

IN THE MATTER OF ARBITRATION BETWEEN

International Association of Machinists & Aerospace Workers, District Lodge No. 165) FMCS Case No. 10-57337-3
(“IAM” or “Union”))
) Issue: Holiday Pay
)
) Hearing Date: 12-08-10
)
&)
) Briefing Date: 01-21-11
Electrolux Home Products, St. Cloud, MN)
(“Electrolux” or “Company”)) Award Date: 03-04-11
)
) Mario F. Bognanno, Arbitrator

JURISDICTION

The IAM, District Lodge No. 165, and Electrolux Home Products are parties to a Collective Bargaining Agreement (“CBA”) with effective dates of November 9, 2009 through November 18, 2012. (Joint Exhibit 1) Pursuant to Article 14 in the CBA, the Arbitrator was duly selected to arbitrate the above-captioned matter, which was heard on December 18, 2010 in St. Cloud, Minnesota. At the hearing, the parties chose to have the matter heard by the undersigned alone rather than by an “arbitration board,” as referenced in §14.2 and §14.3 of the CBA. (Joint Exhibit 1) The parties were given a fair and full opportunity to present their case; a verbatim transcription of the hearing was taken; witness testimony was sworn and cross-examined; exhibits were accepted into the record. The parties agreed to E-mail post-hearing briefs to the Arbitrator on January 21, 2011 and to exchange post-hearing briefs by E-mail on January 24, 2011.

APPEARANCES

For the Union:

James M. Kiser
Colleen Murphy-Cooney
Jerome Frederick
Janice Lehr
Jeff Olmscheid
Tom Spanier
Lynn Franklin

Directing Business Representative
Business Representative
Shop Steward
Chair, Shop Committee
Employee
Employee
Employee

For the Company:

Keith L. Pryatel
Beverly Steffy
Carol Young

Attorney at Law
Director, Human Resource Director
Former Director, Human Resource

RELEVANT CBA PROVISIONS

Article 17 – Holidays

§17.1. Holidays are defined to mean Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and the day after Thanksgiving Day Holiday, Christmas Eve, Christmas Day, New Years Eve, and New Years Day. An additional holiday each year of contract will be observed in **association with Independence Day**. ...

§17.3. If an Employee is scheduled to work and does not work either the previous regularly-scheduled workday or the following regularly-scheduled workday to the holiday, the employee shall not be entitled to pay for the holiday.

(Joint Exhibit 1; original document includes bold font, designation newly negotiated 2009 text)

Article 14 – Arbitration

§14.2. Within **twenty-five (25)** working days after the decision rendered by the Company Representative in the Second Step of the Grievance Procedure, either party desiring to arbitrate a matter which is subject to arbitration shall notify the other party of its intent to arbitrate and state its nomination to the arbitration board. Within five (5) working days the other party shall nominate a member of the board. **Within ten (10) working days of the nomination of the second member of the arbitration board, the parties will either agree** to an Arbitrator or apply to the Federal Mediation and Conciliation Service for a list of Arbitrators **who are members of the National Academy of Arbitrators. The cost of obtaining the panel from the FMCS will be borne equally by the parties. Unless the parties otherwise agree, a panel will be obtained in the following**

manner: The Union will submit to the Human Resources Department a document identifying the grievance together with a check made out to the Company for one half of the cost; the Company will then send for the panel from the FMCS. Within five-(5) (sic) working days after receipt of such list, representatives of both parties shall meet to choose one person from such list by alternatively striking a name therefrom, beginning with the person initiating the arbitration until only one name remains and that person shall be the Arbitrator of the case. Either party shall have the option of rejecting the initial list and requesting a second list from which the Arbitrator will be chosen.

(Joint Exhibit 1; original document includes bold font, designating newly negotiated 2009 text)

Article 21 – Construction of Agreement

§21.2. Any policies or practices heretofore followed which are in any way inconsistent with any of the provisions of this Agreement are hereby revoked.

(Joint Exhibit 1)

I. FACTS AND BACKGROUND

The Company owns and operates a freezer manufacturing plant in St. Cloud, Minnesota. It variously employs 1,300 to 1,500 production and maintenance (“P & M”) workers who are represented by the IAM, District Lodge No. 165. (Tr. 108) The P & M bargaining unit’s employees manufacture chest and upright freezers that are retailed under the brand names of Electrolux, Frigidaire, Tappin, GE and Kenmore. (Tr. 108)

In Article 17, §17.1 the first holiday following New Years Day is the Good Friday holiday, followed by Memorial Day, Independence Day and so forth. (Joint Exhibit 1) The dispute in this case centered on Jay Stone, a Reliability Technician. Mr. Stone elected not to work on Good Friday, April 2, 2010, although he did work either the regularly scheduled workday preceding Good

Friday or the regularly scheduled workday following Good Friday, but not both.¹ (Tr. 66) For not working on both of the regularly scheduled workdays surrounding Good Friday, the Company denied the Grievant Good Friday holiday pay. (Joint Exhibit 2, p. 2) Mr. Stone grieved on April 19, 2010, alleging that his §17.3 holiday pay right was wrongfully denied. (Joint Exhibit 2, p. 1) Thus, the substantive crux of the instant dispute centers on the application and interpretation of the following CBA language:

§17.3.If an Employee is scheduled to work and does not work either the previous regularly scheduled workday or the following regularly-scheduled workday to the holiday, the employee shall not be entitled to pay for the holiday.

(Joint Exhibit 1)

The record evidence shows that since at least 1948, IAM, District Lodge No. 165, has had CBAs with a variety of owners and operators of the St. Cloud, MN facility. The holiday pay language in Article XIV, §3 of the Union's 1948 – 1949 CBA with the Franklin Transformer Manufacturing Company provided:

If an employee does not work both the previous regularly scheduled work day and the following regularly scheduled work day to the holiday, he shall not be entitled to pay for the holiday.

(Union Exhibit 1; emphasis added) The Union's 1960 – 1961 CBA was with the Franklin Manufacturing Company. In Article 14, §4 of this CBA, the wording of the holiday pay language was as follows:

If an employee does not work either the previous regularly scheduled work day or the following regularly scheduled work day to the holiday, he shall not be entitled to pay for the holiday, ...

¹ The record does not specify which of the scheduled workdays surrounding Good Friday that the Grievant actually worked.

(Union Exhibit 2; emphasis added) The Union's 1974 – 1977 CBA with the Franklin Manufacturing Company, Freezer Division, a subsidiary of White Consolidated Industries, Inc. included holiday pay language in Article 17, §3 that read as follows:

If an Employee is scheduled to work and does not work either the previous regularly scheduled work day or the following regularly scheduled work day to the holiday, he shall not be entitled to pay for the holiday.

(Union Exhibit 3; emphasis added) Since at least 1974 this language has remained intact except that the pronoun "he" was later changed to the noun "the employee." (See Joint Exhibit 1, Article 17, §17.3)

A member of the Union's bargaining committee, Colleen Murphy-Cooney, Business Representative, participated in the parties' 2009 negotiations of a successor agreement. (Tr. 46; Tr. 72) At the hearing, she testified that she has been an Electrolux employee for thirty-one (31) years. Further, during the course of her employment, Ms. Murphy-Cooney testified that the language in §17.3 of the CBA has been applied to mean that an employee qualifies for holiday pay if the employee works either the scheduled work day before or the scheduled work day after the holiday, which is to say that the employee need not work on both of the scheduled work days surrounding the holiday to be entitled to holiday pay. (Tr. 46; Tr. 82 – 83) Moreover, Ms. Murphy-Cooney testified that during the parties' 2009 round of contract negotiations, the Company made four (4) "Comprehensive Offers," between November 16 and November 18, 2009. The Company's first, second and third offers included, *inter alia*, the following Company-proposed change to the language in §17.3:

To receive holiday pay, employee must work the scheduled day before and the scheduled day after the holiday.

(Union Exhibits 4, 5 and 6; Tr. 49 – 51) Ms. Murphy-Cooney also testified that the Union continuously rejected the Company's proposed change to §17.3. However, with the Company's fourth "Comprehensive Offer," it withdrew its proposed change to §17.3; the Company told the Union that it's sought-after change to §17.3 was not necessary because, after "re-reading" same, the Company determined that the existing language suited its purposes and that, prospectively, effective April 2, 2010, Good Friday holiday, it would be enforced to mean that the employee must work both scheduled workdays surrounding the holiday to qualify for holiday pay. (Union Exhibits 7 and 8; Tr. 51 – 52; Tr. 76; Tr. 78) Ms. Murphy-Cooney testified that the parties' "either-or" interpretation of §17.3 has controlled for decades; the Union did not acquiesce to the Company's unilaterally imposed "both" interpretation of §17.3. (Tr. 65 – 66; Tr. 82 – 82)

Generally speaking, Carol Young, then the Company's Director, Human Resource, and a member of the Company's 2009 negotiating committee, testified that the Union rejected the Company's initiative to amend §17.3. However, at the parties' November 18, 2009 bargaining meeting, according to Ms. Young's bargaining notes, the Company's chief spokesman withdrew the Electrolux proposal to change §17.3 and he stated:

Finally got the contract out and read the language, 17.3. It requires the scheduled day before and after. This language has been incorrectly applied in the past. Effective 1-1 of 2010, the Company will apply the language as written. I know you believe differently, but there is a mechanism for that. So we can remove this subject from the negotiation processes and do not have to go through the ratification process.

(Company Exhibit B) Ms. Young testified that this spokesman's reference to a "mechanism" meant that the Union could exercise its grievance and arbitration rights if it disagreed with the Company on point. (Tr. 129) On the day before, November 17, 2009, the bargaining notes of another Company-side representative, JoAnn Fladmark-Erickson, attributed the following to this same spokesman:

Frank [the Company's spokesman] got contract out and reviewed. As read, it requires the employee needs to work the day before and after the holiday. The contract has been applied inappropriately – I'm sorry – improperly. As of January 2, 2010, the contract will be followed correctly, and so this proposal is withdrawn. Structure of sentence states that if you do not work the day before or the day after, states either, which means you need to work. Sentence is written as complete negative, which means you need to work both days in order to receive the holiday pay.

(Company Exhibit C)

The record evidence also shows that during the parties' 2009 negotiations they agreed to a timeline of twenty-five (25) working days following the Company's second-step answer to a grievance during which either party, if it wished to do so, must initiate arbitration.² (Union Exhibit 8) Specifically, the parties agreed to §14.2, which, in part, set forth the following language:

§14.2. Within **twenty-five (25)** working days after the decision rendered by the Company Representative in the Second Step of the Grievance Procedure, either party desiring to arbitrate a matter which is subject to

² Carol Young, the Company's former Human Resource Director, testified that prior to the addition of the twenty-five (25) day timeline language in §14.2, there was no timeline during which a grievance must be appealed to arbitration. (Tr. 10; Tr. 34) This testimony contradicted the language in the first sentence of §14.2 in the 2009 – 2012 CBA, because the only negotiated change in this sentence is the reference to "twenty-five (25)," with the rest of the sentence remaining intact. This seems to suggest that the negotiated twenty-five (25) working days timeline replaced an earlier timeline. Indeed, Union Exhibit 8 shows that §14.2 in the pre-2009 – 2012 CBA read, in part, "Within ~~ten (10)~~ twenty-five (25) working days..." This contradiction in the record is deemed to be immaterial as Ms. Young's testimony was not contradicted by the Union and, thus, is accepted as fact.

arbitration shall notify the other party of its intent to arbitrate and state its nomination to the arbitration board.

(Joint Exhibit 1; new language in bold font)

It is uncontroverted that Mr. Stone filed his grievance on April 19, 2010; in a letter addressed to Janice Lehr, Chair, Union Shop Committee, K. C. Fleming, Labor Relations Manager, rendered a second-step letter denying the grievance on April 27, 2010; Colleen Murphy-Cooney, Business Representative, issued a June 7, 2010 letter formally advising the Company "... that we are submitting to arbitration the grievance of J. Stone..." (Joint Exhibit 1, pp. 1, 2 and 3, respectively) Further, it is undisputed that Ms. Murphy-Cooney's letter of June 7, 2010 is dated twenty-eight (28) working days after the date on the Company's second-step letter of April 27, 2010—three (3) days beyond the contractually required twenty-five (25) day timeline. (Tr. 16; Tr. 29) In a letter dated June 10, 2010, Mr. Fleming advised Ms. Murphy-Cooney that her June 7, 2010 notice to arbitrate was untimely. (Company Exhibit G)

II. ISSUES

At the hearing, it was agreed that prior to considering the merits of Mr. Stone's grievance, the threshold issue of arbitrability would be addressed. Said issue concerns the Company's argument that the grievance should be dismissed as procedurally non-arbitrable because it was not filed within the twenty-five (25) days time limit newly set out in Article 14, §14.2 of the CBA. Further, it was agreed that if Mr. Stone's grievance is determined to be arbitrable only then may the merits of the holiday pay issue in dispute be considered. Given this premise, the parties jointly stipulated to the following phrasing of the issues at impasse:

1. Whether the matter is procedurally arbitrable? If so,
2. Whether Grievant Jay Stone was wrongfully denied April 2, 2010, Good Friday, holiday pay pursuant to §17.3 in the CBA? If so,
3. What is an appropriate remedy?

(Joint Exhibit 2; Tr. 4)

III. TIMELINESS ARBITRABILITY: POSITION OF PARTIES

A. ELECTROLUX: The Company maintains that Mr. Stone's grievance is not arbitrable. The Union violated the language in §14.2 of the CBA when it failed to notify Electrolux of its intent to arbitrate within twenty-five (25) working days following receipt of the Company's second-step response to the grievance in question. Specifically, the Company points out that it denied Mr. Stone's grievance on April 27, 2010, because he had not worked both of the scheduled days surrounding the April 2, 2010, Good Friday holiday and, therefore, was not eligible for holiday pay. (Joint Exhibit 2, p. 2) On June 7, 2010, twenty-eight (28) working days later, the Union notified the Company in writing that it was pursuing Mr. Stone's grievance to arbitration. (Joint Exhibit 2, p. 3) The Union's appeal to arbitration violates the newly expressed twenty-five (25) day requirement in §14.2 and, therefore, the grievance must be denied for its untimeliness.

B. IAM, DISTRICT LODGE NO. 165: The Union argues that although its notification of intent to arbitrate Mr. Stone's grievance exceeded the §14.2 timeline by three (3) working days, the parties were customarily lax in the enforcement of contractual grievance-arbitration time lines. In addition, the Union claims that extenuating circumstances explain the timeline breach: first, as Mr.

Fleming was told, the Union's check printing software was temporarily out of order; and second, before June 7, 2010, Mr. Fleming was informed verbally of the Union intent to arbitrate. Further, the Union argues that although the Company made note of fact that the Union's notice to arbitrate was untimely, it also agreed to proceed to arbitrate. Still further, the Union points to the fact that subsequent to the Stone grievance, the Company has continued to violate the §17.3 holiday pay rights of unit employees by failing to give them holiday pay because they did not work both of the scheduled workdays surrounding a holiday. Consequently, other grievances on point have been filed. Ms. Murphy-Cooney and Ms. Lehr testified to having a pre-June 7, 2010 grievance meeting with Mr. Fleming who advised them that the post-Stone holiday pay grievances need not be advanced to arbitration; would be placed in a separate folder; would be resolved by the precedent set with the arbitration of the Stone grievance. (Tr. 17; Tr. 23; Tr. 25 – 26)

IV. TIMELINESS ARBITRABILITY: DISCUSSION AND OPINION

The timeliness arbitrability issue is governed Article 14, §14.2 in the CBA provision, which states in relevant part:

§14.2. Within **twenty-five (25)** working days after the decision rendered by the Company Representative in the Second Step of the Grievance Procedure, either party desiring to arbitrate a matter which is subject to arbitration shall notify the other party of its intent to arbitrate and state its nomination to the arbitration board.

(Joint Exhibit 1) Based on this provision, it is clear that the CBA specifies an unequivocal time limit within which a grievance must be processed to arbitration, namely: to be arbitrable, a grievance must be processed to arbitration within

twenty-five (25) workdays. Moreover, the fact that the instant grievance was not filed within the requisite twenty-five (25) workday time limit is beyond legitimate dispute. Even the Union concedes that the processing Mr. Stone's grievance to arbitration exceeded the §14.2 timeline by three (3) working days.

Nevertheless, the Union argues that the grievance is not untimely for several other reasons, the most convincing being that the grievance is a "continuing" one. A "continuing" violation is defined as

one that recurs on a regular basis, such as to provide a new cause of action or grievance for each occurrence, as opposed to a single, isolated and completed transaction.

See: *ADR in the Workplace* (Laura J. Cooper, Dennis R. Nolan and Richard A. Bales, eds., 2nd ed. 2005), p. 272. Article 17, §17.1 in the CBA, states in part,

Holidays are defined to mean Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and the day after Thanksgiving Day Holiday, Christmas Eve, Christmas Day, New Years Eve, and New Years Day. An additional holiday each year of contract will be observed in **association with Independence Day.**

(Joint Exhibit 1) From this provision it is unambiguously clear that the CBA does specify a set of eleven (11) holidays that recur on a regular, predictable and scheduled basis. It is equally clear from the record evidence that the Company does not dispute the Union's claim that subsequent to the April 2, 2010, Good Friday holiday, the Company has refused holiday payments to Mr. Stone and to other unit employees who did not work both of the scheduled workdays surrounding a holiday. Consequently, each of the post-April 2, 2010 holidays on which Mr. Stone and his unit coworkers did not receive holiday pay after having worked one (1) but not both of the regularly-scheduled workdays surrounding the

holiday represents a uniquely new alleged violation of the CBA and, therefore, Mr. Stone's grievance is continuing in nature.

V. TIMELINESS ARBITRABILITY: AWARD

For the reason discussed above, the instant grievance is arbitrable and, therefore, may be considered on the merits.

VI. MERITS: POSITIONS OF THE PARTIES

We now consider whether Grievant Jay Stone was wrongfully denied April 2, 2010, Good Friday, holiday pay pursuant to §17.3 in the CBA. This consideration requires an interpretation of the following language:

§17.3.If an Employee is scheduled to work and does not work either the previous regularly scheduled workday or the following regularly-scheduled workday to the holiday, the employee shall not be entitled to pay for the holiday.

(Joint Exhibit 1)

A. IAM, DISTRICT LODGE NO. 165: For several reasons, the Union contends that the Company's wrongfully denied and continues to wrongfully deny Mr. Stone and other similarly situated bargaining unit employees holiday pay when they worked one (1), not "both," of the regularly-scheduled workdays surrounding holidays in violation of §17.3. First, the Union contends, the verbiage in §17.3 does not expressly state that the employee must work "both" of the regularly scheduled workdays surrounding a holiday to qualify for holiday pay, as did Article XIV, §3 in its 1948 – 1949 CBA with Franklin Transformer Manufacturing Company.

Second, the Union urges that §17.3 in the CBA expressly references "either-or" language, which customarily is interpreted to mean "one or the other,"

but not “both.” Third, the Union points out that for several decades §17.3 has been interpreted and applied to mean “either-or,” not “both,” confirming the clause’s expressed language and the parties’ bargaining intent.

Finally, the Union observes that during the parties’ 2009 negotiations, the Company proposed to change §17.3’s long-standing “either-or” language to read as follows:

To receive holiday pay, employees must work the scheduled day before and the scheduled day after the holiday.

(Union Exhibits 4, 5 and 6). Under this language unit employees would have to work “both” of the scheduled workdays surrounding a holiday to receive holiday pay. After the Union repeatedly rejected this proposal, the Company withdrew it; pronounced that the only clear interpretation that can be given to §17.3 is that to receive holiday pay an employee must work “both” of the scheduled workdays surrounding the holiday and that over the years Electrolux has “improperly applied” §17.3; promised to properly apply §17.3 going forward.

In summation, the Union argues that the Company is using arbitration to acquire a new contract term that it failed to achieve in negotiations.

B. ELECTROLUX: Initially, the Company maintains that since at least 1974, §17.3 in the CBA has stated:

If an Employee is scheduled to work and does not work either the previous regularly scheduled workday or the following regularly-scheduled workday to the holiday, the employee shall not be entitled to pay for the holiday.

(Joint Exhibit 1) Further, the Company asserts that although phrased in the negative “does not work,” this language is clear, unequivocal and arbitral precedent has interpreted it to mean that employees must work “both” of the

regularly scheduled workdays surrounding a holiday to be eligible for holiday pay. However, for several decades, the Company admits, Electrolux has not applied this clear interpretation. Thus, during 2009 negotiations, the Company argues that it opened holiday pay discussions to alert the Union that employees needed to work the day before and the day after a given holiday to be eligible for holiday pay. Thus, at one point, the Company proposed to clarify §17.3 with the following language:

To receive holiday pay, employee must work the scheduled day before and the scheduled day after the holiday.

(Union Exhibits 4, 5 and 6). Absent agreement on this clarifying language, the Company points out that it withdrew said language; advised the Union that §17.3, as it presently reads, requires work the day before and the day after the holiday for holiday pay eligibility.

Next, the Company maintains that during the parties' 2009 negotiations, Electrolux (1) withdraw its consent to continue the practice of misapplying the clear and unambiguous the language of §17.3, (2) announced that henceforth it would apply §17.3's clear language, and (3) effective April 2, 2010, the forthcoming Good Friday holiday, employees must work both of the scheduled workdays surrounding the holiday to be eligible for holiday pay. Again, citing precedent, the Company urges that past practices are not unalterable and that during the 2009 negotiations it properly uprooted the referenced past practice. Moreover, to establish that the past practice in question is no longer viable, the Company points to §21.2 in the CBA, which states:

Any policies or practices heretofore followed which are in any way inconsistent with any of the provisions of this Agreement are hereby revoked.

(Joint Exhibit 1) Accordingly, the Company concludes, effective on April 2, 2010, the Good Friday holiday, Electrolux properly applied the unambiguously clear language in §17.3 and, therefore, Mr. Stone's grievance should be denied.

VII. MERITS: DISCUSSION AND OPINION

Entitlement to holiday pay is a matter of contract. Thus, the eligibility requirements expressly set forth in the CBA, including the requirement in §17.3, must be fulfilled before an employee is entitled to holiday pay. Section 17.3 states:

If an Employee is scheduled to work and does not work either the previous regularly-scheduled workday or the following regularly-scheduled workday to the holiday, the employee shall not be entitled to pay for the holiday.

(Joint Exhibit 1) Many if not most CBAs require that to be eligible for holiday pay an employee work the last scheduled day before and first scheduled day after the holiday or some variation on this standard. The purpose of this requirement is to deter employees from "stretching" the holiday and to ensure a full work force on days surrounding a holiday. As the Company argued, citing precedent, arbitrators have endorsed this view time and time again. See: *The Common Law of the Workplace* (Theodore J. St. Antoine, ed., 1998) p. 313. But does the above-quoted language in §17.3 clearly mandate that to be entitled to holiday pay the employee must work "both" of the scheduled workdays that surround the holiday, as the Company contends, or does it mandate that the employee must work

“either-one (1)-or-the-other” of the scheduled workdays that surround the holiday, as the Union contends?

There is no dispute over the fact that for at least three (3) decades, §17.3 has been applied in a consistent, long and repetitive and mutually acceptable manner consistent with the Union’s “either-or” interpretations of the holiday pay clause. It could be argued that these tests of past practice have cycled through so many rounds of collective bargaining that the practice itself represents an agreement to modify the contract’s language, even assuming that it is clear and unambiguous. However, this “living document” theory of past practice enjoys scant arbitral support. Conversely, the view that an enforceable past practice may and should be used to give practical construction (i.e., meaning) to seemingly ambiguous language enjoys almost universal arbitral support.. See: Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreement*, 14 Proceedings of the National Academy of Arbitrators 30 (1961).

Is the language of §17.3 ambiguous? Consider this partial phrase taken from §17.3:

If an Employee...does not work either the previous regularly-scheduled workday or the following regularly-scheduled workday to the holiday, the employee shall not be entitled to pay for the holiday.

(Joint Exhibit 1) Nobody could honestly disagree with the conclusion that this phraseology is awkward, at best. Further, this language only expresses conditions for the non-payment of holiday pay. Still further, it does not expressly state whether the employee who works both of the regularly-scheduled workdays surrounding a holiday is entitled to holiday pay. The Company’s chief spokesman

was correct when he observed during 2009 negotiations that the above-quoted phrase is a “complete negative;” that it implies that both of the scheduled workdays in question must to be worked to qualify for holiday pay. (Company Exhibit C) Interestingly, if §17.3 had been expressed as a “complete positive,” it might have read,

If an Employee...does ~~not~~ work either the previous regularly-scheduled workday or the following regularly-scheduled workday to the holiday, the employee shall ~~not~~ be entitled to pay for the holiday.

Expressed in this manner, §17.3 is neither awkward nor incomplete. To wit, if the employee does work either or both of the regularly-scheduled workdays surrounding the holiday, the employee will receive holiday pay; if the employee works neither of the regularly-scheduled workdays in question, the employee will not receive holiday pay.

Ultimately, the undersigned concludes that the language in §17.3 is ambiguous and that past practice is the best evidence of what the language meant to those who wrote it. With these findings, note that it is the parties own history, not the Arbitrator’s opinion, that determines the proper and agreeable interpretation of §17.3. To be clear, the practice is that holiday pay eligibility is established if the employee works either of the regularly-scheduled workdays surrounding the holiday, as the Union argued.

In deciding this matter, the Arbitrator did consider why it took Electrolux more than thirty (30) years to figure out that §17.3 was being “improperly applied.” The most convincing reason for Electrolux’s latter-day interpretative epiphany was the Union’s repeated rejection of the Company’s 2009 bargaining

proposal to amend §17.3, which expressly required that the employee work both regularly-scheduled workdays surrounding the holiday to qualify for holiday pay. At this juncture, the Company's sought-after application of §17.3 cannot be effected without the Union's consent—it must be a bargained outcome.

VIII. MERITS AWARD

For the reasons discussed above, Mr. Stone's §17.3 holiday pay rights continue to be violated. Therefore, he is entitled to holiday pay for all post-April 2, 2010 holidays for which he did not receive holiday pay because he only worked one of the regularly-scheduled workdays surrounding the relevant holidays.

Issued and ordered from Tucson, Arizona on
the 4th day of March, 2011.

Mario F. Bognanno, Labor Arbitrator &
Professor Emeritus