

TIME REQUIRED TO RENDER AWARD: 83 DAYS

IN THE MATTER OF THE ARBITRATION BETWEEN

THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 77,

Union,

and

CEMSTONE PRODUCTS COMPANY, Employer.

FEDERAL MEDIATION AND CONCILIATION SERVICE CASE NO. 05-03537

DECISION AND AWARD OF ARBITRATOR

APPEARANCES

For the Union:

Gary T. Schmidt
Directing Business Representative
International Association of Machinists and Aerospace Workers, District Lodge 77
1010 East Highway 96
Vadnais Heights, MN 55127

For the Employer:

Susan L. Benson
Director of Human Resources
Cemstone Products Company
Suite 300
2025 Centre Pointe Boulevard
Mendota Heights, MN 55120

On November 18, 2005, in Mendota Heights, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The parties agree that the grievance, though never reduced to writing, alleges that the

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Employer violated the labor agreement between the parties by closing its operations on December 31, 2004, in observance of New Year's Day, one of the holidays designated in the agreement.

FACTS

The Employer produces mixed concrete products at thirty-two plants in Minnesota and, through a related corporation, in Wisconsin. Its products are delivered to construction sites by 450 "ready-mix" trucks. The Union is the collective bargaining representative of ten Mechanics employed by the Employer.

Article III, Section 4, of the parties' labor agreement, effective from May 1, 2003, through April 30, 2006, establishes their bargain about holidays. The first two paragraphs of that section are relevant to the present grievance:

Double time shall be paid for all work performed on Sunday and the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, the day before Christmas Day, Christmas Day, a Floating Holiday of the Company's choice, and one (1) Floating Holiday of the employee's choice with one (1) week's notice to the Company.

Should a holiday fall on a Sunday, the day observed by the State shall be considered the holiday and paid for as such. All employees covered by this Agreement shall receive straight time pay for the above mentioned holidays at their regular rate of pay when not worked, irrespective of the day on which they fall.

Daniel R. Murphy, a Mechanic and the Union's Steward, gave testimony that I summarize as follows. January 1, 2005, the new Year's Day holiday, was a Saturday. On Monday, December 27, 2004, the Employer posted the kind of "sign-up sheet" that is ordinarily used to seek volunteers for Saturday overtime, but this posting indicated that those who wanted to work on Friday,

December 31, 2004, should sign the sheet. During the afternoon of Thursday, December 30, 2004, however, the Employer notified employees that its operations would be closed on Friday, and accordingly, no one worked on Friday.

When the Mechanics received their paychecks for the period that included the last week of the year and Saturday, January 1, 2005, they were paid for forty hours -- eight hours of holiday pay plus thirty-two hours for work done on the preceding Monday, Tuesday, Wednesday and Thursday.

Thereafter, Murphy gave the Employer oral notice that the Union considered the Employer's decision not to have the Mechanics work on Friday, December 31, 2004, to be a violation of Article III, Section 4, of the labor agreement. The grievance seeks, in behalf of each member of the bargaining unit, recovery of eight hours' pay -- the difference between the forty hours' pay they did receive and the forty-eight hours' pay they would have received if they had been permitted to work on Friday, December 31, 2004.

The Union makes the following arguments. The effect of the Employer's decision not to have employees work on Friday, December 31, was to designate that day as the New Year's Day holiday, contrary to Article III, Section 4, which clearly provides that the holiday is New Year's Day itself, i.e., January 1. The first sentence of the second paragraph of Article III, Section 4 ("Should a holiday fall on a Sunday, the day observed by the State shall be considered the holiday and paid for as such.") would permit the Employer to designate

another date as the holiday if January 1 had fallen on a Sunday, but there is no comparable provision in the labor agreement that permits redesignation of the date when the holiday falls on a Saturday, as occurred in this case.

The Union urges, therefore, that the Employer's closing of the facility on December 31, 2004, was an effective redesignation of the date of the New Year's Day holiday as December 31, in violation of the labor agreement.

The Employer makes the following arguments. In 1999-2000, the sequence of dates was the same as in this case. December 31 was a Friday, and January 1 was a Saturday. Then as in 2004-2005, the Employer closed its facility on Friday and paid employees for five days of work even though they worked only Monday, Tuesday, Wednesday and Thursday. The Union did not grieve then. The Employer urges that this precedent indicates an acceptance by the Union that the labor agreement permits the Employer to take the action at issue. The Employer also argues that the Employer's action in this case is consistent with Minnesota Statutes, Section 645.44, which provides that when a holiday falls on a Saturday, the preceding day is to be the holiday.

The Union makes the following response to the Employer's arguments. Murphy testified that, in 1999-2000, the Employer gave the employees advance notice that the facility would not be open on Friday, December 31, and that all employees agreed with that decision. He testified that, for that reason, the Employer's action was not grieved. According to Murphy, the

employees accepted the decision then because they had sufficient notice to make plans for the off-day on Friday, whereas, in the present case, the Employer's notice of the closing was given on Thursday afternoon, when they had no chance to make plans for the off-day on Friday.

The Union also notes that the labor agreement expressly addresses what is to occur when a holiday falls on a Sunday, but says nothing about the right of the Employer to change the holiday date when it falls on a Saturday. In addition, the Union points out that Minnesota Statutes, Section 645.44, cited by the Employer, applies to the closing of government offices and does not affect private employers.

DECISION

I make the following rulings. First, the Union's failure to grieve the Employer's similar action in 1999-2000 -- when it paid five days' pay for four days' work after closing operations on Friday, December 31, 1999 -- does not establish a binding practice that the Union must now accept. That precedent has no binding effect because what occurred in 1999-2000 was factually different from what occurred in 2004-2005. The evidence shows that, then, the employees had advance notice of the closing, and that, because they had such notice, they had no objection to the closing. Acceptance of a significantly different action in 1999-2000 does not imply acceptance of the action taken in 2004-2005.

Even in the absence of that difference in the facts, however, I would rule that one previous acceptance of a similar

occurrence does not imply a binding agreement that all such occurrences in the future must also be accepted. A contracting party's consistent and longstanding acceptance of a practice is necessary to a finding of an implied agreement to be bound by the practice in the future.

Second. Article III, Section 4, of the labor agreement includes an express statement of the parties' bargain about holiday pay when a named holiday falls on a Sunday, but the contract does not state what their agreement is when a named holiday falls on a Saturday. I rule that this provision, relating to Sunday, does not imply what is to occur when the holiday falls on a Saturday.

Third. Minnesota Statutes, Section 645.44, cited by the Employer, applies, on its face, only to the operations of state government, and, accordingly, it has no relevance to the present case.

Fourth. The closing of the Employer's facility on December 31, 2004, resulted in payment to employees for five days of work, when they actually worked four, thereby providing them with an extra day's pay beyond the number of days worked. If the Employer had not closed the facility on Friday, December 31, the employees would still have received an extra day's pay beyond the number of days actually worked, but they would have been able to work five days instead of four, receiving six days' pay for five days' work.

Thus, the closing of the Employer's facility on Friday, December 31, 2004, did not deprive employees of the primary benefit of a holiday -- to receive a day's pay without working.

They received the same benefit they receive when a holiday falls on a Friday or on any other weekday, five days' pay for four days' work.

What the employees lost in this case was the opportunity to work on a day of the week that would ordinarily have been a working day. Therefore, the primary issue presented by this case is whether the Employer violated the labor agreement by changing the work schedule of employees so that they worked only four weekdays during the holiday week rather than the five non-holiday weekdays that fell within the week.

Article III, Section 1, of the labor agreement provides:

Forty (40) hours, consisting of five (5) eight (8) hour days from Monday through Friday shall constitute the regular workweek. . . .

The parties' labor agreement does not include an express provision that either reserves or negates the right of the Employer to change the "regular" workweek. In Elkouri and Elkouri, *How Arbitration Works* (Sixth Ed.) 723-728 (hereafter, "Elkouri"), the authors discuss arbitration cases that have considered the right of an employer to change the usual workweek when the labor agreement includes a provision that specifies a "regular" workweek or a workweek of similar description, such as a "usual" or "normal" workweek. The issue presented in such cases is whether the labor agreement's specification of a "regular" workweek indicates an intention not to permit any reduction from what is described as "regular."

Below, I set out parts of the discussion in Elkouri, starting at page 723:

Management has been permitted to suspend operations temporarily, eliminate double-time work, change the number of shifts, and change the number of days to be worked. Thus, where nothing in the agreement clearly guaranteed any particular amount of work each week, and the agreement did not otherwise restrict management's right to suspend operations, management could determine whether work should go forward and its decision to close down on a given day was upheld because it acted for a valid reason and not arbitrarily.

[With the following footnote: "See TRW, Inc., 48 LA 1365, 1367-68 (Kabaker, 1967) (closing on the day before Christmas and the day before New Year's because of reduced orders); Deere & Co., 45 LA 388, 396-98 (Solomon, 1965) (closing to give holiday to nonunit employees though this meant unit employees did not work); . . . Alsco, Inc., 41 LA 970, 972-74 (Kabaker, 1963) (shortage of materials justified sending certain employees home); . . ."]

[At page 726:] Under agreements that expressly define a "normal" or a "regular" workweek, management often has been permitted considerable leeway in making adjustments in the workweek as needed for efficient operations. For example, although an agreement specified a normal workweek of Monday through Friday, special production needs specified the scheduling of one employee to a Tuesday through Saturday workweek. By the same token, under another agreement that provided for a regular workweek of 5 days, management was entitled to schedule a 4-day workweek during a period of reduced production. The arbitrator in that case stated that the provision for a regular workweek was designed to regularize employment and furnish norms from which overtime premiums could be calculated, and not to guarantee employment for all or any group of employees for any specific number of hours per day or hours per week. . .

However, even where an agreement specifically disclaimed a work guarantee and expressly reserved the right to management to adjust work schedules to meet operating requirements, an arbitrator concluded that another contractual provision establishing normal workday, workweek and shift hours was violated when the schedule was modified during Christmas and New Year's weeks. The employer was held not to have the right to change the schedule arbitrarily. In reaching this decision the arbitrator explained that the employee "adjusts his life" to the "normal routine," and that the employer had not provided satisfactory evidence that a change from the normal work schedule was necessary.

This discussion in Elkouri shows that arbitration precedent does not consider a labor agreement's description of a

"regular" or "normal" workweek to be a guarantee that work will be provided during the week described. Nevertheless, the arbitration decisions generally require that a reduction of the contractually described workweek be supported by a showing that the reduction is needed for operational efficiency.

In the present case, the evidence does not show expressly that operational efficiency justified the closing of operations on December 31, 2004 -- though I take notice that, presumably, most ready-mix customers would order less on the day before the holiday. The evidence does not show, however, how the Employer's need for the work of Mechanics would be affected, even if I take notice of a presumed reduction in orders on December 31. The evidence shows that, with the exception of December 31, 1999, the Employer has not previously suspended the work of Mechanics on December 31. This evidence implies that suspension of their opportunity to work on December 31, 2004, was not supported by reasons of operational efficiency.

AWARD

The grievance is sustained. The Employer shall pay members of the bargaining unit who would have been scheduled to work on December 31, 2004, the wages they would have earned if they had been permitted to work on that day.

February 21, 2006


Thomas P. Gallagher, Arbitrator