Cook #1

AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF THE ARBITRATION BETWEEN

UNION

-and-

EMPLOYER

OPINION OF ARBITRATOR

By: JULIAN ABELE COOK, JR.

Arbitrator

In the instant cause, the Grievants have alleged that the Employer failed to properly compensate them in accordance with the Collective Bargaining Agreement.

The basic facts do not appear to be in dispute.

All of the Grievants are members of the firefighting unit within the City A Fire Department. Unlike Inspectors, Arson Investigators, etc. (who work an eight hour shift) or the Dispatcher (who works a twelve hour shift), the Firefighters work on &twenty-four hour shift basis, with intervening four day relief periods.

On January 1, 1978 - the day around which this controversy revolves -none of the Grievants were on duty. They were either on an authorized vacation or not scheduled to work on that date.

On January 17, 1978, the Employer, working on a bi-weekly payment schedule, compensated it's employees, including the Grievants, for the immediately preceding two week

period (which covered the first of January, 1978). The Grievants received compensation which included their two weeks of regular pay plus holiday pay (i.e., payment in the equivalent of eight hours of regular pay).

On January 31, 1978, the Grievants, through their Union Vice President, filed a grievance, contending that they should have been paid for two weeks of regular pay (already received) plus eight hours of holiday pay (already received) plus, vacation pay (not received). In the grievance, the Grievants, who were identified as "Members of Union," contended that, on January 17, 1973, "no employee on vacation New Year's Day were celebrated received an extra day of vacation pay."

On February 3, 1978, the Employer, through it's Fire Chief, responded by stating:

> "Grievance denied. Grievance #4-78 alleges violation of Article XXI, Holidays, Section 9. The language in Section 9 of the current contract is unchanged from the language in the recently ex-' pared three-year contract. The method of paying employees of the Fire Department working on a holiday is and was under the previous three-year contract -- eight hours' pay. During the recent negotiations, both sides discussed the Holiday Article at length. The discussion included the prior three-year method of payment; that being, work on a holiday meant eight hours' pay.
>
> It should be noted that one member of the Firefighters' Bargaining Team is the signed steward of this grievance. Article VIII, Grievance Procedure, Section 3, Step 2b, reads as follows: 'The Union may initiate its grievance at this step of the grievance procedure. A Union grievance is one in which a right given to the Union as such is alleged to have been violated. The Employer's position is that this is not a proper Union grievance. It should be noted that this section was discussed during the recent negotiations also. If there was, in fact, a grievance and it was properly filed, it should have been filed by an individual unit member alleging improper pay for work done on a holiday. For the above-stated reasons, the grievance is denied."

On February 17, 1978, the Grievants, through their Union Vice President filed a Step 2 Grievance, alleging the same facts, as set forth above. However, unlike the initial Step 1 Grievance, this claim contained the following addendum which read as follows:

> "Because of the difficulty involved in contacting all individuals on vacation, we agreed to have Person 1 process this grievance for us.

/s/ Person 2
/s/ Person 3 /s/ Person 4
/s/ Person 5 /s/ Person 6 /s/ Person 7
(Person 8 is out of town on vacation and cannot be contacted)"

On February 23, 1978, the Employer, through it's Employer Manager, wrote:

'This grievance is rejected for failure to comply with the provisions of Article VIII-Section 2.a., Section 3, Step 1. The grievance was filed on February 1, 1978 without signature of the grievants by Union Steward, Person 1.

Article VIII-Section 2.a. specifies that any grievance not initiated within the time limits will be considered settled. The grievants failed to meet this requirement. Section 3. Step 1. requires the grievance to be signed by the aggrieved employee or group of employees and the Union Steward within the specified time limits.

Agreements made between the employees and the Union Steward do not act to modify the expressed terms of the Labor Agreement."

Having failed to resolve the dispute at the Step 2 Level, the Union, pursuant to the Step 3 Grievance procedure, made a demand for Arbitration.

Thus, the issue here is whether a firefighting bargaining unit member is, or is not, entitled to be compensated in the form of an extra day Of vacation pay when a holiday occurs while the employee is on vacation.

The parties stipulated to the introduction of the current Collective Bargaining Agreement (1977-1980), as well as to the three immediately preceding Contracts, covering the 1968-1971, 1971-1974 and 1974-1977 periods.

The four Contracts reflect certain modifications of the Grievance Procedure, none of which are material to this controversy.

However, the provisions within the several Contracts relating to holidays do contain some changes which should be noted.

In the 1968-1971 Collective Bargaining Agreement, Sections 2 and 7 of Article XX read as follows:

Section 2

"Employees who do not regularly work twenty-four (24) consecutive hour shifts shall receive eight (8) or four (4) hours holiday pay, as appropriate, for any of the above holidays they are not scheduled to work, provided they work their scheduled work days immediately preceding and following the holiday. If such an employee is scheduled to work on a holiday, he shall receive eight (8) hours holiday pay plus time and one-half for the hours actually worked on the holiday."

Section 7

"General paid holidays shall not be charged as vacation or sick leave."

In the current Contract, Sections 2 and 7 of Article XXI (successor to Article XX of the 1968-1971 Contract) read as follows:

Section 2

"Employees who do not regularly work twenty-four (24) consecutive hour shifts shall receive eight (8) hours holiday pay for any of the above holidays they are not scheduled to work, provided they work their scheduled work days Immediately preceding and following the holiday. If such an employee is scheduled to work on a holiday, the employee shall receive eight (8) hours holiday pay plus time and one-half for the hours actually worked on the holiday.'

Section 7

"General paid holidays shall not be charged as sick leave."

As an addition, the parties, through the Collective Bargaining process, added an additional provision to Article XXI (to wit, Section 9) which reads as follows:

"An employee on vacation at the time a holiday celebrated shall receive an extra day of vacation."

The significant change between the two Collective Bargaining Agreements is that the

older Contract provided an employee, whose absence from duty was authorized on a holiday, with an extra vacation day, whereas the current Contract gives the affected employee the equivalent of one day of holiday pay.

Prior to the presentation of testimony, the respective parties presented several procedural issues for resolution, all of which were taken under advisement.

The Union, in anticipation of expected testimony from the Employer, sought to exclude all parole evidence (relating to past practices) from admission. The Union contended that the language within the Collective Bargaining Agreement is clear and unambiguous, and that any testimony which attempted to explain the contractual language should not be introduced into evidence.

Under the Parole Evidence Rule, when parties put their Agreement in writing, all previous oral agreements merge in the writing and a Contract, as written, cannot be modified or changed by parole evidence in the absence of fraud or a mistake in the preparation of the writing. Neither party, in the absence of fraud, duress or mistake, may allege or prove by parole evidence that it's terms and conditions were other than those expressed in writing. Erkiletian v Devletian 299 Mich 95. Parole evidence is not admissible to vary or change the terms of a written instrument if the terms are clear and unambiguous. Richard v Lee 205 Mich 92.

The phrase, which is the subject of the Union's Motion, is "an extra day_ of vacation pay." (Emphasis provided). Ordinarily, the definition of a day of vacation pay would be sufficiently indefinite and "ambiguous" so as to justify the introduction of extrinsic evidence. Even in this case, there is some dispute as to the amount of compensation to which an employee (who qualifies under this Section) should receive - The Union says twenty-four hours (of regular pay), and the Employer says eight hours (of regular pay). However, the introduction, and

admission, of joint exhibits (7, 8 and 9) relating to a 1972 arbitration (Union, Union B and Captain Person 9 and Employer, board of Arbitrators for the Employer) resolves the issue of ambiguity regarding the amount of compensation to which a qualified employee would be entitled to receive under the "vacation during holiday" provisions of the Contract.

In that case, the Board of Arbitrators determined that " . . . for each twenty-four hour period an amount equivalent to eight hours times. the normal hourly rate is a day's pay for Firefighters". Inasmuch as the factual' situation therein is 'substantively identical with the facts in the instant cause, this Arbitrator fully accepts the Person 9 definition, and, in so doing, removes the ambiguity from the phrase in question.

Accordingly, there being no ambiguity in the wording of these provisions which are being examined during these proceedings, the Motion by the Union to exclude all parole evidence which would attempt to explain or define the meaning of Section 9 by means of past practices is granted.

We now turn to the two matters which were raised by the Employer, both of which are dispositive in nature.

The first matter relates to the Person 9 decision, supra. The Employer alleges that (a) the facts in the Person 9 case and the instant cause are substantively similar, and (b) the doctrine of *Res Judicata* is applicable. As noted earlier, the Arbitrator agrees that the substantive facts in the two cases are similar.

The Union argues that the Motion should be rejected because the parties and the issues in the two cases are dissimilar.

The doctrine of *Res Judicata* is defined as "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that final judgment or decree on

merits by Court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in the former suit. And to be applicable, requires identity of thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided." Black's Law Dictionary, 4th Edition (Revised).

Although the individual bargaining unit member in the 1972 case was Person 9 and the individual bargaining 'unit members in the present' cause are Person 2; et al, the principal litigants in both cases are Union and the Employer. Thus, the Union's argument regarding dissimilarity is rejected.

The Employer's argument regarding the similarity between the two, cases - which would moot the issue now pending - deserves a close examination. The Person 9 case is significant in that the Board of Arbitrators defined the meaning of a day of vacation pay." In the instant cause, however, the substantive issue is whether the Grievants are, or, are not entitled to receive their regular pay plus holiday pay plus vacation pay. The Person 9 decision does not answer the substantive issue in this case.

Accordingly, the Employer's Motion to Dismiss on the basis of Person 9 is denied. The second Motion by the Employer relates to the alleged failure by the Union to comply with the terms of the Collective Bargaining Agreement which relates to the grievance procedure.

Article VIII, Section 3, Step 1, reads as follows:

> "The grievance shall be reduced to writing on grievance forms provided by the Management, signed by the aggrieved employee or group of employees and by the Union Steward. The grievance shall be prepared in accordance with the provisions of this Article and be dated. The grievance shall be presented to the Fire Chief within fifteen (15) calendar days of the occurrence of the alleged violation, not including the day of occurrence. The Fire Chief will reply to the grievance in writing within fifteen (15)

calendar days of date of the presentation of the written grievance, not including the day of presentation."

The facts indicate that the grievance was filed on January 31, 1978 -thirty days following the holiday in issue, and fourteen days following the receipt of compensation (actual or constructive) by the Grievants from the Employer. Although the New Year's Day Is the date on which the grievance is based, the alleged cause of action did not occur until the Employer issued the paycheck to it's employees, including the Grievants. Thus, January 17, 1978 was the date when the claimed contractual violation occurred. Inasmuch as the grievance was filed on January 31, 1978, it appears that the, grievance was filed in a timely manner.

The second portion of the Employer's Motion relates to the failure of the Grievants to personally sign the grievance form. The evidence indicates that the Step 1 Grievance was signed by the Union's Vice President on January 31, 1978. The Step 2 Grievance was signed by the Union's Vice President and six of the seven Grievants on February 17, 1973, approximately two weeks after the Employer's Answer to the Step 1 Answer had been filed.

The Union, through it's witness, claims that the grievance was not signed by the Grievants because of the difficulty in (1) identifying the Bargaining Unit members who were allegedly adversely affected by the January 17, 137d payment, and (2) locating the affected Bargaining Unit members subsequent ix their identification.

The language in Section 3, Step 1 is quite clear and mandatory. The word "shall" connotes an obligatory directive. Nothing therein suggests any discretion on the part of the aggrieved employee.

Article VIII, Section 3, Step 3, Paragraph b reads as follows:

"The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. The power of the arbitrator shall be limited to the interpretation and

application of the terms of this Agreement and the arbitrator shall have no power to alter, add to, subtract from or otherwise modify the terms of this Agreement as written. Decisions, on grievances within the jurisdiction of the arbitrator, shall be final and binding on the employee or employees, the Union and Management."

When the words contained therein are given their literal, ordinary, everyday meaning, it seems clear that this Arbitrator has little, if any, room with which to interpret language that is clear and unambiguous. However, it is not inconceivable that there, are certain facts, or circumstances which would justify a departure from the exact wording and, at the same time, remain within the purpose and intent of the respective parties. This case does not fall into the latter category. There is no evidence that the grievance was initially filed with the authority of the alleged "injured" Bargaining Unit members. In fact, there is evidence to the contrary evidence which would suggest that the Grievants did not officially sanction the use of their names until the filing of the Step 2 Grievance on February 17, 1978. Further, there is no evidence (despite claims to the contrary) that the Union had, or would have had, difficulty in obtaining the names of the Bargaining Unit members who were allegedly affected by the Employer's actions.

On the other hand, there is evidence that the information was obtained from the Deputy Chief within a matter of a few minutes subsequent to the Union's request. Additionally, there is no evidence whatsoever of .the Union's efforts (if any) to contact the Bargaining Unit members for the purpose of signing the grievance prior to the filing of the Step 2 Grievance.

There is also evidence that the Union knew, or ought to have known, of the Employer's position regarding the payment of vacationing employees prior to January 1, 1978 (i.e., during the pre-1977 to 1980 Contract negotiations) and could have taken preliminary steps (i.e., determining the names, etc. of employees who were scheduled to be off from duty or on vacation on January 1, 1978) in anticipation of the Employer's alleged breach - though, clearly, there was

no legal obligation to do so.

However, when coupling the Grievance Section provisions with the evidence which has been presented, there is little, if any, doubt that the Employer's position is correct. This conclusion is re-enforced by an awareness that had the parties intended to provide for situations, as presented herein by the Union, the Contract would have contained the appropriate language. Unfortunately for the Grievants, and fortunately for the Employer, the Collective Bargaining Agreement is silent as to the circumstances, as found in the instant cause.

Accordingly, the Employer's Motion to Dismiss should, and must, be granted. Further, the Grievance, which has been filed herein, is dismissed on the basis of the Grievants failure to comply with Article VIII, Section3, Step 1 of the current Collective Bargaining Agreement.

Dated: June 28, 1978