BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
HOTEL EMPLOYEES & RESTAURANT EMPLOYEES, LOCAL 122, AFSCME, AFL-CIO	Case 2 No. 44856 A-4724
and	
HYATT REGENCY-MILWAUKEE	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. John J. Brennan, appearing on behalf of the Union.
Miller, Walsh and Maier, S.C., by Mr. Charles P. Magyera, appearing on behalf

ARBITRATION AWARD

The Company and Union above are parties to a 1988-91 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the question of arbitrability of the discharge grievance of Katherine Iverson.

The undersigned was appointed and held a hearing in Milwaukee, Wisconsin on January 15, 1991, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, and neither party filed a brief.

STIPULATED ISSUE:

Is the grievance arbitrable?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE III

GRIEVANCE AND ARBITRATION PROCEDURE

Section 1.

During the term of this agreement, differences of opinion or disputes between representatives of HYATT and any employee or UNION representative regarding interpretation or alleged violation of any provision of this Agreement may become the subject of arbitration only after all steps of the grievance procedure have been utilized and have failed to produce accord between the parties. Arbitration extends to any employee aggrieved that is currently employed except in the case of a discharged employee who shall only have the right to grieve the discharge through the arbitration procedure.

Section 2.

A. Any employee or one of a group of employees having a grievance may discuss the matter with the employee's immediate supervisor or department head, with or without a Steward present. Whenever possible such discussion will be held on the same day as the question is raised. If as a result of such discussion, the aggrieved employee believes that a grievance exists, such employee shall notify his or her Steward/Business Representative and reduce the grievance to writing and submit it to HYATT and the procedure will then be as follows:

B. If the matter is not satisfactorily resolved in Step A, the written grievance presented to HYATT shall be answered in writing by HYATT within seven (7) days. Any grievance, except a discharge or other disciplinary grievance, not presented in writing within fifteen (15) days from the date of the occurrence will be barred. Any grievance involving discharge or other discipline must be presented in writing within seven (7) days following receipt of notice of discharge or other disciplinary action or it will be barred.

C. If the parties fail to reach a settlement of the grievance within the aforesaid time, then the matter shall be submitted to a Joint Grievance Committee composed of two (2) HYATT representatives and two (2) UNION representatives one of which shall be the UNION Business Manager or his designee. The Joint Grievance Committee shall meet at a mutually convenient time and place, on such regular or special basis as it shall determine, and render its decision or award within one (1) day after the close of the hearing. If the Joint Grievance Committee resolves the dispute by a majority of those present and voting, then such decision shall be final and binding upon the UNION, HYATT and the employee. If the Joint Grievance Committee is deadlocked on the disposition of the dispute, then either party may take the matter to arbitration as provided in Paragraph D of Section 2. Nothing contained herein shall authorize the Joint Grievance Committee to alter the terms and conditions of this Agreement or to make a new Agreement.

D. If the matter is not resolved in Step (c), then either the Local UNION or HYATT may refer the matter to arbitration by notifying the other of such intention in writing within one week after the decision of the Joint Grievance Committee. The parties shall attempt to agree upon an arbitrator with three (3) working days of the delivery of the request for arbitration. If the parties fail to reach agreement on the selection of an arbitrator within said three (3) day period, the party referring the matter to arbitration shall request the Federal Mediation and Conciliation Service to submit a list of seven (7) names for consideration as arbitrator. The parties shall alternately strike one name from the list of the proposed arbitrators and the last remaining name shall be that of the arbitrator. The parties shall flip a coin to determine who shall strike the first name. The arbitrator so selected shall meet with the respective parties as soon as practicable following appointment and shall render the decision in writing within thirty days of such hearing. The arbitrator shall be specifically limited to determining issues involving the interpretation or application of terms of this Agreement (including the Appendices hereto) and shall have no authority to add to or subtract from or change existing wage rates or any of the other terms of this Agreement. The award of the arbitrator shall be final, binding and conclusive on all parties. All expenses incident to arbitration shall be borne equally by the parties.

E. Time frame restrictions in this section are not arbitrable. Any grievance not filed within the time limits specified above, shall not be accepted, processed or arbitrable.

FACTS:

The parties stipulated to the following:

1. The parties, Hyatt Regency-Milwaukee and HERE Local 122, are signatory to a labor agreement executed on June 16, 1988 and running through June 15, 1991.

2. HERE Local 122 is a labor organization within the statute's meaning, and Hyatt Regency-Milwaukee is an employer within the meaning of the statute.

3. On May 11, 1990 the Employer terminated the employe Katherine Iverson for alleged theft.

4. At the termination meeting Iverson protested her innocence and refused to voluntarily resign.

Iverson's refusal represented a dispute between the parties following within the coverage of Article III of the Agreement.

5. Pursuant to Article III, Section 2. C., the joint grievance committee (Mike Gallo and Vince Gallo for the Union, and Kevin Beckel and Earl Nightingale for the Company) met on May 21, 1990 to review the grievance. The grievance was not resolved at that meeting.

6. On May 21, 1990 Vince Gallo requested a copy of the spotter's report under which the Company had made its decision to discharge. At that time Nightingale replied that he would need to speak with corporate representatives and get back with Gallo.

7. A few days later [date not known] Gallo received a call from Nightingale, who explained that the Union could review the spotter's report but it would not be sent a copy. The Union would have to review the original report on the Hyatt premises. Gallo replied that he would call the Union's attorney and set up a date to review the report. Nightingale replied that the Hyatt would furnish a room for the review.

8. On June 12, 1990 the Union attorney met with Vince Gallo and they reviewed the spotter's report at the Hyatt.

9. On July 2, 1990 the Union attorneys interviewed the grievant and a decision to arbitrate was made.

10. On July 3, 1990 the Union notified Hyatt of its selection of arbitrators and of its intention to arbitrate.

11. On July 6, 1990 Hyatt notified the Union of its position that the demand for arbitration was untimely per the terms of Article III, Section 2. D., and refused to arbitrate.

12. The determination of this Arbitrator as to the procedural arbitrability of this grievance shall be final and binding.

The facts are not in dispute. The Company contracts with a firm of "spotters" who travel from hotel to hotel anonymously to identify possible instances of theft, and on or about May 11, 1990 the spotters visited the Milwaukee hotel. Three employes were discharged as a result. On May 21, the grievance committee met to discuss the grievances at the second step of the grievance procedure.

Vince Gallo testified that at this meeting there were three terminations to discuss, but that one grievant did not show up. A second employe was offered an opportunity to take a voluntary resignation with all accrued leave, and accepted the offer. But the grievant in this case, Iverson, said she had done nothing wrong. She was asked to leave the room, and Vince Gallo asked Earl Nightingale, the hotel's general manager, for a copy of the spotter's report. Nightingale said he had to get permission from the corporate level.

The meeting ended at that point, with Nightingale saying he would find out if he was permitted to let the Union see the report. Vince Gallo testified that subsequently he and Nightingale played "telephone tag" for a couple of days and through an intervening holiday. When they were able to make contact, Nightingale told him that the Union could see the report, but only on the premises, and that it could not keep a copy. Gallo told Nightingale he would arrange with the Union's attorney for a meeting, and Nightingale said to get back to him and let him know. Gallo spoke to the Union's attorney, and the first day both of them had free was June 12. He called Nightingale back and told him that June 12 was the first day that the attorney and he both had available. Nightingale said he would have a room set up for as long as the Union wished, and requested the Union to leave both copies of the spotter's report in the room when they were finished.

On June 12, Vince Gallo and the Union's attorney met at the hotel, and reviewed the spotter's report. Vince Gallo called Nightingale and told him the attorney wanted to meet the grievant prior to the Union making a decision. Gallo testified without contradiction that Nightingale said "okay, fine". Gallo stated that he told Nightingale he would get back to him as soon as they had a meeting with the grievant. He then set up a meeting with the grievant, and sent out the letter demanding arbitration on July 3, 1990, the day after meeting with the grievant.

Vince Gallo testified that in their discussions Nightingale never made any reference to the time lines in the collective bargaining agreement, and that after the May 21 meeting when Nightingale said the matter was out of his hands, Gallo knew they would never be able to meet any time limits. The parties stipulated that there was never an agreement to extend the time limits.

THE UNION'S POSITION:

The Union contends that Section 1. D. of Article III is relevant to this proceeding, but that even where there are unambiguous time limits, they need not be enforced where there is reasonable justification for failure to meet them. The Union argues that the sole issue before the Arbitrator is procedural arbitrability, and that the case is clearly substantively arbitrable within the meaning of the well-known "Steelworkers' Trilogy" cases. The Union contends that reasonable justification for the delay exists here. The investigation could not be completed within a week, because the Company was unable or unwilling to provide the spotter's report and the Union had to go to the Company's premises. Although there was no agreement to extend the time, the Company was well aware of the time needed. The Union argues that the same justifications for extension of time cited in Tennessee Dressed Beef 1/ relate to this fact situation. Surprise is an issue in procedural arbitrability questions, and there was no surprise here to the Company, because the Company was well aware that Iverson was protesting innocence. The Union also cites arbitral precedent holding that timeliness provisions are neither a strict statute of limitations nor intended to be a trap for the unwary, and that the conduct of the other party has been held relevant and can make application of the limits unjust in particular circumstances. The Union accordingly argues that the grievance should be found arbitrable.

THE COMPANY'S POSITION:

The Company contends that Section D. is clear and sets the requirements. Step C provides for one week to notify the Company in writing that the Union intends to arbitrate, and the same provision specifies a limit on what an arbitrator may consider. The Company notes that Step C specifies that the joint grievance committee cannot "alter the terms and conditions of this agreement or [to] make a new agreement." The Company also notes that Section D. similarly limits an arbitrator's authority, while Section E. states that "time frame restrictions in this Section are not arbitratable. Any grievance not filed within the time limits specified above, shall not be accepted, processed or arbitrable."

The Company argues that the Union here is urging the Arbitrator to rewrite the collective bargaining agreement to extend the time frames so as to let the Union take as long as it wants to investigate before deciding to arbitrate. The Company argues that Vince Gallo's testimony shows he was aware of three terminations, and that Vince Gallo could have requested the spotter's report prior to the May 21 meeting but did not. There was a delay because the general manager needed corporate approval to show the spotter's report to the Union, but the Union could have filed the letter requesting arbitration during the week following the meeting. The Company argues that there is no requirement that parties know all of the facts relevant to a grievance prior to requesting arbitration, and contends that this would wreak havoc. The Company also argues that the Union did not request an extension based on not having the spotter's report, which would have permitted the Company to either agree or disagree, while if the Company disagreed the Union need only have written a one page letter similar to its July 3 letter.

As to the Union's "reasonable justification" proposed test, the Company contends that no reasonable justification is shown here for failure to comply. The contract is clear, management thought the matter was over and done with, and that is apparent from the general manager's July 6 reply to the Union, which was very prompt and expressed surprise that the matter was still being raised. The Company contends that finding this grievance arbitrable would establish a unilateral standard, which is neither proper in general in arbitration nor within the Arbitrator's specific authority here. The Company requests that the grievance therefore be found not arbitrable.

DISCUSSION:

I note initially that this contract is emphatic in the language restricting both the grievance committee and the Arbitrator from varying the terms and conditions of the Agreement, and that such restrictions have generally been held to apply to the procedures contained in an agreement as well as to its substance. And even though the parties here have agreed, for purposes of this limited issue, to use the WERC's standard staff arbitration service and therefore not to apply Section D. of the Agreement providing for a different mechanism and rules, the requirements of Sections C and E are clearly

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applicable. There would be little justification for me to assume that I had any greater substantive right to modify the parties' collective bargaining agreement then an arbitrator selected pursuant to the clause in which the limitation on such discretion is expressed as to an arbitrator, i.e. Section D.

I must therefore decide this matter within the strict terms of the collective bargaining agreement. This, however, does not mean that I must apply the Agreement's terms in the narrowest sense, which is what the Company here is arguing. A strict reading of Section C does not, in fact, produce the Company's preferred result, in the perhaps unique circumstances of this case.

Section C specifies that the joint grievance committee "shall meet at a mutually convenient time and place, on such regular and special basis as it shall determine, and render its decision or award within one day after the close of the hearing." The one-week fixed period for appealing a matter to arbitration occurs only after the joint grievance committee has finished its work. Section C specifies that "if the joint grievance committee resolves the dispute by a majority of those present and voting, then such decision shall be final and binding upon the Union, Hyatt and the employe. If the joint grievance committee is deadlocked on the disposition of the dispute, then either party may take the matter to arbitration . . . . "

Applying this language to the present dispute, I am struck by the fact that the May 21, 1990 meeting concluded without any definite vote of those present on the grievance and also without the parties being deadlocked. Rather, the Union's request to see the underlying documentation produced an indefinite response from the Company, because the issue apparently had to be referred "upstairs" before the Company could respond to the Union's reasonable request. I therefore read the parties' action at that time as being an adjournment of the proceeding of the joint grievance committee, rather than a decision upon the grievance as such. Since Section C explicitly provides that "the joint grievance committee shall meet at a mutually convenient time and place, on such regular or special basis as it shall determine . . . ." [emphasis added] the committee was within its apparent authority on the face of the language in choosing not to conclude its business at a single meeting. This would hardly be unprecedented in labor relations, and it was thus natural for the Union to assume that it had the Company's agreement to an extension of time, even if it mistook the basis for the propriety of that assumption.

Sometimes a strict construction of a collective bargaining agreement can strain its apparent intent, in such a way as to frustrate the original intent of the parties rather than execute it. I have considered that possibility here, but conclude that there is no reason in labor relations generally or in this Agreement and record in particular to conclude that the intent of the parties was as restricted as the Company argues. I note that while the contract contains a limiting clause in Section E. specifying that grievances not meeting the time restrictions are not arbitrable, there is no restriction on the time within which the grievance committee is to proceed except that it shall be "mutually convenient".

The clause additionally provides that the committee's decision shall be rendered within one day after the close of the hearing. Yet a decision finding that the committee never did so would truly strain the meaning of the parties' actions. I find that the most reasonable construction of the events of May 21 is that while the parties did not agree upon a specific extension of time, they in effect adjourned the grievance committee meeting. The Company did not object to this course of action, and in fact triggered it by its caution over disclosing the spotter's report without higher authority. The subsequent actions of the Union, up to the date that it notified the Company of the Union's position, thus took place within a context in which the grievance committee had never actually "rendered its decision or award".

Admittedly, this view involves a conclusion that the committee could subsequently render such a decision (or deadlock, as it did) without all members being present in one room, and that the Union could justifiably request arbitration rather than just formally expressing its grievance committee members' vote in its July 3 letter. I find this, however, not offensive to the language of the Agreement, both because the Company originally was the cause of the parties separating from the May 21 meeting inconclusively, and because the Company did not protest specifically in its July 6 reply that the Union had not taken part in the Step C "vote". Instead, both parties seem to have assumed at that stage that, the Union having decided that the grievant deserved its support, its two officials would vote alike, and that the Union's decision to represent the grievant would not cause one of the Company's officials to change his mind. This conclusion is also supported by the flexibility in arrangements allowed the joint grievance committee by the phrases "mutually convenient time and place" and "such regular or special basis as it shall determine".

Left entirely to itself, this interpretation would suggest that the Union had the degree of flexibility in response time which the Company fears; i.e. that instead of the Union falling into a "trap for the unwary", the Company did so, by failing to demand a more specific time period for the committee to conclude its deliberations. I do not find, however, any language in this

Agreement which would prohibit an arbitrator from considering a motion by the Company to take allegedly unreasonable delays in processing the grievance into account, in the event that a remedy is ordered. This is a traditional approach

to delays which are not clearly allowed or prohibited in an agreement, and appears well within an arbitrator's authority in this Agreement specifically.

That authority, however, is not mine to exercise. It can arise only in the context of addressing the grievance in its entirety; the discretion to limit a remedy, if exercised at all, is thus reserved to the arbitrator specified in Section D. of Article III; and I am not that arbitrator. I note, in order to answer the Company's contention, only that the Agreement does provide room in its language for a possible answer to the Company's underlying concern.

For the foregoing reasons, and based on the record as a whole, it is my decision

AWARD

That the grievance is arbitrable.

Dated at Madison, Wisconsin this 28th day of February, 1991.

By _____
Christopher Honeyman, Arbitrator