AMERICAN ARBITRATION ASSOCIATION

In The Matter Of:

Employer

And **Case: Wilson #3**

Union

(on behalf of T.T., et.al.)

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OPINION AND AWARD

Procedural Issues

Neither party asserted any procedural issues for resolution prior to commencement of the hearing.

Facts and Background

The issue to be decided by this Arbitrator is whether the Employer violated the parties' collective bargaining agreement by failing to properly schedule employees to work the 2004 Martin Luther King, Jr. holiday. The underlying facts are undisputed.

Article 18, Section E of the parties' agreement provides:

> The Employer will poll employees scheduled to work on the shift in high seniority order to determine each employee's preference regarding work on the holiday. Absence(s) will be granted on the basis of seniority. If there are not enough volunteers to take the paid holiday absence, the Employer shall direct the least senior employee(s) scheduled to work to take the holiday absence. (Such employees shall receive notice of such a schedule no less than ninety-six hours prior the beginning of the work period containing the holiday for which the paid absence will be authorized). Exceptions to

> seniority-order scheduling may be made to account for any special qualifications that may be needed.

On January 13, 2004, Captain J. S. issued a "Holiday Scheduling Notice" for the Martin Luther King holiday. Officers VW, HA, M, DE, DA, HO, J, R, L, G, S, OD, ME and SN were directed to take the day off as a "holiday" because the minimum staffing requirement had been satisfied. (Joint Exh. 5). Officers HA, HO and M were not made aware of the January 13 notice because they were on their "regular day off" on January 13 and 14. When they received notification upon their return on January 15, 2004, they had technically only been provided with notice of a scheduling change 72 hours prior to the shift for which the change was made.

On January 15, 2004, a second notice was issued, adding bargaining unit member DW to the list of officers scheduled to take the day off as "holiday". (Joint Exhibit 7). According to Captain J.S., Officer DW was inadvertently omitted from the January 13, 2004 notice. Again, this notice of a scheduling change occurred only 72 hours prior to the shift for which the change was made.

The inadvertent omission and/or failure to notify officers on their regular day off of the schedule change becomes relevant because the parties' agreement specifically provides that officers must receive 96 hours notice of a scheduling change. Since Officers DW, HA, HO and M were not provided with the requisite 96-hour notice, an internal decision was made to allow them to work on the holiday. Although this decision may have prevented violation of one part of the parties' collective bargaining agreement, it ultimately resulted in violation of another portion of the same agreement by permitting these less senior officers to work (earning 8 hours holiday pay plus premium pay for a total of 12 hours) while officers with greater seniority were placed on holiday "leave" and paid a total of 8 hours.

Both parties acknowledge that this "error" is one of first impression and that it appears that Captain J.S. merely made a mistake in the timing and posting of the holiday schedule. The Employer argues that one mere mistake should not result in a monetary windfall for the officers who were scheduled to take holiday leave. On the other hand, the Union argues that, even though the error has only occurred once, members of the bargaining unit have been financially harmed by not being permitted to work the holiday in accordance with the seniority rights they have earned. And therein lies the conundrum.

Although the collective bargaining agreement clearly identifies the holiday scheduling procedure, the parties are silent on the issue of remedy for a breach of the procedure. In such cases, arbitrators often rely upon "arbitral jurisprudence to resolve the dispute":

> Gap-filling procedures, now popularly known as "default rules," are used by arbitrators when evidence shows that the

> parties would have covered a particular subject matter if they had thought about it. The theory of default rules is that, to fill gaps, arbitrators automatically fall back on arbitral jurisprudence, unless the parties negotiated around established arbitral principles. After decades of evolution, arbitral principles are presumed to be reasonably fair and just. A party relying on an interpretation for filling a contractual gap that differs significantly from well-established arbitral jurisprudence bears the burden of proving that the parties intended to contract around a recognized gap-filler or default rule.
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> ... While the essence of gap-filling must be found in the parties' agreement, that essence "may include, implicitly or explicitly, an authorization for (the arbitrator) to draw upon a range of other sources, including statutory and decisional law."

See, *"The Common Law of the Workplace", §2.21, at 85-86 (St. Antoine, BNA, 1998).* Clearly the parties sought to protect two concepts: selection of holiday scheduling through seniority and notice of schedule changes. Higher seniority employees are permitted to choose whether they will work the holiday and receive either cash compensation or the equivalent hours in compensatory time, or whether they will simply take holiday leave time-off. It stands to reason then, that high seniority employees who elected to work the holiday, but were later instructed to take holiday leave because the minimum staffing requirement had been satisfied, should be compensated in the form of their initial election. That is to say, the four high seniority employees who were instructed to take holiday leave and *who would have been selected to work but for the notification error* that permitted Officers HA, M, HO and DW to work on the January 20, 2004 holiday, should be compensated as if they had been scheduled to work in the form of compensation initially selected on the holiday "poll" admitted into evidence as Joint Exhibit 8.

In reaching this conclusion, this arbitrator is not seeking to add to or modify the existing agreement, nor is she attempting to institute her own brand of industrial justice. Rather, a common arbitral principle permits an arbitrator to award specific performance unless the agreement explicitly limits the arbitrator's authority to do so.

> Arbitrators are constantly required and expected to give meaning to contract provisions which are unclear, in situations which were not specifically foreseen by the contract negotiators. So long as this is done by application of principles reasonably drawn from the provisions of the Agreement, and not by treating of a subject not covered at all by the Agreement, arbitral authority is not being improperly assumed.

See, Superior Products Co, 42 LA 517 (1966). See a/so, *National Academy of Arbitrators, 34th Annual Meeting, 109 (1982).*

AWARD

The Arbitrator awards specific performance of the contractual provisions permitting high seniority employees to choose whether they will work on a holiday or take holiday leave. Accordingly, any of the four high seniority employees who were instructed to take holiday leave, who *would* have been selected to work *but for* the notification error that permitted Officers HA, M, HO and DW to work on the January 20, 2004 holiday, should be compensated as if they had been scheduled to work in the form of compensation initially selected on the holiday poll. If the Department can demonstrate that the minimum staffing requirements had been met and that Officers HA, M, HO and DW were permitted to work *only* because they had not received the requisite 96-hour notification of a schedule change, then the Arbitrator deems that the grievants were not harmed and are not entitled to compensation.

The Arbitrator will retain jurisdiction for a period of 30 days from the date of this award to assist the parties in resolving this dispute, if necessary.

Respectfully submitted,

Gail M. Wilson, Arbitrator

DATED: January 28, 2005