

IN RE ARBITRATION BETWEEN:

SERVICE EMPLOYEES INTERNATIONAL UNION, SEIU, LOCAL 113

and

ST. FRANCIS REGIONAL MEDICAL CENTER

DECISION AND AWARD OF ARBITRATOR

FMCS CASE 060209-53378-7

JEFFREY W. JACOBS

ARBITRATOR

June 26, 2006

IN RE ARBITRATION BETWEEN:

SEIU, Local #113,

and

**DECISION AND AWARD OF ARBITRATOR
FMCS CASE 060209-53378-7
Weekend bonus grievance matter**

St. Francis Regional Medical Center,

APPEARANCES:

FOR THE UNION:

Kelly Jeanetta, Miller and O'Brien
Shane Davis, Business Representative

FOR THE EMPLOYER:

Paul Zech, Felhaber, Larson, Fenlon and Vogt
Rene Raming, Dir. of Labor Relations
Fern Gershone, Labor Relations Consultant
Anita Nystrom, H.R. Generalist

PRELIMINARY STATEMENT

The above matter came on for hearing on June 2, 2006 at the FMCS Offices in Minneapolis, Minnesota. The parties presented testimony and documentary evidence at that time. The parties submitted post hearing Briefs dated June 19, 2006 and were received by the arbitrator on June 20, 2006.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from May 1, 2005 to February 29, 2008. See, Jt. Ex. 1. Article 7 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The Parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

ISSUES PRESENTED

Whether the Employer violated Article 15.10 when it denied weekend bonus pay to casual employees? If so what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 9.1 – Definitions:

- a. Full time employees are regularly scheduled 80 hours per pay period.
- b. Part time employees are regularly scheduled less than 80 hours per pay period.
- c. Casual employees have no regularly scheduled hours. In order to maintain casual status, an employee will be required to work two shifts per month, one of which will be an evening shift, (as long as there are open shifts) and be available to work one holiday per year. This requirement is absolute unless an employee requests and is granted a leave of absence.
- ... f. Employee shall have a minimum of alternate weekends, Saturday and Sunday [night shift = Friday, Saturday] off unless an alternate schedule is agreed to.

Article 12 – Holiday – PTO (In part)

All employees shall earn PTO on the following basis.

<u>Years of Service</u>	<u>Maximum Annual PTO hours based on 1.0 FTE</u>	<u>Accrual rate/hour</u>
Less than 5 years	192 hours	.0925
5-9- years	232 hours	.1117
10-19- years	272 hours	.1309
20+ years	312 hours	.1500

Article 15.10 – Weekend bonus:

All employees shall be paid fifty dollars (\$50.00) for each full extra/unscheduled weekend shift worked. Employees working weekend shifts of more than four (4) hours but less than eight (8) shall receive a twenty five (\$25.00) dollar bonus. The provisions of this section shall apply to all weekend shifts worked between 3:00 pm Friday and 7:00 a.m. Monday. The weekend hours shall not be paid if additional shifts are worked as a result of employee’s voluntary exchanging hours.

PARTIES’ POSITIONS

UNION’S POSITION

The Union took the position that the Employer violated the weekend bonus clause, Article 15.10 when it denied the casual employees the bonus called for in that provision. In support of this position the Union made the following contentions:

1. The Union’s main argument is that the language means just what it says: it says all employees and it means all employees. Casual employees are covered in this contract; there is no dispute about that and are defined in Article 9. The plain language governs the result here.

2. The Union also pointed out that even if the arbitrator does not agree that the plain unambiguous and clear meaning of the language is somehow unclear then the bargaining history also supports the Union's claim.

3. The parties had a long and difficult negotiation and both sides agree that it was not as organized as it should have been. The Union noted that the subject of weekend bonus did come up during negotiations and the parties were well aware of that. The Union's first proposal was to pay \$100.00, see Union exhibit 5, and that through negotiations the parties agreed that it would be the \$50.00 that appears in the contract. See Union Exhibit 7, the Employer's response to the weekend bonus proposal. It too contained the "all employees" language but lowered the amount to \$50.00.

4. On September 21, 2005, the negotiations nearly broke down when the Employer asserted that it had a problem with the "all employees" language and that it should not include casual employees. The Union at that point indicated that without the casuals included there was no deal on the contract and walked out of the bargaining.

5. Approximately a week later the parties met again and this time specifically agreed to the language that appears in the contract. The Union asserted that the fact that the Employer still assumed casuals were not included in the meaning of the language is simply immaterial: they agreed to the language knowing full well that the Union insisted that casuals be included.

6. The Union points out too that each side not only signed the contract but also initialed each page, including the weekend bonus language found in Article 15.10. The Employer cannot now renege on one part of the language simply because they don't like it – they agreed to it. The Union asserted most strenuously that this is what contracts are for.

7. The Union also asserted that lack of mutual assent does not give one party to the contract the right to excise one piece of it they do not like. Under generally accepted contract law, lack of mutual assent is a defense to the formation of a contract at all, not to one specific clause.

8. Moreover, the Union asserted that a unilateral mistake by one party does not negate that part of the contract. Legally, the Employer is simply incorrect in its argument that its own mistake, even if it did misunderstand the Union's words and actions here, constitute grounds to negate this part of the contract.

9. The Union also pointed out that the Employer specifically included casuals in the PTO provisions during the negotiations and that since that language included them there it must be interpreted under generally accepted contract interpretation principles to include casuals in article 15.10. See Article 12, that language also says "all employees" and the parties now pay PTO to casuals using the exact language found in Article 15.10.

10. The essence of the Union's claim is that the language is plain and unambiguous and means exactly what it says: "all employees." The Union further argues that the negotiation history only strengthens this conclusion since the Employer agreed to this knowing exactly what it meant.

The Union seeks an award of the arbitrator sustaining the grievance, ordering the Employer to pay weekend bonus to all employees, including casual employees.

EMPLOYER'S POSITION:

The Employer's position was that there was no contract violation and that the clause does not include, nor was it ever intended to include, casual employees entitled to a weekend bonus. In support of this position and Employer made the following contentions:

1. The Employer argued that while the language says "all employees" it was never intended to mean all employees. The Employer argued that if one examines the contract in its entirety, including casuals in this language leads to an absurd result.

2. The casual employees do not have a regular schedule and many times only work weekends. To grant them a bonus for working on the only days they work anyway would be to grant them a windfall bonus that simply does not make sense in context.

3. The Employer argued that contract interpretation principles do not allow an interpretation that leads to absurdity or inconsistency with other provisions of the contract. Here the language speaks to a bonus for extra or unscheduled shifts on the weekends. Casuals do not work “extra” shifts since in many cases the weekends are the only shifts they pull. Moreover, the definition of casual is that they are unscheduled. To include them here is simply a nonsensical result.

4. The Employer argued that the negotiations were somewhat disorganized and provided considerable testimony that the sides were working off of different documents for much of it and needed to compare notes to be certain they were literally on the same page. On September 21, 2005, the parties thought they had a deal but soon discovered that there was a considerable rift over the weekend bonus language. The Employer representatives raised this issue and even contacted the new Director of Labor Relations to advise her that there was a problem with the negotiations.

5. Even though the Employer representative signed the contract and initialed the pages, he did so under considerable duress since there was a time constraint on another matter pending between Allina and the SEIU International and that this contract was holding that up. According to the Employer, there was no meeting of the minds on the weekend bonus provision and thus there was no contract on this issue.

6. The Employer also argued that paying casuals a weekend bonus is simply administratively impossible. Moreover, it also creates a situation where the casuals could under some circumstances get paid more for their work than do regularly scheduled employees.

7. The essence of the Employer’s argument is that the parties never agreed that casuals would be paid a weekend bonus despite the language in the contract. To read the language in the manner in which the Union insists would be to create the absurd result whereby casuals who have little connection to the facility, certainly not in the same way as to regularly scheduled employees, get a bonus when other employees do not.

The Employer seeks an award of the arbitrator denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

In a case such as this it is the task of the arbitrator to determine the intent of the parties and what the contract means. Obviously, this must start with an examination of the language itself. If it is plain and unambiguous then no further inquiry is needed. If it is not then further factual background is necessary to determine through the practices of the parties and perhaps the negotiation history to determine the intent of the parties so that the decision can draw its essence from the labor agreement.

Here the dispute centers over whether casual employees as they are defined are entitled to a weekend bonus under the terms of Article 15.10. As noted above, the operative language is from Article 15.10 and reads as follow: All employees shall be paid fifty dollars (\$50.00) for each full extra/unscheduled weekend shift worked.

The Union argued that the plain language means just what it says and includes all employees, including the casuals. The Union further argued that there is no need to go further than the language itself to negotiation history or past practice for example since the language is so clear.

The Employer argued that the intent was never to include casuals despite what the language says. Moreover, a close review of the language itself implies that the casuals cannot be included. The language says that the bonus is paid for extra or unscheduled shifts. Casuals don't work "extra" shifts so that part of the language cannot apply. Casuals are never regularly scheduled so it would be absurd to apply this language to include casuals.

One could scarcely imagine a clearer pronouncement of the employees to which this language applies than the language in this clause. It says "all employees." It could certainly have said "all regular part-time and full-time employees" or the like but it does not. The Union's argument that this applies to all employees certainly has merit.

The language by its terms applies only to “each full extra/unscheduled weekend shift worked.” The definition of casual employees clearly states that they have no regularly scheduled hours. Thus if the only term used in Article 15 were the term “extra” there would be considerable merit to the Employer’s argument but it also uses the term “unscheduled.” Casuals do not have regularly scheduled hours. However, this fact does not negate the clear implication that any employee who works an “unscheduled weekend shift” is entitled to the weekend bonus. The language by its terms actually does apply to casuals rather than the other way around.

Thus, using the plain unambiguous language it is clear that Article 15.10 applies to casual employees. There is nothing in that language that excludes them either explicitly or even implicitly.

Further, a close reading of the language shows that the result is neither absurd nor nonsensical to apply to the casuals. While it may be curious to say the least that casual employees would be conferred a benefit when regular employees may not (although that is not the issue here and no decision is or can be made on that now) it is not for an arbitrator to question the parties motives in negotiating the language they did. Elkouri discusses this question at some length. “When one interpretation of an ambiguous contract would lead to harsh absurd or nonsensical results, while an interpretation, equally plausible would lead to just and reasonable results, the latter interpretation will be used.” See, Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 470-72.

Two things mitigate against the employer’s argument. First, the language is not ambiguous. It is completely clear and requires that all employees receive weekend bonus for an unscheduled shift. Second, it is not so totally implausible that casual employees would be entitled to a bonus so as to render the language absurd or nonsensical. Some casuals only work weekends while others do not. A review of the cases referenced in Elkouri shows that the level of absurdity necessary to render a clause “absurd” is quite high. Simply stated, it is not out of the realm of possibility that the parties could well have intended to pay a bonus to casual employees for working on a weekend.

Arbitrators must be very cautious in negating or amending contract language lest they run afoul of the time-honored admonition of the U.S. Supreme Court in the Steelworkers Trilogy not to dispense their own brand of industrial justice. Grievance arbitrators do not get to re-write people's contracts. They are given limited jurisdiction to interpret them as long as the interpretation draws its essence from that agreement. Here the result is certainly not so absurd or logically inconsistent as to render the language null and void or to warrant an interpretation that is contrary to its clearly stated words.

The Employer argued too that the application of this language simply cannot be as the Union contends since it is not possible to apply it in that way. The Employer witnesses testified that it would be impossible to apply this language to the casuals. There was however no evidence on this record to support that statement other than the bald assertion that it would be. No evidence was introduced to show why this was the case or to support the argument that somehow paying the weekend bonus to a casual employee would not be possible. There was thus no support for this assertion by the Employer.

While it is clear that the language itself is plain and unambiguous the parties spent considerable time discussing the negotiations history of this contract and how the actions and statements made during these impacted the outcome here. A review of that evidence also clearly supports the Union's assertion that the parties knew exactly what they were signing and what they had agreed to with regard to the question of weekend bonus.

The facts of the case show that the negotiations for this contract were protracted and difficult. They were also somewhat disorganized by the parties' own admission. The negotiations went on for several months without an agreement but by the end of the summer 2005 the parties were nearing agreement. They soon realized that they were not using the same documents and were in fact working off of different documents. It was then decided to sit down and compare notes in order to make sure they were not talking at cross-purposes and indeed had agreement on the things they thought they had agreement on.

The evidence showed that by September of 2005 it was clear that the parties knew they needed to sit down and literally compare notes to see what they actually had agreement on and what they did not. On September 21, 2005 they met and thought they had agreement on virtually everything. So positive was the mood at first that the new Labor Relations Director left the meeting on a high note and drove to Brainerd. It was soon discovered that the parties did not have an agreement on the weekend bonus language and that the Union indicated that they wanted other language to apply to casual employees. The Employer indicated that it did not believe it did and contacted Ms. Raming to advise her that things were going badly. Negotiations broke down completely at that point with the Union walking out of the meeting saying that there was “no deal.” Significantly, one of the major issues on which this broke down was over the question of weekend bonuses for casuals. The evidence showed that for whatever reason, the Union insisted that they be covered by this language.

The Employer did not believe prior to the session on the 21st that weekend bonus was one of the issues that was still left to be agreed upon. The evidence was clear that one of the issues that hung the negotiations up was the bonus issue and that the drafts of the contract that went back and forth during the discussions on September 21st included the weekend bonus provision. See Employer Exhibit Tab, dated, September 21, 2005. The drafts of this show that the language on weekend bonus was in the Union’s drafts but not in the Employer’s.

On September 27, 2005 the Employer sent out a memo indicating that they had not agreed to everything, See Joint exhibit 13. It was clear at that point that no agreement had been reached.

The parties met again on September 29, 2005 to see if an agreement could be reached. It was also clear at that point that there was an external pressure placed upon this negotiation having to do with another agreement pending between SEIU International and Allina and that there was a time constraint to get this done as it was apparently holding up agreement on this other somewhat larger agreement.

Significantly, the evidence showed that the parties went through each page of what eventually became the contract between the parties and initialed each and every page of it. The weekend bonus language appears at Article 15.120 as noted above. While it may not have been in the Employer's proposal on September 21, 2005 it certainly was in the one that everybody signed. The contract was signed by the parties on September 30, 2005, 3 days after the letter noted above in which the Employer indicated that there was not yet an agreement. The evidence showed that on September 29th there was and that the agreement included the weekend bonus language just as the last Union draft had it.

The Employer argued that these facts show that there was a lack of mutual assent on the weekend bonus provision resulting in no agreement on that language. The Employer essentially argued that this allows the arbitrator to negate that language since there was no agreement on it. Basic contract law holds that lack of mutual assent is a defense to the formation of the contract at all. See, *Law of Contract*, Simpson, West Publishing Co, 1965 at p. 8. See also, Elkouri at pp. 432-33.

Elkouri has perhaps the best pronouncement on this issue as follows: "when the parties attach conflicting meanings to an essential term of their putative contract, is there then no "meeting of the minds" so that the contract is not enforceable against an objecting party? Hardly. The voidability of a presumed contract arises only in the limited circumstances where neither party knew, or should have known, of the meaning placed on the term by the other party, or where both parties were aware of the divergence of meanings and assumed the risk that the matter would not come to issue." Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. at p. 428. See also, Elkouri at p. 429-30. Here no such facts were present. In fact the evidence showed that both parties knew exactly what they were signing and both knew that the Union was insisting that the casuals be included in this language.

Moreover, no one suggested that there was literally *no* contract at all now, yet that is the legal implication of lack of mutual assent on a material term of the agreement such as this. The evidence showed quite clearly that there was mutual assent as manifested by the actions of the parties during this negotiation and that while the Employer did not especially like what it had just agreed to, the simple fact remains that they did agree to it. A grievance arbitrator is powerless to undo that agreement now.

It is also axiomatic in the labor relations arena that in negotiations of the labor agreements, that the parties do not have a deal on anything until they have a deal on everything. The fact that the parties signed and initialed this contract means exactly that: they had a deal on everything. One cannot simply say later that they didn't know what they were agreeing to or that they can sign and initial the contract and later claim that they did not agree to a particular provision of it. That would be unconscionable in the world of labor relations and would, without much exaggeration, turn time-honored concepts of good faith labor negotiations on their ear. That is not an intellectual gymnastic move this arbitrator feels very comfortable with.

It is the avowed duty of the arbitrator to divine the intent of the parties. It is not enough to know what the intent of the party proposing the language but the manifestation of that intent upon the other party to that equation. In other words, it is not enough to know what the Employer thought it was agreeing to but what impact its actions were on the Union when it agreed to it and how those actions and words were reasonably perceived by the Union. "Under the theory of mutual assent which today universally abounds, a contracting party is bound by the apparent intention he outwardly manifests to the other contracting party. To the extent that his real or secret intention differs therefrom, it is entirely immaterial." Simpson, at p 8-9. The facts and circumstances of this case show clearly that the parties both understood what they were agreeing when they signed this contract.

Here it is clear that the Union, for whatever reason, insisted that the casual employees were to be included in the “all employee” language of Article 15.10. The evidence showed that this was the reason negotiations broke down and literally fell apart on September 21, 2005. The evidence also showed that the Employer knew what the Union's concerns were and why they walked out – it was in part over the weekend bonus language and the issue of the casuals so much so that they called the Labor Relations Director on her way out of town to indicate that the negotiations had broken down over this very issue. In this context, the knowledge that the Union was insisting on casuals being included in the language of Article 15.10

Moreover, the language on the bargaining table on the 21st did not change. When the parties reconvened and signed the agreement (initialing each and every page along the way) that language stayed the same. There was no evidence of any contrary agreement to the clear and plain language found within that clause.

Moreover, there was nothing to indicate that the Employer had done anything other than to accede to the Union's demands as stated on the 21st when it agreed to the contract a few days later. Further, the evidence showed that the parties, in order to get a contract, specifically agreed to include casuals in the PTO language. That clause also contains virtually identical language and provides that “all employees” shall earn PTO according to the schedule found in Article 12. This fact too supports the Union’s claim that the parties knew exactly what they were agreeing to when they signed this contract. Thus, the evidence as a whole shows that the intent of the parties was to include the casuals in the language of Article 15.10.

AWARD

The grievance is SUSTAINED. The Employer is hereby ordered to pay weekend bonuses pursuant to Article 15 of the labor agreement for all employees including casual employees.

Dated: June 26, 2006

St. Francis and SEIU #113

Jeffrey W. Jacobs, arbitrator