

1	In the Matter of an Arbitration)	
2	Between)	
3	AMERICAN FEDERATION OF STATE,)	ARBITRATOR'S
4	COUNTY AND MUNICIPAL EMPLOYEES,)	DECISION
5	COUNCIL 75)	and
6	and)	AWARD
7	STATE OF OREGON)	

7 A hearing was held in this case in Salem, Oregon, on
8 January 8, 1986. The Union was represented by Robert D.
9 Durham, its attorney. The State was represented by F. Peter
10 DeLuca, Assistant Attorney General. Both parties offered
11 testimony and written exhibits. They also submitted both
12 prehearing and post-hearing memoranda. A written statement of
13 testimony was also submitted by Joanne Robinette, Executive
14 Director, Oregonians for Cost-Effective Government.

15 The Issue to be Decided.

16 By written Memorandum of Understanding, the parties
17 agreed to submit to arbitration the dispute between them over
18 the question whether, under the provisions of five collective
19 bargaining agreements between the State of Oregon and this
20 Union, the state employes represented by this Union are
21 entitled to a holiday with pay on Martin Luther King's Birthday.

22 The Facts.

23 On November 2, 1983, President Reagan signed into law
House Resolution 3706, previously enacted by the Congress of

1 the United States as Public Law 98-144, which declared a "legal
2 public holiday" on the third Monday in January, beginning in
3 1986, for the birthday of Martin Luther King, Jr.

4 On July 10, 1985, Governor Atiyeh signed into law
5 House Bill 2433 (now ORS 187.010), previously enacted by the
6 Legislature of Oregon, which also provided that "Martin Luther
7 King, Jr.'s Birthday" on the third Monday in January was
8 declared to be one of 10 "legal holidays" in this state. HB
9 2433 also provided for a holiday on "President's Day, for the
10 purpose of commemorating Presidents Washington and Lincoln on
11 the third Monday in February," to replace "Washington's
12 Birthday." The bill also added the following new provision:

13 "(4) In enumerating legal holidays in subsection
14 (1) of this section, the Legislative Assembly does not
15 intend to limit or otherwise affect public or private
collective bargaining or collective bargaining
agreements."

16 The five collective bargaining agreements between the
17 State and this Union all contain nearly identical provisions to
18 the effect that "compensable holidays" shall include not only
19 previously recognized holidays, such as the Fourth of July, but
20 also

21 "Every day appointed by the President of the United
22 States or the Governor of the State of Oregon as a
23 holiday."

24 Almost identical provisions are included in nearly all
25 other collective bargaining agreements between the State and
26 various other unions.

1 No evidence was offered relating to possible
2 discussions between the parties as to the meaning and
3 application of this provision of the collective bargaining
4 agreements either at the time of their adoption or
5 subsequently. Apparently, however, this contract provision had
6 its origin in a personnel rule of the State Executive
7 Department on the subject of Holidays which, beginning in 1981,
8 was no longer binding upon state employes represented by
9 unions, but which, in addition to listing the usual public
10 holidays such as the Fourth of July as "legal compensable
11 holidays," also listed

12 "Every day appointed by the President of the United
13 States or by the Governor as a holiday."

14 Apparently, at the time of negotiating the collective
15 bargaining agreements between the State and this Union, no
16 reference was made to those personnel rules, which then had no
17 effect upon these employes, and neither party informed the
18 other of what is now its position as to the meaning of the word
19 "appointed."

20 Since the original adoption of those rules, however,
21 there have been several occasions when the question of paid
22 holidays to state employes has arisen. These occasions will be
23 discussed in the course of this decision.

Contentions by the Union.

 The contentions by the Union may be summarized as
follows:

1 (1) The words "appointed by the President of the
2 United States or the Governor of the State of Oregon,"
3 as used in the labor contracts, include not only new
4 holidays designated by proclamations issued by the
5 President or Governor, but also include new holidays
6 designed by statute and "signed into law" by either
7 the President or the Governor.

8 (2) To hold that state employes are entitled to
9 holiday pay for new holidays designated by such
10 proclamations, but not for holidays thus "signed into
11 law" by the President or Governor, would require a
12 harsh and unreasonable result which would not have
13 been intended by the parties when they negotiated
14 these contracts had that question then been discussed
15 by them.

16 (3) In such cases arbitrators are required to
17 decide what the parties would have agreed upon had the
18 matter been specifically before them.

19 (4) Arbitrators are also required to decline to
20 construe the words of labor contracts according to
21 their literal meaning if to do so would lead to harsh
22 or unreasonable results.

23 (5) The "history" of this language of these
contract provisions is not such as to require the
result contended for by the State.

(6) Neither is the position of the State
supported by the arbitration decisions relied upon by
it.

(7) The intent of the Oregon legislature in
enacting HB 2433 and the fiscal impact of that statute
are both immaterial. *-Yellow!*

Contentions by the State.

The contentions by the State have been summarized by
it substantially as follows:

(1) The word "appointed" is not ambiguous and
must thus be given its "plain meaning," which "implies
an executive act, not a legislative act," and the
reference to appointment by the President or Governor

1 "excludes the implication of legislative action."
2 There is no evidence of a contrary mutual intent.

3 (2) Such an interpretation does not result in
4 "unreasonableness" or "absurdity." Collective
5 bargaining is an inherently executive function, not a
6 legislative function. A "plain meaning"
7 interpretation allows the parties to the contract
8 greater "bargaining flexibility" and "cannot be
9 unreasonable or absurd because such an interpretation
10 has extended employe benefits in the past."

11 (3) If the Arbitrator finds the language to be
12 ambiguous, he must nevertheless resolve the ambiguity
13 in favor of the State because of evidence of a
14 "history of consistent interpretation by the state" of
15 language which was "borrowed from the statute
16 verbatim" instead of having been "created by the
17 parties."

18 (4) The Union "knew or should have known of the
19 history of the interpretation of this language" in the
20 Union contract, which has been "interpreted by the
21 State at least twice in recent years," while the Union
22 has done nothing to change the contract language.

23 (5) The Arbitrator should "consider the history
of this language and refuse to disturb its
interpretation because of the compelling need of the
State to have consistency in its labor relations."
The State "needs both continuity and predictability,
which militates against disturbing the reasonable
interpretation of this language."

18 Discussion.

19 Because of the importance of the decision in this case
20 and its possible application to other public employes in
21 Oregon, and because of the need to give full consideration to
22 all of the numerous contentions by both parties, the basis and
23 reasons for this decision will be stated in more detail than
might otherwise be appropriate.

1 The critical question to be decided in this case is
2 the meaning and effect to be given to the words "appointed by
3 the President of the United States and the Governor of the
4 State of Oregon as a holiday."

5 The State contends that words in a contract must be
6 given their "plain meaning" absent a showing that the parties
7 intended a different meaning, and that when these words are
8 given what the State contends to be the "plain meaning" of such
9 words it necessarily follows that holidays "appointed" by the
10 President or Governor are limited to those resulting from
11 proclamations of holidays by the President or Governor and thus
12 does not include those resulting from statutes enacted either
13 by Congress or by the Oregon legislature, even if "signed into
14 law" by the President or Governor.

 The Union contends that the interpretation by the
State of the word "appointed" is too narrow and literal; that
in determining the proper meaning to be given to these words
consideration must be given to the purpose of that provision
for new holidays and what the parties would have agreed upon
had they considered the present contention by the State when
these contracts were negotiated, and that to interpret the word
"appointed" as contended by the State, so as to allow holiday
pay for new holidays created by proclamation of the President
or Governor, but to deny holiday pay for new holidays enacted

1 by Congress or by the Oregon legislature and signed into law by
2 either the President or Governor, would be a harsh and
3 unreasonable result and one which would not have been intended
4 by the parties had they considered that question when these
5 contracts were negotiated.

6 Both positions are plausible, at least on their face,
7 and the resulting question presented for decision in this case
8 is both close and difficult.

9 First of all, it is necessary to bear in mind that
10 there is no inherent right to holiday pay, and none exists
11 except as it may be provided by the terms of a labor
12 agreement. Next, in undertaking the interpretation of
13 provisions in labor agreements relating to holidays, an
14 arbitrator must apply the same general principles or
15 "standards" as would be applied by the courts in the
16 interpretation of other contracts.

17 1. Applicable "Standards" of Contract Interpretation.

18 The primary rule to be observed in the interpretation
19 of contracts is that a court or arbitrator must, if possible,
20 ascertain and give effect to the mutual intent of the parties.
21 That task, however, is not always possible.

22 Another frequently stated "rule" for application in
23 the interpretation of contracts (and the one relied upon by the
State in this case) is that if the terms of a contract are not

1 ambiguous, there is no room for interpretation, and such terms
2 should be given their plain and ordinary meaning as defined by
3 a reliable dictionary in the absence of a showing of a mutual
4 understanding by the parties to the contrary.

5 As stated by Mr. Justice Oliver Wendell Holmes,
6 however:

7 "A word is not a crystal, transparent and
8 unchanged; it is the skin of a living thought and may
9 vary greatly in color and content according to the
10 circumstances and the time in which it is used."

11 As also stated in that "Bible" for labor arbitrators
12 (cited by both the State and the Union in this case), Elkouri
13 and Elkouri, "How Arbitration Works" (4th ed. 1985) at 342-43:

14 "An agreement is not ambiguous if the arbitrator
15 can determine its meaning without any other guide than
16 a knowledge of the simple facts on which, from the
17 nature of language in general, its meaning depends.
18 But an agreement is ambiguous if 'plausible
19 contentions may be made for conflicting
20 interpretations' thereof.

21 "* * * * *

22 "* * * An ambiguity in a contract usually means
23 that the parties have failed to express that intent
with clarity. Sometimes, however, an ambiguity may
mean more. It may mean that there never was any
meeting of the minds. When this has been found to be
the case, arbitrators have taken various courses of
action * * *." (Footnotes omitted.)

24 Thus, language of a contract which appears on its face
25 to be clear and unambiguous may prove to have a latent
26 ambiguity when considered in the light of the surrounding
27 circumstances. ^{See} United States National Bank v. Caldwell, 60 Or

1 App 639, 642, 655 P2d 180 (1982). Contracts must be considered
2 in the light of such circumstances, which include the objects
3 and events to which the words can be applied and which caused
4 the words to be used. 3 Corbin on Contracts (1960), 28, §
5 536.

6 As also stated by 3 Corbin, supra, 15, § 535:

7 "There is no single rule of interpretation of
8 language, and there are no rules of interpretation,
9 taken all together, that will infallibly lead to one
10 correct understanding and meaning. In understanding
11 the variable expressions of others, men must do the
12 best they can."

13 To the same effect, as stated by Elkouri, supra, at
14 344:

15 "[T]he standards of construction as used by
16 arbitrators are not inflexible. They are but 'aids to
17 the finding of intent, not hard and fast rules to be
18 used to defeat intent.' Parties probably expect
19 arbitrators to be less circumscribed by rigid rules of
20 construction than the courts, and this helps to
21 protect against harsh and unworkable results.

22 "Sometimes two or more of the rules of
23 interpretation conflict in a given case. Where this
is so, the arbitrator is free to apply that rule which
he believes will produce the better results."
(Footnotes omitted.)

Wow!

24 Cases arise not infrequently in which arbitrators are
25 called upon to interpret and apply the terms of labor
26 agreements to situations which were not foreseen by the parties
27 when the contract was negotiated. Thus, as stated by Elkouri,
28 supra, at 345-46:

1 "Situations unforeseen when the agreement was written,
2 but falling within its general framework, often
3 arise. Where reasonably possible, arbitrators
4 considering these situations must decide what the
5 parties would have agreed upon, within the general
6 framework of the agreement, had the matter been
7 specifically before them. As to such situations, one
8 survey of labor arbitration suggests:

9 "'In such cases there is no true 'intent' of the
10 parties expressed in the agreement itself. What
11 is asked of the arbitrator is that he conceive,
12 or adopt from the arguments of counsel, a theory
13 of the agreement which explains his solution to
14 the matter not covered by the agreement, and
15 which does no violence to the general spirit and
16 intent which have been expressed in the
17 agreement. The arbitrator's task might be
18 described as having to find out what the parties
19 would have intended had they thought to deal with
20 the particular item under dispute, or if they had
21 had time to deal with it. * * *'" (Footnote
22 omitted.)

23 In undertaking to perform this task, the arbitrator
must try to place himself in the position of the parties at the
time of the negotiation of the contract. Cf. In re Edwards
Estate, 140 Or 431, 447, 14 P2d 274 (1932).

A further well-recognized "principle" or "guide" for
use in the interpretation of written contracts, as stated by 4
Williston on Contracts (3rd ed. 1960), 749, § 620, is that:

"* * * an interpretation which makes the contract
fair and reasonable will be preferred to one which
leads to harsh or unreasonable results."

To the same effect, see Corbin, supra, 210, § 552, and
Elkouri, supra, 354.

1 In seeking guidance for the interpretation of labor
2 contracts, it is also necessary to bear in mind that contracts
3 are to be interpreted by application of the same general
4 principles as applied in the interpretation of statutes.
5 Elkouri, supra, 344. Thus, decisions by the Oregon Supreme
6 Court establishing principles to be applied in the
7 interpretation of Oregon statutes are of importance in
8 considering the interpretation of contracts entered into by the
9 State of Oregon.

10 Perhaps the most significant decision by the Oregon
11 Supreme Court with a bearing upon the problem presented in this
12 case is Johnson v. Star Machinery Co., 270 Or 694, 530 P2d 53
13 (1974).

14 In Johnson the issue to be decided by the Oregon
15 Supreme Court was whether a statute of limitations for "any
16 action for negligence" (ORS 12.115(~~1~~)) should be applied so as
17 to bar an action for "products liability" alleging an
18 "ultrahazardous product," in which it was not necessary to
19 prove negligence. Plaintiff contended that the applicable
20 statute of limitations was ORS 12.110(1) relating to an action
21 for "any injury to the person or rights of another not arising
22 on contract, and not especially enumerated in this chapter
23 * * *." The majority of the court held, over a "vigorous
dissent" by this arbitrator, then a member of that court, that

1 such an action was barred by the statute of limitations for an
2 "action for negligence."

3 In reaching that result, the court (at 705) quoted
4 with approval a statement in a previous decision holding that:

5 "When * * * a literal application of the language
6 produces an absurd or unreasonable result, it is the
7 duty of the court to construe the act, if possible, so
8 that it is a reasonable and workable law and not
9 inconsistent with the general policy of the
10 legislature." (Emphasis added.)

Who!

11 In the application of that rule to the facts of that
12 case, the court held (at 706-07) that:

13 "In determining whether the exclusion of products
14 liability cases from the purview of the statute in
15 question would bring about an unreasonable result, it
16 is necessary to determine whether the reasons behind
17 the application of the statute to negligence cases are
18 equally applicable to products liability cases. If
19 the policies behind the statute are equally applicable
20 to both, and there are no relevant distinguishing
21 features of consequence, it would be unreasonable to
22 apply the statute to negligence cases but not to
23 products liability cases."

The rule of Johnson has subsequently been reaffirmed
by the Oregon Supreme Court in State ex rel Cox v. Wilson, 277
Or 747, 750, 562 P2d 172 (1977), and Satterfield v.
Satterfield, 292 Or 780, 782-83, 643 P2d 336 (1982). As
previously stated, both statutes and contracts are to be
interpreted by application of the same general standards, and
the "unreasonable result" standard is also expressly recognized
by Corbin, Williston, and Elkouri as a proper standard to be
applied in the interpretation of contracts.

1 2. Application of Standards of Contract Interpretations.

2 The State contends that "the Arbitrator must first
3 determine whether the contract language is ambiguous" and that
4 "if the Arbitrator finds no ambiguity he should give the
5 language its plain meaning unless he finds that the plain
6 meaning leads to an unreasonable or absurd result or unless he
7 finds evidence of mutual intent to the contrary."

8 It is contended by the State that the word "appoint"
9 is not ambiguous; that the plain meaning of the word "appoint"
10 is "to designate" and is a term used "where exclusive power and
11 authority is given to one person," according to Black's Law
12 Dictionary; that "this definition suggests that appointment is
13 an executive function or an exercise of exclusive power not to
14 be confused with a legislative function or election"; that this
15 is also made clear by the "second component of the clause --
16 'by the President or Governor' which excludes the concept of
17 legislative enactment," and that to read this clause to mean
18 that the President or Governor "appoint" a holiday by signing a
19 legislative enactment "ignores the fact that Black's Law
20 Dictionary states that appointment is done by one person."

21 It is the opinion of this arbitrator that the word
22 "appointed," as used in these labor contracts, is not a clear
23 and unambiguous word, as contended by the State, at least when
considered in the light of all of the surrounding

1 circumstances. It follows, in the opinion of this arbitrator,
2 that this word cannot properly be given what the State contends
3 to be its "plain" or dictionary meaning until consideration is
4 given to the foregoing established "standards" for the
5 interpretation of contracts. It is important to bear in mind
6 in the application of these established "standards" that the
7 effect of the contentions by the State is that:

8 (1) State employes are entitled to a holiday
9 with pay for new holidays if such holidays are
10 "appointed" by an executive proclamation by either the
11 President or by the Governor, but

12 (2) State employes are not entitled to a holiday
13 with pay for new holidays if such holidays are the
14 result of statutes enacted either by Congress or the
15 Oregon legislature, even though such statutes are then
16 "signed into law" by the President or by the Governor.

17 The question whether state employes would be entitled
18 to a holiday with pay only in the first situation, but not in
19 the second situation, was not discussed when these labor
20 contracts were negotiated.

21 In the application of the foregoing "standards" in
22 this situation, two primary questions are presented:

23 (a) Is such a result reasonable or unreasonable,
within the meaning of the previously cited authorities?

(b) If the parties had considered this question
when they negotiated the labor contract, what would
they have agreed upon and what consequences would they
have intended?

(a) Is such a result "reasonable"?

The Union contends that such a result would be "harsh
and unreasonable." Aside from whether it would be "harsh" to

1 deny a holiday with pay in this case, it would appear that to
2 do so may be "unreasonable" within the meaning of the test
3 applied by the Oregon Supreme Court in Johnson v. Star
4 Machinery Co., supra, in which that court held that when the
5 same reasons or policies behind the application of a statute
6 are equally applicable in two given situations and there are no
7 "relevant distinguishing features of consequence" it would be
8 "unreasonable" to apply the statute in one situation, but not
9 the other.

10 Upon the application of that test to this case, it
11 would appear that the same reasons or policies for the granting
12 of a holiday with pay for holidays declared by statute and
13 signed into law by the President or Governor are substantially
14 the same as the reasons or policies for the granting of a
15 holiday with pay for holidays declared by proclamation of the
16 President or Governor and that there are "no relevant
17 distinguishing features of consequence" between the two
18 situations. It follows that it would be "unreasonable" to deny
19 a holiday with pay in the one situation, but not in the other,
20 unless the State is correct in its contentions to the contrary,
21 which will next be considered.

22 At the conclusion of the hearing, both parties were
23 requested to comment upon the application of the rule as stated
in Johnson to this case. In response to that request, the

1 State does not deny the validity of that rule. The State also
2 concedes that "at first blush" such a result would seem to
3 "lack consistency and reason." It contends, however, that upon
4 an "in-depth analysis" such a result is not unreasonable for
5 three reasons:

6 (1) Collective bargaining by the state with
7 unions is an executive function; that to subject
8 collective bargaining to "statutorily created holidays
9 only would subvert the purpose of collective
10 bargaining" and that the "free negotiation of holidays
11 is far more in keeping with the whole idea of
12 collective bargaining than is being bound by
13 legislative enactment."

14 (2) To interpret this contract provision as
15 contended by the State is not unreasonable because it
16 "is unlikely to create long-term obligations for the
17 parties outside of collective bargaining" and that "it
18 makes more sense to bind oneself to one-time
19 occurrences away from the bargaining table than it
20 does to agree to be bound in perpetuity by
21 uncontrollable events."

22 (3) These provisions have "worked in the past to
23 the benefit of the employes," which "shows that the
language is not meaningless and inoperative if given
the employer's interpretation."

Although these contentions may appear to be convincing
"at first blush" (to paraphrase the State), on further analysis
they are unconvincing because:

(1) The fact that collective bargaining by the
State with unions is an executive function and one
which should not be the subject of legislative
enactment is irrelevant. In this case, such
bargaining has resulted in a labor contract, and the
issue to be decided is the interpretation of that
contract.

1 (2) The interpretation by the State would not be
2 less "likely to create long-term obligations" because
3 all of the existing contracts are for a period of two
4 years. Upon their termination, either party,
5 including the State, will be free to negotiate
6 different provisions for holiday pay.

7 (3) The fact that these provisions have resulted
8 in some holidays with pay in the past when holidays
9 have been declared by proclamation of the President or
10 Governor is not relevant upon the question whether it
11 is unreasonable to deny a holiday with pay in this
12 case.

13 Upon consideration of the opposing contentions by the
14 Union and by the State, it is the opinion of this arbitrator
15 that the contentions by the State do not provide sufficient
16 "relevant distinguishing features of consequence" to foreclose
17 application of the rule of Johnson v. Star Machinery Co. in
18 this case, and that upon the application of that rule in this
19 case it follows that to grant a holiday with pay for a new
20 holiday declared by proclamation of the President or Governor,
21 but to deny a holiday with pay for a new holiday declared by
22 act of Congress and "signed into law" by the President would be
23 an "unreasonable result" within the meaning of that rule.

24 (b) What would the parties have agreed upon?

25 As previously stated, the established "standards" to
26 be applied in a case such as this require that this arbitrator
27 attempt to place himself in the position of the parties and
28 undertake to decide what they would have agreed upon and what
29 consequences would they have intended if, at that time, the

1 question had been presented whether employees would be entitled
2 to a holiday with pay for a new holiday declared by statute,
3 but "signed into law" by the President or Governor.

4 In the best judgment of this arbitrator, had this
5 question been raised at the time of the negotiation of these
6 labor contracts, the parties to these contracts would not have
7 intended that these employees be paid for a new holiday in the
8 one instance, but not in the other, and would probably have
9 agreed that there was no valid reason to make a distinction
10 between new holidays by proclamation of the President or
11 Governor and new holidays by statutes "signed into law" by the
12 President or Governor, and that state employees would be
13 entitled to a holiday with pay for a new holiday in either
14 event.

15 It follows, in the opinion of this arbitrator, that
16 upon the application of "standards" established by law for the
17 interpretation of statutes and contracts or the labor contracts
18 in this case, when considered in the light of the surrounding
19 circumstances, that the words "appointed by the President of
20 the United States or the Governor of Oregon" cannot properly be
21 given the literal, dictionary meaning which the State would
22 give to these words, but that these words should be interpreted
23 to be applicable not only when the President or Governor acts
alone in the "appointment" or declaration of a new holiday, but

1 also when the President or Governor, by signing into law a
2 statute enacted by the Congress or legislature, acts jointly
3 with it in the "appointment" or declaration of a new holiday.

4 3. Consideration of Further Contentions by the State.

5 (a) The "History" of Past Interpretation by the State.

6 The State also contends that its interpretation of the
7 word "appointed" is supported by its "consistent
8 interpretation" of that term, which was "borrowed" from a
9 statute, not "created by the parties." In support of that
10 contention, the State offered evidence of four previous
11 incidents in which the question of holiday pay was presented
12 and contends that these previous incidents have not "given rise
13 to holidays with pay for state employes under circumstances
14 such as those here present" and that although not sufficient to
15 constitute a "waiver" by past practice, they should be
16 considered "in order to determine the meaning of the
17 contract." An examination of these incidents, however,
18 demonstrates that in most of them the circumstances were
19 substantially different than "those here present."

20 (1) Columbus Day in 1968. The State says that
21 Congress established Columbus Day in 1968 as a holiday, but
22 that the State did not follow suit and "to this day Columbus
23 Day is not a holiday in Oregon." There is no evidence,
however, that this Union represented these state employes at

1 that time. Also, in the negotiation of subsequent labor
2 contracts with this Union, it is just as reasonable to assume
3 that this provision relating to holidays "appointed" by the
4 President or by the Governor was intended to refer to
5 subsequently declared new holidays as it is to assume that this
6 provision was also intended to apply to past holidays declared
7 by either Congress or by the President.

8 (2) "Moon Landing Day" in 1977. The President issued
9 a proclamation declaring that day a holiday. It was also
10 honored as a holiday with pay by the State of Oregon for its
11 employees. This gives no support to the contention by the State
12 in this case that new holidays declared by statute are not to
13 be holidays with pay.

14 (3) "Hostage Release Day" in 1981. That holiday was
15 declared by Congressional Resolution which was signed by the
16 President. That resolution was not honored as a holiday with
17 pay by the State of Oregon for its employees. No grievance was
18 filed by the Union. Thus, that incident provides some support
19 for the position by the State in this case.

20 (4) The "Korean Airliner Day" in 1983. The President
21 issued a proclamation declaring a Sunday as a day of mourning
22 following that incident. That proclamation was honored by the
23 State of Oregon as a holiday with pay for its employees on the
4 following Monday. Again, as for "Moon Landing Day," this

1 incident gives no support to the contention by the State that
2 new holidays declared by statute are not to be holidays with
3 pay.

4 It thus appears that with the possible exception of
5 "Hostage Release Day," none of the four previous incidents
6 involved a holiday declared by a statute and "signed into law"
7 by the President or Governor, as in this case. As previously
8 noted, the State has conceded that one or two incidents are
9 insufficient to establish "past practice." For similar
10 reasons, one single incident is not such a "history" as to be
11 of any substantial assistance in determining the interpretation
12 to be given to the contract provisions involved in this case.
13 Neither does the fact that these words may have had their
14 origin in previous statutes require adoption of the State's
15 interpretation of these provisions.

16 (b) Whether the Union Knew or Should Have Known of the
17 State's Interpretation.

18 The State concedes that it never informed the Union of
19 its interpretation of these contract provisions, but contends
20 that the Union either knew or should have known of that
21 interpretation by the State, as evidenced by the following
22 facts:

23 (1) The failure of the Union to file a grievance
4 after the Columbus Day incident or the "Hostage Release Day"

1 incident or to seek to change the contract provisions after
2 those incidents. For reasons previously stated, the Columbus
3 Day incident has little, if any, relevance in this case. As
4 for the "Hostage Release Day" incident, it is the opinion of
5 this arbitrator that the failure to grieve or seek a change in
6 contract language after one isolated incident is hardly
7 sufficient to bind the Union to the State's interpretation of
8 these contract provisions.

9 (2) The testimony of a Union representative at a
10 hearing on the Oregon statute to create a holiday for the
11 birthday of Martin Luther King. A "tape" of such testimony was
12 "played" at the hearing of this case. After listening to that
13 "tape," this arbitrator was of the opinion that he could not
14 determine from that testimony whether or not that Union
15 representative knew at that time either that these employes
16 would not be entitled to a holiday with pay on that holiday or
17 that the State would take such a position.

18 (3) The Dorsey Arbitration Award. In 1979 the
19 President, by Executive Order, declared that the day before
20 Christmas on that year would be a holiday for federal
21 employes. The State of Oregon refused to do so for its
22 employes. Mr. William H. Dorsey, a highly respected
23 arbitrator, ruled in favor of the State. In doing so he held
that although state employes may not be entitled to an

1 additional paid holiday "every time the President gave federal
2 employes an extra holiday with pay," state employes would be
3 entitled to a paid holiday when the President, by proclamation
4 or executive order, declares a holiday as "a day of rejoicing,
5 mourning, or other special observance" -- a situation more
6 analogous to that presented in this case, in which the
7 President "signed into law" this act of Congress after publicly
8 declaring that "our nation has decided to honor Dr. Martin
9 Luther King by setting aside a day each year to remember him
10 and the just cause he stood for." Also, it must be kept in
11 mind that this is not a case involving only a federal statute
12 declaring a holiday for federal employes. In this case the
13 Oregon legislature and the Governor of Oregon also joined in
14 declaring a new holiday on this occasion.

15 Of further importance is the fact that the arbitrator
16 did not hold in that case that state employes would not be
17 entitled to a holiday with pay in the event of a new holiday by
18 statute. Indeed, there was no issue in that case whether there
19 could be a new holiday by statute "signed into law" by the
20 President or Governor, as in this case.

21 Finally, this Union was not a party to that case.
22 Thus, although this Union probably knew of that arbitration
23 decision, it may well not have known that the State would deny
a paid holiday to these employes in a situation such as this,

1 in which the holiday was declared both by act of Congress and
2 by Oregon statute and in which both statutes were "signed into
3 law" by the President and by the Governor as a special day for
4 honoring the birthday of a great man.

5 It follows, in the opinion of this arbitrator, that
6 the State has not sustained its burden of proof that this
7 Union, at the time of the negotiation of these labor contracts,
8 knew that in a case such as this the State would take the
9 position that these employees would not be entitled to a holiday
10 with pay.

11 In support of its position, the State also cites the
12 opinion of an arbitrator in Carlsbad Unified School District,
13 78 LA 1063, involving a 1982 California statute declaring a
14 Martin Luther King holiday and a contract with similar
15 provision. The State contends that this decision is "more
16 persuasive" than the more recent opinion of an arbitrator in In
17 re Clinton County, cited by the Union, a New York case
18 involving application of a similar contract provision to the
19 act of Congress involved in this case. Both opinions are of
20 interest, but the reasoning of neither opinion is persuasive,
21 much less controlling in this case, in the opinion of this
22 arbitrator.

23 (c) The Need for Consistent Interpretation.

24 The State contends that it "needs consistency and
predictability in interpreting its contracts" and upon that

1 basis again would "urge the Arbitrator to give weight to
2 Arbitrator Dorsey's opinion." This arbitrator recognizes such
3 a need for consistency. For reasons previously stated,
4 however, this arbitrator is of the opinion that the opinion by
5 Mr. Dorsey is clearly distinguishable and that the decision in
6 this case is not inconsistent with that opinion.

7 (d) The Intent of the Oregon Legislature and Governor.

8 Finally, the State contends that the intent of the
9 Oregon legislature in enacting HB 2433, which declared Martin
10 Luther King's birthday as a new holiday, but combined as a
11 "President's Day" a holiday to honor the birthdays of President
12 Washington and President Lincoln, was to provide a method by
13 which the Martin Luther King holiday could be celebrated by the
14 State and its employes at no additional cost to the State. The
15 State also contends that the Governor might well not have
16 signed HB 2433 had he believed that it would result in an
17 additional paid holiday, and that he did not intend such a
18 result.

19 As previously noted, in the enactment of HB 2433, the
20 legislature specifically provided that it did "not intend to
21 limit or otherwise affect public or private collective
22 bargaining agreements." It follows that despite the possible
23 intent by the legislature and Governor to make HB 2433 "revenue
neutral," it did not deprive state employes covered by

1 collective bargaining agreements from the exercise of their
2 rights to holiday pay under the provisions of such agreements.

3 Similarly, the concern expressed at the hearing of
4 this case by a representative of Oregonians for Cost-Effective
5 Government over the cost to the taxpayers of a paid holiday for
6 state employes, while a most legitimate and proper concern,
7 cannot justify refusal by the State to honor provisions of
8 collective bargaining agreements with unions representing its
9 employes.

Wood

10
11 DECISION AND AWARD

12 For all of the reasons previously stated, it is the
13 decision and award of this arbitrator that the provisions of
14 the labor contract between the State of Oregon and American
15 Federation of State, County, and Municipal Employees, Council
16 75, for holidays with pay, when construed by the application of
17 established standards for the interpretation of contracts,
18 confer upon the State employes covered by such contracts the
19 right to a holiday with pay for the birthday of Martin Luther
20 King, Jr., on January 20, 1986, or to payment of time and
21 one-half if required to work on that day, as provided by the
22 provisions of that contract.

