BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
KAUKAUNA UNIT LOCAL UNION 2150 OF KAUKAUNA, WISCONSIN OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS - AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR	Case 66 No. 46313 MA-6945
and	
UTILITY COMMISSION FOR THE CITY OF KAUKAUNA, OUTAGAMIE COUNTY, WISCONSIN	

Appearances:

Mr. Scott D. Soldon, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of Kaukauna Unit Local Union 2150 of Kaukauna, Wisconsin of the International Brotherhood of Electrical Workers - affiliated with the American Federation of Labor, referred to below as the Union.

Mr. Bruce Patterson, Employee Relations Consultant, 3685 South Oakdale Drive, New Berlin, Wisconsin 53151, appearing on behalf of the Utility Commission for the city of Kaukauna, Outagamie County, Wisconsin, referred to below as the Utility.

ARBITRATION AWARD

The Union and the Utility are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Gerald P. Kieffer, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on December 19, 1991, in Kaukauna, Wisconsin. The hearing was not transcribed, and the parties filed briefs by January 22, 1992.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Utility violate Article VII, Section 8, of the parties' collective bargaining agreement when it required the Grievant to take vacation, not emergency leave, for three hours on May 8, 1991?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VII

SICK LEAVE, MEDICAL & HOSPITALIZATION INSURANCE AND RETIREMENT PLAN

. . .

Sec. 8. A maximum of sixteen (16) hours per year will be allowed with full pay to each employee covered by this Agreement for emergency purposes such as family emergency, etc. where sick leave or funeral leave would not apply. Each case will be determined on its own merits, and will be approved or disapproved in writing by the General Manager with a copy to employee making request and to Kaukauna Unit Secretary. Full written information on each case must be given or the time will be taken as vacation or lost time. Procedures as outlined in this contract will operate in case of employees disagreement.

BACKGROUND

The Grievant has been employed by the Utility for roughly ten years, and was, at the time of the grievance, classified as a Journeyman Lineman. He filed the grievance on May 21, 1991. 1/ The grievance questions the Utility's denial of his request for three hours of emergency leave for May 8.

The Grievant's mother underwent hip replacement surgery on May 1. The surgery had been scheduled roughly one month earlier. The Grievant testified that his mother phoned him at 6:30 a.m. on May 8, advising him that her doctor had authorized her release at 12:00 p.m. on that day. She advised him that the doctor would have her transported by van, but that the doctor wanted someone available to assist her out of the van, and to watch her as she got herself situated at home, in the event she needed assistance or experienced any difficulty. The Grievant testified that she informed him she had tried to reach him the evening before, but could not. He further testified that his brothers were working and were unavailable to help her.

The Grievant then reported for work and requested to leave work at noon. He asked his supervisor for three hours of emergency leave to assist his mother. The supervisor excused him for the three hour period. The van arrived at roughly 12:15 p.m., and the Grievant assisted his mother off the van and into the house. He remained there, as he had earlier indicated he would.

The Grievant had, as of May 8, not used any emergency leave. The three hours he sought were the only work hours he missed due to his mother's surgery. He worked while his brothers attended the actual surgery. His mother was released at 12:00 p.m., because if she had been released later she would have been charged for one additional day of hospital care.

The Utility ultimately denied the Grievant's request for emergency leave. He responded by taking the three hours as vacation, and by filing a grievance regarding the denial of emergency leave.

Ernest J. Mullen is the Utility's General Manager, and responded to the grievance in a letter to the Grievant dated June 5, which states:

. . .

1/ References to dates are to 1991, unless otherwise noted.

The question really is, was the original intent of the use of Emergency Leave to include situations such as this, or putting it another way, was it intended that (the Utility) pay you to attend to your mother while recuperating. It seems to us the events around this situation were controllable such that an immediate response on your part could have been avoided. We are not saying your mother did not need attention, but it is our opinion that this was not the intended use of Emergency Leave, an emergency of any sort was not involved.

Even if the answers to the following questions were negative, in our opinion, Emergency Leave would not apply because providing care and/or assistance is not an emergency:

1. Was it possible or was it explored to have your mother released after 3:30 p.m.?

2. Was the reason that you were not able to make arrangements for someone else to attend to your mother during working hours was because she contacted you at 6:30 a.m. (one-half hour before the beginning of the work day)? The fact that your mother had been told the day before that she was going to be released on May 8 is significant in this matter.

The granting of vacation on short notice was a concession made by the Utility to help you with the situation that you had. To have the Utility bear the

entire expense of your time for dealing with your mother's recuperation, is beyond the intent of Emergency Leave.

The parties adduced a considerable amount of evidence on past practice. The following tables represent a distillation of the Utility's records, without any reference to employe names, regarding instances in which Emergency Leave was granted or denied for reasons explicitly bearing on surgery, in or after-hospital care, or transport for medical treatment.

DENIED EMERGENCY LEAVE REQUESTS

DATE	HOURS	REASON
10/8/90	4	To take son to hospital for tests.
5/18/90	16	Request because of her own surgery. Denied because sick leave is for this purpose.
2/11/87	1	To accompany parents to doctor to find out results of tests.
8/27/86	8	To accompany wife and give moral
1/10/83	8	To be present while mother had
4/14/82	1 1/2	To have a tooth pulled. E.L. denied but sick leave granted.

APPROVED EMERGENCY LEAVE REQUESTS

DATE	HOURS	REASON
10/23/91	8	Wife surgery on knee
9/16/91	3	Take wife to ER because of fall
9/3/91	2 3/4	Father - exploratory surgery
7/10/91	3	Wife surgery on foot
6/3/91	8	Wife - major surgery
5/24/91	8	Wife surgery on foot
5/2/91	2 1/2	Wife to hospital-chest pains
3/11/91	8	Wife undergoing tests in hospital
3/7/91	8	Wife-surgery
12/13/90	3 1/2	Exchange student to hospital
10/18/90	3 1/2	Wife recovering from hospital stay
9/21/90	8	Wife-surgery
9/10/90	8	Wife in hospital-internal bleeding

6/6/90	8		Wife-surgery
5/23/90		7	Granddaughter hospital-life & death
5/14/90		16	Father in Indiana-open heart surgery
4/30/90		3 1/2	Husband in hospital-tests
4/1/90	8		Wife foot surgery
1/17/90		1 1/4	Wife to ER after fall
6/27/89		4	Mother-surgery
5/1 & 5/3/89	9		Father-surgery
5/4/89	8		Wife knee surgery
1/4/89	8		Wife major surgery
11/29/88		8	Wife knee surgery
11/23/88		8	Wife surgery
4/8/88	8		Son surgery
1/22/88		3 1/2	Father surgery
1/7/88	6		Wife chest pains-in to Dr.
10/26/87		1/2	Daughter to doctor
12/15/87		7 1/2	Son to ER-eye flash burn
6/29 & 6/30/87	8 1/2		Wife - emergency surgery
3/17/87		8	Wife surgery
10/19/86		6	Wife in for emergency treatment
5/16/86		10 1/2	Mother - heart attack & surgery
3/3/86	4		Wife major surgery
12/20/85		3	Daughter-emergency visit to doctor
12/9/85		8	Wife-exploratory surgery
4/13 & 4/14/85		10 1/2	Wife-major surgery in Madison
4/8/85	5 1/2		Son to specialist in Madison
6/5/84	4		Wife in to doctor back problem
3/9/83	8		Wife to hospital
7/15/82		2	Son to hospital-accident at home
3/29/82		4 1/2	Son - surgery

1/18/82		2 1/2	Daughter to doctor
7/20/81		8	Wife emergency visit to doctor
5/5/81	4		Wife oral surgery
3/27/91		2	Wife - leg surgery
11/27/79		4 1/2	To take wife to hospital for tests
9/10/79		1 1/2	Donate blood for open heart surgery
5/2/79	8		Wife major surgery 2/

The "1/10/83" reference under "DENIED EMERGENCY LEAVE REQUESTS" heading was grieved by the Union and placed before Arbitrator Coleen A. Burns. Her arbitration award addressed the following issue, which had been stipulated by the parties: "Did the Employer violate the parties' collective bargaining agreement when it refused to grant Linda Collins emergency leave with pay for January 10, 1983?" Burns concluded the Utility did violate the contract, reasoning thus:

> Although Ernest Mullen, Utility General Manager, testified that he interpreted "emergency" as involving the "unforeseen" rather than the "serious", he acknowledged that when the leave request pertained to medical problems of a spouse or child, emergency leave was approved regardless of whether or not the "emergency" was scheduled in advance. Consequently, the Arbitrator is not persuaded that notice, per se, precludes a finding that the grievant's situation was an emergency within the meaning of Article VII, Section 8.
>
> The Utility further argues, however, that emergency leave is inapplicable because a "family emergency" is restricted to events involving a spouse or child. . . The Arbitrator finds no language in Article VII, Section 8, which indicates that the parties intended to exclude "mother" from the term "family". Furthermore, on two occasions, employes have received emergency leave for the purpose of attending their mothers on the day of the mother's surgery. 6/ The record, therefore, does not warrant the conclusion that a mother is not "family" within the meaning of Article VII, Section 8.
>
> In addition to the two requests involving a mother's operation, emergency leave has been granted to allow employes to attend a spouse on the day of surgery (three occasions) and a daughter on the day of surgery (one occasion). 7/ In his letter of January 19, 1983, Mullen stated that prior approvals of emergency leave involving an employe family member hospitalized for surgery were based upon at least one of the following

2/ The "denials" were received into the record as Employer Exhibit 1. The "approveds" were received into the record as Union Exhibit 16.

criteria:

> 1. That the Attending Physician felt that it was necessary that the employe be present with the patient.
>
> 2. That the patient is in a "Life Threatening" situation.

6/ James Landreman, 1978, and Robert Geenen, 1971, both gall bladder surgeries. With the exception of the grievant, the record fails to establish that there have been other requests for emergency leave which involved a parent.

7/ Geenen (1975 and 1979), Landreman (1981) and Monroe Romenesko (1978). According to Mullen, with the exception of the grievant, the Utility has never denied an emergency leave request involving a medical problem of a family member.
3. That it is not physically possible to arrange to have anyone else attend the patient when it is necessary to have the patient attended as in the case of very young children.

Mullen further stated that since the grievant's mother was not a member of the immediate family and "the usual criteria for surgery cases were not present", emergency leave was not warranted.

Neither Geenen nor Landreman, however, provided, or were requested to provide, information that the Attending Physician felt that it was necessary for them to be present at their mother's surgery or that it was not physically possible to arrange to have someone else attend the patient. Furthermore, in each case, the mother underwent gall bladder surgery, not generally considered a "life threatening situation". With respect to Romenesko's emergency leave request, the documentation supplied to the Utility stated that his daughter had "tonsil surgery" and that Romenesko felt that his presence was necessary. Geenen's request for emergency leave was approved by Mullen on the basis "that his wife underwent major surgery and that Mr. Geenen felt that it was necessary to spend the entire day at the hospital". Mullen granted Landreman emergency leave "in order to be with his wife during surgery to repair damage to her knee and leg". The record before the Arbitrator, therefore, fails to establish that approvals of emergency leave involving an employe family member hospitalized for surgery were based upon at least one of the three criteria set forth in Mullen's letter of January 19, 1983.

. . .

For the reasons discussed above, the Arbitrator

> is not persuaded that the rationale underlying the General Manager's decision to deny the grievant's request for emergency leave with pay has a basis in fact. The Arbitrator concludes, therefore, that the decision to deny the grievant emergency leave with pay is arbitrary and capricious. Consequently, the decision cannot be sustained herein.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union contends that Arbitrator Burns has addressed and resolved any issue conceivably posed here. More specifically, the Union argues that Burns "specifically rejected the utility's contention that, because the mother knew the date of the surgery in advance, it did not involve an emergency." Beyond this, the Union asserts Burns also "found that one's mother was included within the normal definition of family in the applicable contract language." The Union also contends that Burns specifically rejected as "too restrictive", the Utility's contentions that an emergency required an express determination by a physician that "the employee be present with the patient"; that the patient must be in a life threatening situation; and that no alternative arrangements for the patient can be made. Since "the applicable contract language has not changed", the Union concludes that the result here must follow that reached by Burns.

The Union assesses the record thus:

> The Union will not belabor the obvious. Under the contract language, the request was appropriate and should have been granted; moreover, the contract language has already been authoritatively construed by Arbitrator Burns . . . ; even under the 1983 conditions set forth in Mullen's letter (quoted in Arbitrator Burns' award) leave was appropriate and should have been granted; and finally, consistent past practice supports the Union's interpretation.

The Union concludes it necessarily follows that "the Arbitrator should issue a decision sustaining the grievance and directing Mr. Mullen to pay the appropriate emergency leave to Mr. Kieffer and to restore his vacation account."

THE UTILITY'S POSITION

The Utility states the issues for decision thus:

> Did the release of the grievant's mother from the hospital on May 8, 1991 constitute an emergency and, therefore, warrant emergency leave as provided in Article VII, Section 8 of the Labor Agreement between the Union and the Employer?
>
> If so, what should the remedy be?

After a brief review of the evidence, the Utility argues that the Grievant's "request for emergency leave is an expansion of the application of Article VII Section 8, and that the release of a patient does not constitute an emergency within the historic administration of the cited labor agreement provision." Noting that the agreement does not define emergency, the Utility cites the

Random House Dictionary of the English Language definition of emergency as the most reasonable guide available. That publication defines "emergency" as "a sudden urgent need usually unforeseen-occurrence or occasion requiring immediate action." Contending that the Grievant's family could have planned for attending the Grievant's mother's release, the Utility concludes "(l)ack of planning . . . should not be a criteria for establishment of this situation as an emergency."

Beyond this, the Utility contends that there are no prior instances of authorizing the use of emergency leave "for the purpose of assisting in the recuperation of an employee's parent from surgery." Since the Burns award relied on past practice, the absence of precedent here is, according to the Utility, determinative. The grievance seeks, the Utility concludes, "to further broaden the application of the benefit."

Since Article VII, Section 8, calls on the General Manager to evaluate each case on its merits, and since that occurred here, it follows, according to the Utility, that there can be no contract violation. The provision has been applied "in a fair and consistent manner", and it necessarily follows, the Utility concludes, that the grievance must be denied.

DISCUSSION

Article VII, Section 8, governs the grievance. That provision grants sixteen hours of paid leave "for emergency purposes such as family emergency". The provision places requests for such leave before the General Manager, who is to grant or deny each request "determined on its own merits".

Because Article VII, Section 8, calls for a case by case review of each request for emergency leave and does not define "emergency", it cannot be considered clear and unambiguous. Examination of the ambiguities of the provision must, however, start with the fact that it has already been addressed in arbitration. While the decision of one arbitrator can not be considered binding on another in a separate case, a prior award involving the same parties and covering a contract provision which has not been changed in bargaining cannot be disregarded without undermining the stability of the bargaining process. Any other conclusion undermines the finality grievance arbitration brings to dispute resolution. The Utility cites, and I can perceive, no reason to question the conclusions reached by Arbitrator Burns which bear directly on the issues posed here.

The Burns award established several points relevant here. First, it established that surgery to an employe's mother can fall within the scope of the terms "family emergency". Beyond this, the Burns award established that the foreseeability of surgery, standing alone, cannot serve to justify the denial of an emergency leave request. The final point established in the Burns award relevant here is the standard of review by which the General Manager's determination is to be assessed. Under the Burns award, the General Manager's decision must be reviewed to determine if the decision "has a basis in fact". If it does not, the decision must be characterized as "arbitrary and capricious", and cannot be sustained in arbitration.

Because the Utility has not promulgated any rule or regulation governing the definition of "family emergency", and because the language of Article VII, Section 8, has not been changed since the Burns award, the factual basis the General Manager's decision must rest on is his review of the Grievant's request in light of similar past requests. Mullen's June 5 denial questions whether ongoing care can constitute an emergency, and specifically whether the Grievant's family could have provided alternate care.

The denial is flawed both in light of the specific circumstances of the Grievant's request and in light of past Utility responses. The record affords no basis to question the Grievant's testimony that the timing of the release was set by his mother and her doctor, outside of his knowledge, for medical and financial reasons. The noon release avoided an additional day's billing to the hospital and presumably assisted the Grievant's mother's recovery. While Mullen's June 5 response questions the notice afforded the Grievant, there is no record basis to undermine his testimony that her noon release came as a surprise to him at 6:30 a.m. on May 8. Beyond this, the assertion that he was doing no more than "dealing with your mother's recuperation" ignores that the Grievant was called upon to do more than observe the healing process. The attending physician required the presence of a family member to assist the Grievant's mother safely into the house, and to watch her for difficulty in moving through the house on her own. As a newly released patient, she was expected to be at the weakest point of her post-hospital recuperation.

The June 5 denial does persuasively question the possibility of alternative means of assisting the Grievant's mother. The persuasiveness of this point is, however, undermined somewhat by the fact that there is no record evidence to rebut the Grievant's testimony that he was the only available family member. More significantly, the June 5 denial is undermined by the Utility's past responses to similar situations. To accept the reasoning of the June 5 denial creates the paradox that the Grievant would have been better advised to seek emergency leave to attend the surgery than to respond to the unanticipated situation he confronted on May 8. The Burns award notes six examples in which employes attended the surgeries of family members. A review of the approved requests set forth above will supply no fewer than twenty more. These examples cannot be summarily dismissed as involving surgery more serious than that involved here. Some undoubtedly were, but the approved requests are not limited to major or to emergency surgeries. The approved requests run a spectrum from open heart surgery to foot surgery.

Even if the Grievant had done no more than assist in his mother's recuperation, the Utility has granted such requests in the past. On October 18, 1990, the Utility granted an employe three and one-half hours of emergency leave based on "Wife recovering from hospital stay". Beyond this, it is undisputed that the Grievant assisted in the process by which his mother was transported from the hospital. The Utility has granted emergency leave to employes to transport family members to and from a hospital for tests. The Utility has also granted emergency leave for employes to attend medical tests. There are, in addition to the edited list of examples cited above, further approvals which are relevant here. On March 9, 1987, the Utility granted an employe eight hours of emergency leave based on "Wife sick-doctor said needed at home". There is no dispute that in this case the releasing physician insisted that a family member be present at home.

Nor can the need for the Grievant's presence on May 8 be credibly challenged in light of prior Utility approvals. The Grievant's mother had undergone her second hip replacement within a two year period. Her strength and mobility were by no means assured. The need for assistance for her could be

considered self evident even if the doctor had not ordered it. How such a need can be undermined in light of prior Utility approvals of emergency leave to employes needing to pick up sick children is not apparent.

In sum, the record will support no basis in fact for the June 5 denial. It follows that the denial must be considered arbitrary and capricious, in violation of Article VII, Section 8.

It should be stressed that this conclusion is restricted to the facts posed here. The record establishes the Grievant confronted an unanticipated event on May 8, which required his presence. The June 5 denial understated these facts, characterizing the "nursing" services required of the Grievant as no more than the observance of his mother's recuperation. Beyond this, the denial lacks support in light of prior Utility approvals of similar requests. This is not to say the Utility must grant any request for emergency leave. The record does establish the leave is neither routinely requested nor lightly granted. The Utility's concern that the present case broadens the benefit ignores that the definition of family emergency has not been established by contract or by rule, and thus rests on present circumstances viewed in light of past responses. The variety of past responses defines the breadth of the benefit. Narrowing the scope of that benefit must come through collective bargaining, not grievance arbitration.

The remedy appropriate to this case requires little discussion. The AWARD entered below makes the Grievant whole by ordering the Utility to deduct the three hours of work he missed on May 8 from the emergency leave then available to him, and to credit his vacation account with the three hours he was compelled to take for that absence.

AWARD

The Utility violated Article VII, Section 8, of the parties' collective bargaining agreement when it required the Grievant to take vacation, not emergency leave, for three hours on May 8, 1991.

As the remedy appropriate to the Utility's violation of Article VII, Section 8, the Utility shall credit the Grievant with three hours of vacation to replace those hours taken as vacation by the Grievant on May 8, 1991. The Utility may deduct three hours of emergency leave from the emergency leave balance available to the Grievant on May 8, 1991.

Dated at Madison, Wisconsin, this 30th day of March, 1992.

By _____
Richard B. McLaughlin, Arbitrator

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