BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILK SPECIALTIES GLOBAL

and

TEAMSTERS LOCAL UNION NO. 662

Case ID: 442.0000
Case Type: A

AWARD NO. 7915

Appearances:

Stacey Pexa Lodden, Director, Human Resources, Milk Specialties Global, 7500 Flying Cloud Drive, Suite 500, Eden Prairie, Minnesota, appeared on behalf of the Company

Scott D. Soldon, Soldon Law Firm, LLC, 3541 North Summit Avenue, Shorewood, Wisconsin, appeared on behalf of the Union.

ARBITRATION AWARD

On April 13, 2015, the above-captioned parties requested a panel of arbitrators from the Wisconsin Employment Relations Commission. They thereafter selected William C. Houlihan, a member of the Commission's staff, to hear and decide a pending grievance. A hearing was conducted on July 15, 2015 in Adell, Wisconsin. A transcript of the proceedings was taken and distributed by July 20, 2015. Post-hearing briefs were filed and exchanged by July 30, 2015.

This dispute arose when the Company discontinued paying overtime for all work performed on Sunday.

BACKGROUND AND FACTS

The Company and Union are signatories to a collective bargaining agreement, the relevant provisions of which are set forth below. The bargaining relationship goes back many years. The Company has historically paid time and one-half for all hours worked on Sunday.

This is regardless of the number of hours worked during the week. Sunday work is regularly scheduled, and employees working Sunday may work no more than 40 hours in the applicable workweek. This practice has been in existence for at least 23 years, spanning numerous collective bargaining agreements.

During the negotiations leading to the 2014 – 2018 collective bargaining agreement, the Company's Director of Human Resources, Stacey Pexa Lodden, advised the Union that the Company intended to address the Sunday overtime pay matter. According to Company witness Todd Spykstra, Director of Operations, the Company advised the Union that it intended to drop the mandatory overtime pay on Sundays. Company witness Mike Artery, Plant Manager, confirmed the essence of Spykstra's testimony. Additionally, Spykstra, Artery and Jessica Johnshoy, Regional Human Resources Manager, all testified that in a grievance meeting David Hoeppner, the Union Business Agent, acknowledged that the Company had given notice of the anticipated change in negotiations.

Union witness Larry Reilly, the Local Steward, testified that the Company did not advise the Union that it intended to discontinue the practice. Hoeppner testified that the Company never indicated that it intended to discontinue the practice. On rebuttal, Hoeppner testified that the Company said that it may choose to discontinue the practice at some future time

During negotiations there was no written Company proposal to discontinue paying overtime on Sunday, nor was there any proposal to modify any other applicable provision of the contract.

The parties reached an agreement on a new contract in August 2014 which took effect on August 1, 2014. The Company continued paying Sunday overtime until March 2015. On March 3, 2015, the practice was terminated by Artery who issued a memo dated March 3, 2015, which eliminated the overtime pay where it was not specifically outlined in the contract. The change became effective March 23, 2015. A grievance was filed on March 9, 2015.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 12. HOURS OF WORK AND OVERTIME

> 12.1 The parties recognize and agree that the nature of the Company's business is such that normal hours of work cannot be defined or guaranteed. Nothing in this Agreement shall be construed as a guarantee of hours, work or pay.

* * *

12.3 Employees shall be paid their current straight-time hourly rate for all hours worked, except as follows:

> Employees shall be paid one and one half their current straight-time hourly rate for hours worked in excess of 40 in any workweek.
>
> For employees who work five (5) eight (8) hour shifts, overtime will be paid after eight (8) hours worked if the employee works all of his or her regularly scheduled hours.
>
> For employees who work other than five (5) eight (8) hour shifts, overtime will be paid after forty (40) hours worked.
>
> Employees who are working 12 hour shifts shall be paid one and one-half times their current straight-time hourly rate for all hours worked in excess of 12 hours per day.
>
> Employees who are required to work six (6) consecutive days in a workweek (M-Su), shall receive 1½ for the sixth (6th) day worked. Employees, who are required to work seven (7) consecutive days in a workweek (M-Su), shall receive DOUBLE time for the seventh (7th) day worked.

* * *

12.9 The overtime policy and practices in effect under the prior agreement will continue in effect under this Agreement.

ISSUE

The Union views the issue as:

> Did the Company violate Article 12 of the collective bargaining agreement by discontinuing automatic payment of overtime for all hours worked on Sunday?
>
> If so, what shall be the remedy?

The Company believes the issue to be:

> Did the Union carry its burden of proof to establish that the Company violated Article 12, Section 3, of the collective bargaining agreement by discontinuing automatic payment of overtime for all hours worked on a Sunday?
>
> If so, what shall be the remedy?

I believe the Union bears the burden of proof in this dispute. In that context, I agree with the statement of issue posed by the Union.

DISCUSSION

There is no dispute that a practice existed which paid time and one-half for all work performed on Sunday. The premium was paid for all work performed, regardless of the number of hours worked by the employee. It was uniformly applied over a considerable number of years. Something was said in negotiations relative to the benefit. The parties' dispute precisely what was said, but the evidence supports a conclusion that the status of the benefit was raised.

Whatever was said in negotiations, the practice remained in effect following the parties' agreement on their successor contract. The agreement was signed in early August, with an August 1 effective date. The matter did not come to a head until Artery sent his March 3, 2015 memorandum.

Article 12 addresses overtime. Article 12.3 calls for straight time pay, subject to certain exceptions. The blanket overtime rate for Sunday is not one of the contractually enumerated exceptions.

However, Article 12.9 addresses overtime policy and practices. On its face, the plain meaning of Article 12.9 would appear to address the practice of paying overtime on Sundays. It is a practice which involves overtime. The only testimony as to how the language has been applied came from Johnshoy. Her testimony on this topic consisted of the following:

> Q: … Does Article 12.9 refer to overtime pay provisions?
>
> A: No, it does not.
>
> Q: What does Article 12.9 pertain to?
>
> A: 12.9 language is in reference to scheduling and distribution of overtime amongst employees.

Johnshoy has been with the Company since April 2014 and has been assigned to the Adell plant since January 2015. There were no examples or details offered to support the testimony. There was no history of how the provision was applied. Much of Article 12 addresses how overtime is scheduled and distributed. The testimony is conclusory and offers no insight as to how Article 12.9 has been applied relative to the various provisions in Article 12.

Read literally, Article 12.9 refers to the Sunday overtime practice. I believe the clause must be read to include the Sunday practice of paying overtime for all hours worked. Article 12.9 does not specifically identify pay or overtime, but it does reference practices. The article does not enumerate any specific policy or practice, but rather references the policies and practices and incorporates them into the contract by reference. It is the practice that pays overtime for all hours worked on Sundays. The practice has therefore been incorporated into the collective bargaining agreement. As such, it is a part of the agreement.

The parties dispute what was said in negotiations. The words used in negotiations do not affect the outcome of this award. The parties left Article 12.9 in the contract. They did so having had a discussion over a very substantial overtime benefit that has existed for over 20 years. Article 12.9 committed the Company to continue the overtime practice from the prior contract. That commitment was in writing and ratified by the parties. The Company is not free to rely upon its verbal notice to terminate a benefit which it subsequently committed to continue.

The Company points to Article 12.1 to support its decision. Article 12.1 can be read narrowly or broadly. Read narrowly, as applied to the facts underlying this dispute, the provision provides that the Sunday work and corresponding hours and pay are not guaranteed. That is not in dispute in this proceeding. Read broadly, the provision would appear to void all other provisions of the contract. Such a reading would be extraordinary and at odds with the historic application of the agreement.

There was no explanation as to why the benefit was allowed to continue for seven months following execution of the agreement. If the Company believed it had terminated the benefit, and that the parties understood that to be the fact, the unexplained passage of time undermines that understanding.

AWARD

The grievance is sustained.

REMEDY

The Company is directed to restore the practice, and to pay overtime for all hours worked on Sunday. The Company is further directed to make the employees whole for lost earnings they have suffered as a result of being paid straight time instead of time and one-half for Sunday work.

Signed in the City of Madison, Wisconsin, this 11th day of September 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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William C. Houlihan, Arbitrator