BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

NORDBERG, INC.

and

LOCAL 7889, UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, CLC 1/

Case 8
No. 57232
A-5744

(Personal Days Grievance)

Appearances:

Mr. James Grzeca, Personnel Director, Nordberg, Inc., 325 East 15th Street, Clintonville, Wisconsin 54929, on behalf of the Company.

Mr. Donald O. Schaeuble, Union Representative, United Paperworkers International Union, 214 Woodside Drive, Potter, Wisconsin 54160, on behalf of the Union.

ARBITRATION AWARD

Pursuant to the terms of the 1998-2001 collective bargaining agreement between Nordberg, Inc. (Company) and Local 7889, United Paperworkers International Union, AFL-CIO, CLC (Union), the parties requested that the Wisconsin Employment Relations

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1/ The name of the labor organization involved in this case has been changed since it filed the instant request for grievance arbitration with the Commission. The labor organization's new name is Paper, Allied, Industrial, Chemical and Energy Workers International Union, Local 70889, AFL-CIO, CLC.

Commission designate a member of its staff to serve as arbitrator of a dispute between them regarding whether the Company violated the collective bargaining agreement by the manner in

which it administers personal days. The hearing was held at Clintonville, Wisconsin on March 25, 1999. No stenographic transcript of the proceedings was made. The parties submitted their post-hearing briefs by April 1, 1999, whereupon the record was closed.

STIPULATED ISSUE

The parties stipulated that the following issue should be determined in this case:

Has the Company reneged on agreements reached in the 1998 negotiations regarding personal days? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE XVI
(VACATIONS)

. . .

Section 3. Allotment of Vacations.

(a) Vacations will, so far as possible, be granted at times most desired by employees based on seniority, but the right to allotment of any vacation period is reserved to the COMPANY in order to insure the orderly operation of the plant.

Vacation days that are denied, may not be taken as personal vacation days.

Vacations may be taken in increments of weeks, days or half days (four hours).

(b) Employees may take their vacations during the period beginning January 1 and ending December 31.

(c) Vacations are not accumulative from one year to another. All employees entitled to vacations under the foregoing schedule shall be required to take their vacations. An exception may be made for employees with hardship cases.

(d) All vacations, except for **five (5)** days, must be scheduled prior to April 1. Employees will be notified if their choices are approved as soon after April 1 as is possible. Vacation schedules may be altered after April 1 if they are for time off per **Article XVI, Section 3(h)** or if the COMPANY is notified at least **two (2)** working days before the scheduled or rescheduled vacation and the operation is not adversely affected. For vacation purposes, seniority cannot be exercised after April 1.

(e) Any employee with an anniversary date in December may schedule vacation at any time during December.

(f) The COMPANY will post a notice 60 days before the date of the physical inventory/maintenance shutdown.

The COMPANY has the right to select employees to work the physical inventory and maintenance shutdown period. This selection shall be done by posting for volunteers to work. The employees will be selected from such posting list and at least one (1) employee selected must be a UNION official. If enough employees do not volunteer, the COMPANY can require the least senior qualified employees not on vacation to work.

(g) Half Days. **Each employee will be limited to eight (8) half days per year. The request must be made two (2) working days before the vacation.**

(h) Vacation time may be applied against periods of sickness or disability as follows:

Periods less than one week –
5 Days per calendar year without
doctor's verification and
5 additional days per calendar year
with a doctor's verification.

Periods of one week or more –
With doctor's verification.

The COMPANY must be properly notified before the start of the employee's shift for this clause to aply, except in cases of emergencies.

Employees will be allowed to apply three (3) vacation days to absences other than sickness or disability. 2/

2/ Bolded phrases or sentences within the body of Article XVI indicate changes negotiated in 1998.

BACKGROUND

The parties have had a collective bargaining relationship for some time. In the 1988-90 collective bargaining agreement, the parties first agreed to include the provision of personal days for employes. Relevant portions of the 1988-90 contract read as follows:

Section 3 – Allotment of Vacations

. . .

(d) All vacations, except for three (3) days, must be scheduled prior to April 1. Employees will be notified if their choices are approved as soon after April 1 as is possible. Vacation schedules may be altered after April 1 if they are for time off per Article XVI, Section 3(h) or if the COMPANY is notified at least three (3) working days before the scheduled or rescheduled vacation and the operation of the department is not adversely affected. For vacation purposes, seniority cannot be exercised after April 1.

. . .

(h) Vacation time may be applied against periods of sickness or disability as follows:

Periods less than one week –
5 Days per calendar year without doctor's verification and 5 additional days per calendar year with a doctor's verification.

Periods of one week or more –
With doctor's verification.

The COMPANY must be properly notified before the start of the employee's shift for this clause to apply, except in cases of emergencies.

> Employees will be allowed to apply three (3) vacation days to absences other than sickness or disability.

. . .

During negotiations for the 1988-90 agreement, the Union proposed to add personal days to the contract because employes were being called at home to work extra hours and they needed to be able to take days off outside the regular vacation schedule. Union representatives then present explained that the three days that were placed in the contract were intended to be used for any reason that employes wished, even for illness, but that the contract did not specifically refer to these days as personal days. During discussions regarding the new provision contained in the 1988-90 agreement, the Company indicated that it was against granting time off to employes for no reason at all, while the Union argued that vacation should be for any reason employes wished, and that employes who received a certain number of days should not have to explain their actions. Union representatives also stated at negotiations that if employes could not take vacation time off, they might be tempted to take time off without pay, adding extra days per year when they were not at work and productive. Each employe who testified indicated that Section 3(h) explains how to use the personal days referred to in Section 3(d). Union representatives then present did not recall whether Sections (d) and (h) of Article XVI Section 3 were presented together by the Union. The parties ultimately agreed to and signed off on the changes in Article XVI, Section 3(d) and 3(h) on the same date.

During negotiations for the 1995 collective bargaining agreement, the Union proposed to change the number of personal days in Article XVI from three to five days, by changing references in Article XVI, Sections 3(d) and (h) from three days to five days. The parties fully discussed the proposal but they did not agree to make this change and the collective bargaining agreement remained the same as it had been in 1988-90.

During negotiations for the 1998-2001 agreement, the Union proposed to change Article XVI, Section 3, as follows:

> (d) All vacations, except for **five (5)** days, must be scheduled prior to April 1. Employees will be notified if their choices are approved as soon after April 1 as is possible. Vacation schedules may be altered after April 1 if they are for time off per Article XVI, Section 3(h) or if the COMPANY is notified at least **two (2)** working days before the scheduled or rescheduled vacation and the operation is not adversely affected. For vacation purposes, seniority cannot be exercised after April 1.

The Union failed to propose any change to Article XVI, Section 3(h) and no document that the Union submitted to the Employer indicated that Section 3(h) of Article XVI would be changed to five days during the 1998 negotiations.

Union representatives stated that during negotiations for the 1998-2001 contract, they specifically referred to the five days they were requesting as "personal days". Company representative Arndt stated that on one occasion, the Union made a statement that the employes had 5 personal days, at which point Company representatives angrily stated that the employes did not have five personal days and negotiations broke off. After negotiations resumed on this day, personal days were never mentioned again by the Union. The Company did not know that the Union intended to change the number of days referred to in Section 3(h) from three to five during the 1998 negotiations by this single reference to personal days. Union representatives could recall no details of any of the discussions.

Company representative Arndt stated that the five days referred to in amended Section 3(d) of Article XVI could be utilized by employes as follows: Employes could schedule two days ahead of time under other provisions of Article XVI and have three personal days to be used as they pleased without pre-scheduling those. Thus, employes would not lose any of their allotted days under the amended contract.

On September 15, 1998, the Union ratified the 1998-2001 collective bargaining agreement. On September 21, 1998, the Union filed the instant grievance, stating in part that "The Union wants five personal days". The Company denied the grievance on the grounds that only three personal vacation days were listed in Article XVI, Section 3(h) of the contract. On December 10, 1998, the parties executed the 1998-2001 collective bargaining agreement, despite the pendency of the instant grievance, without changing Article XVI, Section 3(h).

POSITIONS OF THE PARTIES

Union

The Union asserted that the 1998-2001 contract as it has been amended is ambiguous and internally contradictory. The Union then referred to Article X, Section 1 (b)(7) which states:

> The powers of the arbitrator shall include authority to render a final and binding decision with respect to any dispute brought before the arbitrator, including the right to modify or reduce or rescind any disciplinary action taken by the Company excluding the right to amend, modify or alter the terms of this Agreement.

Thus, the Union urged the Arbitrator not to change the contract, but to "clarify the existing contractual language."

The Union noted that during negotiations for the effective labor agreement, it proposed to change the number of vacation days employes could have (without prescheduling them) from three to five days. The Union also noted that several of its witnesses recalled that the Union representatives referred to these days as "personal days", and that the Union intended during negotiations to increase the number of personal vacation days from three days to five days by its proposal. Furthermore, the Union urged that the reference in Section 3(d) to Section 3(h) shows that the two paragraphs were intended and are in fact, directly linked to each other, 3(h) being an explanation of how 3(d) is to be administered. In addition, the Union noted that during negotiations for the 1988-90 agreement, when personal days first came into the contract, the last section of the last sentence of Section 3(h) was placed in that section as an explanation of how to use the days referred to in Section 3(d). Thus, the Union argued, making a proposal to change Section 3(h) was unnecessary.

The Union urged that the evidence indicated that Union representatives made it clear that they intended to increase the number of personal days in the 1998-2001 contract from three to five at several points during negotiations. The Union argued that although "the Union may have been remiss by overlooking the last sentence in paragraph (h), during the negotiations process and in their initial contract proposal. . . the intent of the Union was clearly communicated to the Company on several occasions. . ." Thus, the Union sought an award "allowing employes to use five personal vacation days, as has been allowed under the contract of 1988".

Company

Initially, the Company contended that if the Union intended Article XVI, Sections 3(d) and (h) to be connected and changed simultaneously, they should have proposed to do so in negotiations over the 1998-2001 collective bargaining agreement. The Company noted that during the 1995 negotiations, the Union proposed to change both Sections 3(d) and (h) when they proposed to change the contract from three personal days to five personal days. The Company urged that it would be inappropriate for the Union to use the grievance arbitration process to correct the error it made in negotiations.

The Company argued that the contract language is clear; that Section 3(h) specifically sets a 3-day limit. The Company analyzed the evidence as follows. Two Union witnesses testified that during negotiations for the 1998-2001 agreement, the Union asked for five personal days. The Company witnesses testified that this did not occur. The Company questioned how Union members could remember the exact words they used, but could not recall the Company's general reaction to the issue of an increase in personal days.

The Company queried whether Union witnesses were thinking "personal days", but never verbalized those words to the Company in negotiations. The Company asserted that issues in the mind of a party but not put in writing or presented, cannot be agreed to or become a part of the final agreement, and that both parties to negotiations should put all of the issues on the table so that they can be fully discussed. In this case, the issue before the Arbitrator was not a part of negotiations for the effective labor agreement. In any event, the only instance which Company witnesses could recall Union representatives using the words "personal days" involved a heated discussion which halted negotiations, and after which the issue of personal days was never raised again. No agreement was reached over the issue. The Company therefore, did not violate the agreement.

The fact that Article XVI, paragraph 3(d) and (h) were changed on the same day during the 1988 negotiations, does not mean that those provisions should be forever linked in the minds of the Union members and Company officials. Rather, the Company urged that these two paragraphs are separate and distinct; that paragraph 3(d), although it refers to paragraph 3(h), does so only because some of the days in Section 3(d) can be used in the manner that is described in Section 3(h).

Finally, the Company argued that during 1995 negotiations, the Union clearly proposed to change Sections 3(d) and (h) to include five, rather than three personal days. Those demands were not agreed upon. Therefore, the Union should have been aware that if it truly wished to change the number of personal days employes were allowed, it should have proposed to change both 3(d) and 3(h). The Company urged that it should not be penalized because of an oversight by Union officials in preparing their proposals for the effective labor agreement and that the written and signed contract must govern, despite the embarrassment of Union officials regarding this issue. The Company therefore urged the Arbitrator to deny and dismiss the grievance in its entirety.

DISCUSSION

The ultimate issue in this case is whether the parties, in fact, reached a meeting of the minds during the 1998-2001 negotiations – that the Article XVI provision for three "personal days" be changed to five days. The record evidence is insufficient to prove that such a meeting of the minds ever occurred. In this regard, I note that the Union witnesses stated that they used the term "personal days" several times during negotiations in reference to Article XVI Section 3(d) proposal, but none of the Union's witnesses could recall any details of the discussion thereon. In contrast, Company witness Arndt recalled that the term "personal days" was used only once by Union representatives during negotiations. Arndt recalled that when this reference was made in the context that employes now "had" five personal days, this comment resulted in a heated outburst by Company representatives, who angrily denied that employes "had" five personal days and the break off of negotiations. When negotiations

resumed, the Union never again referred to "personal days". I have credited Arndt's testimony on this point, given the greater detail she was able to recall and the Union's failure to specifically deny Arndt's account. The fact that the Union made no attempt to clarify its intentions regarding the change the parties had agreed to in Article XVI, Section 3(d), supports the Company's contention that it never knew that the Union's proposal to change Article XVI, Section 3(d) would automatically result in a change in the number of Section 3(h) "personal days" allowed to employes.

Furthermore, an analysis of the language of Article XVI, Section 3, supports a conclusion that Section 3(d) and Section 3(h) are separate provisions. Although it is true that Section 3(d) refers to Section 3(h), Section 3(d) contains the general procedure for selecting, scheduling and altering vacations, and includes a procedure how to alter vacation schedules in order to use Section 3(h) vacation time. In my view, the last sentence of Section 3(h) is a clear and unambiguous declaration of employe rights which does not deal with how such days are selected or granted, fails to refer to Section 3(d), and makes no reference to the number five. The fact that the parties agreed to change Section 3(d) to except five days from the regular vacation schedule (rather than three days) does not automatically mean that those five days are Section 3(h) "personal days". Indeed, the reference to Section 3(h) and Section 3(d) does not even appear in the same sentence as the reference to the five-day entitlement.

Thus, the clear language of Section 3(h) assures employes that they "will be allowed to apply" only three vacation days to personal absences. If the parties had mutually intended to assure that employes be allowed five such days, they could have, and should have, made that clear in Section 3(h). The Union failed to make a proposal to change Section 3(h) and it failed to make its intentions clear regarding the number of personal days it wished employes to have. Although it is true that contract language can be reformed or changed so that it evidences the true intent of the parties when both parties mistakenly neglect to amend a provision of their contract in accord with their agreement thereon, this is not the case here. At best, the record evidence shows that the mistake was the Union's – a unilateral, not a mutual mistake. Where a unilateral mistake has been made, reformation of a contract will not be applied. The contract must stand as it was printed and executed by the parties, unless and until the parties mutually agree to change its provisions.

It is significant that no provision of the contract would be rendered meaningless by reading Section 3(h) as it appears in the current labor agreement. Indeed, to substitute the number five for the number three in Section 3(h) would violate this arbitrator's authority contained in Article X, Section 1(b)(7). In this regard, Company representative Arndt stated (and the Union's witnesses affirmed) that all five days expressly referred to in Section 3(d) could be used, although only three of these could be used under Article XVI, Section 3(h) during the 1998-2001 contract.

In sum, the Union failed to prove that a clear link exists between Section 3(d) and Section 3(h) which would require that employes be allowed to apply for five days pursuant to Section 3(h), rather than the three days stated in that section. The evidence was also insufficient to show that the Company understood and agreed that a change to Article XVI, Section 3(d) would automatically result in a change in the number of personal days granted under Section 3(h). Based upon the above analysis, the parties' briefs and the record evidence herein, and noting that I have no power (under Article X) to amend, modify or alter the terms of this contract, I issue the following

AWARD

The Company did not renege on agreements reached in the 1998 negotiations regarding personal days. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 5th day of May, 1999.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

SAG/gjc
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