

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TAYLOR ENTERPRISES

and

TEAMSTERS LOCAL UNION NO. 43

Case 31
No. 47757
A-4950

Raymond Prudhom - Holiday
Pay

Appearances:

Teamsters Local Union #43, 1624 Yout Street, Racine, WI 53404 by Mr. Charles Schwanke, President, appearing on behalf of the Union.

Mr. Jack Taylor, 1900 Kentucky Street, Racine, WI 53405 appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement for the years 1990-1993, Teamsters, Chauffeurs and Helpers Union No. 43 (hereinafter referred to as the Union) and Taylor Enterprises (hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the refusal of the Company to pay driver Raymond Prudhom holiday pay for the 1991 Thanksgiving holiday. Daniel Nielsen was so designated. A hearing was held on November 11, 1992 at the County Board offices in Racine, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties agreed not to submit post hearing arguments, and the record was closed at the end of the hearing.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties agreed that the issue in this case was:

"Is the grievant entitled to holiday pay under the contract?"

They further agreed that, if the answer was "yes", the appropriate remedy would be to

order the Company to pay one day's pay to the grievant.

PERTINENT CONTRACT LANGUAGE

ARTICLE 14. Management Rights

The Employer possesses the sole right to operate the mass transit system and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement and the past practices in the departments covered by the terms of this agreement, unless such practices are modified by this agreement or by the Employer under rights conferred upon it under this agreement or the work rules established by the Employer. These rights which are normally exercised by the Employer include but are not limited to the following:

1. To direct all operations of the transit system.
2. To hire, promote, transfer, assign, and retain employees in their position with the transit system and to suspend, demote, discharge and take other disciplinary action against employees for just cause.
3. To lay off employees due to lack of work or funds in keeping with the seniority provisions of the agreement.
4. To maintain efficiency of the transit operations entrusted to the Employer.
5. To introduce new or improved methods or facilities.
6. To change existing methods or facilities.
7. To contract out for goods or services; however, there shall be no layoffs or reductions in hours due to any contracting out of work.
8. To determine the methods, means and personnel by which such transit operations are to be conducted.
9. To take whatever action must be necessary to carry out the functions of the transit system in situations of emergency.
10. To take whatever action is necessary to comply with City, State or Federal law.

In addition to the management rights listed above, the powers of authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive rights of the Employer to establish reasonable work rules.

The Union and the employees agree that they will not attempt to abridge these management rights and the Employer agrees that he will not use these management rights to interfere with rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the Employer to

consult or negotiate with the Union concerning the above areas of discretion and policy.

ARTICLE 16. Vacation & Holiday Pay

Full-time employees who have completed their probationary period shall receive holiday pay in the amount of eight (8) hours x the employee's current hourly rate of pay for each of the following holidays:

New Year's Day
Memorial Day
Fourth of July

Labor Day
Thanksgiving Day
Christmas Day

If a holiday falls within the work week, computation for overtime hours shall be reduced by eight (8) hours straight time holiday pay.

It is agreed that if any of the negotiated holidays fall on a day other than the employee's normal work day or during the employee's vacation period, the employee shall be paid an additional eight (8) hours pay at the employee's straight time hourly rate.

If the employee may be required to work on any holiday, the employee shall receive time and one-half for all hours worked in addition to the eight (8) hours holiday pay, at their straight time rate.

In order to qualify for eight (8) hours straight time time pay for a holiday not worked, it is provided that regular employees must work the regular scheduled work day which immediately precedes and follows the holiday, except in cases of proven illness or unless the absence is mutually agreed to.

Employees on the ten hour work day shifts shall be paid ten hours pay at their straight time hourly rate for all paid holidays.

Employees who are serving their probationary period are not entitled to holiday pay for holidays falling within the probationary period.

ARTICLE 25. ARBITRATION

In the event that the Employer and the Union cannot mutually agree to a settlement

of any unresolved controversy which may arise concerning any matter or the interpretation of this Agreement, such unresolved controversy shall be reduced to writing and shall be referred to the Wisconsin Employment Relations Commission to have an arbitrator appointed for settlement.

The filing fee required by the Wisconsin Employment Relations Commission for arbitration shall be split equally between the Union and the Employer.

The Employer and the Union agree that the decision of the arbitration committee shall be final and binding upon both parties. The Employer and the Union agree that Union membership shall not be a matter subject to arbitration.

BACKGROUND FACTS

The Employer operates the Belle Urban System busses in Racine, Wisconsin. In so doing, it employs personnel in the classification of Driver, who are represented for the purposes of collective bargaining by the Union. The grievant, Raymond Prudhom, was employed as a Driver until his retirement in June of 1992. At the time of this grievance his daily work schedule began at 5:00 a.m.

In November of 1991, Thanksgiving fell on the 28th. The grievant was scheduled to attend a Workers' Compensation hearing on the morning of the 27th, and received permission from the Company to leave work at 8:00 a.m. Another driver was scheduled to replace him for the remainder of his shift. On the evening of the 26th, the grievant's lawyer reached a settlement with the Company and told the grievant that the hearing would be cancelled, but that he should come to the lawyer's office at 8:45 a.m. the following morning to sign paperwork connected with the settlement.

Jack Taylor, the owner of the Company, became aware of the settlement on the evening of the 26th, and left a note for the dispatcher, telling her cancel the grievant's leave for the next morning. The note told her to tell the grievant that he must either work the entire day or sacrifice his holiday pay for Thanksgiving. At approximately 5:30 a.m., a company supervisor conveyed this message by radio to the grievant, who was already driving his route. The grievant told his supervisor that he had permission to take the time off, and had a meeting scheduled with his attorney. He stated that he was intending to leave at 8:00 a.m. and that the Company should have a relief driver ready at that time.

The grievant worked 3 hours and 20 minutes of his shift, and then left for his meeting with the attorney. He was paid for the time worked, but received no pay for the balance of the shift, nor for the Thanksgiving holiday. The instant grievance was thereafter filed seeking holiday pay.

POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the grievant had permission to leave work to attend to the Workers Compensation matter, and that he did indeed use his time for that purpose. Inasmuch as the absence was mutually agreed to, the grievant should be entitled to the holiday pay for Thanksgiving.

The Position of the Employer

The Company takes the position that the permission for the grievant's absence on November 27th was withdrawn because of the cancellation of the hearing. Any signing of papers or meetings with his attorney could have been accomplished outside of normal working hours, and thus there was no need for time off from work. Since the grievant took the time off in defiance of the Company's directive that he remain at work, and thus did not work his scheduled day before the holiday, he is not entitled to holiday pay.

DISCUSSION

The contract provides that employees must work the scheduled day before and after a holiday in order to qualify for holiday pay. There is an exception for cases where there is mutual agreement to the absence. In this case, there was a mutual agreement that the grievant could leave work early for the Workers Compensation hearing. The issue on which the case turns is whether, and under what circumstances, the Company may revoke its agreement to the time off.

On the question of whether the mutual agreement for time off may be rescinded, there is little question but that it may, since the agreement was specifically intended to allow time off for the grievant to attend a Workers Compensation hearing scheduled to be held during working hours. With the cancellation of the hearing, the underlying reason for the time off was removed. While there still remained paperwork and the like connected with the case, the Company is correct in asserting that this could have been taken care of outside of working hours and did not necessitate time away from the job. The cancellation of the hearing represents a material change in circumstances which, in the view of the undersigned, justifies the Company's withdrawal of permission for time off on November 27th. This would not actually represent a unilateral rescission of the agreement by the Company, since both parties entered into the agreement for time off with an implicit limitation of the use to which the time would be put.

Having concluded that the Company had the right to withdraw permission for time off from work, the undersigned also concludes however that, under the peculiar circumstances of this case, the grievant was entitled to receive his holiday pay for Thanksgiving. There are two reasons for this conclusion, both hinging on the timing of the Company's notice to the grievant.

The contract provides that the grievant is entitled to holiday pay if he works his scheduled hours on the day before and the day after the holiday. This is a common provision in labor agreements, intended to prevent employees from extending holiday periods through the use of unauthorized absences. In this case, the grievant had already begun working his scheduled shift on the 27th when he was informed by radio that the Company was, in effect, changing the schedule. He has already made arrangements to confer with his attorney at the time originally scheduled for the hearing. Without speculating about the circumstances under which the Company might be justified in changing a work schedule after the employee has commenced his work day, the undersigned concludes that under these circumstances, the attempt to change the work schedule may not operate to deny the grievant holiday pay. The grievant's work schedule when he reported for work and began working called for him to work until 8:00 a.m. He worked the scheduled time. His reason for not working the remainder of the day was not related to extending his holiday period, but was instead directly connected with the original purpose of the time off from work. For these reasons, the undersigned finds that the grievant did work his scheduled hours on the day before the holiday, for the purposes of the holiday pay provision, 1/ and was therefore entitled to receive pay for Thanksgiving of 1991.

In addition to the conclusion that the grievant satisfied the technical requirements for receiving holiday pay under the contract, the undersigned also concludes that the unique circumstances of this case would lead to an estoppel of the Company's right to withhold holiday pay. Each party to a contract has some obligation to exercise its rights in a reasonable manner. As noted, the grievant had made an appointment with his attorney to wrap up the Workers Compensation case. He did so in the belief that he had permission to use the next morning for the Workers Compensation dispute. He was not attempting to use the day for a purpose unrelated to the original request for time off. The Company acted unreasonably by waiting until literally the last minute to withdraw permission for the time off. Granting that the Company was not aware of the settlement until the night before, there remained the option of either contacting the grievant at home or at least providing notice before he had actually left the garage to begin his work day. By waiting until after the grievant had begun working to withdraw permission for him to leave early, and then maintaining its position even after he explained that he had scheduled an appointment related to the litigation in reliance on the original agreement for time off, the Company helped to create the situation it now complains about. Given this, the Company may not now stand on its rights under Article 16.

On the basis of the foregoing, and the record as whole, the undersigned makes the following

1/ This is not a discipline case, and the arbitrator expresses no opinion about the propriety of the grievant's decision to ignore his supervisor's directive to work the remainder of his shift. The decision here is strictly limited to the facts of this case and application of the holiday pay language.

AWARD

The grievant is entitled to holiday pay under the contract. The Company is directed to immediately pay him the amount of one day's pay as a remedy for the violation of Article 16.

Signed and dated this 13th day of November, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator