

**BEFORE**

**ARBITRATOR BARRY E. SIMON**

|  |   |                          |
|--|---|--------------------------|
| In the Matter of the Arbitration Between | ) |                          |
|  | ) |                          |
| UNITED STEEL, PAPER AND FORESTRY,        | ) |                          |
| RUBBER MANUFACTURING, ENERGY,            | ) |                          |
| ALLIED INDUSTRIAL AND SERVICE            | ) |                          |
| WORKERS INTERNATIONAL UNION              | ) |                          |
| AND ITS LOCAL 1011,                      | ) |                          |
|  | ) | Indiana Harbor West      |
| Union,                                   | ) | Grievance No. 3-SP-21-35 |
|  | ) |                          |
| and                                      | ) | <b>Case 137</b>          |
|  | ) |                          |
| CLEVELAND-CLIFFS STEEL, LLC,             | ) |                          |
|  | ) |                          |
| Employer,                                | ) |                          |

**OPINION AND AWARD**

The above identified matter was heard before the undersigned Arbitrator, a member of the parties' Board of Arbitration, on February 10, 2023 in the West Annex Main Office Building of the Indiana Harbor steel plant, East Chicago, Indiana. Representing Local 1011 of the United Steelworkers, hereinafter referred to as "the Union," was:

Michael R. Millsap  
District 7 Director

Representing Cleveland-Cliffs Steel, hereinafter referred to as "the Company" or "the Employer," was:

Richard L. Samson, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Sworn testimony was given before the Arbitrator, and the parties were afforded a fair opportunity to present their evidence and arguments in this matter. In lieu of closing arguments, the parties electronically filed post-hearing briefs that were received by the Arbitrator on Monday, March 13, 2023, at which time the record was closed.

**Background:** The Company owns and operates multiple steelmaking facilities, including the Indiana Harbor Works in East Chicago, Indiana. Production and maintenance employees at the facility referred to as Indiana Harbor West are represented by Local 1011 of the Union pursuant to a collective bargaining agreement effective September 1, 2018 through September 1, 2022, hereinafter referred to as the “Basic Labor Agreement” or “the Agreement.” The parties have stipulated that the grievance herein is governed by that Agreement. The Company is the successor to ArcelorMittal USA as the Employer under the Agreement.

On December 13, 2021 the Union filed a grievance on behalf of five employees,<sup>1</sup> hereinafter collectively referred to as “Grievants.” The grievance stated, “The Grievants were not given the opportunity to earn at least 40 hours of pay for the week of 11/21/2021,” and sought as a remedy that they be made whole “for the difference between what hours they worked and 40 hours.” The grievance was denied by the Company and progressed through the grievance procedure in accordance with the provisions of the Agreement. The parties being unable to reach resolution, the matter was submitted to arbitration before the undersigned Arbitrator. The parties have stipulated that the

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<sup>1</sup>Luis Cruz, Tony Exford, Rebecca Broom, Geroriana Adamopoulos, and John Riffle.

grievance is properly before the Arbitrator and that he has jurisdiction to render a final and binding Award.

The essential facts in this case are undisputed. At the time the grievance arose, each of the Grievants was a probationary employee and had worked for the Company fewer than thirty (30) days. Each Grievant worked Monday, Tuesday and Wednesday, November 22, 23, and 24, 2021. Thursday and Friday, November 25 and 26, 2021, were holidays under the Agreement. Grievants did not work on either of the holidays, and they were compensated only for the hours they worked during the week.

**Statements of Issue:** The Union proposes the following Statement of Issue:

*Did the Company violate Article Five Section C paragraph 4 Full Week Guarantee of the 2018 Basic Labor Agreement when it scheduled the Grievants to work the week of November 21, but failed to give the Grievants an opportunity to earn at least forty hours of pay? If so, what should the remedy be?*

The Employer defines the issue before the Arbitrator as follows:

*Did the Company violate the Basic Labor Agreement when it did not pay holiday pay "not worked" to the affected Employees or when it did not assign them to work at premium or overtime rates on additional days or shifts during the week of Thanksgiving 2021 in order to meet the alleged requirements of the full week guarantee? If so, what should the remedy be?*

In the absence of the parties' concurrence on a Statement of Issue, they have authorized the Arbitrator to define the issue before him. It is the Arbitrator's preference to simplify the issues before him. The Employer's proposed Statement of Issue refers to actions it believes a sustaining Award might have required it to do in order to comply with the Agreement. The Union, however, has essentially restated the grievance, arguing only that the Employer should have given the

Grievants the opportunity to earn at least forty hours of pay. Its proposed Statement of Issue succinctly and clearly describes the issue before the Arbitrator, and he adopts it.

**Relevant Contract Provisions:**

**ARTICLE FIVE - WORKPLACE PROCEDURES**

\* \* \*

**Section A. Local Working Conditions**

\* \* \*

2. Deprivation of Benefits

In no case shall Local Working Conditions deprive an Employee of rights under this Agreement and the conditions shall be Changed to provide the benefits established by this Agreement.

\* \* \*

5. Modification of Agreement

No Local Working Condition shall be established or continued which conflicts with any provision of this Agreement.

\* \* \*

**Section C. Hours of Work**

\* \* \*

4. Full Week Guarantee

An Employee scheduled to work will receive, during a payroll week, an opportunity to earn at least forty (40) hours of pay (including hours paid for but not worked, work opportunities declined by the Employee, disciplinary time off, absenteeism and report-off time for Union business, but excluding overtime pay and premium pay). An Employee on an approved leave of absence or disability during any payroll week shall be considered as having been provided the opportunity for this guarantee during any such week, it being understood that the pay, if any, that such an Employee is entitled to receive while on approved leave of absence or disability

is that provided by applicable law or the Agreement, not the earning opportunity set forth in this Paragraph.

\* \* \*

**Section I. Adjustment of Grievances**

\* \* \*

6. Board of Arbitration

\* \* \*

b. The member of the Board (arbitrator) chosen in accordance with Paragraph 7(1) below shall have the authority to hear and decide any grievance appealed in accordance with the provisions of the grievance procedure as well as disputes concerning the Insurance Agreement. The arbitrator shall not have jurisdiction or authority to add to, detract from or alter in any way the provisions of this Agreement or the Insurance Agreement.

\* \* \*

d. The decision of an arbitrator shall be final and binding upon the Company, the Union and all Employees concerned.

\* \* \*

**Section J. Management Rights**

The management of the plants and the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty is vested exclusively in the Company.

In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

**ARTICLE TEN - PAID TIME OFF AND LEAVES OF ABSENCE**

**Section A. Holidays**

\* \* \*

3. Pay for a Recognized Holiday Not Worked

- a. An eligible Employee who does not work on a holiday shall be paid eight (8) times his/her Regular Rate of Pay.
- b. As used in this Section, an eligible Employee is one who (1) has worked thirty (30) calendar days since her/his last hire; (2) performs work or is on vacation in the payroll period in which the holiday is observed; or if s/he is laid off for such payroll period, performs work or is on vacation in either the payroll period preceding and the payroll period following the payroll period in which the holiday is observed; and (3) works as scheduled or assigned on both his/her last scheduled workday prior to and his/her first scheduled workday following the day on which the holiday is observed, unless s/he has failed to so work because of sickness or other good cause.

**Position of the Union:** The Union does not dispute that the Grievants are not entitled to holiday pay for Thanksgiving and the day after because they had not worked thirty calendar days before the holidays, as required by Article Ten, Section A.3.b. It argues, however, that Article Five, Section C.4 allows all employees who are scheduled to work during a payroll week to be guaranteed an opportunity to earn at least forty hours of pay. It cites Arbitrator Ronald F. Talarico's Award in Case No. 113, Grievance No. PW-2020-0004, that the language of the rule is clear and unambiguous, and that it applies to every employee without exception. If the parties wanted to make an exception to this provision to deal with employees who are not entitled to holiday pay, the Union says they knew how to do so.

The Union refutes the Company's defense based upon past practice. First, it maintains that past practice is relevant only if the contract is not clear and unambiguous. It denies that the Company has demonstrated what language of the Agreement is not clear or unambiguous. Rather, it insists that the language before the Arbitrator, as it was in the case before Arbitrator Talarico, is clear and unambiguous. Secondly, it denies the Company has proven the existence of a past practice.

The Company's only evidence, says the Union, is the testimony of two witnesses that they were not aware of any grievances on this issue, and a document purporting to show that employees had not been offered an opportunity to earn forty hours' pay between 2015 and 2021 . The Union's response is that grievances might have been resolved prior to reaching their step in the grievance procedure. It further asserts the document offered by the Company is insufficient to establish a past practice.

The Union replies to the Employer's argument that it would have to bear an extraordinary expense by offering the Grievants work on the holidays or Saturday and Sunday by asserting this is just a cost of doing business. It points out that the Employer's right to manage the business carries the obligation that it cannot violate the terms of the labor agreement.

Arguing that the Company is asking the Arbitrator to ignore the language of Article Five, Section C.4, as well as Arbitrator Talarico's Award, the Union asks that the grievance be sustained and that Grievants be made whole.

**Position of the Employer:** As this is a contract interpretation dispute, the Employer first argues that the Union has the burden of demonstrating the Agreement has been violated. It submits the Union has not met that burden.

The Employer cites the explicit language of Article Ten, Section A.3.b., providing that only employees who have worked thirty consecutive calendar days are eligible for holiday pay not worked. It is undisputed, says the Employer, that the Grievants did not meet this requirement, making them ineligible for holiday pay when they did not work on Thanksgiving or the day after Thanksgiving 2021.

The Employer asks the Arbitrator to reject the Union's reliance upon the full week guarantee found in Article Five, Section C.4. Referring to the provision that "[a]n Employee scheduled to work will receive, during a payroll week, an opportunity to earn at least forty (40) hours of pay (including hours paid for but not worked. . . .)" the Employer submits that "hours paid for but not worked" assumes eligibility for such pay, whether it be vacation pay, holiday pay, or some other form of pay. If that were not the intent, the Employer contends there would be no need for the parenthetical; the parties could have simply said employees are guaranteed forty hours of pay. The inclusion of the parenthetical, says the Employer, therefore must be given some logical meaning.

The Employer cites arbitral precedent rejecting the concept of daily or weekly guarantees without limitations. It avers that scheduled employees are not entitled to such guarantees when precluded from working with reasonable justification. In this case, the Employer asserts there was no work essential to producing steel for the Grievants to perform on the two holidays. It explains that the Grievants had been engaged in orientation and training away from the plant for the first two weeks of their employment. During the first three days of Thanksgiving week, it says they were receiving additional training in the department. Thus, none of them had stepped foot on the production floor by the time of the holiday, says the Employer. Although the Employer says there was some supervision on the floor during the holiday, they were engaged in the supervision of employees engaged in the actual production of steel. Consequently, it says additional employees would have to be called in at premium rates to supervise the Grievants, who would not be performing productive work. This, says the Employer, would have meant disrupting the holiday plans of supervisors or bargaining unit members.

The Employer argues that Arbitrator Talarico's Award supports its position. It says he recognized that other contract language, such as the Layoff Minimization Plan under Article Eight, could act as a counterweight to the full week guarantee. Where a limitation on a right exists within the Agreement, such as the right to holiday pay, the Employer asserts it is a limitation on the full week guarantee.

The Employer denies the Union has offered any evidence that would explain how the parties, in drafting the Agreement, considered the interplay between the full work guarantee and holiday pay eligibility. On the other hand, it avers the holiday pay eligibility requirement has been in predecessor contracts as far back as 1962, while the full work guarantee came much later. The Employer cites its evidence that it has had a practice of not paying holiday pay or providing alternate pay opportunities under these circumstances. The Employer acknowledges a single exception on Good Friday 2021, when the department erred in failing to actually pay the new hires for an entire week and the pay for the holiday was part of the correction of that error.

The Employer explains it had the option under the Agreement of scheduling the Grievants to work the holiday, in which case they would receive premium pay at the rate of 2.5 times their regular rate of pay. That option, it says, would be available even though the Grievants would not be eligible for pay for not working the holiday, and would result in the new hires being paid more than the full week guarantee. It says the same result would occur if the Grievants were to work additional hours or days around the holiday week. It denies this was intended by the parties when they drafted the Agreement.

If there is any ambiguity between the two contract provisions, the Employer asks the Arbitrator to employ common arbitral guides to interpretation. One is the consideration of past practice, which the Employer says favors its position. It contends the practice at this plant meets the traditional tests for finding a past practice to be binding upon the parties. The Employer maintains the Union has been aware of the scheduling of new employees and that they had not been paid for the holidays they did not work in the past.

Additionally, the Employer cites the principle that “when one interpretation of an ambiguous contract would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally plausible, would lead to just and reasonable results, the latter interpretation will be used.”<sup>2</sup> It argues the Union’s position nullifies the eligibility requirements of Article Ten, and makes a mockery of the idea of having those requirements to receive holiday pay for time not worked.

The Employer says the Union’s approach would require either the payment of holiday pay as if there was no eligibility requirement, or putting employees to work at the premium rate when there was no work for them to perform. This, insists the Employer, would be an absurd result and not what the parties intended in drafting the Agreement.

The Employer argues the Union has failed to meet its burden of proof, and asks that the grievance be denied.

**Discussion:** This case presents the problem of reconciling two contract provisions that seem to be contradictory. On the one hand, Article Five, Section C.4, guarantees employees the

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<sup>2</sup>*Elkouri & Elkouri: How Arbitration Works*, 8<sup>th</sup> Edition, 2020, Section 9.3.a.xv.

opportunity to earn forty hours of pay in a work week. On the other hand, Article Ten, Section A.3, directs that employees who have worked fewer than thirty calendar days are not eligible for holiday pay. The Union does not dispute the Grievants' ineligibility for holiday pay.

Although the Union explains the Agreement guarantees an opportunity to earn forty hours' pay, rather than guaranteeing forty hours' pay, its principal witness, Grievance Chair Richard Barron, testified that the grievance before the Arbitrator is for forty hours' pay, and not forty hours' work. He acknowledged that paying for the lost hours is equivalent to paying holiday pay to the Grievants.

Both parties cite Arbitrator Ronald F. Talarico's Award in Case 113 in support of their respective positions. That decision, in turn, was based upon Awards of Arbitrators Rolf Valtin and Terry A. Bethel. All three cases dealt with the Layoff Minimization Plan under Article Eight of the Basic Labor Agreement, with the end result being that the Employer may reduce the workweek of employees with fewer than three years of service, but only as part of the Layoff Minimization Plan. Thus, Arbitrator Talarico answered in the negative to the issue "Whether the Company violated the Basic Labor Agreement when it unilaterally implemented a 24-hour workweek for some employees with fewer than three years of continuous service." It is in that context that he held:

That this violates Article Five, Section C, Paragraph 4, could not be more clear. Paragraph 4 contains no exception permitting the Company to schedule employees with fewer than three years of continuous service for fewer than 40 hours. It states that "[a]n Employee scheduled to work will receive, during a payroll week, an opportunity to earn at least forty (40) hours of pay. . . ." "Employees" means all employees – those with greater and those with fewer than three years of continuous service. There is no qualifier or exception in Paragraph 4. [emphasis in original]

Arbitrator Talarico goes on to express the principle of contract interpretation that he applied to come to his conclusion. He wrote:

Equally supportive of the Union's position is the rule of contract construction that a collective bargaining agreement should be read as a whole and all words and clauses in the agreement should be given effect. The fact that a word or clause is included in a collective bargaining agreement indicates that the parties intended that it have meaning and is not surplusage.

This statement is consistent with the instruction, "[t]o better understand the intent of the parties, interpret an agreement as a whole document," as found in *The Common Law of the Workplace: The Views of Arbitrators*, 2<sup>nd</sup> Edition (2005), p. 79. The Comment to that instruction states:

Arbitrators make an effort to avoid interpreting contractual terms in isolation from the rest of an agreement, unless the parties manifest a contrary intention. As Harry Shulman observed, "[T]he interpretation which is most compatible with the agreement as whole is to be preferred over one which creates anomaly." Shulman, Harry, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1018 (1995), [at 80.]

In this regard, the Arbitrator must consider Article Ten, Section A.3., which set the conditions for receiving pay for a holiday when it is not worked. In this case, the Grievants were disqualified from receiving holiday pay because they had not met the requirement of having worked for thirty calendar days. This is only one of three requirements that must be met to be eligible for holiday pay. The fact that the listing of requirements using the conjunction "and" means that the failure of an employee to meet any one of the requirements will act as a disqualifier for holiday pay.

If, as the Union argues, every employee is entitled to forty hours' pay in a week that includes a holiday not worked, the effect would be to negate the entire purpose of setting eligibility requirements for holiday pay. An employee would be entitled to what would have been earned on the holiday; it just would not be called holiday pay. That cannot be what the parties intended when they set the eligibility requirements for holiday pay. That leads to a second principle of contract interpretation that arbitrators apply a rule of reasonableness. In this regard, *The Common Law of the Workplace* offers this instruction:

An interpretation giving a reasonable meaning to contractual terms is preferred to an interpretation that produces an unreasonable, harsh, absurd, or nonsensical result. Good faith is an element of reasonableness. [at 81.]

By any measure, requiring the Employer to offer work opportunities to employees who would then earn more money than they would have had they been eligible for holiday pay would be unreasonable, if not absurd.

A third rule of contract interpretation is that specific terms in an agreement more clearly reflect the parties' intention than does general language. *The Common Law of the Workplace* states:

Most arbitrators assume that, had the parties thought expressly to state it, they would have indicated that a specific provision constituted an exception to general language. An arbitrator uses this interpretive tool in an effort to implement the parties' implicit intent. [at 79.]

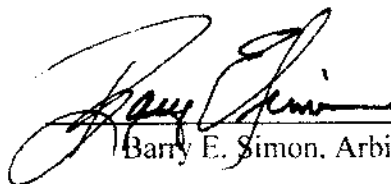
In the Basic Labor Agreement, Article Five, Section C is a general provision, while Article Ten, Section A is a more specific rule governing holidays as one form of paid time off. It dictates what days employees may get paid without being required to work, how they are paid if they do work, and which employees are not entitled to pay if they do not work. In this regard, the holiday pay provisions supersede the workweek guarantee provision.

In the case before him, Arbitrator Talarico did not have the question of holiday pay. He did, however, recognize that the Layoff Minimization Plan does permit the Employer to reduce the workweek of certain employees, citing Arbitrator Bethel's Award, notwithstanding Article Five, Section C.4. Even though Arbitrator Talarico wrote there was no exception, it is evident an exception exists under the Layoff Minimization Plan for employees with fewer than three years of continuous service. That exception is found elsewhere in the Basic Labor Agreement, as is the exception for payment of holiday pay to employees with fewer than thirty days of service.

By another theory, Article Five, Section C.4. applies only to employees who are scheduled to work. Arbitrator Terry A. Bethel, in a different matter,<sup>3</sup> ruled that the full week guarantee did not apply to an employee who was withheld from service pending an evaluation by his psychologist. In that case, Arbitrator Bethel found it was reasonable for the Employer to keep the grievant off work, and found further that he was not entitled to be paid the guarantee because he was not scheduled to work. In the instant case, Article Ten, Section A.3. permits the Employer to not schedule certain employees to work on the holidays without being required to pay them for holiday time not worked. The Grievants, therefore, were properly not scheduled to work, and Article Five, Section C.4. did not apply to them for that workweek.

It is the Arbitrator's conclusion that the Union has not met its burden of proof in this case. The Statement of Issue must be answered in the negative.

**Award:** The grievance is denied.

  
Barry E. Simon, Arbitrator

Dated: April 7, 2023  
Arlington Heights, Illinois

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<sup>3</sup>United States Steel Corp. and USW Local 2660, Case No. USS-47,933, 137 LA 630 (March 9, 2017).