Frost #4

VOLUNTARY LABOR ARBITRATION

In the Matter between:

EMPLOYER

-and

UNION

No. #A Union Initiated/Working Agreement

No. #B Employee 1/Working Agreement

Issued: June 23, 1998

AWARD

1. Grievance #A is denied. Article 40 of the Agreement did not require the Employer to reimburse employees for time worked under a Working Agreement, from June 1995 to June 1996, as substitutes for Equipment Operator Employee 1.
2. Grievance #B is denied. Equipment Operator Employee 1 is not entitled to reimbursement for sick leave and vacation days which were exhausted prior to his going on the Working Agreement in June, 1995.

INTRODUCTION

This matter was referred to arbitration pursuant to the 1994-97 Agreement between the Employer ("Employer") and Union ("Union"). A hearing was held on July 29, 1997. The two grievances were consolidated for hearing before the arbitrator, as the issues are governed by the same contract provisions and generated by the same facts. The parties were afforded ample opportunity to examine and cross-examine witnesses, to present documentary evidence and to

argue their respective positions. Witnesses testified under oath and post-hearing briefs were filed.

ISSUE

1. Grievance #A. Whether or not Article 40 of the Agreement required the Employer to reimburse employees for time worked under the Working Agreement, from June 1995 to June 1996, for Equipment Operator Employee 1.

2. Grievance #B. Whether or not Equipment Operator Employee 1 was entitled to reimbursement for sick leave and vacation days exhausted prior to his going on the Working Agreement in June, 1995.

STATEMENT OF FACTS

On February 11, 1957 the parties executed a written agreement which provided that bargaining unit members would work for another member incapacitated by a non-duty related illness or injury. This "Working Agreement" was incorporated into the collective bargaining agreement in 1997 as Article 40.[1] Union witnesses confirmed at the arbitration that during the 1977 negations there was no discussion of what would happen under Article 40 if an employee covered by the working agreement did not return to work because he or she was granted a duty disability retirement.

On May 8, 1995 Equipment Operator Employee 1, a 17-year Fire Department employee, began exhausting his vacation and sick leave benefits while off work due to psychological/ emotional problems.[2] He participated in three counseling session through the Employee Assistance Plan ("EAP"), was referred for psychological/ psychiatric evaluation and treatment, and first saw board certified psychiatrist Person 1, M.D. on May 13th. Throughout May and June, 1995, no medical professional had diagnosed Employee 1's problems as being job-related.

[1] Since that time the language has undergone minor changes not important to this dispute.
[2] Employee 1's sick leave and vacation leave were exhausted sometime between June 13th and 22nd, 1995. Exhaustion of sick leave and vacation leave is condition for placement under the Working Agreement.

(Medical records reflect that Employee 1 demonstrated frustration, anger and paranoia focused on the Fire Department, and that he mistrusted anyone at the Fire Department, especially

supervision, and felt he had been mistreated over the years).

Employee 1 filed a worker's compensation claim based on work-related stress, giving May 8, 1995 as the date of injury.[3] On June 12, 1995 the Employer gave its Notice to dispute Employee 1's claim, maintaining his stress was not work-related.

On June 13, 1995, after examining and evaluating Employee 1, Employer Physician Person 2, D.O. concluded that:

1. Mr. Employee 1's current psychological and emotional condition is not work caused.
2. Mr. Employee 1 should not work at his regular job as a firefighter nor in a light-duty capacity at the present time.

The Employer Physician's conclusions qualified Employee 1 to be placed under the Working Agreement[4] and the initial schedule for bargaining unit members to working Employee 1's shifts was issued on June 13th. Bargaining unit members immediately took over Employee 1's duty and shift requirements without compensation, while Employee 1 received full salary.[5]

The Employer has historically enforced the working agreement arrangement, including collection of sums due from the covered worker. In this case, the Department had to write to Employee 1 to prompt him to pay the house dues and other out-of-pockets to cover the shifts the substitutes were working for him.

Although clear at the time Employee 1 was placed on the working agreement that a question existed about the work-related status of his condition, the Union acquiesced in Employee 1's

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[3] Department of Labor, Bureau of Workers' Disability Compensation Claim #95-0168.

[4] Activation of the Working Agreement is by certification of the Employer Physician that an employee is incapacitated due to a non duty-related condition or injury, and that s/he is unable to perform light duty due to that situation (Art. 40, Sec. 4,13).

[5] Bargaining unit members who substitute for am incapacitated employee under the Working agreement receive no compensation, while the incapacitated employee receive his/her regular salary (Art. 40, §7).

placement on the Working Agreement under Article 40.[6]

Sometime prior to January, 1996, Grievant applied to the Board of Trustees of the Police and Fire Retirement System ("Pension Board") for a duty-disability retirement.

In January, 1996, Dr. Person 1 sent a Psychiatric Assessment and a completed Certification Form to the Employer. Person 1 certified that Employee 1 was totally and permanently incapacitated,[7] that his condition was work-related, and that Employee 1 should be retired on the basis of duty disability. [8]

At its June 5, 1996 meeting the Pension Board granted Employee 1 a duty disability retirement. [9] (Employee 1's pension became effective in the month of its approval). In support of its action, the Board noted these medical views:

> Dr. Person 1, on behalf of Mr. Employee 1, was of the opinion that Mr. Employee 1 is totally and permanently disabled due to work-related Major Depression Disorder with Psychotic Features. Dr. Berger, on behalf of the Retirement System, disagreed with Dr. Person 1. Dr. Person 3, the neutral physician, found that Mr. Employee 1 is totally and permanently disabled on the basis of a Bi-Polar Disorder, Mixed Severe, with paranoid features. [10]

On June 17, 1996 Employee 1's working agreement expired. By that time Employee 1 had received a full years of salary and employees who worked for him had each contributed 12 hours of uncompensated time.

[6] Communications and discussions between Employee 1, the Union and the Department recognized that he claimed his condition was work-related, but he had no medical professional to support that position.
[7] Person 1's diagnosis was Major Depressive Disorder with Psychotic Features.
[8] The Certification Form Person 1 completed indicated that Employee 1 had already requested a Duty Disability retirement.
[9] Article 2 of the Employer ordinance establishes the Police and Fire Retirement System; its members are appointed by the Employer by the Union.
[10] Dr. Person 3 was the third doctor chosen by the Person 1 and the physician for the Pension Board, since their conclusions were at odds. (No reports for doctors Berger or Person 3 were made part of the arbitration record).

On August 21, 1996 the Union filed the two grievances. Grievance #A sought

remuneration for bargaining unit members who worked for Employee 1, and #B sought remuneration for Employee 1's sick leave and vacation time, because "his illness was determined to be 'duty related' by the Employer."

The Employer denied the grievances, noting that Article 40 provided no compensation to members working for another, and that responsibility to reimburse bargaining unit members belonged to Employee 1 and not to the Employer. (#A). The Employer also replied that the only way Employee 1 could be reimbursed for his sick leave and vacation benefits was for him to repay the Employer the money he originally received for them. (#B).

On September 11, 1997, Employee 1 withdrew time his worker's compensation case while it was awaiting trial.[11]

PERTINENT PROVISIONS

ARTICLE 40. WORKING AGREEMENT

SECTION 1. PARTICIPATION
The members of the Grand Rapids Fire Department who are represented by the Union Bargaining Unit, do hereby agree to participate in a Working Agreement herein set forth as follows. The provisions of this Article do not apply to personnel who are serving their original entrance probationary period.

SECTION 2. PURPOSE

A. To maintain a participating member on the payroll in the event of an off duty illness or injury resulting in a disability that would extend beyond their accumulated sick leave and vacation benefits. To provide this protection until the member

1. Is approved for return to duty by the Employer Physician; or
2. Has used the maximum time benefits provided under this Agreement; or
3. Until the end of the calendar year in which the member attains forty (40) years of credited service for those employees hired before July 1, 1992, or thirty-five (35) years of credited service for those employees hired on or after July 1, 1992.

SECTION 3. LIMITATION
A. This Working Agreement, when activated for an individual, may provide a maximum of one (1) year of protection for any specific illness or injury.

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[11] The arbitrator's Information about this withdrawal was received by phone, from the parties, after the arbitration hearing.

A. In the event that benefits are derived under this provision and the employee's injury or illness is subsequently determined to be duty incurred and subject to the Worker's Compensation Act, the

employee shall make restitution to the members who worked in the employee's behalf.

SECTION 4. ACTIVATION

A. This Working Agreement will be activated for any member of the bargaining unit who has exhausted all of his/her accumulated sick leave and vacation benefits for any illness or injury which complies with the provisions of this agreement, or is unable to perform light duty.

B. The decision to activate the agreement for an individual shall be made by the Employer Physician, upon his/her determination that the individual is incapacitated for duty, or light duty.

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SECTION 7. NO COMPENSATION

It is agreed and understood that when this Article is applied, working members shall not be compensated in any way. They are working on behalf of the incapacitated member in order that member may be maintained on the payroll as if working.

Workers' Disability Compensation Act MCA 418.161 "Employee" defined....

Sec. 161.(1Xa) .... fire fighters... in municipalities... providing like benefits, may waive the provisions of this act and accept like benefits that are provided.... this waiver shall not prohibit such employees ... from being reimbursed under (this Act] for the medical expenses or portion of medical expenses that are not otherwise provided for by the municipality...

POSITION OF THE UNION

The Union maintains that Employee 1's illness was work-related and subject to the Workers' Compensation Act within requirements of Article 40 §E3. As such, he was not required to exhaust sick leave and vacation due to his psychological condition, and substitutes who worked for him under the Working Agreement from June, 1995 to June, 1996, are entitled to restitution.

The Union explains that the Employer's contest of Employee 1's workers' compensation claim and its denial of benefits from funds segregated to pay workers' compensation claims, does not mean Employee 1's condition was not "subject to the Workers' Compensation Act" under Article 40. For, on an objective basis, Employee 1's condition was disabling and work-related. Thus, Grievant's medical records and the depositions taken during the worker's compensation

proceeding, along with the approval of a duty disability by the Pension Board, lead to the inescapable conclusion that Employee 1's disability was duty related.

The Union also points out that the working agreement recognizes, through Article 40 §3E the traditional reluctance of employers to voluntarily assume obligations under the Workers' Compensation Act. (The Union also notes that the existence of the working agreement engenders additional reluctance to concede work-relatedness and compensate employees, since the advantage to the Employer of the working agreement over the worker's compensation benefits is that replacement of the incapacitated employee is provided with no increased payroll obligation). Therefore, if the reimbursement entitlement of those who worked for Employee 1 can be frustrated by the Employer's denial of the work-relatedness, in the workers' compensation forum, a clear injustice results.

In regard to coverage under Article 40, §3E, the Union also maintains that Employee 1's case was "subject to the Workers' Compensation Act" because §418.161 of the Workers' Disability Compensation Act (WDCA) permits receipt of disability pension benefits in lieu of traditional workers' compensation entitlements, and the employer is only responsible for the payment of medical expenses out of workers' compensation funds if the employee so elects. Electing like benefits does not remove the controversy from application of the WDCA. In this regard, when Section 3 E of Article 40 states that "in the event that benefits are derived under this provision and the employee's injury or illness is subsequently determined to be duty incurred and subject to the Workers' Compensation Act", the like benefits provision contained in Section 418.161 of the WDCA, if elected by the employee, clearly serves to satisfy the limitation set forth in Article 40.

The Union concludes that Article 40, §3E was satisfied although Employee 1 did not

actually get paid workers' compensation benefits, because this provision requires but an objective analysis to appropriately resolve the current grievance and because Employee 1 received like benefits under the Act. (Also, since there is no negotiated resolve of the issues Employee 1's case presents under Article 40, the grievance arbitrator is free to, within the language of the Agreement, Person 3y out the intended, fair-minded, purpose of its provisions).

It is regrettable, for reasons known only to Employee 1 that he withdrew his application for benefits at the time his worker's compensation case was scheduled to be tried or resolved. But neither the Employer's refusal to pay workers' compensation benefits, nor Employee 1's withdrawal of his application in the face of receipt of like benefits, leads to the objective conclusion that his condition was not "subject to the Workers' Compensation Act"

Although Employee 1 was required by Article 40 §3E to make restitution to those substitutes, Employee 1 does not have a contract with his fellow bargaining unit members; the only contract is between the Union and the Employer. And this contract should provide the basis for reimbursement since the Employer activated the working agreement and compelled bargaining unit members to work for Employee 1, based on the certification of the Employer physician whose unqualified psychiatric opinion has since been refuted by two board certified psychiatrists. (Based on whose opinions Employee 1 was granted a duty-disability retirement). Further, the Employer has historically enforced the working agreement arrangement, including collection of sums due from the covered worker. Since the Employer is responsible for activation and implementation of the agreement, the Employer should be compelled to enforce the reimbursement provisions of the contract.

Suggested remedies by the Union for the employees who contributed twelve hours of time under the working agreement are to credit them with twelve hours of: (1) Sick time to be

used in conformity with the sick time entitlements and qualifications set forth in the contract; or (2) Vacation time to be used in strict conformity with the contractual requirements; or (3) Straight time pay. For the reasons set forth, the Union urges the arbitrator to grant both grievances.

POSITION OF THE EMPLOYER

The Employer claims the Union has shown no contract violation nor requirement that it reimburse those who worked for Employee 1 under the working agreement. Nor, the Employer continues, has the Union shown a basis for reimbursing Employee 1 for his vacation and sick leave.

The Employer maintains that neither Employee 1's filing of a worker's compensation claim nor the Pension Board's determination that Employee 1's injury was duty related for retirement purposes, made his condition "subject to the Workers' Compensation Act." The Employer stresses that there was never a determination that Employee 1's condition was subject to the Workers' Compensation Act, and there never will be one, since Employee 1 withdrew his claim while his case was awaiting trial.

But even interpreting the Pension Board's decision as making Employee 1's illness subject to the Workers' Compensation Act, the Employer alternatively argues, the contractual remedy is for bargaining unit members to seek restitution from Employee 1. That is the only method of reimbursement under Article 40, §3.E, and that Section is the only exception to the Article 40, §7 provision that "working members shall not be compensated in any way." The Employer maintains that asking the arbitrator to alter or add the clear and unambiguous language of Article 40, §7, and make the Employer responsible for reimbursing the employees who worked for Hailer, is a request that exceeds the arbitrator's authority (Article 8, §3C2) and should

not be granted.

The Employer also maintains that the contractual silent on the subject of an individual on the working agreement ultimately receiving a duty disability pension, does not give the arbitrator the authority or power to alter or add to the collective bargaining agreement.

The Employer also maintains it correctly followed procedures for placing Employee 1 on the working agreement and no evidence was presented to show it manipulated the working agreement. Nor did the determination by an independent board, a year after Employee 1's initial placement, equate to manipulation or control by the Employer. In fact, the Pension Board physician believed that Employee 1's illness was not duty related. Further, the Employer maintains it was not unjustly enriched, as it received only what the Working Agreement provided it; and the main purpose of the arrangement was to benefit the individual bargaining unit member, which is what occurred. In conclusion the Employer requests that both grievances be denied in their entirety.

ANALYSIS AND CONCLUSIONS

In this case Equipment Operator/Grievant Employee 1 exhausted sick and vacation time between May 8th and June 13th, 1995; he was on full salary under the working agreement for one year, and then received disability retirement benefits. As required by Article 40, Employee 1 was certified by the Employer's Physician as being disabled from all fire fighter work, due to non-work related causes; the working agreement was consequently put into effect. All parties, however, were aware from the start that a question of work-relatedness existed, and Employee 1's workers compensation claim was filed before his working agreement began.

Resolution of both grievances which arise out of these facts depends on interpretation and application of Article 40 §3E, which allows for compensation of bargaining unit members who

substitute for another under a working agreement. Such compensation is the exception to the rule that substitutes are not paid[12] and the exception arises where the incapacitated worker's condition "is subsequently determined to be duty incurred and subject to the Worker's Compensation Act." Further, Article 40 §3E provides that the employee on whose behalf others work "shall make restitution."

Were there no restitution provision in Article 40 §3E, the non-working member could be unjustly enriched by collecting worker's compensation benefits on top of full salary under the working agreement. In such a case, the restitution requirement eliminates that unjust enrichment and also provides some compensation to the bargaining unit members who work without pay. [13] In this case Employee 1 did not receive double benefits for any period of time. Any unjustness, [14] therefore, lies not with double payment but with Employee 1's voluntary withdrawal of his worker's compensation claim - a claim which would not have benefitted him, [15] but would have benefitted those who worked for him.

The record is clear that Employee 1 did not go to trial in the worker's compensation case, but withdrew that claim in September, 1997. Whether Employee 1's withdrawal was due to callus disregard for those who had helped him (intentionally sabotaging coworker's

[12] Even without reimbursement, working bargaining unit members generally benefit through operation of the working agreement, by securing for themselves and others the insurance value of this protection.

[13] Turning over workers compensation payments would amount to partial reimbursement to working members, since worker's compensation benefits do not amount to full salary.

[14] It can be maintained that injustice also existed since Employee 1 never returned to work, to be available to work under future working agreements. The arbitrator notes, however, that there are many reasons a covered employee would not return to work after a working agreement. And, Article 40 recognizes that a covered worker will not return in the situation where the employee has reached his/her credited service limit. (Art. 40 §2A3. references 40 and 35 years limits of credited service, and Article 2 §1.243 of the Employer Ordinance (Police/Firemen Retirement Board) provides that these are the credit service limits under the pension program).

[15] However, had Employee 1 proceeded and prevailed on his worker's compensation claim, he could have effectively been • reimbursed for the sick and vacation time he expended between May 8, 1995 and June 13, 1995.

compensation), or was due to psychiatric inability to recognize co-workers as deserving of appreciation and best efforts,[16] or for some other reason, [17] is unclear. What is clear was that Employee 1's actions eliminated funds to reimburse those who had worked for him. [18]

Against this background the Union maintains that those who worked for Employee 1 should be reimbursed for the time they worked, and that Employee 1 should be reimbursed for his expended sick and vacation time. These positions require two conclusions: that Employee 1's disability was "subject to the Worker's Compensation Act," and that the Employer was responsible for reimbursing substitute workers.

The Union invites the arbitrator to review and evaluate Employee 1's medical documentation from the worker's compensation case, and from that review to conclude that his condition was work-related and, therefore, subject to that Act. The arbitrator finds no basis in Article 40, however, to support such an independent review. Rather, "subject to the Worker's Compensation Act," is a matter for determination of the Worker's Compensation Bureau and not the arbitrator. Nor does the arbitrator find support on this record for the "like benefits" argument the Union presents, since Employee 1's disability retirement benefits took effect in June, 1996, which was after the time period for which the both grievances seek relief In effect, there were no "like benefits" during the pertinent period.

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[16] Employee 1 may have, for example, felt animosity toward members who worked for him, being ill and detached from the reality of the situation.

[17] Employee 1 may, for example, have been too depressed to continue with this case, or he may have had difficulties maintaining legal representation due to the limited period for which benefits could be achieved. (A duty disabled retiree is obviously not entitled to seek or secure worker's compensation benefits for time lost from work due to injury or illness. So after June 5, 1996,. Employee 1's remaining claim in worker's compensation would have covered the period of May 8, 1995 (last day worked) to June 5, 1996, which roughly amounts to the one-year period Employee 1 was off work and covered by the working agreement).

[18] The worker's compensation proceeding offered "potential" rather than a certain source of funds for reimbursement. (There was reason in the psychiatric evaluations of Employee 1, to surmise that the outcome of trial would have been favorable to Miner, but that it not to say it would have necessarily been so).

The Union's position that relief should be provided by the Employer to the substitute workers rests in largest part on the decision by the Employer's Pension Board to grant Employee 1 a duty-disability retirement. Since the Pension Board recognized work-relatedness based on psychiatric evaluations, an inference can be created that the Employer was bound to do the same in the worker's compensation forum, and should be held accountable for not dropping, by at least June 5, 1996, its objection to Employee 1's worker's compensation benefits.

Had the Employer finagled or otherwise manipulated the effects of the working agreement in relationship to the worker's compensation case, the arbitrator would have held it responsible for the effects on its improper actions. (Which effects could have included reimbursement of substitutes to the extent that worker's compensation benefits would have provided). But there is no evidence here that the Employer acted other than permissibly at each step. It had the right to dispute Employee 1's claim for work-related stress, and the decision of the Pension Board, which is an independent body, did not bind the Employer in the worker's compensation proceeding.

It is noted with respect to the Employer's potential responsibility for reimbursing substitutes, that operation of the working agreement benefits the Employer. Thus, it is able to replace a missing fire fighter without incurring additional payroll obligation. But this benefit is built into the working agreement arrangement, and it may have been why the Employer agreed to the working agreement arrangement in the first place. In any event, the Employer's receipt of expected benefits does not amount to unjust enrichment.

The bargaining unit members who worked for Employee 1 deserved to be treated better than they were in this case. But Article 40 provides them no recourse. Clearly, Article 40 should be expanded to provide better protection for the unit members against recalcitrant beneficiaries

of the working agreement.

AWARD

1. Grievance #A is denied. Article 40 of the Agreement did not require the Employer to reimburse employees for time worked under a Working Agreement, from June 1995 to June 1996, as substitutes for Equipment Operator Employee 1.
2. Grievance #B is denied. Equipment Operator Employee 1 is not entitled to reimbursement for sick leave and vacation days which were exhausted prior to his going on a Working Agreement in June, 1995.

Dated: June 23, 1998

ELAINE FROST, ARBITRATOR