Steinberg #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

OPINION AND AWARD

The above-captioned matter was litigated on March 31, 1994 before an Arbitration Board chaired by the undersigned impartial arbitrator, selected by the parties from a panel of neutrals submitted by the National Mediation Board. A complete record of relevant testimonial and documentary evidence was made and the parties orally argued their respective cases.

ISSUE

The parties stipulated the following issue was properly before the Arbitration Board for final and binding award:

1. Is the Employee entitled to eight days additional vacation for 1993?

BACKGROUND

As of 1993 the Employee was a 16-year employee of the Employer. He left the bargaining unit and joined management in 1987, and he returned to the bargaining unit in May 1992. If he had remained in the bargaining unit throughout, he would have been entitled to 20 days vacation in 1993. Since management employees accrue vacation benefits under a different formula, the Employee's 1993 vacation benefit was prorated, effective from the time he returned to the

bargaining unit, and he was allowed only 12 days' vacation.

By custom and practice management earns vacation benefits on a monthly basis to be taken during the year the benefit is accrued. To the contrary, bargaining unit employees accrue vacation in a given year to be taken in a subsequent year. In rounded terms, as different formulas are applied by the Employer, the Employee was granted 5/12ths of his Employer vacation benefit in 1992 (absent any carry-over of previously earned, but unused, vacation), and 7/l2ths of his contractual vacation benefit in 1993.

The Employer argues it has equitably apportioned the Employee's vacation for the years wherein he first left and then returned to the bargaining unit. Over this period spanning six calendar years the Employee allegedly received all the vacation days, pay or credit for which he would have been entitled under the negotiated formula even though he was allowed only 12 days vacation for 1993. The Employer maintains that if the Employee were to be credited for the full 20 days vacation in 1993, he would be receiving unjust enrichment.

The Union, to the contrary, asserts clear contractual language applies; meaning total Employer seniority governs vacation benefits and not just bargaining unit seniority. It disputes the Employer's calculation of vacation credited to Employee and taken by him during the period of 1987-1992.

RELEVANT CONTRACTUAL LANGUAGE

Article 11 - Vacation With Pay

(A) All employees hereunder who have been with the Employer for one (1) year or more as of January 1, will be entitled to an annual vacation of two (2) weeks with pay.

Vacation compensation will be based on the classification the employee occupies during his vacation Period. Employees, who have been with the Employer less than twelve (12) months as of January 1, will be entitled to vacation in accordance with the following schedule:

Complete Months of Service as of January	Days of Vacation
1 Month	1 Day
2 Months	2 Days
3 Months	3 Days
4 Months	4 Days
5 Months	5 Days
6 Months	6 Days
7 Months	7 Days
8 Months	7 Days
9 Months	8 Days
10 Months	8 Days
11 Months	9 Days
12 Months	10 Days

Vacation accrual for any employee who has more than twelve (12) months service shall be one-twelfth (1/12th) per month of appropriate vacation allotment.

B. Vacation allowances are as follows:

Completed Years of Service	Vacation Allowance in Work Days
5	15
11	20
17	25
22	30
30	35

It is understood that vacation accruals shall be due from January 1, after the employee completes required specific years of service period.

DISCUSSION

A fair reading of the parties' Agreement is that total service with the Employer, including predecessor employers, applies to determine when vacation benefits escalate from two weeks to three and in intervals until 7 weeks, or 35 days vacation is earned. The Employer does not

dispute such an interpretation and where the parties desire to apply limited seniority, for example just bargaining unit seniority, they have expressly said so.

I agree with the Employer that an anomaly is created when an employee returns to the bargaining unit mid-year, but the proper application of contract does not allow for treating the returnee as a new employee and pro-rating his/her vacation which may be taken the subsequent year. A 16-year employee, such as Employee was January 1, 1993, is entitled by contract to 20 days vacation. If he receives anything less, it is a violation. Because the equities are not with management, this neutral arbitrator cannot avoid granting affirmative relief.

Any prior overpayment for which the Employer seeks credit is between it and the employee and it should not entangle the Union. The Union cannot control how the Employer treats its non-represented managerial employees. It was totally within the control of the Employer to avoid overpayment which was a product of its differing vacation formula. While its entitlement period differed from the negotiated vacation plan it was nevertheless intended that employees receive roughly the same amount of vacation per year whether they were represented or not.

If Employee, for example, transferred into management on January 1, wherein he would apparently be eligible for 30 days of vacation under both the Employer and the negotiated formula, the Employer vacation based on the current year accrual while the negotiated was in the prior year, the Employee should only be entitled to take 15 days of vacation the current year, and not 30. The surplus would be there to be used in the year the employee returned to the bargaining unit (or to be paid to the Employee when he left the Employer). If Employee returned to the bargaining unit on January 1 in his 16th year, for example, he may not have accrued negotiated vacation benefits in the prior year according to the Employer, but he nonetheless would have 15

days vacation available to him by virtue of his credit. The rationale of why the Employee is entitled to the 15 days vacation this current year is largely irrelevant.

As a practical matter there is not the evidence to confirm whether the Employee was previously paid the differential of 8 (or more) days as the Employer contends. The fact that none of the prior records maintained by the previous employer were available or in existence should not work to the Employee's detriment. It was not his obligation to prove the amount of vacation time or payment he actually received over a 6 year period and the Employer did not attempt to subpoena his pay records for those days. The Union's burden of proof was met by its submission of the contract language. It was then the Employer's obligation, as an affirmative defense, to prove a modifying custom and practice, which it did not do , or evidence the pre-1993 overpayment. This it could not do.

AWARD

Having carefully reviewed the evidence record, upon due deliberation and for the reasons set forth above, the impartial chair of the Arbitration Board hereby renders the following award:

The Employee is entitled to eight additional day's vacation for 1993:

Absent agreement among the Employer, the Union and the Employee that all or part of the eight days can be taken as 1994 (or even 1995) vacation, the Employee is entitled to immediate payment at his 1993 hourly rate for loss of eight days vacation in 1993.