

IN RE ARBITRATION BETWEEN:

**GLASS, MOLDERS, POTTERY, PLASTICS & ALLIED WORKERS INTERNATIONAL
UNION (GMPIU)**

and

DOTSON COMPANY

DECISION AND AWARD OF ARBITRATOR

FMCS CASE # 11-58491-3

JEFFREY W. JACOBS

ARBITRATOR

7300 Metro Blvd. #300

Edina, MN 55439

Telephone 952-897-1707

E-mail: jjacobs@wilkersonhegna.com

December 7, 2012

IN RE ARBITRATION BETWEEN:

GMPIU

and

Dotson Company.

DECISION AND AWARD OF ARBITRATOR
FMCS CASE # 11-58491-3
Sick leave grievance

APPEARANCES:

FOR THE UNION:

David Hoffman, International Vice President
Dan Bauer, Local President
Derrick Stobie, Vice President
Jim Ganzel, Financial Sec'y of Local Union
Heidi Wells, Recording Sec'y of Local Union

FOR THE EMPLOYER:

Richard Dryg, Trusight, Inc.
Kelly Peterson, HR Manager

PRELIMINARY STATEMENT

The hearing in the matter was held on November 21, 2011 at the Dotson Company offices in Mankato, MN. The parties submitted post-hearing Briefs dated November 30, 2011 at which point the record was closed.

JURISDICTION

The parties are signatories to a collective bargaining agreement dated July 1, 2009 through June 30, 2012. Article 11 provides for submission of disputes to binding arbitration. There were no procedural arbitrability issues raised by either party.

ISSUES

The issues are determined to be as follows:

Is the grievance procedurally arbitrable and timely?

If the matter is determined to be procedurally proper the issue is: Did the Employer violate the Agreement when it refused to allow employees to use the sick days referenced in Article 9 (5) on a scheduled workday without a penalty? If so, what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

1. The Employer retains exclusive right to manage the business
2. In its direction of the working force, it will comply with all provisions of the Agreement. No employee shall be discriminated against for any reasons, but nothing in this agreement shall interfere with the right of the Employer to discharge an employee for cause. Any questions arising under this Article shall be taken up as a grievance under Article 11.

ARTICLE 6 – RULES AND REGULATIONS

The employees covered by this agreement will observe such rules and regulations as may be established by Management and the Shop Committee, providing such rules and regulations do not conflict with or supersede any of the terms or provisions of this Agreement. ...

ARTICLE 9 SECTION 5

Employees have three (3) paid sick days computed at their basic hourly rate, credited on January 1st to use in eight (8) hour increments per calendar year January to December. New employees successfully completing their probationary period in first quarter receive 3 days, second quarter receive 2 days, third quarter receive 1 day and fourth quarter receive zero days.

ARTICLE 11 GRIEVANCE PROCEDURE – (relevant portions)

Section 3 – Should a dispute arise as to any of the terms of this Agreement affecting an employee of the Company, the employee will first take up the dispute with his/her supervisor. If no satisfactory agreement is reached within one (1) working day, the grievance shall be processed according to the following procedure:

Step 3 ... If satisfactory settlement cannot be reached within ten (10) working days, the matter may be referred to an arbitrator selected by the parties. ...

Section 6. No grievance shall be eligible for arbitration unless filed with the Employer within ten (10) working days of its known occurrence. ... Any grievance not pursued within the time limits will be considered settled on the basis of the answer given at the last step.

UNION'S POSITION:

The Union took the position that there was a violation of the collective bargaining agreement, CBA, when the Company unilaterally changed the policy regarding the use of paid sick days for use on a scheduled Saturday. In support of this the Union made the following contentions:

1. The Union pointed to the provisions of Article 9 (5) cited above and asserted that they are absolutely clear and unambiguous and require that employees be allowed to use paid sick on any work day, including Saturdays without limitation other than that they must use them in 8 hour increments. The Union asserted most strenuously that there are no other limitations and that the Employer's attempt to add a restriction on their use on scheduled Saturday work must be rejected.

2. The Union cited Elkouri and Elkouri and noted that under the plain meaning rule, there is no need to resort to any interpretative tools or other devices to divine the meaning of this clause – it is clear and can mean only that the employee may use a paid sick leave day on any scheduled workday.

3. The Union pointed to the negotiation history of this provision and noted that there was no discussion at all about a limitation on the use of sick days on Saturdays. Without any discussion there can be no agreement to disallow use of sick time on Saturdays in the face of such clear language.

4. The Union further noted that the previous contract contained different language and that the language of Article 9 (5) was changed to the current provision. Under the prior contract personal time was not allowed to be used on scheduled Saturdays. That old provision was however changed and personal time was converted to sick time under the terms of this Agreement. With any such change in language goes a concomitant change in meaning. Here the words convey a clear intent that the sole limitation on the use of sick time is that they be used in 8-hour increments. It does not matter how the sick leave was used under previous CBA's. What matters is the wording of this Agreement.

5. The Union argued that there was even a prior grievance over this very issue when the Company tried unsuccessfully to unilaterally change the sick leave policy. See, Union exhibit 1 and Employer exhibit 3. The resolution of that grievance was also clear, and consistent with current language. That resolution, which was signed by both Union and Management representatives, provided that “from today forward we will have employees state whether or not they want to use the paid sick day. This issue may come up for future discussion when we discuss attendance issues.”

6. The Union noted that the Company acknowledged at the hearing that the grievance was over this exact issue and that the Company put up a posting unilaterally changing it. Thus the resolution was to allow the use of sick time as the employees desired, including use on scheduled Saturdays. The Company agreed that it could not change the agreement without negotiation.

7. In fact the Union noted, up until February 15, 2011, the Employer had actually paid people for their sick days on Saturdays. There was no “agreement” between the HR person and Union representatives to change the policy. All that was agreed was to post the change so employees would know what the Company's policy was and avoid getting into trouble. Union and management continued to discuss this change; nothing more.

8. The Union further countered the Employer’s claim that the management rights article somehow gives it the right to change this policy. This policy is part of the CBA and Article 2 and 6 clearly say that the Management Rights and rules provisions are subject to the terms of the Agreement.

9. The Union further asserted that the incident involving employee Rico has nothing to do with this grievance. He wanted to change the use of an unpaid sick leave day to a paid day after he was written up for calling in on a Saturday. That is not the issue here and should not be considered.

10. Finally, the Union asserted that the matter is timely for a number of reasons. First, even though there were discussions about this policy and the posting was placed on the bulletin board on February 15, 2011 there were ongoing discussions about it. These parties have a history of a good working relationship and frequently are somewhat lax about time issues in order to get matters resolved rather than playing “gotcha” on a time limit. The Union also noted that the grievance was filed April 8, 2011 one day after the Company’s position finally became clear and the Union was told that the Company had changed the use of sick leave policy. It is both timely and procedurally proper. In fact the Company was considerably late in filing its response and cannot now insist on strict timeliness when it was so dilatory in getting a response back.

The Union seeks an award sustaining the grievance and ordering that the Company allow paid sick time pursuant to Article 9 (5) cited above to be used per the contract.

EMPLOYER'S POSITION

The Employer took the position that the matter was untimely and should be dismissed on that basis and that there was no contractual violation here whatsoever. In support of this position the Employer made the following contentions:

1. The Employer asserted that the matter should be denied due to timeliness issues. The Employer pointed to a time line setting forth the relevant events giving rise to this grievance. See Employer exhibit 5. The Employer pointed to the provisions of the grace procedure that call for the denial of any grievance filed more than 10 days after its "known occurrence." The Union was well aware of the Employer's change in policy and knew it with the Rico matter, which occurred in January 2011. The grievance was not filed within 10 days of that event.

2. The Union met with Ms. Peterson in early February and asked and *agreed* that the posting be placed on the employee bulletin board. It certainly knew it when the posting went up on February 15, 2011 announcing the policy. No grievance was filed within 10 days of that.

3. The Union asked to meet with the Company and discuss the policy in March as well. The Union clearly knew by this time what the Company's position was. The Union was told as early as March 22, 2011 what the policy was yet decided not to file this grievance until April 8th, well after the 10 days had expired. There was no agreement to extend these time limits.

4. On the merits, the Company asserted that the Company faces serious staffing shortages on weekends and needs people to come in if there is work to do. There is already a policy granting weekends off if the employee uses certain vacation time on Friday afternoons or Monday mornings. That leaves the Company short staffed many times and to allow this would make the situation even worse.

5. Further, the current language, while not containing any limitation on its face, does reflect the older policy of disallowing use of personal time on weekends. When the current language was negotiated it was assumed that with the minor wording change to sick time the old policy would carry forward even though there was no formal discussion about that at the bargaining table. The Company asserted that this policy against use of paid time off on weekends has been followed for decades and everyone knew or should have known that this was what the Company intended at the table. There was nothing said to the contrary by anyone and the Union never raised this as an issue.

6. Further, even though some people had been allowed to use paid sick time on scheduled Saturday immediately after the CBA was ratified, when the mistake was discovered it was immediately rectified and the policy changed. The Company argued that this does not govern the result here and that it retained a right to change the policy as it saw fit.

7. The Company further pointed to its inherent management right to operate the business efficiently and to its right to promulgate rules and regulations as long as those are not inconsistent with the provisions of the CBA. The Company argued that the rule against use of paid sick time is not inconsistent with the CBA and should be allowed.

9. The Company asserted that it has used the Production Employee Handbook as a supplement to the CBA for policy development and communication formally since 1999 and Labor/Management meetings have been held regularly since the early 1980's. This process includes posting policies to clarify intent or define situations that have not been previously encountered or discussed. The Company asserted that it reserved the right to change any policy at its discretion.

10. The Company relied on a prior award by Arbitrator Cooper in which she noted that the employer's handbook has been amended from time to time and that promulgating a no smoking rule did not violate the CBA.

The Company seeks an award denying the grievance in its entirety.

MEMORANDUM AND DISCUSSION

FACTUAL BACKGROUND

The Employer is a foundry operation located in the Mankato Minnesota area. The parties have a long bargaining history going back as far as 1944 and have a generally good working relationship. The current agreement contains a provision negotiated for the first time in this as part of bargaining for the current agreement. The prior contract had a wholly different clause at Article 9 Section 5 that provided as follows:

Section 5. While it is often necessary that maintenance employees work weekends, we recognized the need for time off periodically. Therefore, should we get into the situation where the maintenance department is working a number of consecutive Saturdays; two different maintenance employees will be allowed to take Saturday and Sunday off each weekend. Maintenance employees do not, however have the option of taking Saturday off and working Sunday. If they accept the option to take the weekend off, they must take both days.”

That language was replaced with the current section. Apparently, under the old language the personal time that employees received was not allowed as paid time off on scheduled Saturdays. There was no discussion of the issue of taking paid time under the new provision during bargaining.

Apparently for some time after the current agreement went into effect, employees *were* allowed to use this provision to take paid time off on scheduled Saturdays. There was no countervailing evidence to this and was a somewhat significant factor in this decision. Although this language appears clear on its face, one of the time honored ways used to determine contractual intent is the way in which language has actually been administered. Here it was administered for a significant period to allow the use of sick time on scheduled Saturdays; just as the Union suggests. This type of action undercut the Employer’s case considerably.

Further, there was a prior grievance over this same, or at least a very similar issue, in 2010. The Union grieved the unilateral change in the way sick days were taken. Once again, such a prior settlement is frequently a strong indicator of contractual intent and provides considerable guidance as to what the parties intended when they negotiated the language.¹

The resolution was as cited above, with the agreement that the employees would state how they wanted the days to be used. The evidence showed that the prior grievance settlement was almost directly on point and that the settlement supported the Union's claims in this matter.

Apparently too, the needs of the business changed and the Employer became busier and needed workers on weekends more frequently. At about this same time an employee, Mr. Rico, called in sick on a Saturday. Although the facts of this incident were not fully discussed, the evidence showed that he was given a disciplinary notice under the attendance policy and later tried to change his unpaid sick time to paid sick time. This matter was not pursued to grievance by the Union.

A few weeks later, Union representatives met with management personnel to discuss the policy, which had by that time changed, and to further discuss the prospect of posting a notice advising employees of the policy.

The Employer asserted that there was an agreement substantively on the question at hand. The evidence showed though that the Union agreed that a posting was a good idea due to the prior practice of allowing paid sick time on scheduled Saturdays. There was no agreement that the Union was acceding the Employer's change in policy.

The parties met over the course of several weeks after the posting. They met on March 22, 2011 and again on April 7, 2011. This grievance was filed on April 8, 2011.

¹ It is axiomatic that the question is what was intended when the language was negotiated. Certainly situations and business needs change during the life of an agreement but the clear rule is that when there is a change that necessitates the amendment to a CBA, the proper response is to negotiate such a change. Unilateral alteration, however compelling the need for it, is simply not allowed.

TIMELINESS/PROCEDURAL ARBITRABILITY

The Employer raised a timeliness issue based on the allegation that the Union's grievance, filed April 8, 2011, was well past the 10 days called for in the grievance procedure. This was based on the assertion that Mr. Rico was denied paid sick time for calling in on a Saturday in January and that the 10 days started running from that date. The evidence however showed that this grievance has little to do with that, even though that may well have been the catalyst for commencing discussions about the sick leave policy. The Union showed that the facts of the Rico matter were somewhat different and that his issue was over whether he could change an unpaid sick leave day to a paid day after he had called in and used an unpaid day and been given a disciplinary write up over it. This matter has to do with a straight contract interpretation matter over whether the provisions of Article 9 section 5 allow employees to use paid sick leave days within the purview of that language on a scheduled Saturday. Thus, while the Rico matter arose in January the evidence showed that this case is different and that the time did not begin running with his case.

More to the point, the Employer raised the argument that the Union was well aware of the Employer's interpretation of the provisions of Article 9 (5) as early as February. The Union in fact met with the Employer to talk about this issue and the evidence showed that for some time (as will be discussed later) the Employer in fact was paying people under the new provisions of the CBA paid sick time for scheduled Saturdays.² The Employer posted the notice on the employee bulletin board on or about February 15, 2011. Frankly, this would under normal circumstances have been enough to warrant the dismissal of the Union's case due to the dilatory filing of the grievance on April 8, 2011, nearly two months later.

² There was no actual evidence as to how many employees were paid in this way but the Union's witnesses made the assertion that this was occurring before the policy was posted on February 15, 2011 and the Employer conceded that point. It certainly did not introduce any countervailing evidence. Thus on this record, limited though it was, the evidence was that the Employer had been paying this for a period prior to February 15th.

The unique facts of this case however compelled further analysis. There was considerable dispute about whether there was some sort of an agreement between the Union and management over this posting. The Union argued that there was no agreement to the substance of it; rather merely a suggestion that posting it would be a good idea to let employees know that the policy had changed and that they would no longer be able to use paid sick time on scheduled Saturdays. Why the grievance was not filed immediately at that point remained a mystery but the evidence showed that the parties continued to meet and discuss the policy.

The evidence showed two things that were significant about this. First, there was some evidence that the parties have had a lax enforcement of time guidelines in the past and that they frequently meet informally to try to resolve matters rather than immediately proceed to a formal grievance over it, despite the grievance procedure set forth above. It is axiomatic that lax enforcement of a rule undercuts a claim by one party seeking to enforce strict compliance. This is significant too in that in this case there was nothing to suggest that the timelines were a problem or that the employer would be insisting on such strict adherence to them even though the history here is apparently something other than strict enforcement of these time lines.

Here too, the evidence showed that the Employer was quite late in even sending a response to the grievance due to the illness of the HR Director. The Union raised no objection to this at that time and asserted too that a party who has not complied with the strict deadlines of a procedure cannot be heard later to seek strict enforcement of those guidelines by the other party. On balance these factors undercut the Employer's claim for strict adherence to the time guidelines.

Further, due to the way in which these parties have dealt with grievances in the past, they continued to meet to discuss this on at least two occasions. It was not until April 7, 2011 that the Union was clearly told that the policy would not change and they filed the grievance the next day.

Finally, on the question of timeliness, there was no evidence to show that the Employer ever raised this as a defense to the case until the hearing. As many commentators have noted, such an issue may well be considered waived if it is raised for the first time at the hearing. See, Elkouri and Elkouri, *How Arbitration Works*, 6th ed. at page 222 and n. 114. While there have been some who express a contrary view, the great weight of arbitral precedent supports the notion that a party, typically the Employer, who raises timeliness for the first time at the hearing will have waived that defense.

On this record, the evidence showed that this issue was not raised until very late in the game, perhaps not even until the day of the hearing. Moreover, the waiver theory advanced by Elkouri and the other commentators and arbitrators have considerable merit. Finally, because of the lax adherence to strict time limits by the parties in the past, strict enforcement of time lines cannot be enforced now. Accordingly, because of the unique facts here, the matter proceeds to determination on the merits.

MERITS

As in any contract interpretation matter the starting point is the contract language itself. Here the Union's assertion that the language is clear and unambiguous had considerable merit. The sole limitation in the language is that the employees must use their paid sick time in 8-hour increments. there is no corresponding limitation on when they can use them. Certainly there is no limitation on their use on a scheduled Saturday.

Even if one resorts to interpretive tools to determine the meaning and intent of the current language, the Union's case has merit. These will be discussed in the context of the defenses raised to the Union's claim.

The Employer raised several defenses to the claim. One was that the Employer needs employees to come in on Saturdays to meet production goals. They explained that there are frequently staffing shortages on weekends due to other practices and CBA provisions in place and that they need people to work. See e.g. Employer Exhibit 5, in which Ms. Peterson outlined the rationale for the change in policy.

While the arbitrator has some sympathy for the Employers plight in making sure they can meet the demands of their customers and that the nature of the business is frequently “feast or famine,” as the Employer put it, these considerations do not outweigh the clear dictates of a collectively bargained provision. As always, it is not for the arbitrator to dispense his or her own brand of industrial justice but rather to interpret the language and the agreements the parties negotiated for themselves. If the contract language is clear, then it frankly does not matter that the Employer’s business model or the business needs have changed. At that point the parties must negotiate something to meet the needs of both parties.

Further, the fact that the Employer apparently did in fact allow employees to use paid sick leave for scheduled Saturdays for a period of time after the current agreement went into effect is again very strong evidence of contractual intent. This is especially true in the absence of bargaining history or any evidence of statements made at the bargaining table. Perhaps the best measure of what the parties intended when negotiating a provision is how they actually administered it. Here it was clear that the Employer administered it in such a way as to allow the employees to use paid sick time under Article 9 (5) and stopped it only when the business became busier.

The second was that under the prior CBA the practice was apparently not to allow what was then termed personal time to be used as paid time for scheduled Saturdays. The Employer assumed that the same understanding would go with the new language since they believed they were simply changing personal time to sick leave. Such assumptions are dangerous in the face of a need to be clear about what exactly the other party thinks may change when the language of a labor agreement changes.

It is well established in labor relations that the words of a labor agreement have meaning. It is further well established that with a change in language comes a change in meaning unless something contrary is clearly expressed or there is strong evidence to the contrary. Here there was only the language itself to rely upon and that showed plain meaning in support of the Union’s case.

The Employer also asserted that its policy handbook somehow takes precedence over the terms of the CBA and that the policy handbook may be changed at the discretion of management. This is simply wrong. The terms of a collective bargaining agreement take precedence where it is different from a policy handbook. Here the clearly worded language of the CBA on this issue governs the terms and conditions of employment for the employees covered under the CBA; not the other way around. The stark reality and the clear law of labor relations is that the terms and conditions found in the CBA take precedence over anything to the contrary found in the Employer's unilaterally promulgated policy.³ It further matters little that the policy "makes sense" or is based on legitimate business reasons or was administered fairly. What matters is what the CBA says and here, the clear terms of the CBA provide that employees "have three (3) paid sick days computed at their basic hourly rate, credited on January 1st to use in eight (8) hour increments per calendar year January to December." This language contains no other limitation or restriction on their use.

The Company relied on a prior award wherein Arbitrator Cooper ruled that the Company had the right to promulgate a no smoking policy. That was true in that case but there was no contrary provision in the labor agreement governing smoking. In fact, Arbitrator Cooper specifically found in her case that "the Union does not contend that any other provision of the working Agreement was violated by the Employer's premises-wide smoking ban."

The Union's arguments there were that the rule was unfair for various reasons. That is not their argument here. The argument here is based on clear and unambiguous language in the CBA. That is a truly significant distinction between these two cases. Here there *is* a specific CBA provision governing this very issue. The issue here is whether the clear terms of the CBA govern the use of sick leave – as noted above, it does. On this record, the prior award is quite distinguishable and is simply inapplicable to the present situation and contract language.

³ That is not to say that the employer cannot promulgate a policy. It can. However, where that policy either runs afoul of or is inconsistent with the terms of a collectively bargained labor agreement, the CBA trumps the policy and it makes no difference if the rules are posted on the bulletin board or found in a handbook.

Accordingly, the grievance is sustained and the Employer is ordered to follow the contract language and allow the use of paid sick time pursuant to Article 9 Section 5.

AWARD

The Grievance is SUSTAINED as set forth herein.

Dated: December 7, 2011

Jeffrey W. Jacobs, arbitrator

Dotson and GCPIU AWARD