IN THE MATTER OF ARBITRATION	)	
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CLEVELAND CLIFFS (WEIRTON PLANT)	)	
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	)	
and	)	Case 21TM60443
	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 2911	)	Case 125

Peter D. Post, Esq., for the Employer
Pete S. Visnic, Esq., for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves a claim for scheduling pay on behalf of Grievant Sean Henry.

A hearing was held on September 9, 2021 at Weirton, West Virginia. Both parties called, examined and cross examined witnesses, and offered documentary evidence. The Parties provided oral summations at the close of the hearing.

Contract Provisions Involved

ARTICLE THREE - HEALTH, SAFETY AND THE ENVIRONMENT

Section B. The Right to a Safe and Healthful Workplace

1. The Company will provide safe and healthful conditions of work for its Employees and will, at a minimum, comply with all applicable laws and regulations concerning the health and safety of Employees at work and the protection of the environment. The Company will install and maintain any equipment reasonably necessary to protect Employees from hazards.

ARTICLE FIVE- WORKPLACE PROCEDURES

Section C. Hours of Work

1. Normal Workday and Work Week

b. Management shall make reasonable efforts to post or otherwise make known to Employees schedules by 2:00 p.m. on Thursday, but in no event not later than 2:00 p.m. Friday of the week preceding the calendar week in which the schedule becomes effective. The Company will establish a procedure affording any Employee whose last scheduled turn ends prior to the posting of his/her schedule for the following week an opportunity to obtain information relating to his/her next scheduled turn. This procedure will also be applicable with respect to Employees returning from vacation.

c. Employees shall be paid for all shifts which are part of their original posted schedule.

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 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.

The Facts

Grievant Sean Henry is a Maintenance Technician Electrical (MTE) in the Tin Mill. He works throughout the mill as needed. He normally works together with another MTE, Paul Kasper. These two work in conjunction with two other MTEs who are primarily responsible for electronic (as distinguished from electrical) issues, as well as three Mechanics. Henry and Kasper also interact with production Employees

in the areas where they are performing their functions. It appears, however, that Henry works in closer proximity with Kasper than with any other Employee. Nonetheless, as Henry characterized it, all the maintenance Employees work hand in hand to get equipment running again.

The Grievant works a predictable and repeating schedule of 12 hour days, either from 6:00 a.m. to 6:00 p.m. or from 6:00 p.m. to 6:00 a.m.

The current case relates to his schedule for the week beginning Sunday January 17, 2021. The schedule for that week was posted by Friday January 14 and had Grievant Henry scheduled to work on Monday January 18, Tuesday January 19, Wednesday January 20 and Saturday January 23 into Sunday January 24. January 18 was Martin Luther King Day, for which Henry would have been paid double time and a half for time worked. He would also have received time and a half for hours worked on Sunday January 24. By his calculation, if he had been permitted to work during the week at issue, he would have been paid for a total of 84 straight time hours. At issue in this case is whether Grievant Henry was entitled to be paid for the hours for which he was scheduled but did not work. (He was paid holiday pay for Martin Luther King Day, and there is no dispute in this respect.)

At around 10:00 p.m. on Sunday January 17 Paul Kasper phoned Sean Henry and said that he just learned that he had tested positive for COVID. Although Henry is not entirely certain on this, he thought that Kasper was tested Friday and learned of the result on Sunday. Henry contacted Turn Foreman Frank Faldowski, who works with Henry and Kasper each turn, to let him know that Kasper had tested positive.

Maintenance Manager Jared Glover testified that Faldowski called him and told him that Kasper had tested positive. Glover also spoke by phone with Henry and asked if he had been within six feet of Kasper for more than five minutes. Henry replied that he probably had to be. He asked if Henry had been in contact with others but Henry did not mention any one. Glover told him that since Paul Kasper had tested positive for COVID, Henry was not to report to work for the next ten days. Other Maintenance Employees filled in for the Grievant the week of January 17 on the shifts he had been scheduled to work.

Henry checked the Union's website, which advised:

> Anyone who has been in close contact with a confirmed positive case should stay home and self-isolate. "Close contact" means touching, or being within 6 feet of such a person for more than 5 minutes. Unfortunately, the Centers for Disease Control recently issued a statement that workers who had been exposed could stay on the job, so long as they did not develop symptoms. The USW, AFL-CIO, and many health experts strongly disagree.

The following Tuesday Henry phoned Human Resources / Labor Relations Manager Dana Meager. Henry asked when he could return to work. She told him he could be tested on the sixth or seventh day and if the test is negative he could return to work. Henry calculated that the effect would be only that he could return on the ninth rather than the tenth day. Meager also told Henry that he could use vacation to cover the days off or could file for unemployment compensation. (The waiting week had been waived.) Henry chose not to use vacation since he had only ten days for the year. He also did not apply for unemployment compensation, since he expected that his holiday pay for Martin Luther King Day would be deducted, and he would net almost nothing. He also did not test for the virus. In fact he has never tested positive, nor been treated for COVID, nor experienced any symptoms of infection.

According to Meager, she went through the protocol and asked if Henry had been in close contact with Kasper, and Henry said that he had. Her version is slightly different from Henry's, that she told him he could test on the fifth through seventh day and return on the eighth day.

Henry and Kasper were the only Employees quarantined in connection with Kasper's positive test. The other MTEs, Mechanics and production Employees with whom Henry and Kasper collaborated during the days before January 17 were not quarantined. Foreman Frank Faldowski was also quarantined, but tested negative on Sunday and was permitted to return to work on Wednesday. Henry himself returned to work on Sunday evening January 24. Henry and Kasper had worked together on Thursday January 14 and Friday January 15. (See Union Exhibit 1 and Company Exhibit 1.) Apparently January 14 was treated as triggering the ten day quarantine period.

On cross examination Henry acknowledged that he and Kasper work all over the mill and could have been "shoulder to shoulder" in mid-January. He conceded that he and Kasper were likely within six feet of each other cumulatively for more than 15 minutes.

By spring of 2021 at least 120 Weirton Employees had testified positive for the COVID virus, and all of them were quarantined and not permitted to work until the ten day quarantine period had elapsed or until they had tested negative for the virus. At least 75 other Employees were also quarantined because of close exposure to co-workers who had tested positive. Sadly, two Weirton Employees died from COVID.

Although apparently some of the 195 Employees who were quarantined were informed not to report to work after their schedules had been published, no grievances were filed seeking compensation under Article Five Section C (1) (c) for any of these individuals.

There have been situations in which Employees on the Friday schedule who were not permitted to work as scheduled were not paid. These include where the Company removes the Employee from the schedule for disciplinary reasons, report offs, vacations and absences.

According to General Manager Brian James, Article Five Section C (1) (c) pertains to cancellation of shifts, changes in schedules because of loss of power, no steel available, production mishaps and similar causes. He stated that Henry was treated as being on an approved leave of absence during his quarantine rather than absent or on disability. In his view Henry was unavailable for health reasons.

The current (August 17, 2021) CDC guidelines state:

> Quarantine if you have been in close contact (within 6 feet of someone for a cumulative total of 15 minutes or more over a 24-hour period) with someone who has COVID-19, unless you have been fully vaccinated. People who are fully vaccinated do NOT need to quarantine after contact with someone who had COVID-19 unless they have symptoms. However, fully vaccinated people should get tested 3-5 days after their exposure, even if they don't have symptoms and wear a mask indoors in public for 14 days following exposure or until their test result is negative.

The Company's policy (dated December 21, 2020) states in part:

2.5 If you are in close contact (closer than 6 feet for 10 consecutive minutes or longer or a cumulative total of 15 minutes or more during a 24 hour period, beginning 48 hours before symptoms or, for asymptomatic people, 2 days prior to the test specimen collection) with an individual who has tested positive with COVID-19:

You must not report to work.
You are required to notify your manager/call off center or follow your facility's call-off procedures.
You will undergo a 10-day quarantine period from the date of your first exposure to the person who tested positive.
I. You have the option to return to work after 7 days if you test negative for the COVID-19 virus in the 5-7 day window since exposure and remain asymptomatic. You will be required to adhere to the return to work provisions detailed in Section 3.2b.

. . .

Issue as Framed by the Arbitrator

Did the Employer violate Article Five Section C (1) (c) when it refused to pay Grievant for hours he did not work while he was quarantined after exposure to an individual who tested positive for COVID.

Position of the Union

The Union maintains that once posted, the schedule is not to be changed. It argues that the literal language of Article Five Section C (1) (c) is clear, and that since Grievant Henry was on the schedule, he is entitled to be paid for all hours scheduled.

It considers that quarantine was not necessary given his work procedures and environment, and that he should have been permitted to work.

It also suggests that the Grievant was not treated even handedly in that other Maintenance Employees who worked with the Grievant and Kasper were not required to quarantine. Further, it points to Foreman Faldowski who was permitted to return to work on Wednesday.

Its primary position, however, is that without regard to whether the requirement to quarantine was proper, the Company violated the collective bargaining agreement in that once the schedule has been published, it is final. Thus it contends that based on the posted schedule, the Company is liable for payment of all wages for the scheduled hours, at premium rates where applicable. It regards the language as clear and compelling that once the schedule has been posted, the Employee should be paid.

It emphasizes the lack of any force majeure language in the agreement.

Although the Employer contends that it had the right to quarantine the Grievant, the Union insists that the plain language of Article Five Section C (1) (c) does not provide for any exceptions. It compares Article Five Section C (4), the full week guarantee, which provides listed exemptions such as absenteeism, Union

business time, disciplinary time off and disability or approved leave of absence. In its view the lack of comparable exceptions in Section C (1) (c) is significant, in that it demonstrates that the Parties could have negotiated comparable exceptions in Section C (1) (c). It asserts that the provisions of Management Rights are largely confined to the right to discipline.

It notes that the decisions cited by the Company relate to the full week guarantee, but it is not claiming a violation of that provision.

The Union regards the Company's claim that the Grievant could have used vacation or filed for unemployment compensation as immaterial. It insists that Grievant Henry was entitled to be paid under Article Five Section C (1) (c) and should not be required to waste his vacation time, and that the subtraction of holiday pay would minimize any unemployment compensation so that the Grievant would not be in the same position as if paid by the Company for the scheduled shifts. In any case, it urges that he had no contractual obligation to seek unemployment compensation.

It asks that the grievance be sustained and that the Grievant be reimbursed for all wages he would have received if he had worked the scheduled shifts, including premium pay. It concedes that holiday pay is not at issue.

Position of Management

The Company maintains that the agreement does not require payment to the Grievant for the hours he did not work since he was relieved for proper cause and quarantined after COVID exposure. It contends that there is no question it had the right to relieve him from duty to protect fellow Employees, in keeping with CDC guidelines and consistent with its duty to provide safe and healthful working conditions. It cites the Management Rights provision as recognizing its right to relieve in these circumstances. It insists that it has the right to relieve for proper cause and that the Grievant was relieved and put on a quarantine leave of absence. It argues that Employees are relieved for various reasons including discipline, safety and health, and that if an Employee has been relieved and is not available, the Employee is not to be paid.

It emphasizes that it did not cancel or reschedule the shift. It considers that Grievant was not on layoff. Rather it considers that since he was quarantined he was not available to work the shifts for which he was scheduled. In its view Article Five Section C (1) (c) is not a make whole provision but rather to penalize the Company if it cancels shifts or reschedules them with little warning. It points to an explanatory letter stating "If a shift is canceled after the schedule is posted, an Employee shall be paid for the canceled shift. Such shift will be used for the purpose of calculating overtime." It sees this as evidence that Section C (1) (c) applies to cancellation of a shift, but here there was no cancellation, change or rescheduling, and the shift went forward as scheduled with other Employees filling in. It opines that this Section addresses scheduling of Employees rather than relieving Employees.

Further it regards Section C (4) as inapplicable to situations where an Employee is ill, disabled, or on leave of absence.

In the Grievant's case, the Employer submits that he was not paid because he had been relieved and was unavailable for work. It notes the absence of similar grievances on behalf of other Employees similarly situated, which it views as supporting its interpretation of Section C (1) (c).

It relies on two arbitration decisions where Employees were relieved for anger management issues or sent home by the Plant Nurse, and in both cases were held not entitled to guaranteed pay. In its view the question is whether the Employee was relieved for proper cause.

The Company disputes any claim that there was no need for the Grievant to be quarantined, in view of his admitted exposure to the virus and in keeping with its duty to protect other Employees. It urges that he should not be entitled to payment simply because he was "lucky" enough to have had his exposure to the virus discovered after the schedule was posted.

It asks that the grievance be denied.

Analysis and Conclusions

Article Five Section C (1) (c), if interpreted as strictly and literally as urged by the Union, would amount to money in the bank for every Employee once his or her shift was scheduled. The Union notes that unlike Section 4 of this same Article, Section C (1) (c) lists no exceptions at all to the rule stated. As argued by the Union, this section would require that once the shift had been scheduled, the Employee was entitled to be paid, no matter what.

This would bring about some seemingly strange results. For example, under the literal language of Article Five Section C (1) (c), if the Employee was incarcerated and could not work, he or she would still be paid. If the Employee was in the hospital and could not work, he or she would still be paid. Indeed, if the Employee simply decided not to come to work, he or she would still be paid.

This is not, however, how the section has actually been applied by the Parties. According to undisputed testimony, Employees who were on the schedule but did not work because of disciplinary suspensions, report offs, and absenteeism have never been paid under Article Five Section C (1) (c). Apparently no protests have been filed in such situations, and thus it appears that the Union acquiesces that Employees are not entitled to payment under such circumstances.

Even where the literal language of an agreement is susceptible of a different interpretation, the most reliable guide to the intended meaning is often how the Parties themselves have applied the language. In this situation, the Parties' conduct betokens a mutual acceptance that at least in some circumstances where Employees have been scheduled but do not in fact work the scheduled shifts, the Employees are not entitled to payment for the scheduled shifts. The common thread appears to be not only that the Employee does not work, but also that the Employee is not available to work the scheduled shifts. That unavailability apparently must result from factors specific to the Employee. Thus if the Employee is available to work but the work itself is unavailable, for example because of lack of material or because of a power failure, the Employee is presumably entitled to payment under Article Five Section C (1) (c).

With reference to the specific facts of this case, I find that Grievant Henry was unavailable to work his scheduled shifts due to exposure to the COVID virus. In this regard I note that unavailability to work is not the same as unwillingness to work. Grievant Henry was apparently willing to report to work as scheduled if permitted to do so by the Company. Nonetheless, the Company reasonably and properly concluded that permitting him to do so would pose an undue risk to other Employees, in contravention of its duty to provide

a safe and healthful workplace. Although the Grievant was willing to work, an Employee on disciplinary suspension is also willing to work, but in both cases the Employee is unavailable for work.

It is apparent that the Company did not permit Grievant Henry to work the originally scheduled shifts because it regarded him as unavailable in view of his medical status, rather than because of exigencies unrelated to his specific situation such as a power failure. In this case the Company did use other Employees who were in fact available, to cover the scheduled shifts.

As the Company correctly observes, it did not change the schedule for the MTEs since it filled the slots to which the Grievant was originally assigned with other MTEs, presumably at overtime. When an Employee is unable to attend work on his scheduled date, it is the Employee and not the Company, who is changing the schedule.

To summarize the above, where an Employee is scheduled to work certain shifts but does not in fact work because of unavailability for work due to factors specific to the Employee, the Employee is not entitled to payment under Article Five Section C (1) (c). I therefore conclude that the current grievance should be denied.

This conclusion is in keeping with prior arbitration decisions under the agreement. In U.S. Steel Corp. Keetac Plant, Case No. USS-47,933 (2017) and U.S. Steel Tubular Products, Case No. USS-47,132 (2012), Employees who were "scheduled" to work but were reasonably precluded from doing so because they posed a risk to fellow Employees (in one case because of psychological questions and in the other because of a risk of infection) were not entitled to be paid for the time missed. I note that these cases arose under the full work guarantee of Article Five Section C (4) or the earlier full week and full day guarantee of Article Five Section B (3) (b). The principle seems the same, however, that despite the guarantee to an Employee who was "scheduled to work" (Article Five Section C (4)), Employees are not entitled to that guarantee where they are precluded from work because the Company reasonably determines that they pose a risk to fellow Employees. Section C (4), unlike Section C (1) (c) does specify certain exceptions, but the situations covered by the grievances in the prior cases were not among the exceptions stated. Nonetheless, the holdings were that the Employee was not entitled to compensation despite the guarantee for "scheduled" work. The conclusion seems equally applicable to the current case that a scheduled Employee is not entitled to any pay guarantee where the Employee is deemed unavailable for work because he or she poses a health and safety risk to other Employees.

Award

The grievance is denied.

Issued September 26, 2021

Matthew M Franckiewicz