

FMCS MIDWEST ARBITRATORS' SYMPOSIUM
Wednesday May 25, 2005

Limits of Bargaining History
Mary Jo Schiavoni

Bargaining history should only be used where the language is ambiguous.

The problem:

A. One party has expressly attempted to include language in negotiations but failed.

Example 1: Matanuska Electric Assn, 11 LA 597 (Landau, 1998)

Grievance over non-bargaining unit design engineer performing bargaining unit work.

Applicable Contract Language:

Sec. 2.2.1. Within limitations of this agreement, the Company retains the right to assign work described above among the employees within the bargaining unit.

Section 2.5. Management Rights. Except where limited by this Agreement, the Company retains the right to direct the Company's business and work forces, ... The listing of, or failure to list specific right in this agreement is not intended to be restrictive or, nor shall it waive, any of the rights of the Company not specifically surrendered herein. Management shall have reserved exclusively all other rights to manage its business and direct its working forces not specifically expressed above.

Section 5.13.1. Supervisors performing Bargaining unit work. Supervisors may perform bargaining unit work to the extent that such work is minimal in scope and does not become a regular function of the supervisor's normal work load and subject to the following:

- a. No regular employees shall be laid off or suffer a reduction in hours worked due to the supervisor's performance of work.
- b. When a bargaining unit member is absent due to unscheduled leave or illness, a supervisor may perform work necessary to keep the Company's operations timely.
- c. Supervisor may perform work required to save life, limb or property during emergency situations.

In 1993 negotiations, the Union proposed “Only bargaining unit employees may perform the work of the bargaining unit.” The Company proposed “Supervisors may perform bargaining unit work at management’s discretion.” Neither side’s language was adopted and the Section 5.13.1 language was agreed to.

In 1995, Union voiced concerns about supervisors performing bargaining unit work but language of Section 5.13.1 remained unchanged.

See also, River Valley Board of Education, 115 LA 529 (Goggin, 2000) where Union unsuccessfully sought to assure that most senior qualified bargaining unit employees would be selected for vacant positions.

Example 2: Earthgrains Co. 112 LA 171 (Grooms, 1999)

Grievance over unilateral schedule change so that employees may get split days off.

Applicable Contract Language

Management Rights – It is agreed that the operation of the plant and direction of the employees, including the making and enforcing of reasonable rules to insure orderly and efficient plant operations, the determination of employee qualification, the right to hire, to transfer to promote, to demote to discipline, to discharge for cause, to lay off for lack of work, are rights vested in the management of the company except when made subject to the right of appeal through the grievance procedure in this Agreement.

Working hours

Section 1 Schedules. Schedules shall be posted not later than the end of the working week for the following week and in the event of a change in the production needs, all employees shall be notified at the completion of the day’s work of their scheduled starting time for the following day or as early as possible. The start of the work week shall be the starting time of Sunday’s 3rd Shift then Monday’s last shift. If a line starts up on Sunday’s 3rd shift the Friday and Saturday’s 3rd shift will be considered the weekend. In the event management elects to change the starting shift of the work week, affected production and wrapping employees will not receive a bump and employees in department indirectly affect may only bump within their own department...

In the event a line or department expands into a regular seven (7) day operation, employees on that line would be allowed to select available off days by seniority. Employees not wishing available off days or new starting time shall be allowed a bump...

Section 6. Based on business condition, the Company may, with the local Union’s agreement work for any period of time on forty hour four day week.

Employees shall be paid overtime at the rate of time and one half for the time worked in excess of ten hours per day or forty hours per week, whichever is greater, but not both.

In 1997 Company unsuccessfully proposed that scheduling be expressly mentioned in the management rights article.

Example 3: Leggett and Platt, 115 LA 1233 (Bowers, 2001)

Grievance over whether bed manufacturer violated contract when it used another of its plants to pre-bag hardware used with beds.

Applicable Contract Language

Article I – Recognition

- 1.1 The Company agrees to recognized the Union as the exclusive bargaining agent with respect to rates of pay, wages, hours of employment and other conditions of employment for all of the Company's production and maintenance employees employed at its plant located at ... including
- 1.2 The Company agrees that the making, assembly, erecting, dismantling, and repairing of machinery of all descriptions performed by the Company directly is recognized as coming within the jurisdiction if the IAM. However, this shall in no way limit the Company's right to use a supplier's employees or to subcontract the work described above, where such is economical or is desirable from the standpoint of efficiency and ease of operations. It is not the intention of the Company to subcontract work regularly performed by bargaining unit employees, provided, however nothing herein shall prevent the Company from continues to subcontract work that has been subcontracted in the past or work that is beyond the ability of bargaining unit employees to perform.

Article 12 – Management

- 12.1 There is exclusively reserved to the Company, the management of the Company's plant and the direction of its working force, including but not limited to, the right to plan, direct, and conduct plant operations, and to determine the product to be hauled, produced or manufactured; the scheduling of production and the methods, processes, and means of production and handling; the right to hire, select, assign, transfer, promote, demote, suspend, and discharge for proper cause, and to promulgate and enforce plant rules and the right to relieve employees from duty because of lack of work or other legitimate reasons, The Union recognizes the provisions of

the Agreement which constitute limitations upon the Company as being the only limitations, other than limitations of law, upon the Company's right to manage its business.

12.3 None of the foregoing rights may be exercised in a manner which conflicts with the express terms of the Agreement.

Prior to 2000 four bargaining unit employees worked as Hardware Baggers. In March of 2000, the Company bought a Bagging machine for another plant and transferred the bagging function there.

Negotiations for the agreement ended in February of 2000. During those negotiations, the Company attempted to include a more extensive listing of specific rights in the general management rights clause that would have included pre-bagged hardware.

The problem

B. One party in negotiations has expressly attempted but failed to exclude an existing contract clause.

Example: Sprint/Central Telephone Co., 114, LA 633 (Baroni, 2000)

Grievance over whether the Company violated contract by contracting out work independent contractors for period exceeding 30 days without posting the positions internally or by failing to permanently hire the contractors who performed the services for a period in excess of six months.

Applicable Language

Management Rights 2.202. The Company has and will retain the exclusive right and power to manage its business and direct working forces, including but not limited to the right to hire... its employees, provided that the Company shall not exercise these rights in violations of the provisions of this Agreement. Nothing in this agreement is intended to interfere with the recognized prerogative of the Company to manage and control the business but each employee covered by the agreement shall have the right of appeal through the grievance and arbitration procedure.

Company had used subcontractors for twenty years. In 1995, the Union attempted unsuccessfully to obtain a restriction on management's right to contract out work to supplement its workforce. All the company agreed to was to provide a monthly list of the subcontractors.

The problem

C. One party has made a proposal for purpose of “clarifying” the existing language.

- 1) The party has withdrawn the language but informed the other side that it believes the right exists without the clarifying language.

Example 1: Kentucky Electric Steel, Inc., 111 LA 1025 (Beckjord, 1998)

Grievance filed over Company’s insistence upon vacations during maintenance shutdown.

Bargaining was prolonged and each side had proposal applicable to the issue before the arbitrator. The Union’s proposal was that the company could schedule one maintenance shutdown per year and that only during the summer and with no requirement for shutdown vacations. The Company proposal provided for scheduling of vacations during maintenance shutdowns when employee are given 60 days notice.

The Company relied upon its management rights clause and Vacation provisions which gave employees vacations “at times most desired by employees, so far as possible without disrupting the orderly operation of the plant.” Management had the powers “to determine the schedules of productions and ... to maintain efficiency in its...operations.”

Example 2: 5th Ave. Musical Theatre, 111 LA 821 (Snow, 1998)

Grievance filed over employer’s unilateral decision to hold audition in August of 1997.

Applicable Language

2. Mutual Cooperation

The parties agree that it is in the best interest of all to present the highest quality performances, and they agree to cooperate in achieving this goal.

3. Management Rights

The Union recognizes the right to manage and control the presentation of musical entertainment at the 5th Avenue theatre is

vested solely in the Employer, except as such right may be contrary to the express terms and conditions of this agreement. The Employer shall, at all times, have the right to complete supervision, direction and control over the services of employees employed, including the right to control the manner, means and details of the performance of services by the employees, as well as the ends to be accomplished.

4. Union Recognition

The Employer recognizes the Union as the sole and exclusive bargaining agent for all musicians engaged to play in 5th Avenue Musical Theatre Company productions at the 5th Avenue Theatre, except for musicians traveling with and directly employed by touring productions.

5. Booking and Engagement

The Employer, through a supervisor who is a trained professional musician, shall advise musicians engaged to play a future production no later than thirty days prior to the first scheduled rehearsal. Such notification shall include instrumentation, doubling if known, and all dates and times of rehearsals and performances. The Union shall be sent a copy of such notices. The supervisor shall perform, among other, those duties commonly performed by musical contractors. The Employer shall select musicians to perform using standard musical criteria. The Employer waives its right to prevent the supervisor from joining the Union. The supervisor shall not perform under this contract, unless he or she is a member of the Union and is paid in accordance with the contract when so performing.

In negotiations, the Union permitted deletion of the following provision:

Nothing in this agreement shall be construed so as to interfere with any obligation owed by musicians employed hereunder to the American Federation of Musicians or the Union as members thereof. Any matters affecting wages and condition not expressly provided for in this agreement shall be subject to negotiations between the Theatre and the Union.

Union took the position that deletion of the above provision was meaningless because the Union's right to negotiate over wages and conditions of employment was already protected by federal law.

2) The party makes no such representation that it has the right notwithstanding its withdrawal.

The problem

D. “Manifested” versus “Undisclosed” Intent

1. Discussion

Example 1: City of Reno, 118 LA 1013 (Bogue, 2003)

Grievance over changed standby/call back pay.

Unrebutted testimony that Employer explained intent and reasons for proposed change in bargaining.

Example 2: Pepsi-Cola General Bottler, Inc., 115 LA 1665 (Feldman, 2001)

Grievance filed over sub-contracting

Applicable Language

Work Assignments

Section 1. The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require their supervisors to perform work which is recognized as the work of the employees in said units.

Section 2. Any employee that is required to work in a higher classification will be paid the higher rate for all hours worked on that day.

Section 30. Should the Company in its sole discretion determine that a change in distribution is desirable, the Company shall have the right to implement such a change. The Company shall determine the appropriate wages to be paid under a new system subject to review under the grievance procedure. The Company shall give the Union written notice at least thirty days before such changes are made. This section shall supersede any conflicting provisions of the agreement.

Article 19 - Management

The Company construes and the Union recognizes the provision of this Contract as constituting limitations and being the only limitation upon the Management’s rights to manage its business.

Section 1. All management rights the Employer had prior to signing this Agreement including the management of the Plant and the direction of the working force, the right to hire, promote employees, to suspend or discharge for cause to assign employees to jobs, to increase or decrease the working force, to determine prices of product, to determine the products to be handled, produced or manufactured, the schedules and standards of production and the methods, processes and means of production or handling, are vested exclusively in the Employer, except those specifically surrendered or modified in the Agreement.

Facts: First contract between the parties because Company had been sold and the employer assumed the prior contract with some changes. Company testified that there was mention in course of negotiations that outside contractors might perform transport jobs. Union claimed that never heard anything about this during negotiations or any time thereafter until Employer actually notified them of subcontracting.

Arbitrator found there was “mere mention” during negotiations.

2. No Discussion

Example 1: Beverage Concepts, 114 LA 340 (Cannavo, 1999)

Grievance over elimination of double time shifts –no discussion on topic in negotiations

Example 2: Crestline Exempted Village Schools, 111 LA 114 (Goldberg, 1998)

Grievance over discontinuance reimbursement of employees mail-in prescription benefit –no discussion of issue during negotiations- most recent agreement contained no reference to reimbursement and specified that all past practices not contained in agreement were no longer binding.

3. Circumstances at time of bargaining as parties viewed them.

Example 1: Caraustar Inc., 118 LA 1067 (Paolucci, 2003)

Grievance over change in pay period. The employer notified the Union of the need for the change given new methods of production. The Union never objected.

Example 2: Whirlpool Corp., 115 LA 669, (Kilroy, 2001) in this case the proposed language gave the Company the exclusive right to determine locations for the making or assembling of products but the Employer told the Union bargaining committee and Union members in it final offer for which the members voted that the offer included no outsourcing or event the threat of outsourcing no intent to outsource and employees relied on this representation.

Example 3: Republic Special Metals, (Obee, 2004);

Grievance over contracting out mason helper work.

Facts - specialty steelmaker was formed when parent corporation purchased assets of predecessor that filed for bankruptcy although under predecessor work had always been performed by bargaining unit. Under new agreement with new employer there was no "mason helper" job classification. New agreement contained a two paragraph subcontracting provision as opposed to 15 page provision in agreement with predecessor corporation.

The problem

E. Ascertaining what transpired from

1. Records, minutes, recordings

Example: Benton Carroll-Salem School District, 114 LA 1822 (Heekin, 2000) where union proposed to "Openings shall be filled within thirty days of the posting and hiring done at the following board meeting. If no one internally applies, then openings should be filled as soon as possible." and Board rejected this language during negotiations. The agreed to language contained no time limit for filling positions after the position has been posted. A Union-drafted document contained the hand-printed notation "no" next to "vacancies" "time limit proposal" submitted as part of a list of various proposals.

2. oral representations

Example 1: Madison Warehouse Corp. 112 LA 501 (Suardi, 1998)

Statement by Union business representative in negotiations that calculation of profit bonuses "makes sense to me"

Example 2: Aladdin Temp-Rite, 112 LA 1105 (Krislov, 1999)

Oral representations by Union but denial by Company that Union presented document on dues structure during negotiations, union notes do not indicate that document was presented to management

Example 3: Hamilton County Sheriff, 111 LA 363 (Paolucci, 1998)

Parole evidence of un rebutted sole union witness not sufficient

3. other extraneous competent evidence

Example: Tubetech, Inc., 113 LA 1025 (Richard, 1999)

Letter from Company attorney specifying that employees would receive percentage of pretax profits of start up company as bonus (construction against the party drafting the document)

4. inadmissible communications

attorney-client correspondence?

The problem

F. Ascertaining what transpired based upon

1. Expertise of negotiators
2. Distance from bargaining (5 years ago, 10 years ago? 20? When is it no longer relevant?)

Example 1: Vought Aircraft, Inc., 118 LA 35 (Allen, Jr., 2003), where recent bargaining prevails over old bargaining history

Applicable Language

Effective March 11, 2002, the base hourly wage rate of all bargaining unit employees will be increased by 3%.

Bargaining history – Two prior agreements in 1987 and 1991 both specifically provided that employees on layoff were to receive all General Increases. This language was deleted many years ago. The 1996 agreement provided that laid off employees would return at “midpoint of the labor grade.” That language deleted at the Union’s demand. The issue was not addressed in the most recent negotiations.

3. Successor Employers and/or Unions

Examples 1: Printpack, Inc., 112 LA 1115, (Crider, 1999) Here, the arbitrator concluded that the successor employer was bound by its predecessors' past practice of not requiring employees to work weekday overtime except for circumstances specified in the contract despite the contention that the predecessor's contract had expired and the successor negotiated a new contract and the parties discussed weekday overtime in bargaining and made some specific changes. The arbitrator relied upon the successor's questioning of the union in negotiations about side agreements both oral and written and the parties agreeing to a policy change permitting weekday overtime where there are scheduled absences and voluntary weekday overtime was discussed. For opposite result

Example 2: Aladdin Temp-Right LLC, 12 LA 1105 (Krislov, 1999)

Grievance over successor employer's failure to deduct dues for employees according to union percentile formula

Applicable Language

The Company will deduct Union dues on each payday of each month an amount designated by the International Secretary-Treasurer of the Union.

The predecessor employer had applied the formula.