

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 SHEET METAL WORKERS' INTERNATIONAL :
 ASSOCIATION, AFL-CIO, LOCAL NO. 565 :
 :
 and : Case 5
 : No. 42969
 : A-4530
 BADGER SHEET METAL WORKS, INC. :
 :

Appearances:

Mr. Paul Lund, Business Manager and Secretary-Treasurer, appearing on behalf of the Union.
 Michael, Best & Friedrich, Attorneys at Law, by Mr. Jonathan O. Levine, appearing on behalf of the Company.

ARBITRATION AWARD

Sheet Metal Workers' International Association, AFL-CIO, Local No. 565, herein the Union, and Badger Sheet Metal Works, Inc., herein the Company, agreed to have the undersigned arbitrate a dispute under the final and binding arbitration provisions of the parties' collective bargaining agreement. Pursuant thereto, the Wisconsin Employment Relations Commission appointed the undersigned as arbitrator to hear and decide the dispute specified below. A hearing was held on January 30, 1990 at Green Bay, Wisconsin. A transcript was issued on February 14, 1990. The parties completed their briefing schedule on March 22, 1990.

After considering the entire record, I issue the following decision and Award.

ISSUES:

The parties stipulated to the following issues:

1. Did the Company violate the 1986 collective bargaining agreement 1/ when it denied the grievants vacation pay for time worked between their September 1988 anniversary dates and their date of separation on August 25, 1989?
2. If so, what shall the remedy be?

In addition, the Company raised the following procedural issue:

1. Should the grievances be denied because neither of the grievants complied with Article IX, Step 1 of the grievance and arbitration procedure?

BACKGROUND:

Greg Kane

Greg Kane, hereinafter referred to as grievant Kane, was hired by the Company on September 21, 1982. On September 21, 1983, he became "eligible" for one week of vacation under Article VIII of the agreement. On each anniversary date thereafter, he became eligible for two weeks vacation. September 21, 1988 was no exception, though grievant Kane did not use his full two weeks, earned from September 21, 1987 to September 21, 1988, before leaving the Company.

On August 25, 1989, grievant Kane informed shop foreman Claude DeNamur that he was quitting. DeNamur told him that he didn't want to have anything to do with it and that he should see Greg DeCaster, the Company's President. DeCaster met with grievant Kane and told him that he should speak with JoAnn Fisher, the Company's bookkeeper and Vice-President, concerning his insurance and any unused vacation left from the previous (1987-1988) anniversary year. Fisher told grievant Kane that he would be paid for unused vacation days but that he was not entitled to any vacation pay for time worked since September 21, 1988. Grievant Kane then left the premises without asking why and without talking to anyone else.

Quin Oshefsky

Quin Oshefsky, hereinafter referred to as grievant Oshefsky, was hired by the Company on September 24, 1983. On September 24, 1984, he became "eligible" for one week of vacation pursuant to Article VIII. On each anniversary date thereafter, he became eligible for two weeks vacation. On September 24, 1988,

1/ In effect from December 2, 1986 thru December 1, 1989.

grievant Oshefsky again became "eligible" for and later took two weeks vacation.

Grievant Oshefsky quit his job with the Company on August 25, 1989. After finishing some morning work at Proctor & Gamble, he went to the Company and mentioned to DeNamur in passing that he was quitting. He then told Fisher that he was quitting and wanted to offset insurance premiums with any remaining vacation. Fisher told grievant Oshefsky to speak with DeCaster.

Grievant Oshefsky called DeCaster later that morning. DeCaster told grievant Oshefsky that he was not entitled to vacation pay and later sent him a letter dated August 25, 1989 confirming the denial of pro rata vacation pay because "you did not reach your anniversary date of September 24."

The Grievances

The grievants filed grievances on September 13, 1989. The grievances alleged a "violation of Article VIII - Vacations - Section 1. The Company has denied me vacation pay for time earned since my 1988 anniversary date." For relief the grievants asked "that the Company pay me for the vacation time I have earned between my 1988 anniversary date and the date I left employment."

DeCaster denied the grievances stating that both grievants used or were paid for the two week vacation they became "eligible" for on their anniversary dates in September, 1988 and were not entitled to anymore vacation until their September, 1989 anniversary dates.

DeCaster discussed the grievances with Union Business Manager Paul Lund on September 29, 1989. By letter dated October 3, 1989, the Company denied the grievances at Step 2 as follows:

As per our discussion on 9-29-89 pertaining to vacation pay for Quinn (sic) Oshefsky and Greg Kane, they have received their 2 weeks vacation for 1988 to 1989 anniversary.

Please refer to article IX, grievances and arbitration, step 1, Quinn (sic) and Greg did not discuss the matter directly with either of the foreman (sic) before or after they terminated their jobs at Badger Sheet Metal Works. As far as the company is concerned, step 1, oral discussion, was never taken by the two employees, therefore, the grievance should be dropped.

The parties were unable to resolve their differences and proceeded to arbitration.

Although Step 1 of the grievance procedure provides that an employee must present his complaint to a foreman, foremen generally referred disputes involving vacation or insurance to DeCaster or Fisher for resolution.

Generally, employes had to work until their anniversary date to be eligible for vacation based on time worked during the prior anniversary year although sometimes employes were allowed to begin taking vacation as of the 1st of the month in which their anniversary date fell. Employes also were allowed to carry over vacation for use in the following anniversary year instead of it being considered forfeited.

The Company has never paid an employe who left the Company before his anniversary date pro rata vacation.

This is not the first time that the Company and the Union have faced the issue of whether an employe who quits prior to his anniversary date is entitled to pro rata vacation pay. On August 30, 1987, Steve Fay quit his job with the Company to work for Nicolet Paper. Fay requested pro rata pay vacation pay for time worked since his September 16, 1986 anniversary date. DeCaster testified that he discussed the matter with Lund, and that they both agreed that an employe who quit before his anniversary date was not entitled to a pro rata vacation under Article VIII.

By letter dated September 4, 1987, the Company denied Fay's request for pro rata vacation as follows:

. . .

You terminated your employment with Badger Sheet Metal as of August 30, 1987 when you phoned Mr. Greg DeCaster at his home and told him you were leaving to take a job at Nicolet Paper.

We were informed by Mr. Paul Lund, Local 565 Business Agent, that since you terminated your employment before your anniversary date you are not entitled to any vacation.

. . .

Fay subsequently filed an unfair labor practice charge (which was ultimately dismissed by the NLRB) against the Union alleging that the Union failed to fairly represent him in his dispute with the Company over pro rata vacation pay. During the course of investigating Fay's unfair labor practice charge, Lund discovered the September 4th letter noted above. He then sent a letter dated February 10, 1988 to DeCaster which, in material part, stated:

Enclosed is a copy of your September 4, 1987 letter to Steve Fay which states that I informed the Company that Steve was not entitled to any vacation due to his terminating employment before reaching his anniversary date.

This will serve to advise you that I do not recall discussing the matter of Steve Fay's vacation with any Company representative, at any time. I only recall a phone conversation which I had with Shop Steward Andy Hyer in early September, 1987, in which I stated to him that Steve's claim for vacation pay may be questionable due to the contracts silence on the matter of pro-rated vacation.

Also be advised that I would have no objection whatsoever if the Company had paid, or were to pay, Steve Fay for the pro-rated amount of vacation he may have been presumed to have earned between his 1986 anniversary date and the date he terminated his employment with Badger Sheet Metal.

I would further request that, in the future, I be furnished a copy of the any Company correspondence which makes reference to statements claimed to be made by me or the designated representatives of Local 565 concerning contract interpretation.

DeCaster did not recall "seeing" the above letter.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE VIII - VACATIONS

Section 1. Vacations will be granted for time earned using the employee's anniversary date as the vacation eligibility date.

Earned Vacation Schedule:

One Year One Week
Two Years Two Weeks

Effective December 2, 1988:

Eight Years Three Weeks

Section 2. Vacation will be granted to employees upon their request, provided that the employee gives the Company ten (10) days advance notice.

ARTICLE IX - GRIEVANCES AND ARBITRATION

All questions involving issues arising out of or pursuant to the matters agreed to herein or in respect to interpretations, application, conflicts or differences with respect to matters specifically covered by this Agreement shall be resolved by the Grievance Procedure hereinafter set forth. Either party to this Agreement may bring a grievance. All grievances shall be handled in the following manner:

Step 1 - Oral discussions

An employee having a grievance must discuss the matter directly with his foreman and, if he requests it, may be accompanied by a Job Committeeman or Steward. Every effort shall be made to settle the matter immediately. If such grievance cannot be resolved after oral discussion, it shall be reduced to writing and presented to the foreman within forty-eight (48) hours. The foreman shall give a written answer to the Union Representative initiating the grievance and the Local Union's Business Manager within forty-eight (48) hours of the time of submission.

Step 4 - When either party has carried a matter of dispute through the steps of the

UNION'S POSITION:

The Union rejects the Company's procedural objection to the grievances for the following three reasons. One, a practice existed among employees to bypass foremen, and take grievances or other problems directly to JoAnn Fisher or Greg DeCaster for resolution. Foremen didn't have records on matters like vacation pay or insurance, and routinely suggested to employees that they speak to Fisher or DeCaster if they had problems or questions in these areas. Two, by the time the grievants became aware of the Company's rejection of their claim to pro rata vacation pay, they were working for another employer; and unable to easily take time off from their new jobs to discuss their grievances with a foreman. Finally, the Company did not raise the procedural defect issue in its initial written response to the grievances, and therefore is barred from any later challenge to the grievance's arbitrability.

With respect to the merits of the dispute, the Union rejects the Company's reliance on a past practice of never giving pro rata vacation pay to an employee when he leaves employment because the Union never acquiesced in said practice. The Union also claims that Article VIII, Section 1 "does not contain an express requirement that the employee be on the payroll or on the Company's employ on a particular date in order to qualify for vacation." In this regard the Union argues that the "eligibility date" is a simply a 'cut-off date' for computing vacation pay, and is not a condition precedent for entitlement to vacation benefits. Finally, the Union maintains that the Company's interpretation, that the employee has no vacation entitlement unless still employed on his anniversary date, is totally contrary to the concept of vacations being granted for "time earned."

Based on all of the above, the Union requests that the arbitrator sustain the grievances and find that the grievants are entitled to pro rata vacation pay for time earned in their 1988-89 anniversary year and order the Company to pay the grievants each 11/12ths of two weeks vacation (11/12 x 80 hours) at the hourly pay rate they were receiving on August 25, 1989 plus interest at the rate of 12% per annum from August 25, 1989 to date paid.

COMPANY'S POSITION:

The Company initially argues that the grievances are not arbitrable. In this regard the Company claims that the grievants did not pursue an oral discussion with their foreman or submit a written grievance to their foreman within 48 hours as required by Step 1 of the grievance procedure. The Company concludes that "since the conditions for arbitration have not been met, the grievances are not procedurally arbitrable" based on Step 4 of the grievance procedure and arbitral precedent.

Even if arbitrable, the Company maintains that the grievants do not have a right to pro rata vacation pay under Article VIII, Section 1. In this regard the Company first argues that the "plain meaning" of the aforesaid contract provision is that an employe becomes "eligible" for a vacation on the passage of the employment anniversary date and on successive anniversaries thereafter. (emphasis supplied) To reach this conclusion the Company points out that Article VIII specifically designates "the employe's anniversary as the vacation eligibility date." The Company adds that by definition the "vacation eligibility date" is simply the date on which an employe becomes "eligible" for or entitled to, vacation benefits. The Company next points out that under Article VIII, the "vacation eligibility date" also happens to be the employe's anniversary date. Thus, according to the Company, the "anniversary date" is not only the basis for computing the amount of vacation owed, but it is also the date that establishes eligibility for vacation. A worker, therefore, is not "eligible" for a vacation unless he is employed on his anniversary date. The Company cites the decisions of several arbitrators in support of this inter-pretation of the disputed contract language.

Finally, the Company argues that it has always followed a consistent past practice under which no employe has been paid pro rata vacation pay when resigning prior to his anniversary date. The Company adds that the Union had knowledge of and acquiesced in this practice. The Company cites arbitral precedent and 1990 bargaining history to support its reliance on past practice in denying pro rata vacation pay in the instant case.

In view of all of the foregoing, the Company requests that the grievances be denied.

DISCUSSION:

The Company initially raises a procedural objection that the grievances were not properly processed at Step 1 and, therefore, should be dismissed. The Arbitrator agrees. Step 1 clearly requires that "an employee having a grievance must discuss the matter directly with his foreman" in an attempt to resolve the dispute. If a grievance cannot be resolved after oral discussion, Step 1 also requires that "it shall be reduced to writing and presented to the foreman within forty-eight (48) hours." 2/ There is no evidence that the Company has been lax in enforcing these requirements. Nor did the Union present any evidence that foremen were not accessible or unresponsive to Step 1 concerns. 3/

2/ The Company did not raise this objection in a timely manner prior to hearing.

3/ Tr. 34. If a foreman was unable to resolve the dispute he referred employes to Fisher or DeCaster. Tr. 67-68 This does not absolve employes from first bringing the matter to the attention of a foreman.

The record indicates that both grievants told their foreman they were quitting. However, the record also indicates that they failed to discuss the dispute over vacation pay with said foreman prior to filing a written grievance. Contrary to the Union's assertion, the Company raised its procedural objection in a timely manner during the grievance process and prior to agreeing to arbitrate the dispute. Also contrary to the Union's assertion there is no persuasive evidence in the record that the grievants were unable to discuss the matter with a foreman prior to filing a written grievance. There is no evidence that the grievants even attempted to discuss the matter with a foreman prior to filing their grievances. 4/

The Company argues that "where the parties have set forth the steps to be taken in the course of the grievance procedure during the collective bargaining process, the arbitrator should not assume jurisdiction if those steps have not been taken." The Arbitrator agrees. Applying that principle to the facts of the instant case, the Arbitrator finds that he does not have jurisdiction to hear the instant dispute. The Union argues, however, that the Arbitrator should not dismiss the case over an "insignificant technicality." Assuming arguendo that this argument of the Union should prevail and the Arbitrator should decide the merits of the dispute "on a plea of substantial justice" the Union's case still would fail. In this regard the Arbitrator notes that Article VIII does not specifically provide for pro rata vacation pay. There is no evidence that the Company ever paid pro rata vacation pay to any of its employees. To the contrary, the record indicates that employees became "eligible" for vacation on the passage of the employment anniversary date and on successive anniversaries thereafter. (emphasis supplied) The record also indicates that the Company never paid an employee who left the Company before his anniversary date pro rata vacation. (emphasis supplied) Finally, the record indicates that the Union had knowledge of and acquiesced in the Company's practice of not paying pro rata vacation pay to employees who terminated their employment (the Steve Fay matter) at least until the present dispute.

Based on all of the above, the Arbitrator finds that the answer to the procedural issue, as framed by the Company, is YES, the grievances should be denied because neither of the grievants complied with Article IX, Step 1 of the grievance and arbitration procedure.

In light of the foregoing, it is my

AWARD

That the grievances are denied and the matter dismissed.

Dated at Madison, Wisconsin this 18th day of April, 1990.

By _____
Dennis P. McGilligan, Arbitrator

4/ The grievants could have used a telephone since they no longer were employed by the Company.