on June 1, 2008.

Due to an error by the Company, driver’s pay was not adjusted to reflect the new Agreement terms relating to over-dimensional pay and was paid just as it had been paid under the previous Agreement. This mistake continued for about eight months following the effective date of the new Agreement. When, pursuant to a Company audit, the Company discovered its mistake, it gave notice of that mistake to the Union and implemented the driver’s pay according to the new language.

The testimony clearly establishes that both parties agreed that the language in the new Agreement was the intended language, but once the Company implemented the new contract terms the Union contended that the Company’s interpretation of the language was wrong and that the drivers should be paid premium pay not only for the actual hours they were hauling over-dimensional loads but also for the return trip to the plant even though they were no longer hauling the over-dimensional load. During the hearing the Union contended that the conventional term used throughout the industry relating to such payment was called “Ticket-to-Ticket” pay. According to the Union Ticket-to-Ticket meant that as long as a driver was driving a truck associated with the haul he or she was to be paid premium pay. Thus, the return trip should be paid premium pay even though the driver was no longer hauling the over-dimensional load.

The Company agrees with the Union that Ticket-to-Ticket means “round trip” but this term was never used in negotiations nor was there any discussion to lead anyone to believe this was the agreement. None of the witnesses could recall such a discussion nor could it produce negotiating notes referring to the term. The Company’s chief negotiator testified that at no time was the term

Ticket-to-Ticket or any such practice discussed in negotiations. The new Agreement does not refer to the term Ticket-to-Ticket and, in fact, the term itself is a clear contradiction of the language contained in the new Agreement.

A past practice cannot generally trump a clear and unambiguous contract term. The plain meaning of the Agreement supports the Company's position. There can be no other meaning assigned to the relevant words other than they clearly state the fact that the obligation regarding payment of premium pay only is to be paid when drivers are actually hauling over-dimensional loads. If the Union had wanted to qualify the proposal made by the Company to include Ticket-to-Ticket language, they could have done so, but did not.

DISCUSSION

"Plain and unambiguous words are undisputed facts. The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used." PHELPS DODGE COPPER PRODS. CORP., 16 LA 229, 233 (Justin, 1951).

I am not in the least bit persuaded by the Union's suggestion that the language in this Agreement means what the Union says it means. The Union says the language incorporates the so-called "Ticket-to-Ticket" meaning. According to the Union this means that each driver should receive round trip pay for each load he or she carries which contains an over-dimensional load even though he or she only carries the load one way. This interpretation of the Contract language is wrong. What the Contract says is "The Over-Dimensional Premium shall be paid for the *actual hours* when any such oversized load or loads are hauled." (My emphasis.) "The arbitrator will declare an agreement to be clear and unambiguous where he is able to determine its meaning without any other guide than a knowledge of the simple facts on which, from the nature of the language, in general, its meaning depends." See KEEGO HARBOR, MICH., POLICE DEP'T., 114 LA 859, 863 (Roumell, Jr., 2000). I am able to make that determination here without any other guide. The language could not be more clear as to the intent of the parties and any modification of that language by the Undersigned for any reason is beyond my authority. To allow the past practice alleged herein to prevent the Employer from exercising the rights given to it by the clear and unambiguous language in the instant dispute, as the Union seems to suggest, would result in the *de facto* rewriting of the parties' Contract and that is not the job of the Arbitrator. In this case, the language provides for the payment of Premium pay only when the driver is hauling an over-sized load. If that load is hauled one way, the premium pay is paid one way. If the over-sized load is hauled round trip, the premium pay is paid round trip. The intent of the parties is manifest when one compares the old Agreement with the new. The old Agreement provides premium pay for ". . . all time worked on any day. . . loads are hauled" whereas the new Agreement provides premium pay ". . . for the actual hours. . . loads are hauled."

Evidence of bargaining history or industry practice (or past practice) in the face of clear and unambiguous contract language is irrelevant. See Elkouri and Elkouri, *How Arbitration Works*, 5th Edition, p.508, (citations omitted) and UNIVERSAL STUDIO TOUR, 93 LA 1, 3 (Gentile, 1989). If the language of the agreement is clear and unequivocal, past practice will not vitiate it unless there is mutual accord of the parties that they have intentionally modified their contract and that the practice reflects their new agreement. See METRO TRANSIT AUTH., 94 LA 349, 352 (Richard, 1990). There is no such mutual accord of the parties here. For this reason, *inter alia*, the fact that the Employer mistakenly paid drivers more premium pay than it should have paid before discovering its mistake is irrelevant. The Employer's reliance upon the clear terms of the contract in rectifying its mistake was justified.

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

AWARD

1. The failure of WBC Corporation to pay Scott Greene premium pay for over-weight, over-size or over-dimensional loads for his trip hours did not violate Article 36, Section 2 of the parties' June 1, 2008 to May 31, 2011 Agreement.

2. The grievance is denied and dismissed in its entirety.

Dated at Wausau, Wisconsin, this 22nd day of April, 2010.

Steve Morrison /s/

Steve Morrison, Arbitrator

SM/gjc
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