BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OAK CREEK WATER AND SEWER UTILITY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 2150

Case 124
No. 56775
MA-10410

(Grievance of Linda Quandt)

Appearances:

Ms. Jill M. Hartley, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, on behalf of IBEW, Local 2150.

Mr. Robert H. Buikema, Davis & Kuelthau, S.C., Attorneys at Law, on behalf of Oak Creek Water and Sewer Utility.

ARBITRATION AWARD

The International Brotherhood of Electrical Workers, Local 2150, hereinafter the Union, and the Oak Creek Water & Sewer Utility, hereinafter the Utility, jointly requested that the Wisconsin Employment Relations Commission provide a staff panel from which to select an arbitrator in the instant grievance dispute, pursuant to the terms of the parties' collective bargaining agreement. The undersigned, David E. Shaw, was selected by the parties, and thereupon designated by the Commission to arbitrate the dispute. A hearing was held before the undersigned on December 16, 1998 in Oak Creek, Wisconsin and the proceedings were transcribed. The parties submitted briefs by February 3, 1999, and reply briefs were submitted by February 19. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues and to the following statement of the substantive issues:

> Did the Oak Creek Water & Sewer Utility violate the collective bargaining agreement when it denied the Grievant's request for vacation time between December 25 and December 31, 1998?
>
> If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1998-2000 Collective Bargaining Agreement and Employee Handbook have been cited:

ARTICLE 1
AGREEMENT/RECOGNITION

> **Section 1**. This agreement is made and entered into at the Oak Creek Water and Sewer Utility Commission pursuant to the provisions of 111.70, Wis. Statutes, by and between the Oak Creek Water and Sewer Utility Commission (or its municipal successor), hereinafter referred to as the "Commission" and Local 2150, International Brotherhood of Electrical Workers affiliated with the AFL-CIO, hereinafter referred to as the "Union."
>
> The employer recognizes the Union as the exclusive bargaining agent for all regular full-time and regular part-time water, sewer, utility, and secretarial employees, of the Oak Creek Water and Sewer Utility, excluding all supervisory, managerial, executive, confidential, seasonal, casual, temporary, and professional employees, as their representative; . . .

. . .

ARTICLE 4
MANAGEMENT-EMPLOYEE RIGHTS

> The Commission possesses the sole right to operate the Water & Sewer Utility and all management rights repose in it. These rights include, but are not limited to, the following:

. . .

(G) To maintain efficiency of operations by determining the methods and means and the personnel by which such operations are conducted.

. . .

(K) To determine the kinds and amounts of services to be performed as pertains to operations, and the number and kind of classifications to perform such services.

ARTICLE 9
SENIORITY

. . .

Section 2. **Loss of Seniority.** Seniority shall be broken if an employee:

. . .

(9) in the event an employee in the bargaining unit is transferred from his/her position with the Commission, but outside the bargaining unit, he/she shall retain the seniority he/she had accumulated to the time of such transfer for a period of one (1) year. If the employee returns to the bargaining unit within the time period set forth above, he/she shall transfer to the same classification and type of work as when he/she left the bargaining unit. If the employee returns to the bargaining unit after such period, he/she shall forfeit his/her seniority in the bargaining unit.

ARTICLE 10
GRIEVANCE PROCEDURE

Section 6. **Arbitration**

. . .

5. **Decision of the Arbitrator:** The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where

the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE 15
VACATION

. . .

Section 4. Choice of Vacation Period. Because of the nature of Utility work, it is necessary to limit the number of employees on vacation at the same time. The employee with the greatest seniority within a Utility department shall be given his or her choice of vacation, limited to two (2) weeks on the first pick, taken in one (1) week increments. After all employees have chosen their first round of vacation, the remainder of vacation days shall again be granted on the basis of seniority, limited to two (2) week increments in all future rounds. . .

One day of vacation equals eight (8) hours. The employer shall determine the number of employees on vacation at any given time.

EMPLOYEE HANDBOOK

VACATIONS

Because of the nature of the Utility's work, it is necessary to limit the number of employees on vacation at the same time. The employee with the greatest seniority within a Utility department shall be given his or her choice of vacation, limited to two (2) weeks on the first pick, taken in one (1) week minimum increments. After all employees have chosen their first round of vacation, the remainder of vacation days shall again be granted on the basis of seniority, limited to two (2) week increments in all future rounds.

RELATIONSHIP TO UNION CONTRACT

To the extent that provisions of this Handbook conflict with provisions of the Union contract, the Union contract shall control.

BACKGROUND

Linda Quandt, the Grievant, has been employed by the Utility since May 1982 and is a member of the bargaining unit represented by the Union. Since December 1, 1997 she has held the position of Utility Accountant. Prior to that time she was employed as a Utility Secretary. The Grievant's direct supervisor is Steven Yttri, the Utility Finance Director. There are two other people in her department: Kathy Esselman, the Confidential Secretary, who has worked for the Utility since September 1976, and Diane Skenandore, the Utility Clerk, who has been employed since August 1987. Ms. Skenandore is also a member of the bargaining unit, while Ms. Esselman is not. Esselman went to part-time in 1991 and then was again made full-time the beginning of 1998.

Pursuant to Article 15 of the labor agreement, and the Utility's Employee Handbook, which uses identical language, employees are to turn in requests for vacation on or before March 15 each year, limited to two weeks on the first pick. Vacation times are to be allotted according to seniority within the department and the vacation schedule is to be posted by April 1.

Since 1993, the Grievant had taken vacation on December 21-23 and 27-29. The Grievant is responsible for payroll and the billing, however, Skenandore is also cross-trained in the billing and can fill in for the Grievant in her absence. The Grievant also answers the phone and works with customers when Skenandore is unavailable or absent. When Esselman went to part-time the Utility began utilizing seasonal help to cover the December-January holiday period. Esselman went back to full-time in January of 1998 and the Utility discontinued the use of seasonal help for the summer and the December-January holidays.

On March 10, 1998, the Grievant submitted her vacation form requesting vacation on December 21, 22 and 23, as well as December 28, 29 and 30. Combined with weekends and days off for the Christmas and New Year's holidays, this would have resulted in her being gone from December 19 through January 3. Approximately three weeks later, Yttri approached the Grievant and informed her that Esselman had also asked for time off on December 28, 29 and 30 and, because Esselman had more seniority, she would receive those vacation days, and the Grievant would receive her requested days on December 21-23. The Grievant disputed this, and argued that, under the labor agreement, her seniority rights superceded Esselman's, since Esselman was not in the bargaining unit. Yttri disagreed and further informed the Grievant that she should resubmit a request form indicating her alternative selection by the next day, which she did under protest.

On April 13, 1998, the Grievant filed a grievance over the denial of her requested vacation days and asked that they be reinstated. The grievance was processed through the grievance procedure and the parties, being unable to resolve their dispute, proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union asserts that, under the labor agreement, the Grievant has the greatest seniority in the department and, therefore, was entitled to her choice of vacation days over Esselman. Seniority, as defined in Article 9 of the Agreement, does not apply to non-unit employees and, in Section 2, specifically states that any employee who transfers to a non-unit position will lose any acquired seniority after one year. Therefore, Esselman, a non-unit employee, cannot be considered to have seniority over the Grievant. Citng, KANSAS CITY, KANSAS, 100 LA 534 (Berger, 1993). In considering the bidding and bumping rights of non-unit employees the arbitrator in that case held that, absent agreement or clear evidence to the contrary, any seniority rights provided by the agreement can only apply to unit members. In this case, the agreement clearly excludes non-unit employes from its provisions. Therefore, Esselman had no entitlement to preference in vacation selection over the Grievant.

While the Utility's Employee Handbook has identical vacation selection language, to the extent that its application would conflict with the effect of the labor agreement, the agreement controls. Under the labor agreement, the Grievant, as the senior unit employe, is entitled to vacation preference. The interpretation of the handbook urged by the Utility would give preference to Esselman, creating a conflict between the handbook and the labor agreement. The handbook, however, specifically states that "To the extent that provisions of this Handbook conflict with provisions of the Union contract, the Union contract shall control." Thus, according to the terms of the handbook itself, this apparent conflict must be resolved in favor of the Grievant.

The Union also cites CITY OF MARSHALLTOWN, 101 LA 251 (Mikrut, 1993), wherein the arbitrator held that it violated the collective bargaining agreement and diminished unit members' rights to provide non-unit captains a benefit identical to one provided to the unit firefighters (Kelly days) under the terms of the contract, and then give the captains preference in date selection over the unit employes. This case is analogous, in that non-unit employes are being given preference over unit employes in exercise of rights bargained into the labor contract. As in MARSHALLTOWN, this clearly violates the agreement and the Utility should be required to cease and desist from this practice and give preference in vacation selection to unit employes.

The Union further asserts that, even assuming the Utility was entitled to grant Esselman's vacation request, it still should have granted the Grievant's request, because it failed to show a need to limit the number of employes off work in the department at this time to one. Past history within the department shows that it has not been uncommon for two employes to be gone, leaving only one to staff the office for periods of time without creating apparent problems for the Utility. In fact, the Grievant typically took the week between Christmas and New Year's as vacation when Esselman was part-time, negating the Utility's argued need for more staff at that time of year. Furthermore, Esselman and the Grievant do different jobs and much of what the Grievant does Esselman is unqualified to do. Therefore, there is no merit to the argument that both of these employes cannot be gone at one time.

In its reply brief, the Union asserts the Utility misstates the Union's position as to the definition of an "employe" in the agreement. The Union has consistently taken the position that the reference to "employe" in the agreement applies only to bargaining unit employes, not all employes. The clear language of Article 15, Sec. 4, of the agreement grants the employe with the most seniority in the department first choice in selecting vacation. It is well established that clear and unambiguous contract language must be enforced as written.

Contrary to the Utility's claim, the two clauses of Article 15, Sec. 4, do not conflict; rather, they are separate and distinct and independent of one another. The conflict is instead between the agreement and the Employe Handbook. While the vacation selection language in those documents are identical, taken in the context of this grievance, the two documents are clearly in conflict. As in this case, the employe entitled to first choice under the agreement and the employe entitled to first choice under the handbook may be two different individuals, thus creating a conflict. According to the handbook, the agreement controls in that case. Further, the argument that it has a practice and policy of allowing only one employe in this department off at this time of the year, does not change the fact that the Utility is obligated to grant the Grievant's request based upon her seniority.

Regardless of the Utility's ability to determine the number of employes on vacation at the same time, the clear language of the agreement gives the Grievant first choice in selecting vacation. As the Utility has the practice of permitting at least one employe to take vacation over the holidays, that slot must be filled by the most senior bargaining unit member. The Utility may not use its ability to prescribe the number of employes on vacation at one time to prohibit all bargaining unit members from taking vacation while allowing a non-unit employe to take vacation at that time.

The Union also asserts that the Utility's reliance upon ARMSTRONG is misplaced, as that case did not involve a conflicting employe handbook that acknowledged the labor agreement controls in case of a conflict.

Last, the Union disputes the claim that accepting its position voids the contract language giving the Utility the right to determine the number of employes on vacation at one time. Giving the most senior bargaining unit member first choice in selecting vacation does not conflict with the practice of only allowing one employe on vacation at one time.

For all these reasons, the Utility should be ordered to cease and desist from this practice and grant vacation selection preference to bargaining unit employes in the future.

Utility

The Utility asserts that the clear and unambigous language of Article 4, Management - Employe Rights, and Article 15, Vacation, of the agreement gives it the unfettered right to determine staffing needs and allocate vacation time. The seniority language in the agreement is limited by that right and there is no language in the agreement that requires the Utility to justify its decision, even though it has done so in this case. Even the Grievant, a Union Steward, admits the Utility has the right to determine the number of employes who may take vacation at a given time or to prohibit any employe from taking vacation at a time requested.

The Utility also asserts that the vacation selection clauses in the agreement and Employe Handbook are not in conflict and do not mandate that bargaining unit employes should get preference over non-unit employes in vacation selection. The agreement does not refer to non-unit employes at all and specifically excludes them from the definition of "employees" contained in the recognition clause. A labor agreement only applies to employes covered by it. FLEX LAB, INC., 103 LA 219 (1994). Here, the Utility has the right to limit the number of bargaining unit members on vacation. Yttri decided there were no slots available for unit employes the last week in December, based on his determination that two employes must work as scheduled and the fact that one employe was already scheduled to be off that week. There were sound business reasons for the decision. Billings must be processed and mailed at the end of each month. The Grievant is responsible for billings, though another employe has been cross-trained to assist. The last half of December is unique in that there are four holidays out of the ten work days. In 1997, the Utility attempted to operate with only one employe scheduled to work the last two weeks in December and, in spite of incurring overtime, still did not get the billing timely processed. Thus, Yttri determined that in 1998 two employes must be scheduled to work each work day in December. As both the Grievant and Esselman requested one of the same weeks off, Esselman's request was granted and the Grievant received her requested vacation for the preceding week, but not for December 28-30.

In ARMSTRONG CORK CO., 37 LA 21 (1961), under similar but more restrictive language than here, the employer denied a union employe's vacation preference on the grounds that supervisory employes had already selected the week for vacation. The arbitrator found that the agreement gave the company the clear right to designate vacation times for employes

and, conversely, that the agreement gave no employe the right to select vacation free from company control. The arbitrator found no conflict in the "seniority" provision, since supervisory employes were not in the bargaining unit. Therefore, whatever basis the employer used for designating the supervisors' vacation was outside the union's control.

Here, under the agreement, only if the Utility decides there is a slot for a unit employe does the seniority provision come into play. As in ARMSTRONG, Yttri determined that he would allow the non-unit employe to be on vacation. Since he only allows one vacation absence at any given time, that meant there would be no slots available for the unit employes – a determination which even the Grievant, a Union steward, conceded was within the Utility's contractual rights. (Tr. at p. 48.) The request that the Utility be required to always grant the vacation selection of the most senior bargaining unit employe in a department would void the contract language that guarantees the Utility that right and is, therefore, contrary to the Arbitrator's authority.

Even if the definition of "employe" and the application of seniority were construed broadly enough to encompass both unit and non-unit personnel, the Utility should still prevail. Both the agreement and the handbook base vacation preference on department seniority, and Esselman has more seniority than the Grievant. The Union must "choose its poison". Either seniority and the definition of "employee" apply only to those in the bargaining unit, in which case they are not binding on those outside the unit, or they apply Utility-wide, in which case Esselman has the most seniority. In either case, the grievance should be dismissed.

The Utility also disputes the existence of any past practice of allowing the Grievant vacation in the last two weeks of December, such that she is now entitled to it. While she was granted vacation during these weeks between 1993 and 1997, the elements necessary to establish a binding past practice do not exist, since the issue of competing vacation requests was never raised before. Further, changed circumstances brought about by an increased workload and a policy of no longer employing seasonal help, required a departure from any such practice, making it moot. DRAVO CORP., 76 LA 903 (Duff, 1981). Even if a practice existed, it is superceded by clear and unequivocal contract language, which gives the Utility the right to determine how many employes may be on vacation at a given time.

In its reply brief, the Utility disputes what it feels are erroneous statements in the Union's brief regarding the procedure for approving vacation requests, an inference that there was a "blanket policy" of allowing only one employe to be on vacation at any time, the assertion that the workload in December was no different than any other month, and the assertion that the office has functioned in the past with only one employe.

The Utility also asserts that the Union has selected provisions of the agreement that suit its position and disregarded the rest. It attempted to use the seniority clause in the agreement to require the forfeiture of the language limiting a unit employe's right to select vacation. While the Utility agrees the seniority clause and vacation clause in the agreement recognize seniority and are exclusive to employes covered by the agreement, that exclusivity applies equally to the limiting language which provides that the Utility may determine the number of employes on vacation at any given time. The Union had to ignore that provision because there is no way to reconcile it with the Union's interpretation, which would render that limiting language void.

It is a cardinal principle of contract interpretation that agreements are to be construed as a whole. Where possible, effect must be given to all of the language agreed to by the parties. Article 15, Sec. 4, of the agreement expressly retains management's right to limit the number of unit employes on vacation at one time. Once the number of bargaining unit vacation slots is determined, the unit employes select by seniority. This interpretation gives effect to the entire agreement. The Union's interpretation that management may establish the number of bargaining unit employes on vacation, provided the reason for the decision is not the absence of a non-unit employe, is not consistent with the agreement's overall meaning and purpose.

Finally, the Utility asserts the Union's reliance upon MARSHALLTOWN is misplaced. The contract in that case set forth guidelines for the selection of "Kelly days" each month and provided for the exact number of bargaining unit members who could be off each day, imposing penalties on the employer if the correct number were not allowed to be off. The employer changed the manner in which Captains' comparable day requests were considered allowing the Captain on the crew to have first pick in the work cycle, regardless of his seniority. Previously, Captains had selected on the same basis of any other crew member – relative seniority. The arbitrator granted the grievance because the employer did not retain language that would allow it to reserve selection slots for Captains. He found that the change reduced the rights of bargaining unit members because they had a contractually guaranteed number of "Kelly day" slots. Here, there is no contractually-guaranteed vacation slot. The agreement gives management the exclusive right to establish the number of slots. Thus, the employes never had a right in that regard which could be diminished.

For all the above stated reasons, the Utility concludes the grievance should be denied.

DISCUSSION

The Union has characterized this case as being one about seniority and the primacy of the collective bargaining agreement over and against the Employe Handbook. Thus, it argues in matters of vacation selection, seniority only applies to bargaining unit members and,

therefore, since the contract takes precedence over the handbook, unit employes always get preference over non-unit employes in vacation selection. The argument is not persuasive. In the instant case, there is no dispute that non-unit employes do not have seniority within the bargaining unit. Rather the issue centers on the effect, if any, of seniority language contained in the labor agreement on non-unit employes, and the authority of the Utility to regulate vacations according to its staffing needs, as well as the reasonable exercise of that authority.

The language of Article 15, Section 4 of the agreement, which is identical to language in the handbook, clearly ties vacation preference to seniority. Nevertheless, the agreement does not purport to define the rights of unit employes against those of non-unit employes, therefore the language can only be said to apply to the relative rights of employes in the bargaining unit. The Union is correct in asserting that, absent clear language, non-unit employes cannot acquire seniority rights over unit employes with respect to rights contained in the agreement, however, the converse is also true. In this case, the rights of non-unit employes arise outside the labor agreement and are allocated without reference to it. Under the Employe Handbook, non-unit employes also select vacation by seniority; however, that is only as to other non-unit employes and there is no "conflict" with the labor agreement to be resolved by the clause giving supremacy to the agreement. That clause applies only to the rights of unit employes under the agreement, i.e., they are determined by the agreement, rather than the handbook, when there is a conflict. Thus, while the Grievant has seniority among the unit employes in her department, this status does not automatically guarantee her priority over the non-unit employe.

The issue then becomes whether the Utility has authority to limit the vacation selections of bargaining unit employes. Article 4 of the agreement generally reserves to the Utility the right to determine schedules of work and the personnel necessary to conduct its operations. More to the point, Article 15, Section 4, the vacation selection clause, not only points up the necessity of limiting the number of employes on vacation at any time, but also expressly reserves the right to make that determination exclusively to the Utility. This prerogative is not contested by either the Union or the Grievant. Thus, the question of who is entitled to vacation at any given time only arises after the Utility has decided whether vacation may be taken, and by how many employes.

Without agreeing that the Utility's rights in this regard are unfettered, as it claims, it does appear from the record that the Utility's decision to limit vacation to one employe at a given time in the last two weeks of December was justified. The Utility is already closed for four days during this period for holidays, notwithstanding the fact that there are extra end-of-the-month and end-of-the-year tasks which must be performed. While it is true that vacation has been granted to the Grievant in the past at this time of year, circumstances have changed.

Despite there being only one other full-time employe, it was necessary at those times for the Utility to hire seasonal help to cover the shortage, which it has since determined not to do in the future. Also, the significant increase in the Utility's customer base in recent years has increased the workload from what it was in the past. Therefore, the Utility's decision to limit the number of employes on vacation at this time of the year is reasonable under the circumstances.

The Union's argument that the two employes have different jobs, so that no additional staffing problem would arise if both were gone, is not persuasive. Some tasks, such as answering the phone, dealing with the public, and posting the mail could be done by any of the employes. If two of the three were gone, and the third had to leave for any reason, these things would not get done. Further, if, as the Union maintains, the other unit employe, Diane Skenandore, is the only other employe capable of covering for the Grievant, the same problem arises if the Grievant is absent at this key time of the year – only one employe is on hand who can do the requisite tasks and if she becomes ill or has an emergency, the Utility has no coverage. As it is the processing of customer billings that is a large part of the work at this time, and that is primarily the work of the Grievant and Skenandore, allowing Esselman to be off would appear to have the least impact on completing that work.

It was also not unreasonable for the Utility to divide vacation time between the two employes as it did. The Grievant, as was her habit, asked for both of the last two weeks of December as vacation, however, Esselman also asked for the last week in December. Faced with these competing requests, the Utility granted the Grievant her first requested week, prior to Christmas, and gave the other to Esselman. This was a reasonable attempt to accommodate both employes, while still addressing the Utility's staffing needs at this time of year. This also distinguishes this case from CITY OF MARSHALLTOWN, cited by the Union, as there the employer had not only altered a practice, but gave the non-unit employes first pick in selecting Kelly days off in every instance.

For the foregoing reasons, it is concluded that the Oak Creek Water & Sewer Utility did not violate the collective bargaining agreement when it denied the Grievant's request for vacation time between December 25 and December 31, 1998.

Based upon the above and foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 12th day of July, 1999.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
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