BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KRANZ, INCORPORATED

and

TEAMSTERS LOCAL UNION NO. 43

Case 11
No. 65829
A-6221

Appearances:

John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman. S.C., 1555 N. RiverCenter Dr., Suite 202, Milwaukee, Wisconsin 53212 appearing on behalf of Teamsters Local Union No. 43.

Ronald Walley, Warehouse Manager, Kranz, Inc. 2200 DeKoven Avenue, Racine, Wisconsin 53403, appearing on behalf of Kranz, Incorporated.

ARBITRATION AWARD

Kranz, Incorporated, hereinafter Kranz or Employer, and Teamsters Local Union 43, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission provide a list of five WERC commissioners/staff arbitrators from which they could jointly select an arbitrator to hear and resolve a dispute between them regarding the instant grievance. Commissioner Susan J.M. Bauman was so selected. A hearing was held on July 13, 2006 in Racine, Wisconsin. The hearing was not transcribed. The parties made oral argument after the presentation of testimony, whereupon the record was closed.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to the issues to be determined in this case. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The Union suggested the following issues for decision:

> Did the Employer violate the collective bargaining agreement and/or established precedent by failing to pay the Grievant three weeks vacation at the time of his voluntary separation? If so, what is the appropriate remedy?

The Employer framed the issue as:

> Is the Grievant entitled to the three weeks of pay?

In addition, although not stated by the Employer as part of its suggested statement of the issue, the Employer, in its written response to the grievance and its opening statement, raised a question of the timeliness of the filing of the grievance. Based upon the relevant evidence and argument and having considered the parties' suggestions, I find the issues to be

1. Was the grievance timely?

2. Did the Employer violate the collective bargaining agreement and/or established precedent by failing to pay the Grievant three weeks vacation at the time of his voluntary separation?

3. If so, what is the appropriate remedy?

FACTS

Grievant Gerard Lakatos was employed by the Employer as a Picker/Transfer Driver from April 19, 1993 until his voluntary separation from Kranz. His last day of work was March 11, 2006. On March 171 Kranz issued a payroll check to Lakatos for his final week of work, the period ending March 11. In accordance with the vacation provisions of the collective bargaining agreement, Lakatos was entitled to three weeks of vacation in 2006 which he had signed to take during the summer. He had not used any vacation in 2006, other than a casual day, before he separated from Kranz. His final check indicated that he had used 8.00 hours of vacation (the casual day) and had 120.00 hours of ACCVC (accrued vacation) and 8.00 hours of accrued sick leave (ACCSK).

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[1] Unless otherwise indicated, all dates are 2006.

When Lakatos began his employment with Kranz in April, 1993, he did not become eligible for paid vacation until he had completed one year of employment, in April 1994. The vacation schedules are posted in January of each year for employees to select vacations during the period January 1st through December 31st in accordance with the collective bargaining agreement. Lakatos generally signed for summer and fall vacations. In January 2006 Lakatos selected three weeks of vacation in the summer/fall period. Subsequently, he gave a two week notice to the Employer that he was leaving Kranz, which he did on March 11, without having completed his 13 full years of employment or taking any of his three (3) weeks of vacation.

Although Lakatos had anticipated that he would be paid for those 120 hours of vacation on his last check, upon receipt of the check issued March 17 that did not include the payment, he thought that another check, covering those 120 hours, would be forthcoming the following week. The check did not arrive. Lakatos stopped at the Employer's business and spoke with Ron Walley, Warehouse Manager, about the unpaid vacation. Walley denied that payment for unused vacation was due to Lakatos. Lakatos then spoke with Lewis Cadkin who also denied that payment was due.

Lakatos filed a grievance on April 4, 2006, contending that there was a violation of Article 10 of the collective bargaining agreement in that he did not receive payment for the unused three weeks of vacation he had earned in 2005, and that the grievance occurred on March 28, 2006, upon notification that he would not receive payment for the 120 hours of vacation. The grievance was presented to Ron Walley by Jerry Jacobs, Secretary-Treasurer of Teamsters Local 43. By memo dated April 5, 2006, Walley denied the grievance as follows:

> In response to the grievance filed by Gerard Lakatos dated 4-4-06, Gerard felt he was not paid his vacation time for 2005. Our records show that he was paid for all vacation time in 2005. In regards to vacation time for 2006, Gerard quit employment with Kranz on 3-10-06. Following procedure spelled out in Article 10 of the Contract, Gerard did not meet the requirement for any pro-rata vacation for 2006 having worked only ten (10) weeks of the current calendar year.
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> Furthermore, the date the alleged grievance occurred is incorrect, in as his paycheck was mailed to his house and would have been received no later than 3-20-06. This would put his claim outside the timeframe spelled out in the grievance procedure. This is moot anyway in that when Gerard self-terminated his employment with Kranz, he no longer would be a member of the collective bargaining unit under this agreement.
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> It is the position of Kranz that this grievance be dropped and no payment is due.

RELEVANT CONTRACT PROVISIONS

ARTICLE 9. HOLIDAYS AND SICK LEAVE

. . .

. . . One day of paid sick leave is available to all full-time employees sixty (60) days after their probationary period. Sick leave is available for illness, or injury of an employee. Sick leave may be used in half day or full day increments. No unauthorized paid sick time may be taken. In order to obtain paid sick leave, the employee must telephone no later than 60 minutes before the employee's start time and receive authorization from the employee's supervisor. If the supervisor is not available, the employee must leave a voice mail explaining the absence, and must identify where the supervisor can reach the employee to return the call. Paid sick leave is not carried over from year to year. Sick leave cannot be used during a scheduled vacation or holiday without a physician's statement. Unused sick leave is not payable upon termination. (Emphasis added)

ARTICLE 10. VACATION

Section 1. The Employer agrees that all employees covered by this Agreement shall receive the following vacation based on the length of service with the Company: Employees with 1 year of service, one (1) week vacation with full pay, in advance.

Employees with 3 years of service, two (2) weeks vacation with full pay, in advance.

Employees with 15 years of service, four (4) weeks of vacation with full pay, in advance.

Vacation periods shall be scheduled between January 1st and December 31st of each year.

If the Company decides to close the whole plant for a vacation period, then the employees will cooperate in carrying out this plan.

Section 2. Pro-Rata Vacation
An employee who has been laid off, quits or retires before qualifying for the full vacation benefit set forth in the applicable subsection of Section above, but who has completed at least thirteen (13) of more consecutive weeks, but less than

three (3) years, of continuous employment with his Employer shall be entitled to vacation pay at his regular straight-time hourly rate as set forth in the following schedule:

Vacation pay for employees who die or are retired shall be pro-rated.

Weeks Employed	**Vacation Hours Credit**
31 or more	40.00
30	38.75
29	37.50
28	36.25
27	35.00
26	33.75
25	32.50
24	31.25
23	30.00
22	28.75
21	27.50
20	26.25
19	25.00
18	24.00
17	23.00
16	22.00
15	21.00
14	20.00
13	19.00

For purpose of the above pro-rata schedule, a week of employment is defined as any calendar week in which work is performed under this Agreement.

For each of the third (3rd) to the seventh (7th) years of continuous employment, both years inclusive, after his hiring date or any anniversary thereof, a laid off, quits or retired employee who so qualifies will receive a pro-rata vacation benefit double that which is set forth in the above schedule.

For each of the eighth (8th) to fourteenth (14th) years of continuous employment both years inclusive, after his hiring date or any anniversary thereof, a laid off, quits or retired employee who so qualifies will receive a pro-rata vacation benefit of triple that which is set forth in the preceding schedule.

For each of the fifteenth (15th) and following years of continuous employment after his hiring date or any anniversary thereof, a laid off, quits or retired employee who so qualifies will receive a pro-rata vacation benefit of four (4) times that which is set forth in the proceeding schedule.

(Emphasis added)

ARTICLE 14. ARBITRATION

Section 1. The Union and the Employer agree that there shall be no strike, lockout or tie-up. Grievances shall be taken up between the Employer involved and the Union in accordance with the following procedure. A grievance is defined as any controversy between the Employer and the Union concerning compliance with any of the provisions of this Agreement.

Section 2.
(A) All grievances, unless otherwise provided for in this Agreement, must be made known in writing to the other party within seven (7) working days (excluding Saturdays, Sundays, and holidays) after the reason for such grievance has occurred or after the first date upon which the grievant should have become aware of the existence of such grievance, whichever is later. Provided, however, that such time limitations shall not apply in those instances in which the Employer and an employee who have agreed to a condition of employment contrary to this Agreement. The aggrieved employee or employees' shop steward, or another authorized representative of the Union shall first submit a written grievance to the Employer's duly authorized representative dated the day of submission. The Employer's duly authorized representative must make a written disposition of the matter within seven (7) working days (excluding the date of submission of the grievance and Saturdays, Sundays and holidays) after the submission of such written grievance thereto, by certified mail, return receipt requested, to the Union office postmarked within said seven (7) working day period.

(B) The Employer and the Union having jurisdiction over the employee, shall meet as a Grievance Committee and reach settlement which shall be final and binding.

Section 3. If written disposition of the matter by the Employer's duly authorized representative is unsatisfactory, either party within seven (7) working days must notify in writing the Employer or the Union as the case may be, of its intention to submit the dispute to the Wisconsin Employment Relations Commission for arbitration.

Section 4. The impartial arbitrator shall have the sole and exclusive power and jurisdiction to determine whether a particular grievance, dispute or complaint in arbitrable under the terms of the Agreement. The decision of the impartial arbitrator on any matter submitted to it shall be final and binding on all parties. The impartial arbitrator shall issue his decision no later than thirty (30) days after the case has been submitted to him.

Section 5. The time limits set forth in this Article (except for the time in which an arbitrator must render his decision), shall be strictly enforced and failure of either party to comply with these time limits shall constitute a default and resolve the particular grievance, dispute or complaint in favor of the other party unless both parties mutually agree to an extension.

Section 6. In the event the matter goes to arbitration the losing party will pay the full cost of the arbitrator, but not including the wages lost by witnesses. In the event the parties, and the arbitrator, if necessary, are unable to determine which party lost the arbitration, the arbitrator shall have authority to make such determination, including any proration, which he may decide.

POSITIONS OF THE PARTIES

It is the Union's position that the grievance was timely filed because it was filed within seven (7) working days of Lakatos being told by Ron Walley and Lew Cadkin that he was not entitled to payment of the 120 days accrued vacation that he had earned in 2005. Although the Grievant received his final paycheck, issued on March 17, by no later than March 20, not including payment for the 120 hours, he did not know until his discussion with Walley and Cadkin on March 28 that he would not be paid for the accrued vacation. The grievance was filed within seven (7) working days thereafter, in accordance with the contract.

With respect to the merits of the grievance, the Union contends that vacation is accrued in one year and is available for use the following year. When the Grievant began his employment at Kranz in April 1993, he was unable to use vacation until he had completed one (1) year of service. Thus, in January 1994, he was able to sign for one week of vacation which had accrued during the prior year. Similarly, in January 2006, he signed for three weeks of vacation that had accrued in 2005. These days were scheduled for the Summer and Fall of 2006, but Lakatos left Kranz in March 2006 without using the vacation days. Accordingly, he is entitled to be paid for the days. Because Lakatos had not worked for 13 weeks in 2006, Article 10, Section 2, Pro-Rata Vacation is inapplicable. The Union asks that the Grievant be paid for 120 hours of accrued vacation.

The Employer contends that the grievance is untimely in that the Grievant received his last paycheck no later than March 20, at which time he should have known of the alleged contract violation. Since the grievance was not filed until April 4, it was not timely and the grievance should be denied.

On the merits of the grievance, it is the Employer's position that Lakatos was paid for his 2005 vacation benefits and since he did not work for thirteen weeks in 2006, he is not eligible for pro-rated vacation benefits. The Employer contends that the grievance should be dismissed as the Grievant received all that he was entitled to and was treated in a manner like that of other employees who terminated their employment through resignation or retirement in the past two years:

Name	Disposition	Date	Explanation
Chuck Jones	Retired	05/27/05	Chuck worked until the end of April, and scheduled his vacation for then. His actual last day of employment was May 27.
Fred Diekman	Quit	07/29/05	He had scheduled and used part of his vacation for 2005, the balance being paid per the pro-rated schedule in the contract.
Bill Petersen	Quit	09/05/05	He had scheduled and used all vacation for 2005 prior to giving notice. He was paid an extra two weeks in error by someone who does not usually do payroll and is no longer with the company.
Bryan Hoffman	Quit	5/31/05	He had scheduled and used all vacation for 2005 prior to giving notice.
Paul Ruegg	Retired	07/30/04	He had scheduled and used all vacation for 2004 prior to giving notice.
Pete Ydunate	Quit	09/06/05	He had scheduled and used all vacation for 2005 prior to leaving Kranz. He was paid an extra two weeks vacation in error by someone who does not usually do payroll and is no longer with the company.
Jeff Bezotte	Terminated	04/23/04	He was fired for violence in the workplace. Vacation was paid per verbal agreement between Jeff, Jerry Jacobs and Ron Walley.

DISCUSSION

Timeliness

The Employer contends that the grievance was not filed in a timely manner. The collective bargaining agreement provides at Article 14, Section 2:

> All grievances, unless otherwise provided for in this Agreement, must be made known in writing to the other party within seven (7) working days (excluding Saturdays, Sundays, and holidays) after the reason for such grievance has occurred or after the first date upon which the grievant should have become aware of the existence of such grievance, whichever is later. . . . The aggrieved employee or employees' shop steward, or another authorized representative of the Union shall first submit a written grievance to the Employer's duly authorized representative dated the day of submission.

The Grievant was aware no later than March 20 that his paycheck issued on March 17 and covering the period ending March 11, 2006 did not include payment for 120 days of accrued vacation. At that time, however, he had no way of knowing whether the Employer would issue an additional paycheck for the 120 hours that are listed on the pay stub as accrued vacation. There is nothing written on the pay stub to indicate that this is the final payment that Kranz would make to Mr. Lakatos.

Logically, Lakatos thought that he should wait a week to see if he would receive another check to cover the accrued vacation. When that did not happen, he met with Ron Walley and Lew Cadkin, at which time it was made clear to him that the Employer was of the view that the vacation monies were not owed to him. The Grievant then had seven (7) working days to file a grievance. A written submission was made on April 4, well within the seven (7) day period. Thus, the grievance is timely.

Merits

As the Employer states the issue, "Is the Grievant entitled to the three weeks of vacation?" this would appear to be a relatively simple case. The Employer contends that Lakatos was fully paid in 2005 for his three weeks of vacation, but the Union contends that the Grievant earned three weeks of vacation in 2005 that he was to take in 2006 and since he was no longer employed by Kranz, he should be paid for the three weeks. Both parties agree that Section 2, Pro-Rata Vacation, is inapplicable because Lakatos only worked ten (10) rather than thirteen (13) weeks in 2006.

There is considerable arbitral precedent holding that vacation is a form of deferred compensation that vests in the employee as it is earned, and that employees are entitled to the vacation/wages absent language in an agreement limiting entitlement or imposing requirements that must be met, such as being on the payroll as of a specified date. See, Elkouri and Elkouri, *How Arbitration Works*, Sixth Edition, pp. 1058-1060, and the cases cited therein. In each instance, it is necessary to start with the wording of the collective bargaining agreement. It is the task of the Arbitrator to first attempt to discern the parties' intent, before resorting to broad principles. The parties' intent is best found in the wording that they have used to express their intent, how that wording has been used in the past, and the bargaining history, if any.

In this case, Article 10 – Vacation, Section 1 states that employees shall be entitled to receive the following vacation based on the length of service with the Company:

> Employees with 1 year of service, one (1) week vacation with full pay, in advance.
> Employees with 3 years of service, two (2) weeks vacation with full pay, in advance.
> Employees with 8 years of service, three (3) weeks vacation with full pay, in advance.
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> . . .

This language would appear to mean that upon completion of one year of service, an employee would be entitled to one week vacation with full pay; after three years of service, the entitlement would be to two weeks of vacation; and after eight years of service, like the Grievant herein, three weeks of vacation. This would support the Grievant's contention that after he had completed his first year of service, April 19, 1993 through April 18, 1994, he was entitled to one year of vacation during the period April 1994 through April 1995. Bringing this concept forward to his full last year at Kranz, he was entitled to three weeks of vacation during the period April 19, 2005 through April 18, 2006, to be taken during the period April 2006 through April 2007. However, Lakatos voluntarily quit his employment, effective March 11, 2006.

This analysis, however, does not take into account the phrase "in advance" that is part of the language of this section of the collective bargaining agreement. Does this mean that the wages for the vacation are paid to the employee prior to taking the week(s) of vacation? Does this mean that the employee is entitled to the amount of vacation in advance of completing the required years of service, such that a new employee can take his or her week of vacation during the first year of employment, prior to his/her anniversary date? This language is, to say the least, ambiguous. Unfortunately, the record is silent on its meaning. The only testimony with respect to when the vacation became available was that of the Grievant. Mr. Lakatos'

uncontested testimony was that he was not entitled to a week of vacation until he had reached his first anniversary date, in April 1994. The Employer testified that Mr. Lakatos had been paid for his 2005 vacation, and there is nothing in the record that contests that statement, either.

Employees sign for vacation in January of each year, regardless of when their anniversary date occurs. Unfortunately, the record is devoid of any information as to which January listing allowed the Grievant to sign for two weeks of vacation, January 1996 when he would complete three years of service in April 1996, or January 1997 after he had completed three years of service the prior April? Similarly, the record does not inform as to whether Lakatos took three weeks of vacation starting in 2001, when he would complete his 8th year of employment in April, or in 2002, after he had completed his eighth year of employment.

In order for Section 1 and Section 2 of Article 10 to be harmonized, it must be that the Grievant, and any other employee, is permitted to take the number of weeks of vacation for which he will become eligible during the year that he becomes eligible. Further, the phrase "in advance" must mean that the employee is allowed to take that number of weeks during the year in which he reaches the higher level of vacation allotment. Although the Grievant may not have been permitted to take vacation during his first year of employment, he has, by 2006, taken all the vacation that he earned or accrued through April 19, 2005. Vacation time earned since then must be determined by looking at Section 2, Pro-Rata vacation, as he has not worked another full year, having quit before his anniversary date.

Had Mr. Lakatos worked until April 18, 2006, the analysis would be complete and he would be entitled to receive three (3) weeks pay for vacation. Article 10, Vacation, does not contain language similar to that found in Article 9, Holidays and Sick Leave. In that section of the collective bargaining agreement, it clearly states that "Unused sick leave is *not* payable upon termination." (emphasis added) No such language appears in Article 10. Standard principles of contract interpretation provide that since the parties included such language in Article 9, but not in Article 10, they intended that unused vacation leave is payable upon termination.

However, Lakatos did not work that entire period. His last date of work was March 11, 2006, requiring a review of Section 2. Contrary to both the Union and the Employer who contend that Article 10, Section 2, Pro-Rata Vacation does not apply in this case, I find that it is directly on point. Mr. Lakatos is

> An employee who has been laid off, quits or retires before qualifying for the full vacation benefit set forth in the applicable subsection of Section above, but who has completed at least thirteen (13) or more consecutive weeks, [and is between] the eight (8th) to fourteenth (14th) years of continuous employment, both years inclusive, after his hiring date or anniversary thereof . . . will receive a pro-rata vacation benefit of triple that which is set forth in the preceding schedule.

Contrary to the Employer's contention that Lakatos worked only 10 weeks in 2006 and was, therefore, not subject to the pro-rata vacation provision, the language demonstrates that years are to be measured from an employee's anniversary date, not from January 1. During his last year of employment, Lakatos worked from April 19, 2005 through March 11, 2006, 46 weeks and 4 days. Because he worked more than 31 weeks in his 13th year of employment with the company, he is, in accordance with the language of Article 10, Section 2, entitled to triple the vacation hours credit found in the schedule for 31 weeks or more, or three times 40 hours, or 120 hours of vacation pay.

The Employer and the Union both argued that the information provided by the Employer regarding vacation money paid to others who left employment with Kranz in the past two years supported their position as to the Grievant's entitlement to 120 hours of vacation. Without the benefit of the seniority dates of the seven individuals, it is impossible to determine whether any or all of them received the proper amount of vacation or vacation pay upon their separation from the Employer. I note, however, that Article 10, Section 2 does not apply in the event of an involuntary termination.

Although vacation picks are made on a January through December basis, an employee's entitlement to vacation is based on his or her anniversary date. In the case of the Grievant, that was April 19. All calculations as to his vacation eligibility must be based thereon. Accordingly, Mr. Lakatos is entitled to 120 hours of vacation pay, based on the pro-rata vacation schedule contained in Section 2 of Article 10.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The grievance was timely.

2. The grievance is sustained. The Employer violated Article 10 of the collective bargaining agreement by failing to pay the grievant for 120 hours of vacation pay.

3. The Employer shall immediately pay the Grievant for 120 hours of work at the rate of pay he was earning at the time of his voluntary separation, $14.79 per hour.

Dated at Madison, Wisconsin, this 8th day of August, 2006.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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