Epstein #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

THE PROCEEDINGS

The above parties, unable to resolve a grievance filed by the Employee, with reference to the Employer's refusal to accept his resignation from the Crash Fire Rescue Crew on November 3, 1992, submitted the matter to the undersigned for arbitration under the terms of their Labor Agreement.

The Board of Arbitration provided for in the Agreement was waived by the parties who stipulated that the undersigned should act as sole Arbitrator.

A hearing on the matter was held on September 29, 1993. Both parties were represented and fully heard, testimony and evidence were received and both parties filed post-hearing briefs.

THE ISSUE

Was the Employer in violation of the Labor Agreement between the parties when it refused to accept the attempted resignation of the Employee from the Crash Fire Rescue Crew on November 3, 1992? If so, what should the remedy be?

PERTINENT LABOR AGREEMENT PROVISIONS

ARTICLE I- RECOGNITION AND AGREEMENT

A. The purpose of this agreement is, in the mutual interest of the Employer and of the employees, to provide for the operation of the services of the Employer under methods

which will further, to the fullest extent possible, the safety of air transportation, the efficiency and economy of operation, and the continuation of employment under conditions of reasonable working hours, proper compensation and reasonable working conditions. It is recognized by this Agreement to be the duty of the Employer and the employees to cooperate fully, both individually and collectively, for attainment of these purposes.

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ARTICLE 2- MANAGEMENT RIGHTS

A. Subject to the provisions of this Agreement, the Employer retains discretion and authority to manage its operations and direct its work force. Such rights include, but are not limited to, the right to hire, promote, demote, transfer, furlough and recall; to assign and reassign duties, schedules and hours of work. . . .

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ARTICLE 3- CLASSIFICATION OF WORK

. . . While an individual's job classification sets out the duties normally associated with his job, the interests of efficiency and cooperation may require his being assigned or reassigned to perform or assist in job duties normally associated with another classification. Further, all employees are expected to perform, as needed, those routine duties associated with maintaining the workplace in a safe, clean, and operative condition; provided, however, employees will not be assigned to other job duties for punitive reasons.

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ARTICLE 16- GRIEVANCE AND ARBITRATION PROCEDURE

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C. Grievance Procedure. A grievance is defined as a dispute between the parties arising under the express terms of this Agreement.

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ARTICLE 26- WAGES

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D. Employees serving on the crash, fire and rescue (CFR) crew will receive an additional $50.00 per month for each month of active service on the CFR crew. The CFR crew chief will receive an additional $15.00 for a total of $65.00 per month of such service.

DISCUSSION AND OPINION

The Employer

The Employer submits that the evidence at the arbitration hearing indicated that the Employer has expressly retained their right to assign mechanics to necessary duties, other than their primary ones, unless done for punitive reasons. It notes that the Employee’s continued presence on the crew, until a trained replacement became available, was necessary to the operation of the

airport, which contracts with the Employer to provide federally-mandated CFR services. On that basis, the Employer notes that its continued assignment of the Employee to the CFR crew, after he had submitted his resignation from the crew, did not violate the Collective Labor Agreement and was necessary under both the Employer's contract with the County and federal law. In fact, it notes that, because the Union has not pointed to any provision of the Agreement which the Employer has allegedly violated, that the case does not even constitute a grievance within the meaning of Agreement and that therefore the Union's claim must be denied.

The Employer was known as Company 1 prior to August of 1993. It notes that it provides the only scheduled air passenger service to Airport 1 in City 1, State 1, and that federal aviation regulations require the airport to provide specific aircraft rescue and fire fighting services. The airport has contracted with the Employer for personnel to fulfill the requirements of the regulations and some of the personnel involved, including "first responders" such as the Employee, must undergo specific emergency medical training. The Employer also notes that the airport cannot operate during a period when CPR coverage is not provided. It notes that since before the parties entered their first Labor Agreement, which is governing in the instance case, the Employer has used employees from the Mechanics Craft Class to fulfill the CFR positions. It notes further, that the CFR crew positions have historically been filled by volunteers, and until the Employee's attempted resignation from the crew, the Employer had never before been faced with the prospect of a shortage in crew personnel. It points out that the Employee was trained as a First Responder, but that on November 3, 1993, tendered his resignation from the CFR crew to be effective that same day, but he was seeking to retain his mechanic position and was not resigning his employment.

The Employer submits that had the Employee been allowed to resign his post immediately the Employer would not have had enough trained First Responders to comply with its contractual commitment to the County and under the federal regulations. Therefore, the Employer informed the Employee that his resignation from the crew could not be accepted until a replacement First Responder was trained and available. It also points out that after receiving the Employee's resignation; it began seeking and training a replacement and that as soon as a replacement was available, the Employee's resignation from the crew was made effective. It was there after that the Employee filed a written grievance against the Employer's refusal to accept his resignation when tendered.

The Employer stresses that the grievance did not allege that the Employer had violated any particular contract provision and that the space marked "contract provisions believed applicable" was left blank. It also notes that the Labor Agreement defines a grievance as a "a dispute between the parties arising under the express terms of the Agreement."

The Employer urges that the only contract provision that mentions the CFR crew is Section 126.D (Wages), which creates a monthly bonus for serving on the crew. The Employer also notes that in the contract negotiations, which resulted in the adding of this section, the Union was concerned about some kind of wage incentive for CFR duty, not whether CFR services could be assigned involuntarily.

In fact, testimony indicates that the only proposal that the Union made had to do with economics. The Employer does point out that there was extensive discussion at the table on the Employer's authority in general to make involuntary assignments and that throughout the negotiations Employer representatives maintain that they did not want the contract to allow employees to refuse assignments of duty other than their usual duties, and it specifically cites testimony of

Union Negotiator Person 1 who recalled on several occasions the Employer expressed its intention not to be hamstrung by cries of "it's not my job." In response to that concern the parties agreed to language in Article 3, which refers to classification of work, specifically preserving the Employer's right to re-assign employees any "job duties normally associated with another classification." Mindful of the Employer's legitimate concern regarding re-assignment of duties, the Union was itself concerned that the Employer might use its authority to single out employees the Employer did not like and assign them unpopular tasks. To guard against any such abuse of authority, the parties agreed to one limitation on the right of re-assign, which was that such re-assignment would not be made for "punitive reasons:" The Employer notes that parties did not construct any other limitations on the Employer's retained right to re-assign employees.

The Employer submits that the Labor Agreement defines a "grievance" as a "dispute between the parties arising under the express terms of the Agreement." It notes that the claim of the Union in this case fails to meet that definition, because neither in the written agreements giving rise to this hearing, nor during the hearing itself, did the Employee or the Union identify any express provision of the Agreement which had been violated. It notes that the Employee's initial complaint alleges only that CFR duty has always been voluntary, and not that the Agreement has been violated. Here again, the Employer cites Union Negotiator Person 1 admitting that "we never negotiated any language" reflecting whether CFR duty was voluntary. Therefore, the Employer points out that while the Union framed the issue as to whether CFR duty is voluntary by its own admission that subject is not treated under the Agreement. The Employer maintains that absent any express provision that the Union claims was violated, the Union's claim does not constitute a grievance; and therefore is not subject to arbitration. For that reason alone, the claim must be denied.

In support of its position, the Employer points out that the case of the Union here is even weaker than a claim rejected in an arbitration involving Lockheed Aircraft Corporation, Where the Employees in that case challenged the Employer's assignment of Bargaining Unit employees to "field duty" to Edward Air Force Base out of seniority order. In that case, the grievance was filed by an employee with more seniority than some of those assigned to field duty. The Employer contended, first, that the grievance was not arbitrable, because it did not involve the interpretation or application of a contract, and second, that in alternative, the assignment of less senior employees with more experience in the particular task to be performed on the field duty was valid on the basis of operational needs. The Employer notes that like the instant agreement, the contract in Lockheed limited arbitrable grievances to those involving provisions of the contract itself, and also provided that the contract was the sole agreement between the parties. The Employer also notes that in that case, the Employer contended that no provision of the contract dealt with the assignment of field duty, and that the Union only contends that the Employer violated past practice. In that case, the Arbitrator found the grievance to be unarbitrable, because the directives and not the contract was the basis for the Union's claim. The Arbitrator there stated however though ...Equity may be involved in the Employee's treatment; the Arbitrator is in no position to provide a remedy unless the interpretation or application of the Agreement is involved.

The Employer submits that in the instance case the Union does not claim that any provision in the Labor Agreement was violated. In fact, the Union's argument is even less substantial, because there is not even a statement of Employer policy to support the Union's argument as there was in the Lockheed arbitration. Therefore, the Employer submits that the Union is reduced

to arguing that the Employer is bound by an alleged past practice, and because only grievances alleging a violation of a specific contract provision are arbitrable, the Union's grievance here must be denied.

The Employer asserts that it retained the right to re-assign mechanics for operational reasons and it notes that absent a specific contractual provision supporting its claim, the Union could prevail only by showing a violation of some unwritten right arising out of past practice. In this regard, the Employer points out that for a past practice to have ripened into a binding contractual commitment, the practice must be clear, consistently followed over a reasonably long period of time, and shown to be mutually accepted by the parties. In the instance case, the relevant practice is an involuntary assignment to CFR duty due to operational necessity, and because this situation has never before arisen, there is no relevant past practice to support the Union's claim. In fact, the Employer maintains that it retained the right to do what it did in this case because the Management's Right Clause gives the Employer the right to assign and re-assign duties and the Classification of Work Clause expressly provides that the Employer may direct that employees be assigned or re-assigned to perform or assist in job duties normally associated with another classification.

In regards to the suggestion of the Union that the contract provisions do not apply to CFR duty is not a job covered by the agreement; the Employer submits that this argument is of no value in light of the provisions for compensation for CFR duty. It stresses that because Bargaining Unit employees receive extra pay for CFR duty, that duty constitutes work covered by the Agreement and that the Employer's continued assignment of the Employee to CFR duty falls well within the scope of its authority to assign work covered by the Agreement to employees covered by it.

In addition, the Employer submits that the Union's argument that CFR duty has always been voluntary is irrelevant to the disposition of the instant case. It notes that while CFR duty has historically been voluntary, it was voluntary for the simple reason that there always had been enough volunteers and that had there been none the Employer would have simply assigned someone to that duty, a right which the Employer clearly had before the Labor Agreement. Therefore, unless the Labor Agreement diminished the Employer's rights in that regard, those rights were retained through the specific language of Section 3 and the following language from the Management's Right Clause: "Any of the rights the Employer had prior to the signing of this Agreement are retained by the Employer except those specifically modified by this Agreement." The Employer points out further that the Union has always admitted, and the Agreement even addresses, whether CFR duty is voluntary or involuntary and therefore the Employer cannot have violated the Agreement by making an involuntary assignment to CFR duty.

The Employer also notes that, to the extent that the contractual language leaves any doubt about the breadth of the Employer's retained rights to reassign employees, the bargaining history in this case conclusively establishes the purposes behind that language. The Union admits that the Employer did not want its hands to be tied by employees unwilling to perform those tasks only performed normally by associates with their classification. It is exactly what the Employee wanted to do in this case. The Employer therefore maintains that the. Union agreed that the Employer would retain its inherent pre-contract right to re-assign employees, but with one limitation, which the Union does not claim applies in the instant case. Furthermore, the Employer submits that there can be no legitimate doubt about where the equities lie in the instant situation. It charges that a decision denying the grievance would preserve to the Employer its managerial right to assign employees, ensure the availability of CFR coverage, and place only

the slightest burden on a trained First Responder who sought to resign that post. Because an employee would merely have to remain available to respond to a crash or fire until a replacement could be trained, it would only be a slight obligation on his part. The Employer submits that given the rarity of such incidents, there is almost no burden at all on the employee. Conversely, the Employer notes that a decision sustaining the grievance would mean employees could shut down the airport whenever they wanted, because the Employer, the County, and the traveling public would be at the mercy of the employees.

Because the parties did not negotiate any provisions that would prohibit the Employer from delaying acceptance of the Employee's resignation from the CFR crew until a trained replacement was available, the Union has failed to carry its burden of proof and therefore the Employer maintains that the Union's grievance must be denied.

The Union

The Union takes the position that the issue before the Arbitrator is whether serving as a member on the CFR crew is a mandatory condition of employment under the Labor Agreement. It notes that the provisions of Article 3 of the Agreement list the different classifications covered by the Agreement. It points out that the job classifications set out the duties normally associated with each classification and that there is no reference to a CFR crew member, nor is such a position listed as a classification covered by the Labor Agreement. The Union points out that Union Representative Person 1 in his testimony stated that there were discussions during negotiations as to class and craft designations, and that the CFR was never determined to be a part of the Craft or Class of Mechanic by the National Mediation Board.

The Union charges that that the Employer attempted to show that CFR duties are associated with a classification covered by the Agreement yet at the same time they argue that the Employer may require employees to perform or assist in job duties normally associated with "another classification." In the view of the Union "another classification" is a classification outside the Labor Agreement, and the Labor Agreement cannot apply to an employee not represented by or a part of a class or craft by law.

The Union maintains that it has shown that serving as a CFR crew member is a voluntary assignment, with which the Employer agrees.

In response to the Employer maintained that the CFR crew is voluntary, so long as there are enough volunteers to maintain coverage at the airport, and if a volunteer attempts to resign that position and that resignation would limit their coverage, then the voluntary position becomes a mandatory assignment, the Union submits this is contrary to the practice of the parties.

The Union cites the testimony of Union Representative Person 2, who stated that prior to 1990, predating the Labor Agreement, that if the situation had arisen where there were not enough volunteers then they would have had to assign the lowest senior person to the duties involved.

The Union indicates that it has shown that for the Employer to assign duties to an employee that are from another classification, the duties must be covered by a classification under the Labor Agreement and that the CFR is neither a classification nor a job duty described or covered under this Agreement.

The Union cites the testimony Of Person 1 that during a recess in negotiations in May of 1991, he faxed a document to the Employer pertaining to CFR crew. This document advised the Employer that employees serving on the CFR crew could no longer volunteer for the crew unless they where compensated in some way. It notes that the Employer did not respond during the

recess, but upon resumption of negotiations, it did respond and eventually agreed to compensate employees serving on the crew on the basis of an additional $50:00 per month per each month of active service on the crew. In this regard the Employer refers to Article.26 Paragraph E, which states that employees serving on the CFR would receive an additional $50.00 per month per each month of active service.

The Union stresses that no where is there any provision in the Labor Agreement stating that serving on the CFR crew is mandatory.

It maintains the Employer presented no evidence to support its position that the resignation of the Employee could result in the airport closing. It points out that there was no evidence presented that an employee on the CFR crew absent through sickness or vacation or any other unexpected reason at any time caused or could cause the airport to be closed. Furthermore, no evidence was presented and no witness from any federal agency responsible for airport operations appeared. Therefore, when the Employer attempts to shift responsibility for the airport operational requirements, the burden of proof shifts with this position, and yet there is no evidence of any qualified witness to support the Employer's position in reference to the airport closing.

It is the contention of the Union that the Arbitrator is obligated, on the basis of the evidence presented which refers to the Labor Agreement, and the history leading to the existence of the practice, that it is clear that even where the Employer operated under "At Will Doctrine" before the contract, CFR service was voluntary.

The Union stresses that prior to the current Labor Agreement, any employee could serve on the CFR crew and that the Labor Agreement provides for a payment only for those covered by the Agreement. But volunteers are not exclusively Bargaining Unit employees because employees

outside the Agreement can and have served on the CFR crew and all such service was and must remain voluntary.

The Union maintains that employees covered by the Labor Agreement with lawful instructions and work assignments should be within the craft and class only, and that work assignments that would mandate CFR service to the class and craft would be an erroneous conclusion, because it would represent a modification of the class and craft for which only the National Mediation Board has authority. Based on the fact that serving on the CFR crew is voluntary by both Agreement and non-Agreement covered employees, this work is neither a classification nor a. job duty described in the Labor Agreement. The Union maintains that the CFR crew is not and never has been a part of the craft and class of mechanic, as determined by the National Mediation Board. It therefore requests that the grievance be sustained and that there be a finding that service on the CFR crew is voluntary and not a mandatory condition of employment.

DECISION AND AWARD

I have reviewed the testimony, evidence and arguments of the parties, and I find that the action of the Employer in the instant case is definitely not punitive in nature so that there is no basis for any claim that this would form a reason for supporting the grievance. I agree with the Employer that the issue in the instant case is not whether the CFR crew assignment is mandatory, but rather whether the action of the Employer in the instant case is in violation of the Labor Agreement between the parties.

Although the Employer is correct in its position that the Union in filing the instant grievance set forth no specific applicable provisions of the contract which it claims where violated, and

therefore that the grievance should be held as inarbitrable, I prefer to consider the instant case on its merits even though it could be dismissed as technically not within the Arbitration provisions.

I find that the Employer is required to provide CFR coverage and that the airport cannot operate during any time when such coverage is not provided. It also appears that before the parties entered into this Labor Agreement, the Employer, as a matter of practice, utilized employees from the Mechanics-Craft to fill the CFR positions. It also appears that the crews were historically filled by volunteers and that the grievance in the instant case is the first is the first attempt where anyone who had volunteered attempted to resign from the crew. It also appears that if the Employer were required to accept the resignation of the Employee, it would not have had sufficient trained personnel to comply with its contractual obligation to the airport, and would have been in violation of federal regulations. It must also be noted that the Employer, 'upon receiving the Employee's resignation, began to train a replacement, and that as soon as the replacement was available, the Employee’s resignation was actually made effective.

I agree with the Employer's position that the only contract provision that mentions the CFR crew is that section which creates a monthly bonus for serving on the crew. Furthermore, the provisions of Article 3 preserve the Employer's right to assign employees to any job duties in any classification. I find also that the parties to avoid abuse of the Employer's authority in this area, agreed to provide a clause which would bar the Employer from making assignments to the CFR for punitive reasons, but there are no other restrictive limitations on the Employer's retained right to reassign employees.

In the absence of any prorated claim that there was a violation of specific terms of the Agreement, it might have been possible for the Union to prevail if it could show a specific past

practice in support of its position. However, if there is any past practice involved, such past practice would support the Employer's position.

There is, in fact, a practice of involuntary assignment to CFR duty due to operational necessity, which requires the Employer to make such assignments. The Employer is correct in its position that it retained the pre-contract right to assign duties even after the contract went into effect. There is also support for the Employer's position that, although CFR duty has historically been voluntary, it was voluntary for the reason that there was always enough volunteers, so that the Employer's right to assign employees to CFR duty was never placed in issue prior to the instant case. Furthermore, the provisions of Section 3 dealing with Management's Rights, gave the Employer the rights which it had prior to the signing of the Labor Agreement, which are retained by the Employer except those specifically modified by the Labor Agreement.

I also agree with the Employer that requiring an employee to postpone a decision to resign from the CFR until a replacement could be trained for his job, creates only a slight problem for the employee, but that a decision upholding his right to resign would create a situation where an employee could seriously affect the operation of the airport facility by insisting on immediate resignation rights. It is not relevant to the instant case whether or not there was a specific classification covering the duties of the crew because the Employer, as a matter of a necessity, had the pre-existing right to assign CFR duties to employees in any classification. The only provision in the contract referring to CFR crews is the one which provides additional compensation for persons serving on the crew, but that provision in no way covers the situation involved in the instance case where the obligation to remain on duty until an appropriate replacement is made, is an equitable proposition. The fact that assignments to the crew are made on a voluntary basis does not affect the obligation of a crew member to support the Employer in

its contractual and safety requirements, and I am therefore obliged to deny the grievance. An Award will issue accordingly.

AWARD

The Employer was not in violation of the Labor Agreement between the parties when it refused to accept the attempted resignation of Employee from the Crash Fire Rescue Crew on November 3, 1992.