BARRY WINOGRAD
Arbitrator and Mediator
1999 Harrison Street, Suite 1400
Oakland, CA 94612
(510) 465-5000

IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

| | |
|---|---|
| In the Matter of a Controversy Between: | |
| UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1564 | Arbitrator's File No. 10-107-LA |
| and, | |
| SMITH'S FOOD & DRUG CENTERS, INC. | ARBITRATION OPINION AND AWARD (November 12, 2010) |
| [Re: Holiday Pay Grievance, No. 09-00164] | |

Appearances: Joe Allotta, General Counsel for United Food Commercial Workers, Local 1564; Cristina A. Adams (Rodey, Dickason, Sloan, Akin & Robb), attorney for Smith's Food & Drug Stores.

## INTRODUCTION

This dispute arises under a collective bargaining agreement between the United Food and Commercial Workers, Local 1564, and

Smith's Food & Drug Centers, Inc. The bargaining agreement covers employees working with meat products. The Union contends that the Company violated the agreement by denying holiday pay to Steve Martinez for Labor Day in September 2009, based on misclassifying him as a part-time employee. The grievance also was brought on behalf similarly situated employees. The Company maintains that holiday pay was appropriately denied under the agreement because Mr. Martinez did not qualify for full-time status as he had not been scheduled the necessary number of work hours for the six consecutive weeks preceding the holiday.

The undersigned was selected to conduct a hearing, and render a final and binding award. The hearing was conducted on September 16, 2010 in Albuquerque, New Mexico. At the outset of the proceeding, the undersigned rejected a claim by the Company that the Union's case was precluded by an October 2009 decision in another arbitration proceeding; that is, the "Otero" case. (Co. Exh. 8; Tr. 36-38.) The relationship of that case to this proceeding will be considered in further detail below.

On an additional procedural issue, the arbitrator denied an arbitrability objection advanced by the Company asserting that the Union's grievance was untimely and overbroad to the extent it advanced claims purportedly involving employees other than Mr.

Martinez, and for holidays other than Labor Day in 2009. (Un. Exh. 4; Tr. 38-47.) In accord with established labor relations precedent, the arbitrator concluded that the grievance could fairly be characterized as a group or class-action type claim that put at issue possible holiday pay and remedies for other employees and holidays.[1] In reaching this conclusion, it is observed that Section 15.1 of the labor agreement broadly authorizes "the Union or any employee" to pursue a grievance over "any dispute or disagreement of any kind or character arising out of or in any way involving the interpretation or application of this Agreement." (Un. Exh. 1, Sec. 15.1.) However, in order to proceed in an efficient manner, the evidence at the hearing was limited to Mr. Martinez's case to determine the underlying issue of liability.

At the hearing, the parties were afforded an opportunity to examine and cross-examine witnesses, and to present documentary evidence. The case was deemed submitted for decision upon receipt of final posthearing briefs on October 22, 2010.

---

[1]Elkouri and Elkouri, How Arbitration Works (6th ed.), pp. 211-212.

## ISSUES

The parties were unable to agree upon a statement of the issues for resolution, but stipulated that the undersigned could frame the issues based on their respective statements and the evidence and argument offered in the case. (Tr. 6-7.) The arbitrator has determined that the issues to be resolved are as follows: Did the Company violate Sections 8.3 and 13.6 of the collective bargaining agreement by failing to pay Steve Martinez holiday pay for Labor Day on September 7, 2009; if so, what is the appropriate relief for Mr. Martinez and for other similarly situated employees for the Labor Day holiday in 2009, and for other holidays thereafter?

## RELEVANT CONTRACT PROVISIONS

Section 8.3 Full-time Employees

Full-time employees are defined to be employees who are regularly scheduled to work forty (40) hours or more per week. Regularly scheduled shall mean any six (6) consecutive work weeks. Full-time employees may be reduced to part-time status in order of seniority and the guarantee of forty (40) hours would have no further effect until the employee is once again reclassified to full-time status.

Section 13.6 Holiday Pay

Full-time Employees. Eight (8) hours pay at straight-time hourly rate will be allowed each full-time

employee who qualifies for such pay in accordance with the above provisions.

Part-time Employees. Any employee who shall have received compensation for an average of over twelve (12) hours per week during the four (4) calendar weeks immediately preceding any such work week in which the holiday falls, and who works during the work week during which the holiday occurs shall receive as holiday pay that amount that equals the average of hours worked during the preceding four (4) calendar weeks divided by five (5).

## FACTUAL ANALYSIS AND DISCUSSION

### 1. Facts Giving Rise to the Dispute

At issue in this case is holiday pay for Steve Martinez, a meat wrapper at the Company's store number 459, in the region covered by the meat department labor agreement. (Tr. 96-97; Un. Exh. 1.) The holiday at issue is Labor Day, September 7, 2009. A grievance was filed on September 28, 2009 alleging a contract violation by denying full holiday pay for Mr. Martinez. (Un. Exh. 4.) The grievance sought relief for Mr. Martinez and for similarly situated employees for the Labor Day 2009 holiday and for other holidays. The Union asserted in the grievance that Mr. Martinez had an appropriate number of weeks being scheduled at 40 hours or more, and should have been deemed full-time for eight

hours of holiday pay under Section 13.6 of the agreement, instead of the six hours he was paid.

The Company denied the grievance early in October 2009. (Un. Exh. 5.) In the Company's denial, it urged that Mr. Martinez had not been scheduled for work the necessary number of consecutive weeks because his hours had been reduced, and, therefore he was in part-time status. (Also see Tr. 88-89, 97.) The dispute was moved to arbitration in November 2009. (Un. Exh. 19.)

In the several months preceding Labor Day in 2009, Mr. Martinez was scheduled for six consecutive weeks at 40 hours or more between late December 2008 and early February 2009. (Tr. 65-66, 99-100; Un. Exhs. 6, 15.) Apart from that period, Mr. Martinez was consistently scheduled for 40 hours or more for almost all work weeks in the several months leading up to Labor Day in 2009. Mr. Martinez would have had six weeks of consecutive scheduling for several periods during the year, but fell short of this standard for intervening weeks when he took vacation or other personal time off of work. (Tr. 67-69, 97-98.) For example, between early August 2009 and Labor Day in September 2009, Mr. Martinez was scheduled at 40 hours or more for every

week except for one week of vacation that he took in mid-August 2009.

At the hearing, neither party offered evidence from negotiating history. From the testimony and argument presented, it appears that this language has been present in successive labor agreements for many years. (Tr. 89.)

Regarding the issue of past practice, Jenny Lee, the Company's human resources coordinator for the region since 2002, testified based on her experience, which included coverage for the store at which Mr. Martinez worked. (Tr. 85.) According to Ms. Lee, the Company has adhered to a practice that treats any break in scheduling of 40 hour work weeks prior to a holiday as reducing and converting an employee from full-time to part-time status for determining holiday pay. (Tr. 87-89, 101.) Ms. Lee testified that this always has been her application of the relevant contract provisions. (Tr. 90.) It also is Ms. Lee's understanding that this was the Company's practice dating back to the 1990s.

As explained by Ms. Lee, Mr. Martinez and other employees "reduce" themselves under the reduction language in Section 8.3 by taking holidays or other days off. (Tr. 87, 102-105.) Ms.

Lee acknowledged in her testimony that this reduction is not carried out based on seniority as outlined in Section 8.3, which she understands as applying to store closure situations. (Tr. 103-105.)

In making holiday pay determinations, Ms. Lee primarily reviews computerized scheduling records. (Un. Exh. 6; Tr. 90-92.) She also refers to handwritten work schedules prepared at local stores which are later incorporated into the computer records. (Un. Exh. 15.) When there are inconsistencies between the two on occasion, she reviews these along with documents showing actual hours of work in order to resolve discrepancies.

On the related question of whether the Union had notice of the practice described by Ms. Lee, she recalled testifying about it at the arbitration hearing in the Otero case on September 10, 2009. (Tr. 92-94; Co. Exh. 8, p. 5.) Apart from testimony by Ms. Lee in September 2009, no other evidence was provided by the Company, such as payroll records or similar documents, to demonstrate a longstanding practice, or that notice had been given to the Union, either express or implied, of how the Company determined holiday pay under the labor agreement. No evidence of previous practice was offered by the Union.

As noted above, to support the Company's view of Union awareness of how the Company determined full-time status for holiday pay, it points to the Otero arbitration, which involved a holiday pay claim for Labor Day in September 2008. (Co. Exh. 8.) The Otero case was heard in September 2009, about two weeks before the holiday pay grievance giving rise to this case. (Co. Exh. 8, p. 5 with Un. Exh. 4.) In the Otero grievance, the Union sought extra hours of holiday pay by claiming that vacation, personal time off, and hours scheduled informally, should be added to other hours that were on the schedule in order to determine the proper amount of holiday pay for an employee in part-time status. (Un. Exh. 20.)

The arbitrator in the Otero case rejected this contention. As a result, the prorated pay formula for part-time employees under Section 13 of the agreement was upheld as it had been applied in the Otero case. (Co. Exh. 8, pp. 16-17.) The arbitrator acknowledged in his decision that, to the extent the Union was claiming full-time status for Ms. Otero, it "did not produce evidence that the Grievant was scheduled for forty hours or more during any six consecutive work weeks in 2008." (Id., p. 16.) Nor, as the arbitrator viewed the dispute, could hours actually worked convert the employee to full-time holiday pay status. (Id., pp. 11-12, 17.) In any event, the arbitrator

concluded that the Union did not grieve the issue of full-time status. (Id., pp. 15, 19-20.)

2. Discussion

The Union contends that the plain text of Section 8.3, in conjunction with Section 13.6, extends full time status and holiday pay to employees who work six consecutive weeks, without any condition that those weeks immediately precede a holiday. The Union underscores this argument by pointing to the Company's application as being contrary to the seniority limitation in Section 8.3. In addition, the Union challenges the Company's reliance on past practice by observing that there is insufficient evidence of notice to the Union, or of Union agreement to such practice.

The Company counters that the reduction language in Section 8.3 has been given a fair and reasonable reading by the Company by examining work schedules to determine if an employee has been regularly scheduled at 40 hours or more in the six weeks preceding a holiday in order to qualify for holiday pay. The Company reinforces this construction by pointing to a history of adhering to a practice along those lines, dating back nearly 10 years or more.

Central to the resolution of a contract interpretation dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, an arbitrator will first examine the language used by the parties. If the language is ambiguous, an arbitrator will assess comments and proposals made when the bargain was reached, assuming there is evidence on the subject. In this case, neither party offered evidence of bargaining history. In addition, an arbitrator will examine previous practice of the parties related to the subject to see if it is longstanding, consistently followed, and known to and accepted by the parties.[2] If those criteria are met, the established practice will give meaning to otherwise ambiguous language. For the reasons that follow, the Union's grievance will be upheld.

First, the language of the labor agreement weighs heavily in the Union's favor. In particular, Section 8.3 of the agreement refers to 40 hours of scheduled work and includes the passage, "Regularly scheduled shall mean any six (6) consecutive weeks." The word "any" is not qualified by other contract language. Section 13.6 also assures holiday pay for full-time employees, without qualification other than as defined in the agreement.

---

[2]Elkouri and Elkouri, How Arbitration Works (6th ed.), pp. 607-609.

Certainly, there is nothing in the contract equating "any" six week period under Section 8.3 with the six weeks preceding a holiday as the Company would have it. Literally applied, Mr. Martinez was a full-time employee because of his six consecutive weeks of work scheduled at 40 hours or more between December 2008 and January 2009.

Other language in the agreement when read together and harmonized with Section 8.3 supports this construction. For example, the second paragraph of Section 13.6 spells out a formula for part-time holiday pay by specifying that the basis is the four work weeks immediately preceding the holiday. This demonstrates that the parties were able to confine the "look back" to the pre-holiday period, but did not do so for full-time employees. Further, in Section 8.2.b, full-time employees working in a week that includes a holiday are guaranteed 32 hours of scheduled work, and by the terms of that provision remain in full-time status. Under the Company's construction of Section 8.3, an employee deemed to be full-time under Section 8.2.b would be converted to part-time under Section 8.3, even for weeks of protected holiday scheduling. This reasoning, if adopted by the arbitrator, would be an inconsistent application of the labor agreement.

Beyond this language, the seniority reference in Section 8.3 limits how reductions are to be made, and precludes the Company's interpretation that an employee can reduce himself by taking a vacation. Instead, looking at the seniority language under 8.3, and in other sections such as 9.3, seniority and breaks in seniority are based on specified actions, but an individual being absent for a day of vacation or personal leave is not listed as a reason to break seniority.

The Company observes that the Union has proposed a 52-week period to review an employee's work schedule history, and urges that this weakens the Union's case because it is not tied to language in Section 8.3 or any other provision of the agreement, thereby reinforcing as reasonable the rationale for the Company's assessment based on the six weeks immediately preceding a holiday. This is one possible argument against a 52-week measure. However, at the other end of the spectrum, another way to view the problem is that there should be no time limit for measuring a six consecutive week period absent some other break in service. However, an open-ended method is unrelated to the agreement as well.

In this setting, a sounder approach, consistent with the position taken by the Union, is to confirm the six consecutive

week standard, but to utilize an annualized assessment. In this respect, a one year measure for the "look back" is in keeping with the manner in which the contract refers to yearly periods; for example, in determining years of service under Section 10 and employee anniversary dates under Section 13.

Nor is the Company on firmer ground by claiming that past practice supports its contract application. Here, the Company relies solely on Ms. Lee's recollection of a several year practice. Leaving aside whether such anecdotal proof is enough to show a lengthy, consistent practice, especially in the absence of documentary proof from payroll or other records, there was no persuasive evidence that the Union knew about the practice, much less that the Union agreed to it. The Otero case cited by the Company does not amount to such proof as it went forward almost contemporaneously with the facts underlying this grievance, and expressed, if anything, an objection to the Company's calculation methodology. Regardless, as the arbitrator concluded in the Otero decision, the issue of full-time status was not squarely before him, nor was there evidence of any period of six weeks of consecutive scheduling at 40 hours.

Last, in deciding this case, the arbitrator is obliged to apply the general principle of contract interpretation that

favors avoiding a forfeiture of an established right. In this case, it is observed that there is no express reference either in Section 8 or in Section 13 to alter an employee's status and deny full holiday pay if an employee takes vacation or personal time off in the six weeks period preceding the holiday. In effect, as the Union argues, the Company's construction of the bargaining agreement not only adds a new reduction definition to the language of the agreement, but it penalizes employees who, over months and years of service, have earned the right to take vacation or other personal time from work.

3. Remedy

As the remedy in this proceeding, Mr. Martinez should be made whole for the difference between the holiday pay he received for Labor Day in September 2009 and the full day of pay he was entitled to receive, along with interest, as requested by the Union. In addition, Mr. Martinez should be paid full days of holiday pay for any subsequent holiday for which he should properly have been deemed a full-time employee under the reasoning of this decision. Holidays are listed in Section 13.1 of the agreement.

Moreover, consistent with the class-wide nature of the relief proposed in the Union's grievance, the parties should meet and confer to determine whether other employees were inappropriately denied holiday pay for Labor Day 2009 and for subsequent holidays based on the Company's misapplication of the contract language, and whether they should be made whole for lost holiday pay. In accord with the stipulation of the parties, the undersigned will retain jurisdiction to resolve any disputes over implementation of the remedy. (Tr. 8.)

## AWARD

Based on the testimony and documentary evidence, and the findings and conclusions set forth above, the undersigned renders the following Award:

1. The grievance will be sustained.

2. Steve Martinez will be made whole for the difference between the holiday pay he received for Labor Day in September 2009, and the full day of pay he was entitled to receive, with interest paid on the amount owed.

3. Steve Martinez will be made whole by being paid full days of holiday pay for any holiday after Labor Day in September 2009 for which he should properly have been deemed a full-time employee in accord with this decision.

4. The parties are directed to meet and confer to determine whether other employees were inappropriately denied holiday pay for Labor Day in September 2009 and for subsequent holidays, and whether they should be made whole for lost holiday pay, with interest.

5. Pursuant to the stipulation of the parties, the undersigned will retain jurisdiction for 120 days from the date of this Award to resolve any dispute over implementation of the remedy.

Date: November 12, 2010

BARRY WINOGRAD
Arbitrator