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**In the Matter of the Arbitration between**

METAL WORKERS UNION LOCAL 1, **OPINION AND AWARD**

 **OF THE ARBITRATOR**

 - and -

 Case No. 123

PRECISE SIGNS

Re: Wage & Fringe Benefit Delinquency

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**APPEARANCES:**

For the Union:

David Smith, Esq..……………….Attorney

Dan D.……….………………….President/Business Manager, Local 1

George S ……………………….Business Agent, Local 1

Jeff W ………………………….Grievant

John A .………………………...Grievant

Stephen C ………………………Grievant

For the Employer:

 Matthew Peters, Esq. ………………….Attorney

 Jimmy C. ………………......................Co-Owner, Prescise Signs

 Metal Workers Union Local 1 (“Union”) and Precise Signs Co. (“Precise” or “Employer”) are parties to a collective bargaining agreement (“CBA” or “Agreement”) that provides for the binding arbitration of grievances arising during the term of the Agreement. In accordance with the Agreement and with the consent of both parties, the undersigned was designated the Arbitrator to hear and determine a grievance regarding the Employer’s alleged failure to properly pay wages and fringe benefit contributions to and on behalf of four Local 1 members employed by Precise, for certain periods of time in May and June of 2019, during which time those employees were directed by the Union to stop working.

 A hearing was held in this matter on September 26, 2019, at which time the parties appeared with their witnesses and proof. Full opportunity was afforded the parties to be heard, offer evidence and argument and to examine and cross examine witnesses. Thereafter, the parties were afforded the opportunity to submit post hearing briefs in support of their respective positions.

**ISSUE**

 The issue to be determined by the Arbitrator is as follows:

Did the Employer, Precise Signs violate Article XI, section 1 of the CBA when it failed to pay its employees for lost wages and benefits during a work stoppage occasioned by the Employer’s failure to pay fringe benefit contributions as required by the CBA?

**RELEVANT CONTRACT LANGUAGE**

ARTICLE XI, Sec. 1:

[a]ll payments to the Insurance Fund, the Annuity Fund, the Apprentice Training Fund, the International Training Institute and the Scholarship Fund, except where otherwise indicated, are to be made no later that the tenth (10th) day of each month for the preceding month.

. . .

Should the Employer fail to make such payments within the required time, the Union shall have the right to take the same steps to enforce payment as it would in case of a failure to pay wages, including the right to order the employees to stop working. In such case, the employees shall, on their returning to work, be paid by the Employer for the time lost by them during the work stoppage. Additionally, if legal action is necessary to enforce the payment of contributions to the Funds, the Employer shall pay the sums set forth by the “Employee Retirement Income Security Act of 1974” as liquidation damages.

ARTICLE VII, Sec. 3(c):

[t]here shall be at least a twenty four (24) hour notice given to the union of any layoff, excluding Saturdays, Sundays and Holiday, except for conditions beyond the control of the Employer and/or Act of God.

**STATEMENT OF THE CASE**

 At all relevant times, the Union and Precise were parties to a collective bargaining agreement which required Precise to make fringe benefit contributions on behalf of its employees covered by the terms of the CBA.

 By letter dated May 9, 2019, John N., President of the International Association of Metal Workers (the “International”), advised Dan D., President and Business Manager of Local 1, that Precise had become delinquent in its contributions to the National Pension Fund, as well as other national fringe benefit funds, as applicable. (Union Ex. 1) Mr. N. advised that despite the National Funds efforts to resolve the matter with Precise, Precise remained delinquent in its obligations to the National Funds. Accordingly, Mr. N. instructed Mr. D, that in order to assist the National Funds in recovering these delinquent contributions, Local 1 was to withdraw it members working for Precise until such time as Precise resolved its delinquency with the National Funds. (Id.)

 Thereafter, in accordance with Mr. N.’s direction, and pursuant to Article XI, sec. 1 of the CBA, Local 1 directed its members employed by Precise that they were to stop working on the next business day, May 12, 2019. Four members employed by Precise were directed to report to the work site, but sit out and not work. Those members are as follows: Jeff W., John A., Steve C. and Robert P.

 Jeff W. was employed by Precise as a licensed sign hanger since 2002. He was also the foreman of the shop. He reported to work each day during the periods May 12 through 16, 2019 and May 19 through 23, 2019, but sat out. He testified that he was physically present on each of those days and that each of his three co-workers, John A., Steve C. and Robert P. reported to work on each of those days and also sat out. He testified that by text message on May 16, 2019, Precise’s co-owner Bob B. notified him that the “guys will be paid for the time you guys are sitting outside the shop.” (Union Ex. 3) Precise failed to pay W. wages or make fringe benefit fund contributions on behalf of W. for the ten days or for the Memorial Day holiday, during which W. reported to work and sat out.

 John A. was employed by Precise since August 2013 and is the nephew of the Precise’s co-owner, Jim C. John A. reported to work and sat out for ten days. He testified that he was not paid for the Memorial Day holiday, as provided for in the CBA. Precise failed to pay John A. wages or make fringe benefit fund contributions on his behalf for the ten days, or for the Memorial Day holiday, during which he reported to work and sat out.

 Steve C. was employed by Precise since August 2013. Steve C. testified that he reported to work and sat out for eighteen days and one holiday. He testified that every day he reported to work and sat out, his co-worker, shop steward Robert P. also reported to work but sat out. Precise failed to pay Steve C. wages or make fringe benefit fund contributions on his behalf for the eighteen days, or for the Memorial Day holiday, during which he reported to work and sat out.

 Robert P. was employed by Precise and reported to work, but sat out twenty days. He was not paid for one holiday. George S., Business Agent for Local 1, testified that he spoke with Robert P. every day in issue to confirm that each of Local 1’s members were reporting to the work site and sitting out, as directed by the Union. George S. testified that Robert P. reported to work but sat out a total of twenty days. He further testified Robert P. was not paid for one holiday. Precise failed to pay Robert P. wages or make fringe benefit fund contributions on his behalf for the twenty days, nor for the Memorial Day holiday, during which he reported to work and sat out.

 By grievance dated May 20, 2019, Local 1 grieved the Employer’s failure to pay its employees and its further failure to make fringe benefits fund contributions on their behalf, for the periods of time during which, pursuant to Article XI, sec.1, those employees reported to work, but sat out.

**UNION’S POSITION**

 Local 1 asserts that Precise’s failure to make fringe benefit contributions to the national funds, and its further failure to respond to the International’s communications regarding its delinquencies, prompted the International to direct Local 1 to have its members sit out until the Employer‘s delinquencies were cured. Local 1 appropriately directed the four employees in issue to report to work but sit out. Further, pursuant to Article XI. Sec. 1, the Employer was obligated to pay those employees wages and to make fringe benefit contributions on their behalf for the periods of time those employees reported to work but sat out. The Employer failed to do so, in violation of the CBA. Accordingly, the Union asks that the Arbitrator find that the Employer violated the CBA and direct the Employer to pay wages and make fringe benefit contributions on their behalf for the periods of time during which those employees reported to work but sat out.

 Local 1 argues that the Employer has acknowledged that it is obligated to pay these employees and make fringe benefit contributions on their behalf, as evidenced by co-owner Robert B.’s text message to Mr. W., wherein he states that the “guys” will be paid for the time they are sitting outside the shop.

 As to the Employer’s argument that its financial troubles were so bad that it was forced to shut down in May 2019, co-owner Jim. C.’s testimony at the hearing belies this assertion. Jim C. admitted that Precise is still open for business. Nor did the Employer lay off these employees. Article VII, sec. 3(c) of the CBA requires that twenty four hour notice be given to the Union before a lay off may take place. The Employer never notified Local 1 that a layoff was to take place.

 For all the foregoing reasons, the Union asserts that Precise violated Article XI, sec. 1 of the CBA and demands that the Arbitrator direct the Employer to make the following payments to and on behalf of the four grievant:

**Jeff W.**: 10 days plus one holiday for a total of 11 days.

 Wages: 11 days x 7 hours per day, at a wage rate of $49.20 per hour: $3,788.44

 Fringe benefit contributions: 11 days x 7 hours per day, at contribution rate of $44.14 per hour: $3,398.78

**John A.**: 10 days plus one holiday for a total of 11 days.

 Wages: 11 days x 7 hours per day, at a wage rate of $44.20 per hour: $3,430.40

 Fringe benefit contributions: 11 days x 7 hours per day, at contribution rate of $44.14 per hour: $3,398.78

**Steve C.**: 18 days plus one holiday for a total of 19 days.

 Wages: 19 days x 7 hours per day, at a wage rate of $44.20 per hour: $5,878.62

 Fringe benefit contributions: 19 days x 7 hours per day, at contribution rate of $44.14 per hour: $5,870.62

**Robert P.**: 20 days plus one holiday for a total of 21 days.

 Wages: 21 days x 7 hours per day, at a wage rate of $44.20 per hour: $6,497.40

 Fringe benefit contributions: 21 days x 7 hours per day, at contribution rate of $44.14 per hour: $6,488.58

 Total: $38,724.56

**EMPLOYER’S POSITION**

 The Employer asserts that it did not violate Article XI, sec. 1 of the CBA because the employees in question had been laid off due to its dire financial situation. Accordingly, the Employer was not obligated to pay the employees in question wages or to make fringe benefit contributions on their behalf. Co-owner Jim C. testified that he advised shop steward Robert Robert P. on two occasions, during the week of April 28, 2019 and again during the week of May 2, 2019, that the company would be going out of business due to economic exigencies. Thus, the Employer asserts, it fulfilled its contractual obligation, pursuant to Article VII, sec. 3(c) to notify the Union at least twenty four hours before a layoff.

 Further, the Employer argues that because Robert P. did not testify, Jim C.’s testimony on this issue was uncontradicted and must therefore be accepted as true. In the Employer’s view, notice to the Union shop steward was appropriate notice to the Union, as called for by Article VII, sec. 3(c).

 In the alternative, should the Arbitrator sustain the grievance, the Employer asserts that no recovery should be directed on to be paid to or on behalf of John A. because he got work at Landmark Signs the week of May 12, 2019. Likewise, as to Robert P., because he failed to testify or submit a sworn statement regarding his efforts to obtain other work or his support of the call out, no recovery should be made to or on his behalf.

 For all the foregoing reasons, Precise maintains that it did not violate the CBA and demands that the Arbitrator dismiss the grievance, in its entirety.

**OPINION**

 The gravamen of the Union’s claim in this case is that these men were properly instructed to sit out due to the Employer’s continued failure to make fringe benefit contributions to the national funds and are entitled, pursuant to Article XI, sec. 1 of the CBA to be paid by the Employer for the time lost by them during the work stoppage. Article XI, sec. 1 states:

Should the Employer fail to make such payments within the required time, the Union shall have the right to take the same steps to enforce payment as it would in case of a failure to pay wages, ***including the right to order the employees to stop working.*** In such case, the employees shall, on their returning to work, be paid by the Employer for the time lost by them during the work stoppage.

(Emphasis added.)

 I agree. The Union had the right under Article XI, sec. 1 to enforce Precise’s obligations to the national funds in the same manner as it would enforce a failure to pay its employees wages: by directing its members to stop working until the Employer made good on its obligations or until they returned to work. Further, pursuant to the explicit language of the CBA, on the employees return to work, the Employer was required to pay such employees for the time those employees lost during the work stoppage.

 I credit the uncontradicted testimony of the Union’s witnesses as to the number of days each employee sat out before returning to work with other employers. As to the Employer’s position that no recovery should be made on behalf of either John A. or Robert P. because, as to John A. he allegedly returned to work during the week of May 12, 2019 and as to Robert P. that he failed to testify as to the days he remained on call out or when he returned to work, and thus no evidence of damage sustained by these employee has been presented, I reject the Employer’s argument. John A. credibly testified that he lost ten days of work and one holiday while on call out. He further credibly testified that he subsequently returned to work at Landmark Signs. John A. sustained damages and is entitled to recover for his lost time.

 As to Robert P., I credit the testimony of Business Agent George S. that he spoke with shop steward Robert P. on each of the days Robert P. sat out to confirm not only Robert P.’s compliance with the direction to sit out, but also to monitor the compliance with the Union’s directive by his three co-workers. Further, both Jeff W. and Steve C. credibly testified that Robert P. was in fact present on each of the days he reported to work and sat out.

 In refuting the Union’s demand for lost wages and fringe benefit contributions, the Employer relies primarily on its assertion that the employees had been laid off prior to May 12, 2019, when the work stoppage began and thus were not entitled to lost pay or fringe benefit contributions. In the Employer’s view, Jim C.’s allegedly uncontradicted testimony, must be credited as true. I disagree. First, I note that Jim C. testified that he discussed the fact that due to economic exigencies, the company would shortly go out of business with shop steward Robert P.. In the Employer’s view, these discussions constituted notice to the Union of a layoff, as required by Article VII, sec. 3(c). Even if I were to credit the Employer’s position that its “notice” to shop steward Robert P. constituted “notice” to the Union (which I do not), I find that Jim C.’s discussions with Robert P. were too vague as to adequately notify the Union that a layoff was scheduled to occur.

 Moreover, Jim C.’s testimony was not uncontradicted. The text messages sent by Jim C.’s co-owner, Robert B. to Jeff W., on May 16, 2019 (confirmed by Jeff W.’s testimony at the hearing), assuring Jeff W. that the “guys” would be paid for the time they spent “sitting outside the shop” confirms that the Employer understood that it was required to pay its employees for time lost due to a work stoppage and implicitly acknowledges that the employees were engaged in a work stoppage pursuant to the CBA. This contradicts Jim C.’s assertion that his discussions with shop steward Robert P. regarding “closing the business” served as notice to the Union that a layoff was scheduled to occur. Notably, Robert B.’s text message to Jeff W. was sent after Jim C. allegedly notified the Union regarding a layoff.

 Finally, I note that despite Jim C.’s characterization of his discussions with Robert P. regarding closing the business as constituting “notice” of a layoff, he also testified that the Employer remains in operation and continues to conduct business. Given that the Employer did not in fact close its business, I further find that Jim C.’s discussions with shop steward Robert P. regarding closing the business did not provide then Union with actual notice that a layoff would occur. Accordingly, not only did the Employer fail to provide notice of a layoff to the Union, but I further find that no layoff actually occurred.

 For all of the foregoing reasons I find that Precise violated Article XI, sec. 1 of the CBA when it failed to pay wages and make fringe benefit fund contributions for the periods of time each of its employees engaged in a contractually permitted work stoppage. As to damages, I find that Precise failed to pay wages and make benefit fund contributions to/for Jeff W., John A., Steve C., and Robert P. for time lost during the work stoppage in the total amount of $38,724.56. The total amount of $38,724.56 represents lost wages and fringe benefit contributions due in the following amounts:

 1. Wages:

 a) Jeff W.: 11 days x 7 hours per day, at a wage rate of $49.20 per hour, in the amount of $3,788.44

 b) John A.: 11 days x 7 hours per day, at a wage rate of $44.20 per hour, in the amount of $3,430.40

 c) Steve C.: 19 days x 7 hours per day, at a wage rate of $44.20 per hour, in the amount of $5,878.62

 d) Robert P.: 21 days x 7 hours per day, at a wage rate of $44.20 per hour, in the amount of $6,497.40

 2. Fringe benefit contributions:

 a) Jeff W.: 11 days x 7 hours per day, at a contribution rate of $44.14 per hour, in the amount of $3,398.78

 b) John A.: 11 days x 7 hours per day, at a contribution rate of $44.14 per hour, in the amount of $3,398.78

 c) Steve C.: 19 days x 7 hours per day, at a contribution rate of $44.14 per hour, in the amount of $5,870.62

 d) Robert P.: 21 days x 7 hours per day, at a contribution rate of $44.14 per hour, in the amount of $6,488.58

**AWARD**

On the substantial and credible evidence of the case as a whole, the Arbitrator finds:

 1. Precise violated Article XI, sec. 1 of the CBA when it failed to pay the grievants, Jeff W., John John A., Steve Steve C. and Robert Robert P. wages and benefits for time lost during a work stoppage occasioned by the Employer’s failure to pay fringe benefit contributions as required by the CBA.

 2. For all the foregoing reasons and on the substantial and credible evidence of the case, the Arbitrator hereby Awards and Directs that Precise is to pay wages and make fringe benefit contributions to Local 1, on behalf of its members, in the total amount of $38,724.56, for time lost by grievants Jeff W., John A., Steve C. and Robert P. during the work stoppage occasioned by Precise’s failure to pay fringe benefit contributions as required by the CBA.

Dated: New York, NY

 November 14, 2019

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 Jane Williams, Arbitrator

STATE OF NEW YORK)

COUNTY OF KINGS)

 The undersigned under penalty of perjury affirms that he is the arbitrator in the within proceeding, and signed same in accordance with arbitration law of the State of New York.

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 Jane Williams, Arbitrator