

to the effect that "insofar as is reasonably possible and with due regard to considerations of ability, senior men *do* receive preference for available work opportunities", and that "the recurring disputes over this matter, which are reflected in the minutes, have related to questions of ability, practicality and availability and not to the basic principle involved".

That case did not involve overtime assignments, but rather a question of reshuffling the force when a furnace rebuild was postponed. Umpire Seward held that in line with the general understanding described above, the force should have been reshuffled so that the junior men were laid off, consistent with ability and physical fitness. A careful reading of the reasons for this holding, however, indicates to me that the decision really supports the Company's position in the present case more than the Union's.

Noting that the postponement of the furnace rebuild was not decided upon until Thursday noon, Umpire Seward made the following observations:

"By that time, the Umpire believes, it was no longer practical or reasonably possible to reshuffle the entire force assigned to the Friday day turn, determine who should come in and who should stay home, and get word to all of the affected employees. Under ordinary circumstances, therefore, the Umpire would hold that this was a situation in which—in line with the "practicability" qualification in the understanding—Supervision was *not obligated to reshuffle the entire Bricklayer force in order to give preference to the senior men.*"

He went on to say, however, that higher management was at fault in that case for delaying the decision on the postponement, there being no showing of any emergency or "last minute" factors. "Nothing has been shown", he said, "which would indicate that this decision could not have been made a day or two earlier—when it would still have been 'practicable' for the Bricklayer Department to readjust the Good Friday work assignments". On that limited ground, he sustained the grievances, subject to certain further discussions regarding the appropriate remedy.

Applying the principles of that decision to the present case, there are two significant points of difference in the cases, as I view them. First, there is no contention in the present

case that the need for supplementing the crew for overtime work was, or should have been, known well in advance. There was no contradiction of General Foreman Long's testimony that the need for overtime was only determined near the end of the shift.

Secondly, there was convincing evidence of a past practice of supplementing the crew, in this kind of situation, from the men working nearby. This again contrasts with the situation in Decision No. 653, where there was no suggestion of any precedent for the situation under consideration there.

(As noted earlier, I have made no independent finding on the issue of practicability in this case, due to this past practice, but it should perhaps be added that the Union's case on the merits of the practicability issue was not overly impressive, in my view.)

On the record as a whole, I think the Union has failed to establish a violation of Article II, and the grievance will therefore be denied.

DECISION

Grievance No. H-925 is denied.

CLEAN COVERALL SUPPLY CO.—

Decision of Arbitrator

In re CLEAN COVERALL SUPPLY COMPANY [St. Louis, Mo.] and LAUNDRY WORKERS INTERNATIONAL UNION, LOCAL 108, September 3, 1966

Arbitrator: Fred Witney, selected by parties

VACATIONS

—Pregnancy leave — Vacation eligibility ▶ 116.1554

Under contract granting vacations to employees "who have been continuously employed in the company's plant for a period of one year or more," and also requiring pregnant employees to take six-month leave of absence, during which "her seniority rights . . . shall not be impaired," employees who take six-month maternity leave are not entitled to vacation. Clearly expressed intention of parties is that employees must be on active payroll, "continuously employed," for period of one year, and not merely continued on seniority roster or in state of continuous service, in order to become eligible for vacations. (F. Witney)—Clean Coverall Supply Co., 47 LA 272.

Symbol ▶ indicates number under Index-Digest

Appearances: For the company—Charles Alan Seigel, attorney. For the union — William M. Nicholls, attorney.

VACATION AFTER PREGNANCY

Grievances and Contract Provisions

WITNEY, Arbitrator: — This dispute involves the vacation rights of female employees who are required to be absent from their jobs for six (6) months because of pregnancy. The Company denied their vacation privileges, and in protest against such Company action, five (5) employees filed grievances.¹ Illustrative of the

five (5) grievances is the one filed by Lurlean Brown, dated June 15, 1966.

"Off October 8 till April 4, 1966 because of pregnancy. They (the Company) told (me) that (I) did not have a vacation coming."

Similar grievances were filed by Frieda Billingsley, Jeanette Rains, Lucy Sanders, and Annie May Fuller.

Having failed to resolve the grievances in the Grievance Procedure, the parties have instituted this arbitration for their final and binding settlement.

Relevant to the dispute are the following provisions of the Labor Agreement:

ARTICLE VIII

Section 1. Employees who have been continuously employed in the Company's plant for a period of one (1) year or more, shall be entitled to receive one (1) week's vacation with pay for forty (40) hours at his or her average straight-time hourly earnings for the last five (5) weekly pay periods preceding his or her vacation. Any employee who has been laid off from work or away from work because of illness and then rehired and who would otherwise have been continuously employed for a period of one (1) year, shall be given the same consideration with respect to such vacation as an employee who has continuously worked for a period of one (1) year or more, and be entitled to a vacation as aforesaid, provided such lay off or absence because of illness does not exceed sixty (60) days during such year. . . .

ARTICLE IX

Section 2. In case of maternity, a female employee shall have the right to receive a leave of absence for six months without pay, and her seniority rights in such event shall not be impaired. Said employee will be required to vacate her job

¹ From the record it appears that vacation rights were denied other employees under the same circumstances. The parties stipulated that the decision in this case will serve as the precedent for the disposition of other grievances falling within the same category.

three months prior to delivery and will not be reinstated until three months after delivery. . . . Temporary lay-offs due to lack of work, illness of the employee or leaves of absence granted by the Company shall not constitute interruption of an employee's continuous service with the Company as such term is used in this Agreement, . . .

Basic Question

The basic question in this case is framed as follows:

Under the circumstances of this case, did the Company violate the Labor Agreement?

Background

Of the some 260 employees of the Company, the vast majority are women. For the first time, the parties agreed in the instant Labor Agreement that in the case of pregnancy, the employee shall be required to vacate her job three months prior to the delivery of the infant and shall be required to vacate her job until three months after delivery. This agreement is incorporated in Article IX, Section 2, the so-called "maternity clause."

After the execution of the instant Labor Agreement, one employee, absent because of pregnancy, was denied a vacation by the Company. The denial resulted in a work stoppage, and it terminated only after the Company agreed to pay her under protest with the understanding that the issue involved in this proceeding would be submitted to arbitration.

Hence, this arbitration is sparked by the denial by the Company of vacation benefits when an employee has vacated her job for six (6) months under the "maternity clause" of the Labor Agreement.

Parties' Arguments

On its part, the Union believes that the Company is in violation of the Labor Agreement when it refuses to grant a paid vacation to employees who have vacated their jobs under the maternity clause of the Labor Agreement. It argues that

"a maternity leave of absence is *not* an absence because of illness within the meaning of Article VIII of the contract. The Union's position (is that a maternity leave of absence) did not constitute an interruption of an employee's continuous service with the Company."

It argues further that when the maternity clause was incorporated in the instant Labor Agreement,

"it can be assumed with certainty that the effect the Company now urges it should have on Article VIII, Vacations, was not discussed. Had the difficulty

which now arises in the administration of the vacation plan, i.e., the effect interruptions of service had on such privileges, been fully explored, either the difficulty would have been eliminated or the contract would not have been executed."

However, it refers to the testimony of Smith, Secretary-Treasurer of the Union, who declared in the arbitration hearing that it was his understanding when the negotiations were concluded that the

"required maternity leave of absence would not have this effect on an employee's vacation."

In support of its position, Union Counsel cites Milwaukee Spring Company and American Machine Foundry Company.

On these grounds, the Union requests that the grievances be granted.

In contrast, the Company urges that the grievances be denied. It argues that

"it is well established that seniority rights have no correlation to vacation rights."

That is, the fact that seniority rights are not impaired because of the maternity leave of absence does not automatically qualify an employee for vacation benefits. Further, the Company argues that

"the contract here involved is clearly premised on the concept that a vacation is a reward for actual work performed. In this connection it is important to note that in the 'Vacation' clause, Article VIII, it is provided that if an employee is 'laid off from work or away from work because of illness' the employee shall be given the same consideration in determining continuous employment for vacations as an employee who 'continuously worked,' provided such layoff or absence because of illness does not exceed sixty (60) days during the vacation year." (Ibid., p. 6)

In support of the Company's position, Company Counsel cites Berg Metals Corp. and Kelly v. Montour Railroad Company.

On these grounds, the Company requests that the grievance be denied.

Evaluation of the Evidence

Construction of Article VIII

For a sound decision in this case, it is first necessary to understand the basic meaning of Article VIII, Section 1. It is this area of the Labor Agreement which establishes the vacation formula negotiated by the parties. In this provision, the parties stipulated that employees who have been *continuously employed* in the Company's plant for one year or more

shall be entitled to a week's vacation with pay. After so agreeing, the parties then tackled the problem of vacation pay eligibility for employees who do not work within the year because of being laid off or absent because of illness. If an exception were not made for these employees, absences of this sort would disqualify them for vacation pay because the first sentence of the provision speaks in terms of a worker being "continuously employed." That is, under the first sentence any break in employment could disqualify an employee if special considerations were not stipulated in the provision.

Therefore, for those employees who are not continuously employed because of illness or because of being laid off, the parties agreed that an exception should be made to the stipulation that workers must be continuously employed for a year to qualify for vacation pay. For these employees — those not continuously employed in the year because of illness or layoff — the provision states that they are to be regarded as continuously employed.

If nothing more were added to the provision, there would be no question that the grievants would be entitled to vacation pay. However, the parties placed a limitation on the duration of absence caused by layoff or illness. In language which is precise and unambiguous, the parties agreed that such absence may not exceed sixty (60) days if employees so absent are to qualify for vacation pay. There is no doubt about the clarity of the language in this respect:

"... provided such layoff or absence does not exceed sixty (60) days during such year."

Thus, what the parties agreed to is this: if an employee is absent for sixty (60) days or less because of illness or layoff within the vacation year, he or she will be regarded as continuously employed for purposes of vacation pay. However, if any such absence is longer than sixty (60) days, the employee will not be regarded as continuously employed, and, therefore, not eligible for vacation pay. Up to this point, there should be no question as to the intent of the parties or the construction of the contractual language. The language is unambiguous and unequivocal.

Absence Because of Maternity

As stated, when the instant Labor Agreement was executed, the parties stipulated in Article IX, Section 2 that

employees who are pregnant are required to take a six (6) month leave of absence. That is, they will be required to vacate their jobs three months prior to and three months after delivery. This requirement is set forth in the second sentence of Section 2. In the first sentence of Section 2, the parties agreed that in cases of maternity the employees may take

"a leave of absence for six months."

Apparently, this was incorporated in the previous Labor Agreements, and the innovation of the current contract is that such leaves of absence are compulsory upon the mother.

If we read both sentences together, the absence for maternity is a *leave of absence* for maternity purposes. Though the second sentence speaks in terms of the vacating of the job, the first sentence speaks in terms of a leave of absence; and since the second sentence is the newly adopted language, there is little doubt that what the parties intended was that pregnant women are to be compelled to take a six month leave of absence.

Section 2 also provides that when an employee is laid off due to lack of work, illness of the employee, or leaves of absence granted by the Company, such absences shall not constitute

"interruption of an employee's continuous service. . ."

That is, there is no break in the employee's seniority. Should an employee be absent for six (6) months, say, because of an approved leave of absence, the employee will still earn seniority credits for the period in which he did not work.

Is Enforced Six Month Leave a Layoff Under Article VIII?

The preceding observations provide the framework for the determination of the basic problem involved in this case. Thus, is an employee on an enforced six (6) month leave of absence for maternity purposes eligible for a vacation under the terms of Article VIII? To put it in other terms, is such an employee

"laid off from work or away from work because of illness"

for longer than sixty (60) days within the vacation year?

The Arbitrator recognizes that the Union argues that maternity is not an illness, and, therefore, the absence of the grievants was not be-

cause of illness. Hence, they are entitled to vacation pay. Without prejudice to this Union argument, the Arbitrator will first deal with the issue of whether or not an employee on an enforced six (6) month maternity leave of absence is "laid off" within the meaning of Article VIII? If she is "laid off" within the meaning of Article VIII, she is not entitled to vacation benefits. On the other hand, if she is not "laid off" within the meaning of Article VIII, she would be entitled to vacation pay, provided that her six (6) month absence is not due to illness. Therefore, the Arbitrator will hold in abeyance the question of whether or not pregnancy is an illness until he resolves the question of whether or not a maternity leave of absence is a layoff within the meaning of Article VIII. If this question is determined in the affirmative, there would, of course, be no need to reach a decision on whether or not pregnancy and/or maternity is an illness.

In determining whether or not an enforced six (6) month maternity leave amounts to a layoff within the meaning of Article VIII, the Arbitrator is impressed with the first sentence of Article VIII. As stated, what sets the tone for eligibility for vacation pay is that an employee must be *continuously employed* in the company's plant for a period of one year. That is, he or she must be actively employed for a period of one year. This is unambiguous language which must be given full faith and credit. It does not merely state that the employee must be on the seniority roster of the employer for the year, or in a state of *continuous service* of the Company. Frequently, employees are on the seniority roster or in continuous service of an employer but are not on the active payroll or *continuously employed*. In the instant contract, this would be true if employee is on a Company approved leave of absence, laid off because of lack of work, or ill. These employees accumulate seniority credits — there is no break in their continuous service or seniority — but they are not on the active payroll or continuously employed.

Clearly, the intention of the parties upon the adoption of the first sentence of Article VIII is that vacation benefits will be limited to employees who are on the active payroll of the Company — *continuously employed* — during the vacation year in question. In this light, it follows logically

that employees on an enforced maternity leave of absence for a six (6) month period are not entitled to a vacation. They are not entitled to a vacation because they are not continuously employed. In this sense, an employee on a maternity leave of absence is laid off within the meaning of Article VIII.

In reaching this conclusion, the Arbitrator considered that the words "laid off" as used in Article VIII could mean something different from an absence due to pregnancy. That is, "laid off" might refer to an absence caused by lack of work. Such an interpretation is not possible, however, because the provision does not spell out what "laid off" means. It does not state "laid off" because jobs are not available. Since this is true, and particularly since the first sentence of Article VIII clearly means that vacations are to be limited to those employees who are continuously employed, the Arbitrator would add language to Article VIII if he held that a six (6) month absence because of pregnancy did not disqualify an employee from vacation pay.

After all, the sense of Article VIII is that vacations are to be a reward to the employees for *continuous employment*. In this sense, the employer benefits from the continuous work of the employee, and he, in effect, shares this benefit with the employee in the form of a paid vacation. In all candor, if the Arbitrator did not deny the grievance, there could be discrimination against other employees. Thus, the Union probably would not argue that an employee who takes a six (6) month leave of absence for personal reasons, say, to run a business, political work, union service, attendance in school, would be entitled to a paid vacation. Indeed, if the Union argument is carried to its logical conclusion, such an employee would be entitled to a paid vacation. Certainly, this is not the intent of the language of Article VIII.

Continuous Service v. Vacation Rights

One of the most important arguments of the Union is that Article VIII provides that approved leaves of absence, illness, or layoffs due to lack of work, do not constitute an interruption of an employee's continuous service. Thus, since the grievants' continuous service is not broken by the maternity leave of absence, they are entitled to a vacation. As stated previously, this argument is not meritorious because there is a vast

difference between the protection of an employee's seniority rights under a collective bargaining contract and his eligibility to obtain vacation benefits. True, the grievants' seniority rights are not impaired because of their maternity leave of absence, but it is still true that when they took these leaves of absence they were not *continuously employed* during the vacation year. Suppose an employee is elected to public office, and he obtains an approved leave of absence just short of one year. During this time his seniority is protected as if he were working. However, it would be a most tortuous construction of Article VIII to hold that he is entitled to a paid vacation during this year in which he performed no service to the employer. If he should be denied a paid vacation, it follows logically that the grievants should be likewise denied a paid vacation. Both have their seniority protected, but both were absent from their jobs for longer than the sixty (60) day period specified in Article VIII.

Smith, Secretary-Treasurer of the Union, testified that it was his understanding that employees would not be disqualified from vacations because of the enforced six (6) month maternity leave of absence. He testified that this was his "recollection" of the negotiations. However, as the Arbitrator reads the record in this case, it is quite clear that the basic issue involved in this case was not even discussed in the negotiations. Note, Union Counsel argues that

"had the difficulty which now arises in the administration of the vacation plan, i.e. the effect interruptions of service had on such privileges, been fully explored, either the difficulty would have been eliminated or the contract would not have been executed."

This assertion plus the uncertain testimony of Smith leads this Arbitrator to believe that the parties did not discuss the impact of the maternity leave on vacation rights.

In this light, the Arbitrator must be bound by the written language of the Labor Agreement. If the language as contained in the Labor Agreement is to be followed, the grievants have no merit. Surely, the Arbitrator has no authority to speculate on what might have occurred if the problem were raised in negotiations. And, surely, he has no power to legislate terms of the Labor Agreement.

Precedents

On behalf of the grievants, Union Counsel cites American Machine

Foundry (38 LA 1085) and Milwaukee Spring Company (39 LA 1270). The Arbitrator read both of these cases carefully, but finds that these decisions cannot be used effectively to support the basic claim of the Union in the instant case. Indeed, even if these decisions are read in the most favorable light for the grievants, the Arbitrator simply does not see how they can support their claim in this proceeding. Even Union Counsel recognizes that in American Machine Foundry,

"the agreement in that case allowed the Arbitrator to base his decision on the language of the contract, and the custom and practice of the parties."²

In the instant case, there is not one scrap of evidence which establishes practice. Therefore, the dispute must be decided on the basis of the contractual language involved. Furthermore, as Union Counsel recognizes with respect to both cases,

"... the labor agreement and the circumstances in the above (cited) cases are different from the one in question..."³

In short, the Arbitrator cannot possibly find for the grievants on the basis of the precedents cited by Union Counsel, though he recognizes that they were cited in good faith and not represented by him as precedents which are four-square to the instant case. In fact, the candor of Union Counsel in this respect is truly commendable, since he does not attempt to delude the Arbitrator that his cited cases are the same in circumstances

² In American Machine Foundry, the arbitrator based his decision on past practice. He held that the language of the contracts pertaining to the issue of maternity leaves as they relate to forfeiture of vacation eligibility lacked the "necessary clarity," and, therefore, required "resort to custom and practice to determine the meaning intended by the parties." On the review of the evidence, the arbitrator held that the past practice of the parties supported the employees' position.

³ In Milwaukee Spring the arbitrator held that maternity leaves are not to be computed as "time off for illness" as time worked for purposes of vacation eligibility. He held that the parties abrogated a past practice and negotiated new contractual language which "does not provide for computing time off due to pregnancy as time worked for the purpose of determining vacation eligibility." More over, in this case, there was no issue which is basically involved in the instant proceeding in the determination of whether or not an employee on maternity leave is laid off for purposes of vacation eligibility. In addition, the vacation clause in the precedent case is quite different from that involved in the instant Labor Agreement. The former provided a minimum number of hours worked in the vacation year to qualify for employee vacations; in the latter, the formula requires that an employee be continuously employed with the exception that 60 days absence for illness or layoff shall not disqualify an employee for vacations.

and contractual language as those in the instant dispute.

Conclusion

In the last analysis, the Union requests that the Arbitrator ignore clear-cut contractual language, the intent of the parties, and write a new provision into the Labor Agreement. As we all know, such conduct on the part of the Arbitrator would be indefensible. After all, the authority of an arbitrator is limited to the construction of contractual language as agreed to by the parties. He may not legislate new language, since to do so would usurp the role of the labor organization and employer.

In the instant case, the Arbitrator finds that the contractual language involved does not support the claim of the grievants. Under these circumstances, he has no choice except to deny the grievances. If the Union believes that denial of vacation benefits to employees who take a maternity leave of absence is inequitable, the proper forum to seek a remedy is at the bargaining table and not in arbitration. Of course, this Arbitrator passes no judgment as to whether the present state of affairs is right or wrong, just or unjust, wise or unwise. He limits his decision to the contractual language involved, and, thereby, attempts to justify the faith and trust of the parties in his integrity and competency when they selected him to serve in this case.

One final observation, however, may be in order. The employees of this Company received a substantial benefit when their Union negotiated the maternity leave clause. What this means is that their jobs are automatically protected while they are pregnant and after the delivery of the infant. The Company *cannot* refuse such leaves of absence, as can other employers under other collective bargaining contracts.⁴ By making the leave of absence compulsory, the Union and the Company have taken into consideration the health and safety of the mother and the infant. This is a substantial benefit which this Union has conferred upon their members.

⁴ See, for example, Texas Company (19 LA 709) where it was held that discharge of an employee who was unable to work because of pregnancy was for "proper cause" within the meaning of the contract. Contention of the employee that employer was required to give employee leave of absence, instead of discharging her, was rejected. It was held that the contract permits the employer to grant leaves of absence at his discretion, and he refused to grant leaves of absence for pregnancy.

What the grievants really attempt in this case is to add to this benefit by requesting vacation pay even though they provide no service to the employer for six (6) month period. Undoubtedly, the grievants believe they are entitled to such vacations and seek this benefit in good faith. Their claim, however, is not justified on the basis of the contractual language involved, and, further, the Arbitrator is somewhat disturbed that they attempt (in good faith) to add a benefit — paid vacations — to a real and substantial benefit, the protection of their jobs during and after pregnancy and the safety and health of the mother and the infant. The Arbitrator trusts that should the grievants read this Opinion, they will share the Arbitrator's judgment that under the contractual language they are not entitled to vacations.

AWARD

After carefully considering the evidence, including the relevant provisions of the Labor Agreement, and in his best judgment, the Arbitrator makes the following Award:

The grievances involved in this case are denied on the grounds that under the circumstances of this case the Company did not violate the Labor Agreement.

WHEELING STEEL CORP.—

Decision of Arbitrator

In re WHEELING STEEL CORPORATION, STEUBENVILLE PLANT and UNITED STEELWORKERS OF AMERICA, Grievance No. S-2619, June 22, 1966

Arbitrator: Mitchell M. Shipman

VACATIONS

—Vacation scheduling — Calendar week — "Time" most desired by employee — Orderly operations — Past practice ▶ 116.152 ▶ 24.35

Employer's unilateral requirement that all employees take vacations on calendar-week basis, Sunday through Saturday, violated contract provision that grants employee right to select vacation "at the time most desired by the employee," subject to employer's "final right to allot vacation periods and to change such allotments . . . to insure the orderly operation of the plants." (1) Word "time"

cannot be read to mean season or portion of year available for vacations, excluding days of the week, and provision regarding filling of vacation vacancies cannot be applied to permit such a reading. (2) Past practice under contracts containing same language has been to allow employees to start vacations on days of their choice. (3) There is no evidence that operational needs and requirements have so changed as to require calendar-week vacation scheduling for all employees in order to insure orderly operations. (M. Shipman) — Wheeling Steel Co., 47 LA 278.

CALENDAR-WEEK VACATIONS

The Grievance

SHIPMAN, Arbitrator: — The "Grievance" (Union Exhibit A), as set forth in the written Grievance Report filed by the Union, alleges as follows:

"The Grievance Committee of Local Union #1190 protests Management's intention of scheduling vacations from Sunday to Saturday for all vacation periods for the year of 1966 and thereafter.

This type of scheduling deviates from the established practice in the Steubenville Works.

Discussion was held with Management on this case and the Union objected; stating this type of scheduling vacations was resolved in 1960 by grievance case # 17-G-3224, settled at fourth stage.

Therefore, the Sunday through Saturday vacation scheduling is not acceptable to the Union."

Opinion

The dispute was occasioned when Plant Management notified the Union Committee of its intention to require all bargaining unit employees at the Steubenville Plant to take their vacation on a calendar week basis, the first day to start on Sunday, first turn, and to end on Saturday. The Union objected thereto and filed the instant Grievance, challenging the propriety of this calendar week basis of vacation scheduling and requesting that the Company be directed to revert to its previous method of scheduling vacations on an individual employee basis.

Union's Position

In urging the granting of the Grievance, the Union contends that:

1. A calendar week method of scheduling vacations violates the vacation provisions of Article VII, Section 3-A, which, as provided there-

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