

**BEFORE
JOSEPH V. SIMERI
ARBITRATOR**

In the Arbitration)
) **FMCS Case No. 11-03915-6**
 Between)
)
 THE KROGER COMPANY,)
) **C _____, Grievant**
 And)
)
 UNITED INDUSTRIAL SERVICE,)
 TRANSPORTATION PROFESSIONAL AND)
 GOVERNMENT WORKERS OF)
 NORTH AMERICA, AFL-CIO,)

ARBITRATION AWARD

This dispute was arbitrated on February 16, 2012 in Columbus, Ohio. The Kroger Company (“the Company”) was represented by Michael Majba, Esq. The Grievant and United Industrial Service, Transportation Professional and Government Workers of North America, AFL-CIO (“the Union”) were represented by Stanford Dubin, Esq. The Company and the Union presented witnesses and introduced evidence. Post-Hearing Briefs were submitted to the Arbitrator on April 20, 2012. This Award is issued within 30 days from the submission of the Post-Hearing Briefs.

RELEVANT CONTRACT PROVISIONS

Master Contract (Joint Exhibit 1)

ARTICLE 4. **MANAGEMENT RIGHTS**

The Employer shall be free to hire its own employees, promote, discipline, discharge for just cause and to maintain discipline and efficiency of the employees, subject only to the terms and provisions of this Agreement. The Employer shall also have the sole right to assign and schedule work, determine working schedules, to direct the working forces, to promulgate reasonable rules and regulations and to exercise the normal management rights, except as modified by this Agreement.

ARTICLE 5. **DISPUTE PROCEDURE**

5.2 Steps for Handling Grievances: Any differences, disputes or complaints arising over the interpretation of application of the terms of this Agreement shall be submitted within five (5) calendar days to the Employer in writing, signed by the employee. There shall be an earnest effort on the part of both parties to settle such promptly through the following steps:

STEP 1. By conference between the aggrieved employee, and/or the shop steward and the employee's immediate supervisor. If the grievance is not settled within five (5) calendar days, it may be processed in Step 2.

STEP 2. By conference between an official or officials of the Union or its designated Business Agent and/or the steward and aggrieved employee and the Senior Supply Chain Manager and/or other designated management representative. If the grievance is not settled within three (3) days, it may be processed in Step 3.

STEP 3. By conference between an official or officials of the Union or its

designated Business Agent and/or the steward and aggrieved employee and the Regional Director of Logistics and/or other designated management representative. If the grievance is not settled within three (3) days, it may be referred to arbitration in accordance with 5.3.

The Employer will answer all grievances in writing in Steps 2 through 3 of the grievance procedure outlined above. All grievance forms will be provided by the Union. A copy of all grievances will be numbered and distributed to all designated shop stewards and a copy mailed, faxed or emailed to the Union office.

5.3 Arbitration: In the event the parties fail to reach agreement in Step 3, the dispute may be submitted to arbitration by either party. The Federal Mediation and Conciliation Service shall be requested to provide a panel from which an arbitrator may be chosen by the two parties. The decision of the arbitrator so selected shall be binding on the employee and both parties. The expense incurred in the arbitration proceedings such as hearing room, steno, transcript for each party, and arbitration fees, shall be divided equally between the Union and the Employer.

ARTICLE 6.

WAGES, HOURS & WORKING CONDITIONS

6.5 A. Regular Employees: All regular employees who report each day in accordance with department schedules shall be guaranteed the equivalent of forty (40) hours straight-time pay, except in holiday weeks when the guarantee will be thirty-two (32) hours (thirty (30) hours for those employees working four (4) ten (10) hour days). This guarantee is contingent on no infraction of Employer rules, lateness or absence for other personal reasons of the employee and emergency conditions beyond the Employer's control which prevent or interfere with the normal operation of the business.

6.10 A. Employees will not be required to work overtime unless they are notified of such overtime before the end of the last rest period. Overtime shall first be offered on a voluntary basis by seniority in the classification where the overtime is required and then by seniority on the shift. If an insufficient number of employees volunteer, employees may be forced by inverse seniority on the same basis. If there is an

unscheduled or extra day of work, the Employer shall call the most senior person from the overtime list for the extra day to the appropriate classification after assigning utility.

6.10 D. No full-time employee will be required to work on their scheduled day off or their scheduled holiday. However, if an insufficient number of employees volunteer to work, the following guidelines will prevail.

Holiday work: All employees hired after October 7, 2001, may be forced to work by inverse seniority, by shift on pre-holiday and holiday weeks a maximum of 6 days per week.

All other weeks: Employees hired after ratification (November 18, 2007) or a maximum of 30% of the entire workforce, whichever number is greater, may be required to work a maximum of 2 days per month by inverse seniority and by shift, a maximum 6 days per week. (Excludes extra days mandated during the pre-holiday and holiday weeks).

All mandated work schedules will be posted the Wednesday prior to the start of the week. Employees with valid life event excuses may, with the approval of management, exchange the mandated day for another within the workweek.

If this provision becomes unworkable, the Union and the Company will meet to discuss a solution.

ARTICLE 7. **HOLIDAYS**

7.3 Work Schedule – Holiday Week: Consecutive days (except for those employees working a four (4) ten (10) hour day workweek) will be scheduled in holiday weeks for the regular guaranteed workforce.

The consecutive day requirement above will be satisfied if the Employer schedules four (4) consecutive workdays or if the schedule is four (4) days of work in five (5) consecutive days (any one of which is the holiday).

Employees hired after October 7, 2001, whose bid day off falls on a holiday or day legally celebrated in lieu thereof, will not receive an additional day off, and holiday schedule changes must be posted by Wednesday before the holiday week.

This section (7.3) shall not apply to the freezer.

ARTICLE 9. **SENIORITY**

9.1 Application: On layoffs, recall, choice of shifts and vacations, the principle of seniority shall apply.

FACTS

The Collective Bargaining Agreement (“the Contract”) between the Company and the Union covers warehouse employees represented by the Union at the Company’s facility in Delaware, Ohio. The Contract’s term began on November 11, 2007. It ends on December 15, 2012.

Employees hired before October 7, 2001 are treated differently than those hired after October 7, 2001, as it relates to the issue raised by this Grievance. An employee hired after October 7, 2001 (Jr. Employee) whose day off falls on a holiday or on a day on which the holiday is celebrated, does not receive an additional day off. An employee hired before October 7, 2001 (Sr. Employee) whose day off falls on a holiday or on a day on which the holiday is celebrated, receives an extra day off. That extra day off is referred to in the Contract as the “In Lieu Of Day.” Historically, a Sr.

Employee having an “In Lieu Of Day,” could come in to work that day instead of simply taking the day off, if the Company declared that holiday week an “Open Door Week.” The Contract does not define the term “Open Door Week.” There are also “Open Door Days.” These are random days posted by the Company as open for extra days of work. Nothing in the Contract requires the Company to designate either Open Door Weeks, or Open Door Days.

During holiday weeks, the Company has generally posted a notice designating the entire holiday week as “Open Door.” This means that a Sr. Employee may come in and work on his In Lieu Of Day and earn overtime. At least twice, however, once during the Labor Day holiday week in 2009, and once during the Memorial Day week in 2009, the Company designated only certain days in those weeks as Open Door. No grievances were filed over these Memorial Day and Labor Day postings.

With that as background, on the Wednesday before Memorial Day 2011, the Company posted a notice stating that only the Sunday and Monday of the Memorial Holiday week would be Open Door Days. Thus, employees whose regular day off was a day other than Sunday or Monday, would not be able to work on their normal day off and, presumably, earn overtime.

After the posting, a Jr. Employee, C _____, who actually worked on one of the 2011 Memorial Day week Open Days and earned overtime, filed this

Grievance. He alleges the Company violated Articles 6.5 and 6.10 of the Contract. In his view on behalf of the Union, the Company's failure to post the entire Memorial Day holiday week as Open Door, deprived certain Sr. Employees of the right to work on their In Lieu Of Day, effectively depriving them of overtime. This benefitted Jr. Employees over Sr. Employees, and thus, says the Union, violated the bedrock principle of seniority.

ISSUE

Did the Company violate the Contract when it did not designate the entire Memorial Day 2011 holiday week as "Open Door?" If so, what is the appropriate remedy?

ANALYSIS

This case presents a classic clash between the Company's claim of management's right to direct the workforce and the Union's claimed limitation on that right because of the past practice of the parties. Each position was ably articulated by counsel for the Union and counsel for the Company, both at the Arbitration Hearing, and in their Post-Hearing Briefs.

Because no Contract between a Company and a Union could ever anticipate all issues that might arise, there are instances when the parties express mutual assent to a

course of conduct and that conduct becomes a part of the Contract, despite there being no written language. It is black letter arbitral precedent that past practice, if it is to become a part of the Contract, must be clear, consistent, and mutually accepted. Elkouri & Elkouri, *How Arbitration Works* (6th ed. 2003), p. 608. Stating the rule is simple. Its application provides needed work for many labor arbitrators.

This Contract does not contain a provision stating whether, and in what circumstances, the Company may designate holiday weeks as Open Door Weeks, or certain days of holiday weeks as Open Door Days. Thus, I am not charged with the task to determine whether past practice defines unclear contract language. No, the Contract is silent on this issue. Nevertheless, looking to the Contract is a path, not necessarily the one less traveled, to search for the answer that is grounded in common sense. I unabashedly assume that both the Company and the Union negotiated a contract that is in their mutual best interests. With that as foundation, my charge is to decide whether the Company and Union mutually assented to a requirement that the Company must designate each holiday week as an Open Door Week, thus permitting any employee to come into work on any day during that week and earn overtime, regardless of the Company's staffing needs.

To assist me in determining whether the Company's past designation of holiday weeks as Open Door Weeks has now become a part of the Contract, I look to see

whether it would make any economic sense for the Company to agree to such a limitation. If, when I order a dozen donuts from the donut shop, the baker usually gives me thirteen donuts, do I have a claim for the thirteenth donut when I open the box and find there are only twelve?

Contract Section 6.5A guarantees employees 40 hours straight-time pay, except in holiday weeks when the guarantee is 32 hours or 30 hours for those employees working four 10-hour days. There is no commitment in the Contract, much less a guarantee, of the right to work overtime. Indeed, Section 6.10D mandates that no full-time employees will be required to work on their scheduled days off, or their scheduled holidays. But the Company and the Union must have realized there could be a staffing problem during holiday weeks, because all employees hired after October 7, 2001 (Jr. Employees), can be forced to work by inverse seniority, by shift, on pre-holiday and holiday weeks, a maximum of six days per week.

In Article 7.3, the Contract again distinguishes between employees hired before October 7, 2001, the Sr. Employees, and those hired after October 7, 2011, the Jr. Employees. A Jr. Employee, whose normal day off falls on a holiday, or a day legally celebrated in lieu of the holiday, does not receive an additional day off. This provision recognizes the Company's need to determine appropriate staffing.

A binding past practice, a course of conduct that becomes a part of the contract,

as if it were actually written into the contract, does not happen just because a practice has generally, or frequently, occurred. Just because a practice has existed over time, does not necessarily mean that it becomes part of the contract. The conduct must be understood by both the Company and Union to have become part of their bargain, no less than if it had been actually written into their contract.

In deciding whether the evidence supports a finding of mutual assent, I consider the following factors:

First, what is the Company's purpose in designating holiday weeks as Open Door Weeks, or certain days of a holiday week as Open Door Days? The Company's purpose is to have enough employees available to meet the demand of the Kroger grocery stores, who sell food to the Company's customers. The Company's decision to designate an entire holiday week as an Open Door Week, or only certain days of a holiday week as Open Door Days, is not based on whim. Grocery sales are affected by many factors, whether it be the general state of the economy, the season of the year, the weather, and the competition. Fresh product, and its timely delivery is essential to maintaining sales and profitability. The Company prepares a scheduling forecast, weighing historical data, trends, weather events, and divisional sales plans. Based upon all of that information, the Company decides on a holiday-to-holiday basis whether it will need overtime for the entire holiday week, or only on certain days

of the holiday week. If the Company accepted the premise that it had agreed to designate all holiday weeks as Open Door Weeks, the scheduling forecast would be a useless exercise.

Next, no employee covered under this Contract has the right to work overtime. Indeed, the reason a distinction was made in the Contract between those employees hired before October 7, 2001, and those hired after October 7, 2001, was to make certain that the Sr. Employees not be forced to work overtime if their scheduled day off fell on a holiday, or a day legally celebrated in lieu of the holiday. The testimony of Robert Love, the Union Business Agent involved in the 2001 Contract negotiations where the concept of In Lieu Of Day was introduced, a credible and forthright witness, is telling. In response to my own question about the Contract language, Mr. Love responded:

...some of that language was deeply talked about during Contract negotiations because the older fellows didn't want to be mandated to come in on the holiday to work. So we came up with the language that we have now that would give the younger guys - - I mean given them an In Lieu Of Day, so we would force in the Jr. people that were hired after the Contract so that made kind of everybody happy.

The purpose of the In Lieu Of Day was to protect Sr. Employees from having to work on a holiday. Jr. Employees were not given the same protection.

To now find that the Company and the Union agreed, through past practice, that the Company must designate each entire holiday week as an Open Door Week, means

that the Sr. Employees would, in addition to the benefit of not being required to work on a holiday, also have the right to work on a holiday. It is difficult to accept that the bargained for shield for the Sr. Employees should be transformed into a sword.

It makes perfect sense that the Union negotiated a provision protecting Sr. Employees from the requirement to work on a holiday. In *Ameron HC&D*, 85 LA 65 (Gibson 1985), the issue was whether the contract required the employer to allow an employee the opportunity to work on the employee's birthday holiday. The Arbitrator found it did not, because the employee was being paid for the holiday.

“(I)t is generally accepted that holidays are intended to provide time off and the premium for working on a holiday is to discourage that practice.” At p.69.

Most contracts provide for the assignment of overtime based on seniority, or at least, seniority is a significant factor in the assignment of such overtime. But it surely must be the rare contract that imposes on an employer the obligation to schedule overtime. The reason is that for employees, overtime is both a benefit and a burden. The burden is the time away from family and leisure, and too much overtime work may ultimately result in a less productive employee. The benefit is, of course, more earnings at an increased hourly rate. Here, the Union, acting for a majority of employees, protected the Sr. Employees from the mandated burden of overtime on a holiday. The Union's position, if accepted, would find the Company, through past

practice, gave the Sr. Employees back what they had negotiated away. That is a stretch.

In *International Salt Co.*, 42 LA 1188 (Mittenhall 1964), the employer had, for many years, used two operators on each of two undercutting machines. The Company decided it needed one operator for each machine. The Union objected. The Contract did not contain a management-rights clause. Nevertheless, Arbitrator Mittenhall found for the Company. He stated:

“But the decision as to what size the workforce should be (or what size a given crew should be) is a normal function of management.” At p.1190.

And further:

“The facts themselves reveal that the job elimination was nothing more than an attempt to relate the workforce to production needs.” At p.1191.

Here too, the decision whether or not to schedule overtime and how many days a week to schedule overtime, is an attempt to relate the workforce to production needs, an accepted management function. Does it makes sense the Company assented to relinquish that right, which it did not do at the bargaining table, by a course of conduct? I find the Company did normally designate holiday weeks as “Open Door Weeks,” rather than scheduling overtime only on certain days of the holiday week. Yet, this is explainable as much by production needs, as by finding a mutual understanding between the Company and the Union that

every holiday week would be posted as an Open Door Week, thus allowing overtime all days of the holiday week.

The Arbitration Hearing produced no evidence that the decision to designate Open Door Weeks or Open Door Days was ever discussed during Contract negotiations. This may mean the Union believed that the Open Door Week holiday posting was normal practice and would not be changed without the Union's consent. It could just as logically mean the Company believed its decision to designate holiday weeks as Open Door Weeks, or Open Door Days, was within the exclusive right of the Company.

The Employer introduced evidence that on at least two occasions, once during the Labor Day holiday week in 2009, and once during the Memorial Day holiday week in 2009, the Company designated only certain days in those weeks as Open Door. The fact that the Company did not introduce evidence of other holiday weeks in which only certain days were designated as open door, is not surprising. There would be no need to maintain such records in the regular course of business. The 2009 records were found, by chance, on a computer drive.

The parties have evidenced an ability to put in writing their agreements over issues not directly addressed in their Contract. Attached to the Contract are Letters of Understanding covering the sale of the Employer's business; a cash balance plan

covering employees to be grandfathered; vending machine profits; transfer of work into the bargaining unit; annual bidding of shift preference; limitation of performance of bargaining unit work by employees from other Employer facilities; and the method of calculating overtime in the holiday week. Surely, if the issue of holiday week Open Door posting was a concern, the parties had historically addressed concerns by executing Letters of Understanding. One could realistically infer that the issue raised by this Grievance would have been discussed had it been one of mutual concern before the Grievance was filed.

The posting of Open Door Days, rather than the entire Open Door Week, during the 2011 Memorial Day holiday week did not result in the elimination of any employee positions, or any loss of regular earnings. The Sr. Employee, who may have lost overtime during the 2011 Memorial Day week, assuming he would have chosen to work, did receive his bargained for In Lieu Of Day.

This is the Union's Grievance. The Union bears the burden to prove by the greater weight of the evidence that the Company and the Union jointly agreed, through a course of conduct, that the Company, if it decided it needed overtime during a holiday week, was required to designate the entire holiday week as Open Door Week. I find the Union did not advance the ball beyond the fifty-yard line. The fact that the Company generally designated holiday weeks as Open Door

Weeks, rather than picking and choosing days during that week, establishes only a general practice by the Company. Without more, it does not establish mutual assent between the Company and the Union. Sr. Employees are not harmed if only certain days during the holiday week are designated as open door. The Sr. Employees continue to receive the benefit of their Contract bargain because they are not required to work on the holiday, or on their In Lieu Of Day.

This Contract expires December 15, 2012. The parties will likely soon address this issue as they meet face to face. One cannot eat at the arbitration table what it did not cook in the bargaining kitchen.

AWARD

For the reasons set forth in this Opinion:

1. The grievance is denied.
2. The Employer and the Union must pay the Arbitrator his fee and expenses as provided in the Collective Bargaining Agreement between the parties.

Dated: May 7, 2012

s/Joseph V. Simeri

Joseph V. Simeri, Arbitrator