Case: Stieber #1

THE MATTER OF ARBITRATION BETWEEN

Employer

And

Union

Arbitrator:	Jack Stieber, selected by the parties through the Federal Mediation and Conciliation Service.
Appearances:	For the Union – J.C., Labor Relations Consultant; also as Witness
	For the Employer – RH,; Witnesses: M.K., D.L, J.L., J.C..
Hearing:	October 3, 1991
Briefs:	October 25, 1991
Decision:	November 21, 1991

Background

During negotiations in the Fall of 1987 the parties agreed on a new contract which contained the following Article 24, Section 1:

Article 24
COMPENSATION

Section 1. General Wages.

A. Fiscal Year 1987-88.

Wage Increase Effective October 1, 1987: Effective October 1, 1987, wage rates at all levels will be increased by 3.5%.

B. Fiscal Year 1988-89

1) Wage Increase Effective October 1, 1988:
Effective October 1, 1988, wage rates at all levels will be increased by 3%.

2) Wage Increase Effective April 2, 1989:
Effective April 2, 1989, wage rates at all levels will be increased by 1%.

3) Effective October 1, 1988:
For Schedule II employees who are promoted and whose expenses, therefore, will be covered by the Standardized Travel Regulations, the following shall apply: upon their promotion, such employees shall receive an increase in their hourly rate of $0.30 per hour. The parties agree to review the experience under this provision and negotiate over this provision upon the request of either in the Summer of 1989.

(Joint Ex. 1)

On February 6, 1991, Union Representative D.B. filed the following grievance on behalf of all employees affected by Article 24, Section 1.B.(3):

> Employee's statement of grievance: UNION members in DEPARTMENT who have received a $.30 increase under Article 24, Section 1B3, of the bargaining unit contract, have not been granted subsequent wage related provisions, such as but not limited to wage increases and overtime, based on the additional $.30. This is a violation of the bargaining unit agreement. (Joint Ex. 2)

The remedy requested in the grievance was as follows:

> A just and fair solution of my grievance is: Upon receipt of additional $.30 per hour, UNION employees in DEPARTMENT should have all wage related provisions based upon the regular hourly rate which includes the $.30; the pay of employees who have not received the provisions should have an adjustment made to their regularly hourly rate and applicable provisions; and make whole in every way any UNION employee in DEPARTMENT impacted by the grieved action. (Joint Ex. 2)

Under date of April 2, 1991, J.D.responded in part as follows:

> This contract provision addresses Departmental employees who are covered under Schedule II of the Modified Travel Regulations. Upon promotion and conversion to Schedule I of the travel regulations bargaining unit employees received the $ .30 per hour in addition to the regular pay rate.
>
> It is the position of the Department that the special pay rate identified in Article 24, Section 1 (B.3) is no different that other rates such as hazard pay or the "P" rate for work in prisons.
>
> > There is also an issue of timeliness. Article 9, Section 1 (E) states that "all grievances shall be presented promptly and not later than fifteen (15) week days from the date the grievant knew or could reasonably known of the facts or the occurrence of the event giving rise to the alleged, grievance." February 6, 1991 was the date the union prepared the grievance and mailed it to the Department. There have been several "across-the-board" percentage increases in wage rates since this contractual provision took effect on October 1, 1988. These include a one percent (1%) increase effective April 2, 1989, a three percent (3%) increase on October 1, 1989, a one percent (1%) increase effective April 1, 1990, and a four percent (4%) increase as of October 1, 1990. The grievance was initiated more than three months after employees received their first paycheck showing the October 1, 1990 increase. This is well beyond the contractual time limitations.
> >
> > Grievance denied for lack of timeliness and merit. (Joint Ex. 2)

The grievance was not resolved and was appealed to arbitration on April 9, 1991.

Issue

At the arbitration hearing on October 3, 1991, the parties stipulated to the following issue:

> Did the DEPARTMENT violate Article 24 of the collective bargaining agreement when they failed to

subject the $0.30 per hour increase contained in Article 24, Section 1.B. (3) to subsequent general pay increases?

The parties also stipulated that overtime pay was not in dispute and was not an issue in this case.

Timeliness

Article 9, Grievance Procedure, Sections 1.E. and 1.F. provide:

> E. All grievances shall be presented promptly and no later than fifteen (15) week days from the date the grievant knew or could reasonably have known of the facts of the occurrence of the event giving rise to the alleged grievance. Week days, for the purpose of the Article, are defined as Monday through Friday inclusive, excluding holidays.
>
> F. UNION, through an authorized Officer or Staff Representative, may grieve an alleged violation concerning the application or interpretation of this Agreement in the manner provided herein. Such grievance shall identify, to the extent possible, employees affected. UNION may itself grieve alleged violations of Articles conferring rights solely upon the Association. (Joint Ex. 1)

The Employer contends that since the effective date of Article 24, 1.B. (3) was October 1, 1988 and subsequent increases after that date were effective 4/2/89, 10/1/89, 4/1/90, and 10/1/90, the grievance dated February 6, 1991, was outside the specified time frame of Article 9, Section 1.E. in that it was not filed "no later than fifteen (15) week days from the date the grievant knew or could reasonably have known of the facts or the occurrence of the event giving rise to the alleged grievance."

The Employer further argues that if "the arbitrator finds that the grievance was not time barred by the labor agreement and that a contractual violation occurred, the late filing should operate as a restriction on the retroactivity accorded to unit members." (Employer Brief, p. 4)

Ms. M.K., who was formerly employed as a payroll supervisor in DEPARTMENT, testified that construction technicians often called her about their pay checks and some asked specifically about the $.30 increase. On cross-examination, she was unable to name specific individuals who had called her, the dates when they

had phoned, or whether they had asked and been told whether the $.30 was part of their general wage rate.

The Union submitted Exhibit 11, which consisted of pay warrants for employee M.M. Such warrants are given to employees at the end of each two week pay period.

Selected Figures from Michael A. Mayer's
Pay Warrants. (Union Exhibit 11)

Pay Rate	Regular Hours	Regular Earnings	Pay Period Ending
15.71	80	1244.80	9/30/89
16.02	80	1271,69	10/14/89
16.02	80	1281.60	12/09/89
16.01	80	1280.80	12/23/89
16.17	80	1293.60	4/14/90
16.17	80	1293.60	9/29/90
16.80	80	1344.00	10/13/90
16.50	80	1320.00	4/13/91

M.M.’s "Pay Rate" for the pay period ending September 30, 1989 was shown as $15.71, which was the maximum construction technician rate as of 10-01-89 (Union Ex. 12 and 13). M.M.’s Pay Rate was increased to $16.02 for the pay period ending 10/14/89, reflecting his promotion. The new rate represented a $.31 increase instead of the $.30 which he should have received according to the Agreement. This error was corrected by the DEPARTMENT for the pay period ending 12/23/89 when his Pay Rate was shown as $16.01 and a $4.00 adjustment was made for his overpayment during previous pay periods. M.M. received an increase in his Pay Rate to $16.17 for the pay period ending 4/14/90, reflecting a 1% increase effective 4/1/90. This $16 increase could have been arrived at by taking 1% of $16.01 ($16.01 x .01 $.1601) if his $.30 increase was considered as part of his Pay Rate, or by taking 1% of $15.71 if the $.30 was not included in his Pay Rate ($15.71 x .01 = $.1571). Either way the increase would have amounted to $3.6 per hour, rounded to the nearest full cent.

For the pay period ending 10/13/90, M.M.’s Pay Rate is shown as $16.80, reflecting a 4% increase effective 10/1/90 per the Agreement. This amounted to a $.63 increase over his previous rate of $16.17. How was this arrived at?

Following the MOOT position that the $.30 increase was not part of the General Wage Rate, the 4% increase would have been calculated by deducting $.30 from $16.17 and multiplying the result by 4% ($15.87 x .04 = $.6348). If the UNION position were followed and the $.30 was considered to be part of the General

Wage Rate, the 4% increase would have come to $.65 ($16.17 x .04 = $.6468), making a Pay Rate of $16.82 per hour.

For M.M.'s pay period ending 4/13/91, his pay rate is shown as $16.50. Under "Hours Earnings" there is an entry "UNION TECH R. .30. This reflects the Employer position that the $.30 increase was not part of the General Pay Rate.

The question before the arbitrator is: When did M.M. (and other promoted construction technicians) know or could reasonably have known that his $.30 increase was not being considered as part of his base rate?

Mr. J.L. testified that the DEPARTMENT payroll system was changed during the Summer of 1990 and became "compatible" about February or March of 1991. He said that this is when it became possible to show the $.30 increase separately and not as part of the General Pay Rate. However, J.L. said, that employees could easily have calculated whether or not the $.30 was being considered as part of the Pay Rate for increases.

The Union argues that affected employees could not reasonably be expected to have known that the $.30 increase was not being considered as part of the Pay Rate before it was shown separately because the difference in earnings was negligible.

Mr. M.M.'s pay increase of 1% for the pay period ending 4/14/90 would have been $3.6 whether or not the $.30 was included in his base rate, and his earnings would not have been affected. The 4% increase effective 10/1/90 represented a difference of $.02 in his Pay Rate and $1.60 in regular earnings of $1344.00, depending upon whether the Employer or the Union position was followed. In my opinion, this is too small a difference to alert an employee to the fact that his $.30 increase was not included in his base rate.

The Employer submitted no documentary evidence to rebut Union Exhibit 11, nor did it question the authenticity of this exhibit. The grievance was filed on February 6, 1991, which was within the time frame that Mr. J.L. testified that the new payroll system made it possible to separate out the $.30 increase from the General Pay Rate on employee pay warrants.

Based on the foregoing analysis, I find that promoted employees could not reasonably have known that their $.30 increase was not being considered as part of their base rate. The grievance was therefore timely filed. If the grievance is sustained on the merits, pay adjustments for affected employees will be retroactive to October 1, 1988.

Merits

In resolving disputes over contract interpretation, an arbitrator must first look to the language in the written agreement. If the language is clear and unambiguous, it must, except in highly unusual circumstances, be considered as expressing the intent of the parties. (Elkouri and Elkouri, How Arbitration Works, 4th Ed., pp. 412-413) This principle of contract interpretation is reinforced in many labor management agreements including this one which states that the arbitrator does not have authority "to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement. . . ." (Art. 9, sec. 2. D) The parties in this case do not disagree with this principle. They do disagree as to whether the language in Article 24, Section 1.B. (3), taken within the context of the article as a whole, is clear and unambiguous, as argued by the UNION, or is ambiguous and therefore allows consideration of parol evidence as contended by the Employer.

The increase was negotiated in 1987 and was included in Article 24 Compensation, in Section 1. General Wages. Subsection B. (3) provides that DEPARTMENT Schedule II "employees who are promoted and whose expenses, therefore, will be covered by the Standardized Travel Regulations . . . shall receive an increase in their hourly rate of $0.30 per hour." Other parts of Section 1.B. provide for "wage rates at all levels" to be increased by 3% effective October 1, 1988, and 1% effective April 2, 1989.

On its face the above language appears to treat the $0.30 increase the same as the other two increases in Section 1.B, namely as "General Wages." The Employer argues and quotes with approval another arbitrator who states: "However, an arbitrator does not function in a vacuum. The least required of him is that he read the entire contract before interpreting any individual part of it." (Employer Brief, pg. 5) The Employer Brief notes that the contract language is not consistent in articulating "whether or not a given premium should be built into the base rate" (p. 6) It states that both Section 3, Hazard Pay, and Section 4, Prison "P" Rate provide that those premium rates "shall be in addition to, and not a part of, the [employee's) base pay." However, the Brief notes, Section 2, Shift Differential, "addresses the same concept but uses different language to do so." (p. 6) Section 2 provides that employees scheduled to begin work at or after 2:00 p.m. and before 5:00 a.m. "shall be paid a shift differential of five percent (5%) per hour above their base rate for all hours worked in a day . . ." The Employer argues that the fact that the language on shift differentials is different from the language dealing with "P" rate and hazard pay indicates that "this article is by no means consistent in its treatment of identical concepts." (p.. 6)

I agree that the parties have not always used identical language to connote identical concepts. But in all three instances, the parties have clearly indicated that these payments were not to be considered as part of base pay they did not do this when they agreed to the language providing for the $0.30 increase in

Section 1. 8. (3). Thus, the language used in sections dealing with "P" rate, hazard pay and shift differentials, plus the fact that these payments are covered in separate sections with different headings, rather than under "General Wages" serves to support the UNION interpretation that the parties intended to treat the $0.30 increase differently from these other payments.

Pursuing its assumption that the contract language is ambiguous, the Employer introduced parol evidence to support its contention that the parties had agreed to consider the $0.30 increase the same as "P" rate. This evidence consisted of testimony by Ms. D.L., who was the Employer's note-taker during the 1987 negotiations, and Mr. J.L., Human Resources Director for the DEPARTMENT.

Ms. D.L. testified from her notes that at a meeting of the Management team on October 12, 1987, Ms. B.G., the Employer's chief negotiator, said that Mr. J.C., the UNION chief negotiator, had agreed to treat the $0.30 increase "like P-rate." Mr. J.L. testified that on October 9, he, Ms. B.G. and Mr. J.C. met in the hall at the Office of the State Employer. J.L. said he asked B.G. how the increase would be treated and she responded "like 'P' rate." He said that J.C. nodded his head signifying agreement.

Mr. J.C., testifying from his notes taken during the 1987 negotiations, denied that the issue of the $0.30 increase being considered like "P" rate was ever proposed in negotiations, let alone agreed to by him. He could not recall any meeting between himself, Ms. B.G. and Mr. J.L. at which he had agreed to the increase being treated like "P" rate.

I find no basis in the contradictory testimony of Employer and UNION witnesses which could conceivably rise to the level necessary to overcome the written contract language analyzed above. Whatever management's intention with respect to the $0.30 increase, it cannot overcome the clear contract language of the written agreement that the increase was part of General Wages and was to be treated the same as other increases in Article 24, Section 1.

Award

The Employer violated the collective bargaining agreement when it failed to subject the $0.30 per hour increase contained in Article 24, Section 1.B.(3) to subsequent general pay increases.

The Employer is directed to reimburse employees affected by this violation for lost earnings retroactive to October 1, 1988, and to treat the $0.30 increase as part of General Wages in calculating future pay increases.

Dated: November 21, 1991

Jack Stieber

Arbitrator