

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BSA / LB&B JOINT VENTURE

and

**MACHINISTS LOCAL LODGE 1115 OF
DISTRICT LODGE 66, IAMAW**

Case 2

No. 69150

A-6382

Appearances:

District Lodge 66, IAMAW, 1307 Market Street, La Crosse, Wisconsin 54601, by **Mr. Rick Mickschl**, Directing Business Representative, appearing on behalf of Machinists Local Lodge 1115.

Wyrick, Robbins, Yates & Ponton, LLP, 4101 Lake Boone Trail, Suite 300, Raleigh, North Carolina 27607-7506, by **Ms. Jennifer Miller**, Attorney at Law, appearing on behalf of BSA/LB&B Joint Venture.

ARBITRATION AWARD

On August 31, 2009, Machinists Local Lodge 1115 (hereinafter referred to as the Union) and BSA/LB&B Joint Ventures (hereinafter referred to as the Employer or the Company) jointly requested the appointment of Daniel Nielsen as arbitrator of a dispute concerning the Company's failure to offer vacation benefits to seasonal employees in its operation at Fort McCoy, Wisconsin. A hearing was held in La Crosse, Wisconsin on December 8, 2009, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The hearing was transcribed and a transcript was prepared. The parties submitted post-hearing briefs, which were exchanged through the undersigned on February 23, 2010, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUES

Is the Company violating the Collective Bargaining Agreement by not granting vacation entitlement to seasonal employees employed at the Department of Public Works? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 3 - MANAGEMENT RIGHTS

Section 1. Except as specifically limited or modified by the provisions of this Agreement, the Company has and shall retain the exclusive right of management of its operations and the direction of its employees including, but by no means limited to, the right to plan, train, direct, and control all Company operations and the employees assigned thereto; to maintain order and efficiency; the right to hire, schedule and assign job duties, approve vacation time usage, suspend, layoff, promote, demote, transfer, discipline, and discharge employees; to adopt, amend, and enforce work and safety rules and procedures, including drug and alcohol policies: to determine the number of hours per day or per week: to increase, decrease, or discontinue operations in whole or in part; to determine the job classifications and qualifications of employees assigned thereto: to establish and enforce standards for the quality and quantity of work required to be performed in all jobs; the right to determine what work and functions in the Company's business will be performed by independent contractors, and to require overtime work to fulfill necessary contract requirements.

The foregoing enumeration of the Company's rights shall not be deemed to exclude other preexisting rights or customary functions of management which do not conflict with the provisions of this Agreement.

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ARTICLE 9 - SENIORITY

Section 1. Seniority for purposes of this Agreement shall represent an employee's total unbroken length of service with the Company, including continuous service with a predecessor contractor. Job classification seniority is defined as the total unbroken length of service an employee acquires in a particular job classification. In the event two (2) or more employees have the same seniority date, the most senior employee will be determined by using the employees' last four (4) digits of the employees' social security number with the most senior being the employee with the highest number.

Section 2. Full time employees are in a separate seniority group, part-time employees in another separate seniority group, and seasonal employees in another separate seniority group. Each seniority group is independent of the others. Employees moving from part-time to full time status, or vice versa, will obtain a new full time or part-time seniority based upon the effective date of the change.

The parties recognize the unique circumstances surrounding the employment of seasonal employees. The seasonal employees' seniority is exclusively for the purpose of determining the sequence of laying off and recalling employees as work is available.

Section 3. Seniority shall be broken under the following circumstances:

- a. Discharge.
- b. Resignation.
- c. Retirement.
- d. Failure to comply with, in the case of a lay-off, the reduction in force and recall provisions as set forth in this Agreement.
- e. Failure to perform any work (excluding layoffs) for the Company for a period of nine (9) consecutive months.
- f. Failure to return from a leave of absence.
- g. If absent from work without notice to the Company for two (2) consecutive work days and without an excuse acceptable to the Company.

Section 4. If an employee is transferred to a non-bargaining unit position for less than ninety (90) consecutive calendar days, he/she may return to a position covered by the collective bargaining agreement with his/her original seniority date restored.

Section 5. The Company shall prepare and maintain, subject to examination and correction by Union representatives, the following Company seniority lists:

- a. Full time employees
- b. Part-time employees
- c. Seasonal employees

Each list shall be dated and specify the employees name, job classification, and date of hire. Each list shall be in descending order from the most senior to the least senior employee. The stewards and Business Representative shall be provided with a copy of each list. Employees shall have the right to protest any error they believe exists in a seniority list. An updated copy of the seniority lists shall be provided to the Stewards and the Business Representatives every six (6) months.

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ARTICLE 12 – GRIEVANCE PROCEDURE

Section 1. A grievance is defined as a dispute involving the interpretation or application of a provision of this Agreement.

Section 2. An employee and/or a steward meeting with a supervisor or manager in accordance with the steps outlined in this grievance procedure may do so without loss of pay. Employees and/stewards will not be compensated for time spent investigating grievances. A grievance shall be processed in accordance with the following steps in the grievance procedure outlined below:

Step 1. A grievance shall be first presented to the employee's supervisor within five (5) work days of the date of occurrence which is the basis of the grievance. The supervisor, the employee, and the steward, if requested, will discuss the issue and attempt to adjust the matter. A steward will be provided when requested by the employee. The supervisor will provide an answer to the employee within five (5) work days of their discussion.

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Step 4. If the grievance still remains unresolved, the grievance may be submitted to arbitration provided such submission is made within twenty (20) work days of receipt of the third step reply. The party requesting arbitration shall request a panel of seven (7) arbitrators from the American Arbitration Association (AAA) and will notify the other party of such action.

Section 5. Within ten (10) work days of receipt of the panel from AAA, the arbitrator will be selected by the parties alternately striking names with the last remaining name on the list representing the arbitrator who is selected.

The arbitrator shall not have the authority to add to, subtract from, modify or alter any of the terms of this Agreement. The arbitrator shall limit his decision to the interpretation of the Agreement and to a settlement of the particular grievance under consideration.

The arbitrator's decision shall be final and binding on both parties. Expenses and preparation of their case shall be borne by the party calling their witnesses and the preparing their case. Any filing and processing fees required by the AAA shall be paid by the party requesting arbitration. The expenses associated with a place for holding the hearing shall be shared equally between the parties. The expenses for the arbitrator shall be paid by the non-prevailing party to the arbitration.

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ARTICLE 21 VACATION AND SICK LEAVE TIME

Any employee who will have attained the seniority status specified in the table below during the vacation year shall be entitled to the corresponding vacation with pay. Length of service includes the whole span of continuous service with the present or successor contractor and the with the predecessor contractors in the performance of similar work at the same Federal facility.

Duration of Service	Yearly Accrual
Anniversary date year one (1) through the end of year seven (7)	2 Weeks
Beginning of year eight (8) through end of year thirteen (13)	3 Weeks
Beginning year fourteen (14) and over	4 Weeks

Vacation pay shall be at the employee's base hourly rate, including all applicable premium pay.

Vacation time may be used one day at a time, as long as it is prescheduled and approved by management.

Employees, who are laid off, discharged, or who discontinue service with the Company for any reason, including permanent shutdown, shall be paid any unused vacation credit earned the preceding year.

Insofar as possible, the Company will arrange the vacation of an employee at a time the employee request for vacation. The employees having the greatest seniority will be given first choice in selecting the time of their vacation.

If an employee dies while on the payroll of the Company, vacation pay, as provided above, shall be paid to his/her legal heir or estate.

An additional day's pay shall be granted to an employee on vacation if a holiday occurs during his vacation, or such employee may schedule and take an additional day off with pay either immediately preceding or following his/her scheduled vacation.

The vacation year shall be defined as the period from employee anniversary date to anniversary date.

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STATEMENT OF THE CASE

BACKGROUND

The Company is joint venture under contract to the military to provide logistical support at Fort McCoy, Wisconsin. The Company succeeded VT Griffin Service, Inc. as the vendor in 2008 as the consequence of competitive bidding. The Union is the exclusive bargaining representative of, among others, employees of the vendor in the Department of Public Works at the Fort. This includes seasonal employees. The bargaining unit was first organized in 2007, when Griffin was the vendor, and the first collective bargaining agreement was negotiated between the Union and Griffin. That Agreement established three different seniority groupings for full-time, part-time and seasonal employees. The Seniority provision went on to say that “The parties recognize the unique circumstances surrounding the employment of seasonal employees. The seasonal employees’ seniority is exclusively for the purpose of determining the sequence of laying off and recalling employees as work is available.” The Agreement with Griffin also included a provision for paid vacations, to wit: “Any employee who will have attained the seniority status specified in the table below during the vacation year shall be entitled to the corresponding vacation with pay.” This was followed by a table of three steps, providing 2, 3 and 4 weeks of vacation, depending upon “duration of service”. Under the Agreement with Griffin, seasonal employees were included in the vacation benefit. When Griffin lost the contract, it paid out accrued vacation time to all employees, including seasonals.

The Company and the Union entered into negotiations over a Bridge Agreement, specifying the changes that would be made to the terms of the collective bargaining agreement between Griffin and the IAMAW. The Union was represented in the negotiations over the Bridge Agreement by Rod Hoffman and Rick Mickschl. The Company was represented by Tim Fisher and Lou Brika. Seven changes were made to the Vacations article in these negotiations, but none of them addressed seasonal employees and neither party raised or discussed the vacation benefits of seasonal employees during these negotiations. No changes were made to the Seniority provisions. During bargaining, the parties also agreed to a Memorandum of Understanding allowing employees who had been paid out vacation by VT Griffin to use an equivalent amount of unpaid time between October 6, 2008 and their next vacation anniversary date, and an MOU grandfathering current part-time and seasonal employees in the payments of health and welfare benefit amounts, until such time as they “lose their seniority in the unit” or accepted full-time employment. At the conclusion of the negotiations, Hoffman made the statement that everything that had not been changed would remain the same. The negotiations were concluded in mid-August, and the Bridge Agreement and the MOU’s were executed on October 6, 2008, the day that the Company formally took over from Griffin.

Following the execution of the Bridge Agreement and the MOU’s, the Company stopped allowing seasonal employees to use vacation. It based its refusal on the fact that vacation was available to employees who had attained “the *seniority* status specified in the table” and that the Seniority provision stated that “seasonal employees’ seniority is *exclusively* for the purpose of determining the sequence of laying off and recalling employees...” It

allowed some seasonal employees to use unpaid time, but did not characterize that time as in some way connected with the Vacations provision or the MOU. It also advertised some seasonal jobs as including paid vacation, but asserted that was simply a mistake resulting from using a form letter stating general Company benefits, and not the benefits specific to this bargaining unit. The instant grievance was filed, protesting the change from the benefits received under VT Griffin.

Arguments of the Union

The Union argues that there is no basis for excluding the seasonal employees from the vacation benefit in the contract. Where a provision of the contract does not apply to seasonal employees, the contract says so. In the Holidays provision, for example, the parties expressly provided a distinct benefit for seasonal employees. In Health and Welfare, they expressly prorated the benefit for seasonal employees. In Vacation, there is no such limitation. Vacation is available to employees who have attained a specified seniority status. Both parties concede that seasonal employees have seniority status and continuous service. The Company relies on the limitation in the Seniority provision that “seasonal employees’ seniority is exclusively for the purpose of determining the sequence of laying off and recalling employees.” and bootstraps this into a claim that seasonal do not, therefore, have seniority as set forth in the table of benefits in the Vacations provision. This argument ignores the evident purpose of the limitation in the Seniority provision – to limit the seasonal employees from claiming layoff and recall rights in preference to full-time and part-time employees. That is the way the language was intended when it was originally bargained, that is the way it was applied, and that should continue to be the meaning assigned to it.

The Union argues that if the Company wanted to take this benefit away, it should have attempted to do so in bargaining. The contract as it stood before the Bridge negotiations provided vacation benefits to seasonal workers. The Company left the relevant language unchanged. Rod Hoffman clearly stated across the table that anything not changed in the Bridge Agreement negotiations would continue as before. The arbitrator should therefore grant the grievance, and make the affected employees whole.

Arguments of the Company

The Company argues that it is entitled to rely upon, and the arbitrator is bound by, the clear and unambiguous language of the contract. Vacation is determined by an employee’s having attained a specified seniority status. The Seniority article places clear and strict limitations on the use of seniority by seasonal employees: “The seasonal employees’ seniority is *exclusively* for the purpose of determining the sequence of laying off and recalling employees as work is available.” [emphasis added]. The plain meaning of this language is that a seasonal employee’s seniority cannot be used for any purpose other than layoff and recall. Otherwise the word “exclusively” is impermissibly written out of the language. Clear language overcomes any claims based on bargaining history or past practice, and in this case, it requires that the grievance be denied.

The Company further argues that, even if the contract language contained some sort of ambiguity, the Union's position should be rejected under the common principles of interpretation. Accepting the Union's position leads to absurd results, in that there are different classes of seasonal employees. Seasonal Heavy Truck Drivers work for eight months. Seasonal Tractor Operators work between four and eight months, depending on the Company's needs and their seniority. Given this range, it would be absurd to give the same number of weeks of vacation to all seasonal employees. If a seasonal vacation benefit was intended, the parties would presumably have made some provision for dealing with the disparity in work seasons. They did not, and this proves that no such benefit was intended.

The Company dismisses the Union's reliance on any bargaining history or past practice with VT Griffin. The Company had no knowledge of any such history or practice, and the contract language did even suggest the possibility of seasonal vacation rights. Given the inadequacy of the pre-existing contract language for the Union's purposes, if it wished to secure vacation rights for seasonal employees, it had the responsibility to bring that issue to the table. Having failed to do so, it bears the burden of any resulting ambiguity. The only relevant practice is the clear and consistent position taken by the Company – that seasonal employees would not receive any vacation benefits. For all of these reasons, the Company urges that the grievance be denied.

ANALYSIS AND DECISION

The threshold question in this case is whether, as claimed by the Company, the contract is clear and unambiguous in denying vacation benefits to seasonal employees. The familiar rule is that clear language is to be applied as written, without reference to past practice, bargaining history, or any other aid to contract interpretation. Contract language is clear and unambiguous where it will sustain only one meaning, and where no reasonable argument can be made for any other meaning.

The Vacation article itself easily permits an interpretation that seasonal employees are entitled to vacation benefits. It contains no language expressly excluding them from the benefit. The exclusion argued by the Company is derived from the Seniority provision, where the contract states that seniority for seasonal employees is "exclusively" for the purpose of determining the order of layoff and recall. The Company then reads the Vacation provision, which grants vacation based upon an employee having "attained the seniority status specified" in the accompanying table. The Company's argument is that a seasonal employee cannot attain a seniority status listed in the table, because their seniority is exclusively used for layoff and recall. While this is not a wholly unreasonable reading of the contract, it cannot be said to be the only permissible reading of the contract.

The Company's argument assumes that by using the term "seniority status" in the Vacation article, the parties thereby intended the term in precisely the same sense as it is used in the Seniority provision. That being the case, it is not at all clear why they negotiated

slightly different definitions of the term in the two articles. Article 9, §1 defines “seniority” as “Seniority for purposes of this Agreement shall represent an employee’s total unbroken length of service with the Company, including continuous service with a predecessor contractor.” Article 21 interchanges “seniority,” “duration of service” and “length of service.” The latter is defined as: “Length of service includes the whole span of continuous service with the present or successor contractor and the with the predecessor contractors in the performance of similar work at the same Federal facility.” The additional definition is inconsistent with the notion that “seniority status”, “duration of service” and “length of service” under Article 21 are identical to “seniority” under Article 9.

Further, if the parties intended that seasonal employees be excluded from vacation by making reference to “seniority status” in Article 21, they presumably would have made some similar exclusion in the MOU they negotiated to account for the payout of vacation time by VT Griffin. They did not. Instead, they simply stated that “Employees who were employed by VT Griffin Services, prior to the transfer to BSA/LB&B Joint Venture, were paid out their entire vacation quota. Both the Company and the Union agree to allow those employees who had vacation and were paid out to be allowed to take an equivalent amount of time off, unpaid, until their next vacation anniversary date.” Seasonal employees are “employees.” They had vacation under VT Griffin, and were paid out their unused vacation at the time of the switchover. While the Company credibly claims it did not know this, this language is clear and unqualified, and if it agreed to it without knowing which employees had vacation and were paid out, it did so at its own risk.

Finally, the Company’s belief that the exclusion of seasonal employees from vacation was accomplished by using the term “seniority status” is inconsistent with the language used to achieve that result elsewhere in the contract. Where the contract excludes or treats seasonal employees differently, in Holidays and in Health and Welfare, for example, it expressly states that intent. The Company offers no explanation of why, in the Vacations article alone, this would have been accomplished by implication.

While the Company’s interpretation of Article 21 is not wholly unreasonable, it is not the *only* reasonable interpretation of the language. I therefore conclude that the language is ambiguous, and is subject to interpretation under the normal principles used in grievance arbitration.

As noted above, the Vacation provision itself contains no express exclusion of seasonal employees. On its face, it would confer such benefits to any employee based on length of service. The Company strenuously argues that applying vacation benefits to seasonals leads to absurd results, since persons working vastly different seasons – four months versus eight months – would receive the same number of weeks of vacation. I agree that this is an outcome that one would expect the parties, or at least the employer, to avoid or manage through contract language. That does not render it an absurd outcome, one that reasonable parties could not have intended. It is the outcome that VT Griffin, another experienced federal contractor, negotiated and implemented for these same employees. It may be unpalatable to this Company, but it is plainly not a result that all employers would find absurd.

Article 21 uses three different terms – “seniority status”, “length of service”, and “duration of service” – to define the vacation entitlement of employees. The use of the word “seniority” in this provision, read in context, does not convey an intent to exclude seasonal employees. That would be a possible reading, if the parties somehow indicated that the word was used in the narrow and technical sense of its Article 9 definition. However, the interchangeable use of three different terms, and the inclusion of a different definition for length of service than is used for seniority, all belie any such technical usage. The contract provision as understood and administered under the predecessor employer, granted vacation to seasonal employees. The MOU, as negotiated by this Company, should have provided unpaid time off to seasonal employees who were paid out their vacation time. I do not doubt the Company’s claim that it did not realize that it was agreeing to seasonal vacations, but the language it agreed to and the history of provision under the predecessor vendor should have made it aware of the possibility. I therefore conclude that the Company violated the collective bargaining agreement by denying vacation time to seasonal employees. The appropriate remedy is to cease and desist this practice, to make the affected employees whole for vacation not granted or paid since the filing of the grievance, and to credit those employees with vacation in accordance with the scheduled set forth in Article 21.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Company violated the Collective Bargaining Agreement by not granting vacation entitlement to seasonal employees employed at the Department of Public Works.

The appropriate remedy is to make the affected employees whole for their past losses, and to cease and desist from denying seasonal employees vacation under Article 21.

The arbitrator will retain jurisdiction, solely for the purpose of clarifying or resolving disputes over the remedy, for a period of sixty days from the date of this Award.

Signed this 3rd day of June, 2010 at Chicago, Illinois.

Daniel J. Nielsen /s/

Daniel J. Nielsen, Arbitrator

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