

House #1

ARBITRATOR DECISION

EMPLOYER

- and -

UNION,

Grievance: Violation of Article XXI, Section 9.

OPINION EXPLAINING DECISION BY MALCOLM G. HOUSE, ARBITRATOR

Original Grievance

Date: August 1, 1978

Employee's Name: Employee 1, Employee 2, Employee 3, Employee 4, Employee 5, Employee 6, Employee 7, & Employee 8

Employee's Classification: Fire Fighter, Equipment Operator, Lieutenant, Captain

Engine House: 1, 2, 3, 5, 12 4 13

Nature of Grievance: "Violation of Article XXI, Section 9." Date of Occurrence: July 18, 1978

Statement of Facts: "On July 18, Fire Department personnel received their pay for the period including the July 4 Holiday. No employee on vacation July 4, received an extra day of Vacation Pay."

Suggested Adjustment: "Pay employees that qualify, an extra day of Vacation Pay in accordance with the contract."

Date of Hearing: Wednesday, December 20, 1978 (10:00 AM)

Location of Hearing: City Hall - Room X, City A, Michigan

STATEMENT OF THE CASE

The current Agreement between the parties was entered into as of July 1, 1977 and shall

continue in full force and effect until 11:59 P.M., June 30, 1980.

The instant grievance alleges that the Employer violated Article XXI, Section 9, and claims that the aggrieved employees did not receive an extra day of vacation pay for the July 4, 1978 holiday.

ARTICLE XXI HOLIDAYS, Section 9 reads as follows (Joint Ex. No. 1):

Section 9. "An employee on vacation at the time a holiday is celebrated shall receive an extra day of vacation pay."

Although the subject matter of holidays was contained under Article XXI in the 1974-77 Agreement, Section 9 terminology was identical to that in the current Agreement, as quoted above. (Joint Ex. No. 3)

The Employer's Step 1 reply to the instant grievance was as follows:

Date of Grievance 8-1-78

Reply:

"The grievance alleges a violation of Article XXI, Section 9, claiming that the grievants did not receive an extra day of vacation pay for July 4, 1978.

The term "Extra day of vacation pay" has been determined to be eight (8) hours by virtue of the Person 3 Arbitration Award, consistent with the provisions of Article XXI, Section 3, which defines the benefit to be received by employees who regularly work the twenty-four (24) hour shifts. In the instant case the grievants did not receive an additional eight (8) hours pay.

As you are aware, the above contract provisions have been interpreted and consistently administered in such fashion since June 1, 1971. Apparent in the face of this known, consistent practice, the Union now claims entitlement to an additional eight (8) hours. Such an interpretation would produce the illogical result that employees on vacation during a holiday week would receive sixteen (16) hours additional pay, eight (8) hours more than the employees who worked. Any provision of a labor agreement must be read and interpreted together with other pertinent provisions of the agreement. Therefore, the Grievance is denied."

Date: 8-7-78

Person 1
Signature of Fire Chief

2.

The Union rejected the above-quoted disposition by Chief Person 1 and appealed the instant grievance to Step 2 of the Grievance Procedure. Specifying that 7-18-78 was the...'Date of Occurrence'...the Union's Step 2 Statement of Facts was as follows:

"We agree the employees received an additional eight (8) hours of holiday pay in accordance with Article XXI, Section 3. The contract language is extremely clear that employees on vacation at a time that a holiday is celebrated should also receive an extra day of vacation pay. (Article XXI, Section 9). They did not receive this pay."

Suggested Adjustment: "That employees on vacation at the time a holiday is celebrated receive an extra day of vacation pay in accordance with Article XXI, Section 9."

Date: 8-24-78

Person 2
Signature

The Employer's Step 2 reply to the above-quoted Union position was as follows:

Reply: "The grievance alleges a violation of Article XXI, Section 9, claiming that the grievants did not receive an extra day of vacation pay for July 4, 1978.

The Employer is of the opinion that this issue has been subject of litigation before the Board of Arbitration in the Person 3 case and was conclusively decided in 1972. In the most recent chapter on this matter arbitrator Julian Cook opined that Person 3, was not determinative of the issues in the case then before him. The Employer disagrees and once again asserts that this issue has been decided and that Person 3 is controlling.

Article XXI, Section 3, represents a definitive provision, identifying the difference between employees assigned to the twenty-four (24) hour duty schedule and those employees assigned to the eight (8) hour schedule. Section 9, merely clarifies the status of employees, regardless of their work schedule, who are on vacation when a holiday occurs. This interpretation is consistent with the other sections of the article; such as Section 7, dealing with employees on unpaid leave or layoff, and Section 8, dealing with unexcused absence.

The grievants in this case have received the compensation required by the contract, consistent with years of practice and the Person 3 award. Therefore, the grievance is denied."

Date: August 31, 1978

Signature of Employer Manager

Following rejection of the above-quoted reply by the Employer Manager the Union appealed the instant case to Step 3. Arbitration in keeping with the provisions and requirements of Article VIII. Grievance Procedure.

The Union's "Demand For Arbitration", dated September 7, 1978, was submitted to the American Arbitration Association's Detroit Office in compliance with Article VIII, Section 1, Step 3 of the current Agreement, stating the 'Nature Of Dispute' as a ..Dispute regarding the interpretation of labor agreement: Article XXI, Section 9: Grievance No. 9-78, dated 8/1/78." Remedy Sought: "An extra day of vacation pay for all grievants on vacation on 7/4/78."

UNION'S POSITION

1.

At the out-set of the arbitration hearing Union representatives advised the Arbitrator that he could consider Joint Exhibit 4, as well as other exhibits, "at this point, as jointly agreed upon and accurate and authentic, but the Union does not agree that it (Joint Ex. No. 4) should be considered in this decision. The same will be true of the other exhibits. "The Union doesn't dispute their authenticity but it (Union) reserves objections on whether or not you (arbitrator) should consider it for specific reasons regarding this case."

It is noted that Joint Ex. No. 4 represented a stipulation of facts with respect to Grievance No. 0-00 filed by Captain Person 3. The last sentence of that two (2) page joint stipulation described the issue then in dispute as follows:

"The issue to be decided is whether the Employer violated Article XX, Section 9, (Note: Identical language with that of Article XXI, Section 9 in the instant case) by paying Capt. Person 3 8 instead of 24 hours pay for the February 21 Holiday which occurred while he was on vacation."

As previously noted, it was the Union's position that although the above-quoted matter went to Civil Service Board of Arbitration on May 2, 1972 for decision this Arbitrator was not to consider that decision (Joint Ex. No. 5) when deciding the merits of the instant case.

Subsequently, the Union filed another grievance on January, 31, 1978, again alleging a violation of Article XXI, Section 9, which was processed through the Grievance Procedure to Arbitrator Julian Abele Cook Jr. (AAA Case No. 54 39 0281 78) who described the issue in dispute as follows (Joint Ex. No. 7 - page 3):

"Thus, the issue here is whether-a fire fighting 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."

Arbitrator Cook dismissed the grievance before him on the grounds that the Union had not complied with the terms of Article VIII - Grievance Procedure in his Award, dated June 28, 1978.

2.

Simply stated, the Union's claim in the instant case is that the grievants who were on vacation at the time of the July 4, 1978 holiday should have received an extra day of vacation pay in addition to benefits heretofore paid (including holiday pay already received by them).

The Union relies on that context upon the provisions of the Agreement, Article XXI, Sections 1 and 9. Section 1 describes the paid holidays. Section 9 describing that those on vacation at the time the holiday occurs are to receive an extra day of vacation pay if on vacation.

It was the Union's further contention that no parole evidence need be considered to determine the meaning of the language in the contract describing those rights because that language, standing alone, is clear and unambiguous and therefore requires no additional clarification.

It is clear (Joint Ex. No. 4) that the practice has been for the Employer to pay holiday pay to those on vacation when the holiday occurs. And the Employer has in fact, done that in this case. But the Employer has not paid an extra day of vacation pay as Section 9, Article XXI requires.

Finally, it was the Union's position that if the Arbitrator considered the aforementioned Person 3 decision by the Civil Service Board of Arbitration in 1972, he should also consider the decision by Arbitrator Julian Cook, dated June 28, 1978. The identical issue in the current case was the issue in dispute in the June 28, 1978 (Cook) decision with the exception being that the January 1, 1978 (New Year's Day) holiday was involved, as distinct from the July 4, 1978 holiday in the instant case.

EMPLOYER'S POSITION

The Employer's position was clearly set forth in its pre-arbitration... "Position Statement"...read at the arbitration hearing.

After defining the 'Issue in Dispute', Pertinent Contractual Provisions, 1. Article VIII - Grievance Procedure and 2. Article XXI - Holidays; and Controlling Prior Arbitration Award as being..."1. Decision of the Board of Arbitration, Grievance No.3-72" the following appeared under the heading..."Background - Facts - Argument:

"Since July of 1971, the Employer has administered the provisions of Article XXI - Holidays, Section 9, by paying employees on vacation leave an additional eight (8) hours pay at their straight time rate for holidays occurring during the vacation period.

This provision first appeared in the labor agreement covering the period of June 1, 1971 through May 31, 1974. In March of 1972, a grievance was filed by, Captain Person 3 and Union, alleging a violation of Article XX - Holidays, Section 8 (presently Article XXI - Holidays, Section 9), claiming that he should have received twenty-four (24) hours additional pay at his straight time rate for the holiday occurring February 21, 1972 rather than eight (8) hours. The dispute was processed through the grievance procedure and subsequently presented to the Board of Arbitration. After a full hearing, including a written stipulation of the facts, oral argument, and briefs, the Board of Arbitration issued

a written decision denying the grievance.

Subsequently, the parties negotiated a labor agreement for the period of June 1, 1974 through May 31, 1977, which included the identical Section 9. Similarly, the present labor agreement covering the period of July 1, 1977 through June 30, 1480 contains the identical Section 9.

A grievance was filed on January 31, 1978, again alleging a violation of Article XXI - Section 9 and was presented to arbitration before Julian Abele Cook, Jr. (AAA - Case No. 54 39 0281 78). Mr. Cook dismissed the case on the grounds that the Union failed to comply with the terms of Article VIII - Grievance Procedure.

The Employer argued then and argues now that the Person 3 Case is controlling in the instant dispute. The facts in the Person 3 Case and this case are substantively similar and the doctrine of *Res Judicata* should apply. In the case heard by Arbitrator Cook, the Arbitrator ruled the Board of Arbitrators defined the meaning of "a day of vacation pay" and held that in the instant case, however, the substantive issue is whether the grievants were or were not entitled to receive their regular pay plus holiday pay plus vacation pay.

The Employer disagrees with the said opinion. At Page 1 of the decision of the Board of Arbitration in Person 3, the Board stated: "The issue in this case is whether the Employer violated Article XX Section 2, by paying Captain Person 3 instead of 24 hours pay for the February 21 holiday which occurred while he was on vacation. The Question involves the matter of the amount of pay an employee should receive for a holiday when it falls during his vacation." That was the issue grieved, heard and decided by the Board of Arbitration and that is precisely the case before this Arbitrator. Therefore, Person 3 must control."

DISCUSSION AND CONCLUSIONS

1.

Although this Arbitrator has been advised to disregard the Person 3 Case (1972) unless he also considered the Cook decision (1978) by the Union, and cautioned by the Employer to consider only the Person 3 Case because the facts in the Person 3 Case and the instant case are substantively similar and the doctrine of *Res Judicata* should apply, the Arbitrator finds that to follow such well-meaning advice might conceivably cause him to come up with the wrong answer.

Firstly, the issue in the Person 3 Case was defined by the Civil Service Board of

Arbitration that rendered the decision as follows:

"The issue in this case is whether the Employer violated Article XX Section 9, by paying Captain Person 3 8 instead of 24 hours pay for the February 21 holiday which occurred while he was on vacation."

The Board of Arbitrators concluded that for each 24 hour period an amount equivalent to eight (8) hours at the normal hourly rate was proper, and dismissed the grievance."

Secondly, the issue in the "Opinion of Arbitrator"...Cook was defined by the latter as follows (Joint Ex. No. 7- p. 7):

"The Employer's argument regarding the similarity between the two cases-which would moot the issue now pending - deserves a close examination. The Person 3 case is significant in that the Board of Arbitrators defined the meaning of "a day of vacation pay." In the instant case, 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 3 decision does not answer the substantive issue in this case."

This Arbitrator agrees with Arbitrator Cook's reasoning in that the issue in the Person 3 Case of 1972 and the substantive issue in the case before him (1978) were not one and the same.

In reviewing the testimony of Union witness Person 2, Vice-President of Union, and an employee of the Employer since 1969, Mr. Person 2 testified, during cross-examination, that since 1971, when the language of Section 9 first appeared in the contract, the Employer paid Fire Fighters who were on vacation when a holiday occurred eight (8) hours of straight time pay.

It was also Mr. Person 2's testimony that the Person 3 decision clarified .."what in hours a day of vacation amounted to. They (Bd. of Arbitration said a day of vacation pay is 8 as opposed to 24 hours..."

It was also Mr. Person 2's testimony that since July, 1971 (when Section 9 came into existence) and following the Person 3 decision that the Employer gave Fire Fighters on vacation pay during the week in which a holiday fell their regular normal pay and in addition, eight (8) hours pay at straight time.

However, sometime in 1977 Mr. Person 2 began to study the contract and it was then, too, that he first became aware of the Person 3 (1972) decision. It was then that he concluded the Employer's method of paying for holidays was wrong and formulated the belief that Fire Fighters on vacation were entitled to regular pay, plus eight (8) hours Holiday: pay plus eight (8) hours vacation pay at straight time. Mr. Person 2 also testified that although approximately five (5) holidays passed following his reaching of the aforementioned conclusion, he did not file a grievance protesting the alleged incorrect method of pay.

Finally, it was also his testimony that although the Union proposed improvements in the Vacation and Holiday benefits, the Employer had refused to consider them and the current Agreement had been signed with no change in the Holiday and Vacation benefit sections. When questioned about the Union's proposal during negotiations for changing Article XXI, Sections 3 and- 9 (Joint Exhibit No. 6) in the current Agreement Mr. Person 2, on request, read the Union's proposal which requested that all employees on a 24 hour schedule receive 10 hours additional Holiday Pay instead of the eight (8) hours. If a Fire Fighter worked on the holiday he would also continue to receive pay for all time worked at time and one-half.

If a Fire Fighter was off duty but not on vacation, he would have received his regular pay plus ten (10) hours straight time pay according to the Union's proposal.

The Union's proposal on Section 9 was as follows: "An employee on vacation time at the time a holiday is celebrated shall receive... 'Holiday Pay In Accordance With Section 3 above'

It is noted that the words..."an extra day of vacation pay"...were crossed out in the above-mentioned proposal, which was subsequently rejected by the Employer.

CONCLUSION

In the process of reaching a decision in the matter before him Arbitrator Cook, having

studied the changes in terminology that had been negotiated between the parties in Article XXI (successor to Article XX Of the 1968-1971 Contract), concluded that..."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 is celebrated shall receive an extra day of vacation.'

Arbitrator Cook then made the following observations:

"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. (Joint Ex. No. 7 - p.4)

It is clearly evident to the Arbitrator, after reading all pertinent exhibits and reviewing the verbatim transcript that the parties to the current Agreement at no time intended to compensate a Fire Fighter on vacation for a holiday celebrated in his absence from work, more than he would receive if conscientiously working on his twenty-four (24) hour shift. Furthermore, the Agreement does not contractually provide or contemplate that result.

Finally, Article VIII - Grievance Procedure, Section 3, Step 3 ARBITRATION, b. specifically reads, in part, that..."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..."

In the absence of a practice requiring a particular act and in the absence of a contractual requirement, the Arbitrator cannot direct the Employer to do something which might be desirable in his opinion or in the Union's.

It is the responsibility of the parties to either agree on the facts or present reliable

evidence in support of their respective variations of the disputed facts. The burden of proof rests on the Union in this kind of case.

The Union has the burden of persuading the Arbitrator that the Agreement (including practices interpreting it) creates rights which it claims have been violated.

Nothing in the interpretive practice supports the Union's position in the instant case.

AWARD

The instant grievance is dismissed.

Malcolm G. House,

Arbitrator

January 26, 1979