BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CARPENTERS LOCAL 2832 - CARPENTERS INDUSTRIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

and

EGGERS INDUSTRIES, INC.

Case 66
No. 70531
A-6446

(Vacation Shutdown Grievance)

Appearances:

Littler Mendelson, P.C., by **Attorney Jonathan O. Levine**, 250 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, appearing on behalf of Eggers Industries, Inc..

Gillick, Wicht, Gillick & Graf, by **Attorney Sandra Graf Radtke,** 6300 West Bluemound Road, Milwaukee, Wisconsin 53213, appearing on behalf of Carpenters Local 2832.

ARBITRATION AWARD

Carpenters Local 2832, hereinafter referred to as the Union, and Eggers Industries, Inc., hereinafter referred to as the Employer or the 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. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the vacation shutdown of certain employees, hereinafter referred to as the Grievants. The undersigned was appointed as the Arbitrator. A hearing into the matter was held in Neenah, Wisconsin, on May 25, 2011, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed and is the official record of the hearing. The parties filed post-hearing briefs by September 17, 2011 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUE

The parties were not able to stipulate to the issue.

The Union would frame the issue as follows:

Did the Company comply with Section 9.5 of the collective bargaining agreement? If not, what is the appropriate remedy?

The Employer would frame the issues as follows:

1. Does the side-agreement herein marked and accepted into evidence as Joint Exhibit 4 bar this grievance?

2. Did the Company comply with Section 9.5 of the collective bargaining agreement? If not, what is the appropriate remedy?

The Arbitrator adopts the issue as set forth by the Employer.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE TWO - MANAGEMENT CLAUSE

2.1 The Management of the Company and the direction of the working forces, including the right to hire, suspend, discipline, discharge, or demote for proper cause, and the right to relieve employees from duty because of work, or for other legitimate reasons in vested exclusively in the Company, provided that in exercising these rights, the Company will not use them for the purpose of discriminating against any employee for Union activities. Unless specifically exempted in this agreement, the conduct of all other phases of operations of the Company are reserved exclusively to the Company.

2.2 The parties agree that their decision not to list other rights above is not and shall not be construed as a limitation on the Company's ability to unilaterally exercise such rights. This Agreement shall be interpreted as if all such reserved rights were listed in detail herein. The union (sic) shall have the right to lodge a grievance when the unilateral exercise of such express or reserved rights violates a provision of this agreement (sic) and to grieve the reasonableness of changes in work rules, policies, and practices.

. . .

ARTICLE THREE - HOURS OF WORK

3.1 Both the Company and the Union agree that the hours and workweek are subject to change due to customer requirements, operational needs, unscheduled vacancies, and other reasons. Nothing in this Agreement shall be construed as a guarantee of the number of hours to be worked each day or each week nor as a limitation upon the Company's right to schedule and assign work and the workweek in the most efficient, cost effective manner possible.

. . .

ARTICLE NINE - VACATIONS

. . .

9.5 Vacation vouchers will be distributed the first week after January 1st of each year. At that time the Company will notify employees of a maximum of five (5) individual shutdown days for the upcoming contract year which may be selected throughout the contract year at the Company's discretion. Employees must first reserve five (5) days of vacation eligibility for shutdown days. Employees will be required to use vacation days for scheduled shutdown days. If less than five (5) days are scheduled for shutdown, the remaining days may be scheduled one (1) day at a time with two (2) working days notice.

. . .

LETTER OF AGREEMENT (JANUARY 12, 2010)

This agreement is between Eggers Industries, Inc. (Neenah, WI) and Local Union 2832 Affiliated Carpenters Industrial Council of the United Brotherhood of Carpenters and Joiners of America.

This agreement is to accommodate the union employee vacation time in 2010 since Eggers Industries has exercised its contractual right in accordance with Article 9.5 of the collective bargaining agreement to require employees to reserve five (5) days of vacation for plant shutdown days as was posted with the 2010 Holiday Schedule.

1. Consistent with Article 9.1 of the collective bargaining agreement, union employees earn vacation based on their anniversary date with the company.

2. Consistent with Article 9.5 of the collective bargaining agreement, the Company has the right to notify employees of a maximum of five (5) shutdown days for the upcoming contract year which may be scheduled throughout the contract year at the Company's discretion. Article 9.5 further indicates that Employees must first reserve five (5) vacation days of vacation eligibility for shutdown days, and Employees will be required to use vacation days for scheduled shutdown days.

3. Effective January 1, 2010 through December 31, 2010, the Company will allow union employees to carry over past their vacation year (anniversary date) any unused vacation days which remain in reserve for plant shutdown days for a period of 6 months from their anniversary date. The number of allowable carry over days will not exceed five (5) and will depend on the number of shutdown days that have occurred between January 1, 2010 and the employee's anniversary date. This carry over does not apply to vacation days in general.

4. Vacation days that are carried over per the guidelines in item #3 above will be paid in accordance with Article 9.3 of the collective bargaining agreement.

5. This agreement is only a one-year agreement expiring on December 31, 2010 and is not to be deemed as precedent setting or a permanent modification to the current bargaining agreement. All other provisions of the current collective bargaining agreement shall remain in full force.

EXECUTED BY EGGERS IND. AND BY THE UNION ON 1/8/10 AND 1/12/1O RESPECTIVELY

BACKGROUND

Eggers Industries has two plants, one in Neenah and the other in Two Rivers, Wisconsin. Each are represented by separate Unions: Neenah by the Carpenters Local Union 2832 and the Two Rivers Plant by the Carpenters Local Union 1349. Greg Coenen is the Senior Staff Representative for both Unions. Eggers Industries manufactures wood products for the commercial construction industry.

In the 2004 Two Rivers contract negotiations, the topic of vacation shutdown became a material matter of discussion relating to the Neenah plant. At that time the Two Rivers contract required the Company to identify the specific dates for vacation shutdown by April 1st of each year and to schedule the shutdown between June 1st of the current year and June 1st of the following year. The Company expressed its desire to use vacation shutdown on an "if and as needed" basis to accommodate unpredictable slack periods. To accommodate for this, the parties agreed to essentially incorporate the vacation shutdown language in the 1990 Neenah agreement:

> When vacation request forms are distributed on December 1st, the Company will notify employees of a maximum of forty (40) hours shutdown time for the upcoming calendar year which may be scheduled throughout the calendar year at the Company's discretion.

In 2008 Article Two - Management Clause and Article Three - Hours of Work were changed to modify the Company's ability to schedule work and the workweek. Restrictive scheduling language was modified to provide that:

> Both the Company and the Union agree that the hours and workweek are subject to change due to customer requirements, operational needs, unscheduled vacancies, and other reasons. Nothing in this Agreement shall be construed as a guarantee of the number of hours to be worked each day or each week nor as a limitation upon the Company's right to schedule and assign work and the workweek in the most efficient, cost effective manner possible.

In late 2009 the Company believed there may be slack times during the upcoming year resulting in not enough work to justify keeping the plant running. When the Company posted the plant schedule in November of 2009 it notified the employees in both plants of the need to reserve five days (40 hours) of vacation time to account for the potential of vacation shutdown. This notice provided that the specific days of shutdown would be designated by the Company throughout the year as required. The Union did not grieve this action by the Company but did demand to meet and discuss the impact of the Company's decision. The result of this meeting was the side agreement set forth in Joint Exhibit 4 above.

THE PARTIES' POSITIONS

The Union

Article 9.5 (of the CBA) states that the Company will notify the employees of the shutdown days at the time the vacation vouchers are distributed. Past practice was consistent with such notification for over ten years. This arrangement allowed the Company to take care of

maintenance and avoid "floating" or "island" holidays (such as Christmas or Easter when the holiday might fall on, for instance, a Tuesday) forcing employees to report for work during the middle of the week, then take the following day off, and return the next day. This would also give the employees notice so they could plan their time off.

In early 2010 the Company expressed an interest in more flexibility in using all five mandatory shutdown days without the necessity of posting those specific days ahead of time. In exchange for allowing the employees to carry over unused vacation for a reasonable period of time after their anniversary date the following year (which was the CBA's requirement) the Union agreed to enter into a letter agreement (Jt. Ex. 4)

Section 9.5 is clear and unequivocal: it requires the Company notify the employees of the **individual** shutdown days for the upcoming year. The last paragraph of Section 9.5 tells us that if the Employer does not notify the employees of the five scheduled shutdown days then it may still schedule those days with two days advance notice. Past practice supports this interpretation. When read together with Article three (management rights) it becomes clear that Article three was intended ". . . to make sure employees knew that they would have to sub in vacation time during the scheduled shut downs and allow them to plan their vacations accordingly."

The Employer has not proven the mountains of bargaining history it purports exist. Even if it existed there is no need to ferret through bargaining history since what happened at the Two Rivers plant is not in issue. The Company failed to put on any witnesses that establish any meaning contrary to what the Union argues. Greg Coenen, the Union's Business Representative, testified that he was unsure if the Company had expressed an interest in flexibility to use shutdown on an unscheduled basis and that under no circumstances was it in the employee's best interests to have no notice of shutdown. Nothing regarding bargaining history was proved at hearing to show that it is needed to establish the clear and unambiguous language in the CBA.

The Employer

The Union's request is at odds with the plain language of Section 9.5 and ignores the party's bargaining history defying logic and common sense. The burden of proving a contract violation is on the Union. It is not enough for the Union to show that its interpretation of the contract is a plausible one. It must "establish by the preponderance of clear and convincing evidence that its contractual interpretation is the correct one, intended by the parties, and that the employer's actions were violative of the noted contractual provisions, as properly interpreted." Citing CITY OF DAYTON, 126 LA 1066,1070 (Bell, 2009). Here, the Union must prove that the contract actually requires the Company to identify by early January the specific dates during the year that will be used for vacation shutdown. (Citations omitted.)

The Company has a general management right to schedule vacation shutdown days throughout the year if and as the need arises. When read together, Articles Two and Sec. 3.1 of Article Three, in combination with Article Nine, give the Company the right to schedule vacation shutdown days if and as needed.

The bargaining history of the parties is at odds with the Union's interpretation of Section 9.5. In the event the Arbitrator concludes that Section 9.5 is not clear then bargaining history and other aids may be employed to shed light on the parties' intent. In 1990 the parties agreed to new vacation shutdown language in order to reverse a prior arbitration award which held that past practice limited the Company's right to schedule vacation shutdown days with thirty days advance notice to the employees. The Union did not dispute this version of the parties' bargaining history.

The parties' understanding of Section 9.5 of the Neenah CBA was confirmed during the 2004 Two Rivers negotiations when they removed restrictive language and replaced it with language virtually identical to the Neenah vacation shutdown language as follows:

> When vacation requests are distributed on December 1st, the Company will notify employees of a maximum of forty (40) hours shutdown time for the upcoming calendar year which may be scheduled throughout the calendar year at the Company's discretion.

Mr. Coenen, the Union's Senior Staff Representative, suggested this language to address the Company's expressed interest in being able to "clear vacation" during unpredictable slow times. At hearing, Counsel for the Company proposed a "stipulation", in order to circumvent any difficulties relating to the Union's failure to produce certain records pursuant to subpoena prior to hearing, to the following:

> In 2004 the parties in Two Rivers conducted interest-based bargaining with Federal Mediator Glenn Tarkowski and that the union proposed language similar - vacation shutdown language similar to the language in the Neenah collective bargaining agreement to permit the company to deal with a need to use vacation shutdown on an unpredictable basis.

(Following the above proposal for "stipulation" Counsel for the Union requested a caucus following which the Union rested its case without stipulating to the Company's proposal.)

The parties' understanding of Section 9.5 was confirmed in the 2010 Side Agreement. When the Company posted the 2010 Holiday Schedule the Union did not file a grievance. The

parties met at the Union's request a month later to address the fact that the Company had "exercised its contractual right (emphasis in original) in accordance with (Section) 9.5 of the collective bargaining agreement to require employees to reserve 5 days of vacation for plant shutdown days as was posted with the 2010 Holiday Schedule." In the side agreement the parties reached following that meeting the parties agreed that "Consistent with (Section) 9.5 of the collective bargaining agreement, the Company has the right to notify employees of a maximum of five (5) shutdown days for the upcoming contract year which may be scheduled throughout the contract year at the Company's discretion" further evidencing the intent of the parties.

The Union's proposed interpretation of Section 9.5 defies logic and common sense and would render it and other contract provisions meaningless. It renders the plain language of Sections 2.1, 2.2 and 3.1 meaningless.

There is no binding past practice requiring the Company to identify specific dates for vacation shutdown in January. Mr. McDonald, an employee of the Company, the Union's Vice President and a person familiar with the past negotiations of the Union contract, testified that the Company had not used vacation shutdown days for maintenance in "years and years and years." In other words, the time when maintenance shutdowns were necessary had long since passed and any "practice" the Union might claim to exist would have been broken by the 20-08 contract negotiations and the 2009 Holiday Posting.

DISCUSSION

This is a contract interpretation case. The subject contract section found in Article Nine, Section 9.5 of the Eggers Industries, Inc. (Neenah, WI) Agreement dated May 15, 2008, was in full force and effect at all times relevant hereto, and says:

> Vacation vouchers will be distributed the first week after January 1st of each year. At that time, the Company will notify employees of a maximum of five (5) individual shutdown days for the upcoming contract year which may be scheduled throughout the contract year at the Company's discretion. Employees must first reserve five (5) days of vacation eligibility for shutdown days. Employees will be required to use vacation days for scheduled shutdown days. If less than five (5) days are scheduled for shut down, the remaining days may be scheduled one (1) day at a time with two (2) working days' notice.

A contract term is said to be ambiguous if it is susceptible of more than one meaning, that is, if "*plausible* contentions may be made for conflicting interpretation." (My emphasis) See ARMSTRONG RUBBER CO., 17 LA 741 (Gorder, 1952). Here, the parties have drawn two

separate conclusions from this language, both of which are arguably supported by the language, but only one of which is plausible. They agree on the fact that it is the Company who has the option of designating the specific shutdown days. They disagree on *when* the Company must notify the employees of its decision. The Union says the language requires the Employer notify the employees in January of each year at the time vacation vouchers are distributed. It relies on that portion of the language which states *"At that time, the Company will notify employees of a maximum of five (5) individual shutdown days for the upcoming year. . ."* (My emphasis) The Union, placing emphasis on that portion of the clause which says 'at that time', reasonably concludes that this means while the Company has the right to designate the *particular* shutdown days throughout the year, it must do so in January ('at that time') in order to give the employees ample time, a 'heads up' as it were, to schedule their vacation days at times which would be most beneficial to them. On the other hand, the Company concludes that the language saying 'which may be scheduled throughout the contract year' means that it need not schedule the days in advance (i.e. in January) and may schedule them at any time throughout the year as they are needed. This construction would render insignificant the language in the last sentence of 9.5: "If less than five (5) days are scheduled for shutdown, the remaining days may be scheduled one (1) day at a time with two (2) working days' notice". The *Restatement (Second) of Contracts* comments:

> Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph. . .Where the whole can be read to give significance to each part, that reading is preferred. . . *Restatement (Second) of Contracts*, Sec.202, cmt. d (1981)

I thus conclude that the Company's interpretation is not plausible given the context of 9.5. Hence, the language in 9.5 may not be said to be ambiguous and extrinsic evidence is not required to aid in its interpretation.

Joint Exhibit 4, the Letter of Agreement dated 1/8/10 (by the Company) and 1/12/10 (by the Union), in effect for the entire year of 2010, does not, as the Company argues, bar this grievance. It is only peripherally involved with this grievance. The Letter of Agreement deals with the employees' ability to carry vacation time over into the next year for a period of six months *beyond* their individual anniversary dates in the event the Company fails to use all five scheduled vacation shutdown days. This agreement gave the employees six months longer to utilize their carry over vacation time because prior to this agreement, employees could only carry vacation time over into the next year *until* their anniversary date. The Letter of Agreement is, thus, an accommodation to the Union, not an accommodation to the Company by the Union, as the Union erroneously argues.

Sections 9.5 and 3.1 are not, as the Company asserts, inconsistent with each other. 9.5 places no limitations on the Company's rights to "schedule and assign work and the workweek in the most efficient, cost effective manner possible." The Company is free to schedule work, assign work and the workweek in any manner it sees fit. The only requirement of 9.5 is that the Company must notify its employees of the days it has scheduled ahead of time. It may be more difficult for the Company to schedule these days into the year but the alternative is to schedule them on the spur of the moment leaving no notice to its employees whatever. Such a construction as this would render an absurd result contrary to sound contract construction.

In terms of a remedy, the Union asked to be "made whole" and for the ". . . Company to identify and notify the Union of scheduled shutdown days." There is insufficient evidence in this record for the Undersigned to fashion a "make whole" remedy.

In light of the above, it is my

AWARD

1. The side-agreement herein marked and accepted into evidence as Joint Exhibit 4 does not bar this grievance.

2. The Company did not comply with Section 9.5 of the collective bargaining agreement.

3. The Company shall notify the employees of the individual shutdown days in the upcoming contract year when vacation vouchers are distributed in the first week of January.

Dated at Wausau, Wisconsin, this 8th day of December, 2011.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
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