BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ADVANCED BOILER & TANK COMPANY

and

BOILERMAKERS LOCAL UNION NO. 107

Case 13
No. 68330
A-6339

Appearances:

Joel S. Aziere, Attorney at Law, Davis & Kuelthau, S.C., 300 North Corporate Drive, Suite 150, Brookfield, Wisconsin, 53045, appearing on behalf of Advanced Boiler & Tank Company.

Matthew R. Robbins, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, 53212, appearing on behalf of Boilermakers Local Union No. 107.

ARBITRATION AWARD

Advanced Boiler & Tank Company ("Company") and the Boilermakers Local Union No. 107 ("Union") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the Company, requested that the Wisconsin Employment Relations Commission designate a commissioner or staff member to serve as arbitrator of the instant dispute. The undersigned was so designated. A hearing was held on February 13, 2009, in Brookfield, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant.[1] A stenographic transcript of the proceeding was made. Thereafter, each party submitted post-hearing arguments, the last of which was received on April 15, 2009, whereupon the record was closed.

Now, having considered the record as a whole, the undersigned arbitrator makes and issues the following award.

[1]In the course of the same proceeding, evidence also was taken regarding Case 14, No. 68331, A-6340, another grievance arbitration matter involving the same parties, for which a separate award is being issued.

ISSUE

The parties agreed to allow the arbitrator to frame the issue based on the evidence and arguments presented. The Company proposed the following statement of the issue:

> Whether the Company was under any obligation to pay out any vacation pay to the two Grievants upon termination of employment; and, if so, what is the appropriate remedy?

The Union proposed the following statement of the issue:

> Did the Employer violate the labor agreement when it failed to pay accrued vacation to the two individuals mentioned in the grievance after they terminated their employment with the Company? If so, what is the remedy?

The undersigned adopts the following statement of the issue:

> Did the Company violate its Agreement with the Union when it failed to remit payment to the Grievants, upon termination of their employment with the Company, for vacation hours from eligibility year 2008? If so, what is the appropriate remedy?

REVELANT PROVISIONS

The 2007-2010 Agreement between the Company and the Union contains the following provisions:

> ARTICLE 12. Grievance and Arbitration Procedure
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> . . .
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> Section 2. Arbitration Procedure
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> In the event the grievance is not settled by the foregoing procedure, it shall be referred to an Arbitration Committee consisting of a representative of Employer, a representative of Union, and a third member to be chosen by those two (2) jointly. The decision of the majority of the Arbitration Committee shall be final and binding on the parties hereto. Such decision shall be within the scope and terms of this Agreement, but shall not change such scope and terms; shall be rendered within ten (10) days from the date of reference to the Arbitration Committee, and shall specify whether or not it is retroactive and the effective date thereof. If the two (2) members of Arbitration Committee fail to select a neutral member within two (2) days, the two (2) members already appointed

shall, within two (2) days, call upon the Wisconsin Employment Relations Commission to make a the third selection. In the event either the Employer's or Union's representative fails to cooperate in calling upon the Wisconsin Employment Relations Commission, as herein prescribed, within the said two (2) day's, the other representative shall have the authority to make such request.[2]

. . .

ARTICLE 13. Vacations

Section 1. Effective January, 1984, vacation pay shall be computed on January 1 of each vacation year as follows:

Full Years of Service as of December 31	Hours of Vacation
1 year	40
3 years	80
6 years	120
11 years	160
16 years	168
17 years	176
18 years	184
19 years	192
20 years	200

Section 1A. Effective May 1, 2004 all employees that have less than three (3) years of service on May 1, 2004 will be under the following vacation schedule:

Full Years of Service as of December 31	Hours of Vacation
1 year	40
2 years	80
6 years	120
15 years	160

Section 2. To become eligible for vacation, an employee must work a minimum of Seven Hundred Fifty (750) hours in the year ending December 31. (For purposes of hours worked vacation and holiday hours will be included.

[2] For the purpose of this proceeding, the parties stipulated to a waiver of the requirement set forth in this provision that unresolved grievance disputes are to be referred to a tripartite panel of arbitrators. They consented instead to the jurisdiction of the undersigned, causing the record to reflect that such waiver is limited to this proceeding and not intended to establish any precedent or past practice between them. The parties also stipulated to a waiver of the portion of this provision that would require this award to be issued within ten days.

> Section 3. An employee who works more than Seven Hundred Fifty (750) hours but less than One Thousand Five Hundred (1500) hours shall have his allotted vacation pro-rated as a percentage of One Thousand Five Hundred (1500) to the nearest hour. An employee who works more than One Thousand Five Hundred (1500) hours shall receive full vacation. (For purposes of hours worked Vacation and holiday hours will be included.)
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> . . .
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> ARTICLE 22. Pay Day
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> . . .
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> Section 2. Employees who are discharged from the service of the Company shall receive their wages and personal property in full within one (1) calendar week.
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> Section 3. Employees who quit the service of the employer shall receive their wages and personal property in full within one (1) calendar week.

Further, the Company's Policy Manual contains the following provision:

> 21. VACATIONS: As a courtesy, the Company may permit an employee to take vacation prior to his anniversary date, assuming that employee will be with Advance Boiler beyond his anniversary date.
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> A departing employee will be "charged" in the event his vacations days taken and exceed [*sic*] the vacation days he has earned.
>
> . . .

DISCUSSION

Article 13 of the parties' Agreement provides that, to earn paid vacation, Company employees must meet certain years of service and hours of work eligibility requirements in the course of a calendar year. Article 13 also states that "vacation pay shall be computed on January 1 of each vacation year" – that is, on the day after each eligibility year ends. Both of the Grievants in this case had worked for the Company for seven years, when they terminated their employment positions sometime in 2008. When they left the Company, each of the Grievants already had met, for that year, the minimum years of service and hours of work requirements set forth in Article 13. Nevertheless, any payouts the Grievants received for unused vacation hours, upon termination of employment, did not compensate them for the

hours they believed they had earned in 2008. The Company argues that the Grievants did not successfully earn hours in the 2008 eligibility year, because they were not employed by the Company on January 1, 2009, the date on which, under Article 13, 2008 hours would have been computed.

Before discussing the merits of this case, there are two matters raised by the Company that must be addressed. First, the Company argues that this grievance should be dismissed on the grounds that the Union failed to meet its burden of proof.[3] Specifically, it argues that the Union failed to produce evidence that would prove three facts fundamental to the Union's case: that the Grievants met the minimum years of service requirement, that the Grievants met the hours of work requirement, and that the Grievants were refused the payout to which the Union claims they were entitled. Each of these underlying facts, however, is set forth in the initial grievance form that was submitted as a joint exhibit at hearing. Further, union steward Tom Falesnik provided uncontroverted testimony at hearing indicating that the Grievants had met the hours of work threshold before they left their employment positions in 2008. In a case where these facts also have been asserted by the Union from the outset and have never been disputed by the Company[4], where they are facts that are implicitly established by the basic positions adopted by the parties, where the Agreement does not set forth any burden to be followed, and where some would say that the very concept of a burden has no applicability at all because its focus is the interpretation of a contract, Elkouri & Elkouri, *How Arbitration Works*, 6th Edition (hereafter, "Elkouri"), at 423, these facts have been adequately proven.

The Company further argues against the consideration of a submission filed by the Union after the briefing schedule was completed in this case. The Union's additional filing was justified, however, by the Company's decision to wait until its reply brief to raise the burden of proof argument. Any alleged failure on the Union's part to meet its burden would have been committed at hearing – that being the only opportunity either party had to introduce evidence into the record. Thus, to be able to construct an argument regarding the Union's alleged shortcoming, the Company needed only the benefit of a transcript of the proceedings and the accompanying exhibits, which it had prior to submitting its initial brief. Because the Company waited until its reply brief to raise the burden of proof argument, I have no choice but to accept and consider the additional submissions, by both parties, addressing it.

The question presented by this case is when did the vacation hours accrued by the Grievants in 2008 vest, such that the Grievants were entitled to a payout for those benefits when they left the Company's employment. The parties' dispute specifically focuses on whether the Agreement between them requires an employee to be employed by the Company on January 1 of any given vacation year, such that any vacation hours he has earned during the

[3] I understand the burden of proof obligation to consist of a burden of production and a burden of persuasion. Though the Company uses slightly different terminology, it seems to be arguing that the Union failed to meet its obligation on both counts.

[4] Indeed, even in the course of raising its burden of proof argument, the Company stops short of asserting that it disputes these facts – it merely points out that it has not conceded them.

preceding eligibility year do not vest until that date. Eligibility requirements for vacation accrual are not uncommon, *see,* Elkouri, *supra*, at 1059, *The Common Law of the Workplace*, Theodore J. St. Antoine, Ed., (1998) at 306-308, *Labor and Employment Arbitration, 2nd Edition*, at 31-4 – 31-6, and they certainly can include an active employment requirement mandating that an individual must be on the company payroll on a date certain to successfully earn vacation hours from an any given eligibility period, *see,* Elkouri, *supra*, at ID. *Common Law of the Workplace*, *supra*, at 308, *Labor and Employment Arbitration*, *supra*, at 31-5, 31-18 – 31-20.

The majority of arbitrators, however, will not impose an active employment requirement unless one is clearly set forth in the applicable collective bargaining agreement. *The Common Law of the Workplace*, *supra,* ID., *Labor and Employment Arbitration*, *supra,* at 31-18 – 31-19, BURDICK CORP., 76 LA 611 (Petrie, 1981), TELESCOPE FOLDING FURNITURE COL., 49 LA 837 (Cox, 1967). Where an active employment requirement is found, the basis for it typically is contractual language specifying that employees are required to be "employed", "in the employ", "on the payroll", or "on the active payroll" as of a date certain. *Labor and Employment Arbitration*, *supra,* at 31-6, WHITTET-HIGGENS CO., 15 LA 13 (Healy, 1949).[5] Even where one of these common phrases is not found, the requirement can be otherwise clearly expressed.[6] The Agreement in the present case, however, simply does not contain language conveying a clear intention on the part of the parties to impose an active employment requirement. There is nothing in the Agreement that explicitly requires employees to be on the payroll or employed by the Company, on a certain date or at the occurrence of a certain event, to be able to earn vacation accrued in the previous year.

Moreover, I am not persuaded that such a requirement can be inferred from provisions in the Agreement. The vacation benefit provision at Article 13 states that "vacation pay shall be computed on January 1 of each vacation year". The Company argues that this sentence should be read to convey an active employment requirement, because one reasonably should

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[5] See, for example, contract language found to convey an active employment requirement in ROPER CORP., 61 LA 342 (Bradley, 1973) ("An employee must be on the payroll of the Company on May 1st in order to qualify."); REX CHAINBELT INC., 49 LA 646 (Gilden, 1967) ("All employees on the payroll on January 1 will receive paid vacations according to the following schedules provided. . ."); GREENLEE BROS. AND CO., 48 LA 938 (Davis, 1967) ("To be eligible for vacation and pay allowances, the employee must be in this employment on May 1st, and employers otherwise qualifying whose employment terminates on or after that date will receive vacation pay."); TOBE DEUTSCHMANN CORP., 35 LA 179 (Wallen, 1960) ("Any employee who, as of April 1st of the current year, is in the employee of the Employer and who, as of said date, has been in the continuous employee of the Employer for one (1) year or more . . . shall be entitled to receive vacation and vacation pay as follows: . . ."); WAMSUTTA MILLS, INC., 34 LA 158 (Hogan, 1959) ("Qualifications for and Extent of Vacations: Each employee in the employ of the Employer's mill on June 1st, 1955 and on June 1st of each succeeding contract year, hereinafter called the 'eligibility date' . . ."); WHITTET-HIGGENS CO., *supra* ("Employees who are on the active payroll of the Company on June 30, 1949 shall receive vacation for the period corresponding to their length of service as herein set forth.").

[6] See, for example, OLIN MATHIESON CHEMICAL CORP., 42 LA 1332 (Turkus, 1964) ("An employee who has seniority status as of the effective date of the start of the vacation shutdown, or June 30 if there is no shutdown, will be eligible for vacation in accordance with the following schedule. …").

conclude that vacation pay cannot even exist – and therefore cannot have been earned – until such date as it has been computed. I am not willing to extrapolate such meaning from the term "compute". An agreement to set January 1 as the date upon which the amount of vacation earned over the previous year would be computed simply is not a clear indication that the parties intended to require employees to be on the payroll until January 1, such that their earned benefits would not vest until that date. Further, I disagree with the Company's assertion that the unwillingness to read an active employment requirement into the January 1 provision will render it meaningless. I believe, as other arbitrators have, *see, e.g.,* TOBE DEUTSCHMANN CORP. 35 LA 179 (Wallen, 1960), that a vacation benefit provision can provide for a stand-alone computation date, the significance of which might be no more than an agreement that an employer representative will take the administrative step of calculating – perhaps through a simple review of records reflecting the years and hours worked by each employee – the amount of vacation earned.

Nor does my decision render meaningless, as the Company asserts, the heading in Article 13 that requires "[f]ull [y]ears of [s]ervice as of December 31". As that provision is written, December 31 represents the end of the eligibility period in which an employee must have reached – during any point in the preceding calendar year – an anniversary date that would qualify him for one of the vacation packages of 40, 60, 80, 120, and so on hours. The effect of these seniority benchmarks is not affected by this award.

The Company argues that Article 22 of the Agreement, which entitles departing employees only to their "wages and personal property" and does not specifically state that employees are entitled to vacation payout, should be read as an indication that the parties did not agree to the payout to which the Grievants claim they were entitled. I do not find this argument persuasive. It is well-settled that paid vacation is a form of deferred wages. Elkouri, *supra,* at 1058, *Common Law of the Workplace*, *supra*, at 306, *Labor and Employment Arbitration*, *supra*, at 31-3 – 31-4. This is especially true where the ability to earn the benefit is linked, as it is here, to longevity and performance of work requirements. Elkouri, *supra*, at 1058-1060, *citing*, FOSTER V. DRAVO CORP., 420 U.S. 92, 100-101, 89 LRRM 2988 (1975) ("Generally, the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation."). The fact that, as the Company points out, the vacation benefit in the Agreement before me is not set forth in a section that is physically near or a part of the wages section is not enough, in my opinion, to defeat this strong presumption. Considering the classification of vacation benefits as deferred compensation, the reference to "wages" in Article 22 does more to support, rather than undermine, the Grievants' claim that they were entitled, after termination of their employment with the Company, to the payout of vacation hours accrued during the 2008 eligibility year.

I also do not find persuasive the Company's repeated observation that there is no provision in the Agreement affirmatively requiring a payout for unused vacation upon termination of employment. The Company seemingly insists on this point – while, at the same time, freely acknowledging that employees are routinely paid for banked vacation hours when

employment is terminated – to suggest that any payout that occurs should be viewed as a narrow, practice-based exception to the general absence of any such right in the Agreement. This view, however, fails to take into account the significance of the paid vacation benefit as a form of deferred compensation. As deferred compensation, paid vacation vests once it has been earned. Elkouri, *supra*, AT 1060. Thus, where the right to paid vacation has been conferred by the provision of a collective bargaining agreement, as it has been here, there would be no need for an additional, affirmative acknowledgement of the right to a payout for any portion of the benefit that has been earned but remains unused. As Arbitrator Volz put is, the question is not whether the contract expressly grants a vacation benefit payout, but whether it specifically divests the employee of paid vacation once it is accrued. GOLAY & CO, 59 LA 1245, 1248 (Volz, 1972). Given my conclusion that the Grievants earned their 2008 vacation when they met the years of service and hours of work requirement in 2008 – and that an additional, active employment requirement did not also exist to result in its forfeiture when the Grievants left the Company – their right to receive a payout does not hinge on a specific provision in the Agreement providing that one would be forthcoming.

Finally, the view that an active employment requirement must be clearly established is not inconsistent with the TUBE CITY award, 117 LA 719 (Kindig, 2002), cited by the Company in this case. In TUBE CITY, the Arbitrator based his finding that the Grievant was not entitled to a vacation payout on the observation that the collective bargaining agreement at issue did not specifically provide for such a payout. The omission of such a provision in the agreement had taken on a particular significance, however, because the collective bargaining agreements between the same employer and two other bargaining units – which agreements were negotiated in conjunction with the one at issue – each contained a statement specifically allowing for such a payout. Under those circumstances, Arbitrator Kindig viewed the absence of such a statement in the agreement before him as a clear indication that the parties had decided that their agreement would not provide for such a benefit.

The Company argues that past practice and bargaining history evidence support its position in this case. I disagree. The Company points to three individuals, Christopher Hite, Terrence Roeglin, and Chester Stachowiak, who have terminated their employment with the Company since 2005. None of those men received a payout for vacation hours accrued in the last year of employment, even though each of them met the years of service and hours of work requirement set forth in the Agreement. The Company argues that this evidence establishes a past practice that runs contrary to the Union's claim here. It is axiomatic that the doctrine of past practice requires clarity, consistency, and acceptability. Elkouri, *supra,* at 608-609. The record before me prevents me from concluding that the non-payment for vacation hours earned in the last year of employment is a practice that has been consistently applied or mutually accepted. The practice cannot have been mutually accepted, as it apparently was unknown to the Union. Undisputed testimony at hearing indicates that Union representatives had no knowledge that Hite, Roeglin, and Stachowiak had not received such a payout upon their separation from the Company. For this same reason, nothing can be made of the Union's failure, in the contract negotiations that took place in the spring of 2007, to challenge the fact that the Company had not made such a payout.

Moreover, the evidence before me undermines any claim that the Company has behaved consistently with regard to these payouts. While Hite, Roeglin, and Stachowiak represent three instances in which the Company has refused the type of payout at issue here, there are two others in which such payouts are shown to have been made. The Company acknowledges that, in 2004, it paid former employee Mike Walczak for vacation hours for which he became eligible in the same year he terminated his employment with the Company. The Company's excuse for this event – that the payout was a mistake – with no additional explanation, is simply not an adequate basis for dismissing that occurrence.

Also, I cannot ignore the evidence regard Jon Strandt. Strandt began working for the Company in January of 2007. He was laid-off, however, in October of 2007. In December of 2007, he received a payout that the Union asserts was for vacation hours accrued during eligibility year 2007. The Company argues that Strandt's payout is not relevant here. It points out that Strandt was laid-off when he received the payout and asserts that what he received, therefore, was made available to him under a Company personnel policy that allows current employees to take vacation prior to their anniversary date. The effort to distinguish Strandt's situation on this basis makes no sense. The policy cited by the Company provides that "[a]s a courtesy, the Company may permit an employee to take vacation prior to his anniversary date". Nothing in the record before me indicates that Strandt ever asked the Company to extend such a courtesy, under that policy or any other. Nor did he take – or have a need to take – vacation, as the policy allows. Rather, he simply received a check in the mail in December of 2007 and, in fact, was confused originally about why he was being paid. He ultimately determined that the check was for unused vacation earned in 2007, a conclusion that was confirmed by the fact that Strandt, when he was recalled to work in January of 2008, had to take his vacation time in 2008 without pay.

The payout to Strandt in December of 2007 for hours accrued that same year casts doubt on the Company's claim that it does not consider vacation hours to have been earned until the first day of January following the eligibility year. Further, the fact that payouts were made to Walczak and Strandt undermines the Company's claim that it has a consistent practice of imposing a January 1 active employment requirement.

AWARD

The grievance is sustained. To the extent that the Grievants have not received payment for the vacation hours they had sufficient years of service and hours of work to have earned in eligibility year 2008, they shall be made whole. I remand to the parties the task of computing

the vacation payout owed to each Grievant. Further, I retain jurisdiction for a period of sixty days from the date of this award for the purpose of resolving any dispute that arises regarding that amount.

Dated at Madison, Wisconsin, this 6th day of July, 2009.

Danielle L. Carne /s/
Danielle L. Carne, Arbitrator

DLC/gjc
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