

**AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL**

In the matter of arbitration between:

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS

-and-

DELTA BECKWITH ELEVATOR COMPANY

Case Number: 11 300 03112 02

AWARD OF ARBITRATOR

- I. The Company violated a longstanding part practice when it failed to allow some IUEC Local 4 members holiday pay for Columbus Day in 2002. The employees who were entitled to this holiday pay pursuant to the longstanding past practice must be made whole for the holiday pay denied them for Columbus Day in 2002.
- II. It was a violation of the 2002 - 2007 Master Agreement for Local 4 to direct its members to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks. Local 4 is instructed to cease and desist from directing its members to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks.

Robert M. O'Brien, Arbitrator
May 10, 2003

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INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS

-and-

DELTA BECKWITH ELEVATOR COMPANY

AAA Case No. 11 300 03112 02

Grievance:

- (1) Employees not paid for the Columbus Day Holiday in 2002
- (2) Local 4's directed employees to turn off or disable communication devices during their unpaid lunch breaks

STATEMENT OF THE ISSUE

At the hearing the parties agreed to two issues:

1. Whether the Company violated Article VI, Paragraph 2., of the collective bargaining Agreement, past practice and/or the Local Expense Agreement by failing to pay the Columbus Day Holiday to some IUEC Local 4 Members?

If so, what shall be the remedy?

2. Whether the Union's directive to employees to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks violated the parties' collective bargaining Agreement?

If so, what shall be the remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE II Recognition Clause

- Par. 1.** The Union claims and the Employer acknowledges and agrees that the Union has supplied proof that a majority of its Elevator Constructor Mechanics, Elevator Constructor Helpers and Elevator Constructor Apprentices have authorized the Union to represent them in collective bargaining with the Employer.
- Par. 2.** The Union recognizes that it is the responsibility of the Company in the interest of the purchaser, the Company and its employees to maintain the highest degree of operating efficiency and to continue technical development to obtain better quality, reliability, and cost of its product provided, however, that this provision is not intended to affect the work jurisdiction specified in Article IV and other Articles of the Agreement.

ARTICLE VI Holidays

- Par. 1.** The following shall be designated as paid holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, the Friday after Thanksgiving Day and Christmas Day.
- Par. 2.** In addition, each local may retain established unpaid holidays already agreed upon by past procedure or observed by local building trades councils or declared by State or National Government. Any new Federal holidays such as President's Day and Columbus Day are not to be considered as paid or unpaid holidays unless previously celebrated by the parties to this Agreement.

ARTICLE IX Contract Service

- Par. 1.** Contract Service is hereby defined as any contact obtained by the Company for regular examination or care of apparatus enumerated in Article IV and Article IV (A) of this Agreement and general repairs as indicated in Article VIII, Par. 2 for a period of not less than one (1) month. Contact Service Work shall be exclusively performed by Elevator Constructor Mechanics, Elevator Constructor Helpers and Elevator Constructor Apprentices....
- Par. 3.** It is agreed the regular working day shall consist of eight (8) consecutive work hours, with an unpaid lunch period, between 6 a.m. and 6 p.m., five (5) days per week, Monday to Friday, inclusive....
- Par. 8.**
 - (a) Employees engaged in contract service work agree they will respond to call-backs outside of their regular work hours. The Company, the local union, and the employees shall meet and cooperate in establishing a callback system, which will cover such issues as a list of employees available on

designated dates to respond to overtime call-backs, the number of employees on call-back at any given time, replacements for vacations and holidays, and trading of on-call duty....

MEMORANDUM OF AGREEMENT

This will confirm that during the negotiations for the collective bargaining agreement between the Company and the IUEC to be effective July 9, 2002, the parties agreed to the following....

- b) Employees on contract service shall be required to carry and use beepers or any other designated communication devices that permit them to be contacted and informed of an emergency call while the employee is on the way to work at the beginning of the work day and while the employee is on the way home from work at the end of the work day.

AGREEMENT ON EXPENSES

Local Union No. 4

International Union of Elevator Constructors

AGREEMENT made the 21st day of December, 1981 by and between Local Labor Committee of the National Elevator Industry, Inc., and Local Union No. 4 of Elevator Constructors for the purpose of establishing expenses allowances and rates for automobile mileage.

This Agreement becomes effective December 21, 1981, and shall remain in effect for a period of thirty (30) months, continuing thereafter as long as satisfactory to both parties. Sixty (60) days notice in writing shall be given by either party of their desire to change the Agreement and such written notice shall constitute cause for meeting of both parties....

Holidays

October

Columbus Day - All States

Except Maine, Connecticut

BACKGROUND

The International Union of Elevator Constructors (hereinafter referred to as IUEC or the Union) represents Elevator Constructor Mechanics, Helpers and Apprentices at most of the elevator and repair companies throughout the United States. These employees construct, repair, modernize and maintain elevators and escalators.

For many years, the major national elevator companies were represented in collective bargaining by the National Elevator Industry, Inc. (hereinafter referred to as NEII), a multi-employer bargaining association. NEII and the Union negotiated a series of collective bargaining agreements that were commonly referred to as Standard Agreements. These agreements were usually for a period of five (5) years. Smaller elevator companies signed short form, or "me too" agreements that for the most part replicated the Standard Agreement.

In 2002, the NEII did not represent the national elevator companies in contract negotiations. Rather, the IUEC negotiated directly with the four major elevator companies (Thyssen Krupp,

Kone, Schindler and Otis) beginning in February 2002. They reached a common contract, known as the Master Agreement that was effective from July 9, 2002 to July 8, 2007.

North American Elevator Services (hereinafter referred to as NAES) owns several smaller elevator companies including the Delta Beckwith Elevator Company (hereinafter referred to as the Company or Delta Beckwith). The Company was former as a result of a merger in 1998 between the Delta Elevator Services Corporation (hereinafter referred to as Delta) and the Beckwith Elevator Company (hereinafter referred to as Beckwith).

NAES is a subsidiary of United Technologies, Inc. With minimum negotiations, NAES and the Union adopted the 2002 - 2007 Master Agreement that IUEC had negotiated with the four major national elevator companies. In fact, according to the President of the IUEC, negotiations were conducted over the telephone on one day. It is undisputed that paid holidays were not discussed during that telephone conversation. NAES adopted the 2002 - 2007 Master Agreement, which added Veterans' Day as a paid holiday.

Local Union No. 4 of the International Union of Elevator Constructors (hereinafter referred to as Local No. 4) represents approximately 180 employees at Delta Beckwith. Some 35 to 40 of these employees work in the field maintaining and repairing elevators and escalators. These contract service employees are assigned to the Company's approximately 40 service routes.

Delta Beckwith receives about 50 calls a day from customers reporting problems with their elevators. Most of these calls occur during regular service hours (8:00 a.m. to 5:00 p.m.). Approximately five (5) calls a day involve emergencies. Many of the Company's service contracts require it to respond to elevator shut downs within one (1) hour. Contract service employees are provided Nextel direct connect telephones and pagers to ensure that they can be reached to respond to service calls, so-called "*callbacks*," from Delta Beckwith customers. The Company requires its contract service employees to keep these electronic communication devices on at all times during the working day.

The Standard Agreements negotiated by the NEII and the Union allowed local unions to negotiate special conditions, such as Local Transportation and Expense Agreements, provided that the wage rate in the Standard Agreement was not changed by any local negotiations. In 1981, Local 4 and the NEII negotiated an *Agreement on Expenses* that became effective on December 21, 1981. The 1981 *Agreement on Expenses* addressed local conditions such as mileage rates, parking reimbursement and travel zones.

The 1981 *Agreement on Expenses* also enumerated certain holidays to which Local 4 members were entitled depending in which New England state they were working. The Standard Agreements designated certain holidays for which employees were paid. The Standard Agreements also allowed local unions to retain established unpaid holidays already agreed upon by past procedures or observed by local building trades councils or declared by State or National Governments.

Local 4 retained the unpaid holidays set forth in the 1981 *Agreement on Expenses*. That Agreement could be changed with 60 days' written notice by either party. There is no evidence in the record that either party ever served such notice. Therefore, the 1981 *Agreement on Expenses* was in full force and effect when the current Master Agreement became effective on July 9, 2002.

Although the additional holidays which the Standard Agreements allowed local unions to retain were to be unpaid some employees of Delta and, to a lesser extent, some employees of Beckwith were, in fact, paid for some of these additional holidays, including Columbus Day. The Company was able to identify approximately 21 Local 4 employees who were paid for the Columbus Day holiday. According to the Union, some of these employees were granted paid holidays as an inducement to come to work with Delta or Beckwith; others were given paid holidays after

achieving ten (10) years of service with Delta; and others were guaranteed 40 hours of pay a week by either Delta or Beckwith when they were hired and thus were paid for the holiday.

On May 30, 2002, the Company sent IUEC General President Dana Brigham a letter that was referenced "*MOA Expenses and Delta Beckwith Holidays*." Among other subjects, the Company informed the Union President that it had determined that certain Local 4 employees were receiving paid holidays in addition to the paid holidays provided by the national Standard Agreement. It declared that those additional paid holidays would be discontinued with the new national agreement.

The Company's May 30, 2002 letter was received at the IUEC General President's office where an office employee filed it. General President Brigham was unaware of the letter until November 2002, some five months later, when a dispute arose at Delta Beckwith over the October 14, 2002, Columbus Day Holiday.

No Local 4 employee of Delta Beckwith was paid for the October 14, 2002, Columbus Day Holiday. On October 16, 2002, Local 4 asked the Company to reconsider its decision and negotiate this matter with it but the Company declined contending that the 2002 - 2007 Master Agreement terminated all past practices. Due to the Company's refusal to compensate employees for the Columbus Day Holiday, Local 4 directed Delta Beckwith's contact service employees to turn off their communication devices during their unpaid lunch breaks. Local 4 also advised these employees to reduce their unpaid lunch breaks from one hour to one-half hour.

On November 1, 2002, the Company's contract service employees honored Local 4's directive and reduced their unpaid lunch break from one hour to one-half hour and deactivated their Company furnished communication devices during their lunch break. Delta Beckwith claims that it made several attempts to contact contract service employees around noontime on November 1, 2002, but there was no response. That afternoon, the Company obtained a Temporary Restraining Order (TRO) in Federal Court prohibiting Local 4 from instructing its members to disable their communication devices during their lunch breaks.

On October 16, 2002, the Union filed a grievance in which it contended that Delta Beckwith violated Article VI, Paragraph 2., of the 2002 - 2007 Master Agreement when it did not pay employees for the October 14, 2002, Columbus Day Holiday. The grievance came before the undersigned Arbitrator for a hearing on February 24, 2003. At the outset of that hearing the parties agreed to two issues for the Arbitrator to decide. Those issues are set forth above. Based on the extensive evidence and arguments advanced by the Union and the Company at the hearing and in their post-hearing briefs, this Arbitrator hereby renders the following decision.

FINDINGS AND OPINION

- I. Whether the Company violated Article V, paragraph 2 of the collective bargaining Agreement, past practice and/or the Local Expense Agreement by failing to pay the Columbus Day Holiday to some IUEC Local 4 members?

(A) **Columbus Day Holiday**

There is no question that Columbus Day is not one of the eight paid holidays set forth in Article VI, paragraph 1., of the 2002 - 2007 Master Agreement. The Union contends that it was a paid holiday for Local 4 employees pursuant to the second sentence of Article VI, paragraph 2., but this Arbitrator respectfully disagrees.

The plain meaning of the second sentence in Article VI, Paragraph 2., is that if any holiday becomes a new Federal holiday it is not to be considered a paid holiday unless it was previously celebrated as a paid holiday by the parties to the Master Agreement. With some exceptions to be discussed below, Local 4 employees were never paid for Columbus Day. Therefore, Columbus

Day did not become a paid holiday for Local 4 employees pursuant to Article VI, Paragraph 2., when it became a new Federal holiday.

Nor did Local 4's *Agreement on Expenses* state that Columbus Day was a paid holiday. Rather, it was an unpaid holiday pursuant to Article VI, Paragraph 2., which allowed local unions to retain *unpaid* holidays that were already agreed upon by past procedure or observed by local building trades councils or declared by State or National Governments. The evidence is uncontroverted that Columbus Day was never celebrated as a paid holiday for most Local 4 members. Therefore, it was an unpaid holiday for these employees in 2002.

While Columbus Day was never a paid holiday for the majority of Local 4 employees at the Company, it was a paid holiday for approximately 22 members of Local 4. Prior to 1998, Delta Elevator Service and, to a lesser extent, Beckwith Elevator Company did compensate some of their Local 4 employees for the Columbus Day Holiday for a myriad of reasons. Some of these employees were paid for the holiday as part of a 40 hour guaranteed workweek. Others were granted this benefit when they acquired 10 years of service at Delta. Still other Local 4 employees were paid for the holiday as an inducement for them to come to work at either Delta or Beckwith. And one employee was allowed this benefit when he agreed to transfer from maintenance to adjusting duties.

When Delta and Beckwith merged in 1998, these employees continued to be paid for Columbus Day until 2002 when the Company discontinued this benefit. For these employees, a paid holiday for Columbus Day became a term and condition of their employment.

That this paid holiday was not a benefit negotiated on behalf of these employees by Local 4 is immaterial, in this Arbitrator's opinion. Delta Beckwith and its predecessors willingly compensated these employees for the Columbus Day Holiday for a considerable period of time. Indeed, some of them had been paid for Columbus Day continuously since the 1970's. This longstanding benefit became a term and condition of their employment even though it was not rooted in contract negotiations between Local 4 and their employers.

(B) The May 30, 2002 Letter

The Company argues that even if a past practice existed regarding holiday pay, for Columbus Day, the May 30, 2002, letter that Regional General Manager Belcher sent to IUEC General President Dana Brigham served to terminate any such practice effective with the expiration of the predecessor collective bargaining agreement on July 8, 2002.

It is unclear from the May 30, 2002, letter precisely what Regional Manager Belcher intended when he sent this letter to IUEC's General President. The letter referenced a "*MOA Expenses and Delta Beckwith Holidays*." There was a line for Mr. Brigham's agreement. However, Mr. Brigham never signed the document.

One could infer from this that the letter was a proposal by the Company to discontinue additional paid holidays beyond those in the Standard Agreement. If that was Mr. Belcher's intent then the General President would be required to concur by affixing his signature to the document and it would be appended to the 2002 - 2007 Master Agreement in the same manner that some nine other bilateral agreements were incorporated into the Master Agreement. That did not happen, however, and no such Memorandum of Agreement was appended to the Master Agreement.

Mr. Belcher did not testify in this arbitration proceeding so we do not know his subjective intent. It is undisputed that he did not have any discussions with General President Brigham about the letter before the *Master Agreement* was executed on or about July 9, 2002. In fact, General President Brigham was unaware of the document until November 2002, after the disagreement arose between Local 4 and Delta Beckwith over pay for the Columbus Day Holiday on October 14, 2002.

Assuming that the May 30, 2002, letter was intended to discontinue the practice of compensating some Delta Beckwith employees holiday pay in addition to the paid holidays set forth in the Master Agreement the letter was ineffectual in terminating this practice, in this Arbitrator's opinion, since it was sent to the wrong party.

The practice of allowing some Delta Beckwith employees holiday pay in addition to the paid holidays provided by Article VI, paragraph 1., of the Master Agreement had nothing to do with the International Union of Elevator Constructors. Rather, it was simply a local practice that evolved at both Delta and Beckwith companies since the 1970's. The practice was continued when these two companies merged in 1989. Since the practice was limited to some Local 4 employees it was Local 4 that the Company was obligated to notify if it wished to discontinue allowing these employees paid holidays in addition to those required by the Master Agreement.

That Local 4 was not notified by the Company of its desire to terminate paid holidays in addition to those provided by the Master Agreement is undisputed. There were no local option negotiations between Local 4 and Delta Beckwith in 2002 where this matter could have been discussed. Local 4 was never afforded the opportunity to respond to the Company's desire to eliminate additional paid holidays until after the Columbus Day Holiday on October 14, 2002.

For all the foregoing reasons, this Arbitrator finds that the Company violated a longstanding past practice when it failed to allow some IUEC Local 4 members holiday pay for Columbus Day in 2002. Therefore, the employees who previously had been paid for this holiday pursuant to the longstanding past practice must be made whole for the holiday pay denied them for Columbus Day in 2002.

II. Whether the Union's directive to employees to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks violated the parties' collective bargaining Agreement?

A Memorandum of Agreement incorporated into the 2002 - 2007 Master Agreement requires employees on contract service to carry designated communication devices while on the way to work at the beginning of the workday and while on the way home at the end of the workday. However, no provision in either the Master Agreement or the *Local 4 Agreement on Expenses* specifically requires contract service employees to keep designated communication devices activated during their unpaid lunch breaks. Nevertheless, it is this Arbitrator's opinion that it was management's prerogative to require its contract service employees to keep their designated communication devices on at all times during their regular working day so that they could be contacted to respond to callbacks.

In Article II, paragraph 2., of the Master Agreement the Union recognized that it was management's responsibility to "[m]aintain the highest degree of operating efficiency." Implicit in this responsibility is the Company's obligation to promptly respond to callbacks from customers at all times, including times when contract service employees are on their lunch breaks.

It is unnecessary to decide whether the July 28, 1992, grievance settlement between the IUEC General President and the NEII Executive Director imposed an obligation on all IUEC employees nationwide to utilize communication devices whenever required to do so by their employer since it was a well established practice at Delta Beckwith for contract service employees to keep their designated communication devices on during their lunch breaks.

Like pay for the Columbus Day Holiday for some Delta Beckwith employees the practice of contract service employees keeping their designated communication devices active during their lunch breaks became a term and condition of their employment that could not be unilaterally terminated.

That contract service employees are not compensated for their lunch breaks did not relieve them of the obligation to maintain contact with the Company during their lunch breaks to be available to respond to callbacks. The Company must promptly respond to service calls from its customers for obvious reasons. It is immaterial that there were alternatives available to the Company to respond to callbacks from customers. It was management's prerogative to require contract service employees in the field to respond to callbacks during the regular workday, including calls received during the contract service employees' lunch breaks.

For all the foregoing reasons, this Arbitrator finds that it was a violation of the 2002 - 2002 Master Agreement for Local 4 to direct its members to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks. Local 4 is instructed to cease and desist from directing its members to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks.

AWARD

- I. The Company violated a longstanding past practice when it failed to allow some Local 4 IUEC members holiday pay for Columbus Day in 2002. The employees who were entitled to this holiday pay pursuant to the longstanding past practice must be made whole for the holiday pay denied them for Columbus Day in 2002.
- II. It was a violation of the 2002 - 2007 Master Agreement for Local 4 to direct its members to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks. Local 4 is instructed to cease and desist from directing its members to turn off or otherwise disable electronic communication devices during their unpaid lunch breaks.

Robert M. O'Brien, Arbitrator

Dated: May 10, 2003