MANDATORY OVERTIME

The contract is silent on whether overtime is mandatory or voluntary and the parties never addressed that issue in prior contract negotiations. The management rights clause gives the Employer a number of enumerated rights which includes the "right to manage its business" and the right "to direct the work force." There is no past practice clause.

The Employer, for the first time and upon a week's prior notice, orders all employees to work an eight-hour shift on a Saturday to meet an emergency production requirement in order to keep a big customer, and warns all employees that they will be fired for insubordination if they refuse to work it. The grievant, a ten-year employee with a good work record, refused to work that overtime because she believed the Employer did not have the right to order mandatory overtime and the Employer then fired her.

The Employer states it can assign mandatory overtime under the management rights clause and pursuant to its reserved management rights. The Union states that the maxim expressio unius est exclusio alterius applies, and that the Employer violated the contract because assigning mandatory overtime is not one of the listed rights in the management rights clause.

Question:

Would you sustain the grievance?

Green Light = Yes; Red Light = No.

CLEAR AND UNAMBIGUOUS CONTRACT LANGUAGE

The contract does not have a past practice clause and states:

> Where skill and physical capacity are substantially equal, seniority shall govern in the following situations only: promotions, down-grading, layoffs, and transfers.

When the above language was agreed to in contract negotiations there was a ten-year past practice of assigning overtime work on the basis of seniority. That practice was not discussed in negotiations.

The Employer immediately after the contract was executed assigned overtime without relying on seniority and the grievant, who had the greatest seniority, grieved.

The Union states that the grievance must be sustained because the Employer violated the past practice, and it seeks to introduce evidence relating to the past practice and bargaining history relating to understanding that language. The Employer cites the parol evidence rule and states that evidence of the purported past practice and bargaining history cannot be considered because it contradicts the clear and unambiguous contract language which states that seniority applies "only" for the four listed situations, and that the arbitrator is prohibited from adding to or modifying the contract. [1]

Question:

1. Would you admit and consider the past practice and bargaining history evidence?

   Green Light = Yes; Red Light = No.

2. Would you sustain the grievance?

   Green Light = Yes; Red Light = No.

3. Would your answer be different if there were a past practice clause in the contract reading: "All prior past practices shall continue."

   Green Light = Yes; Red Light = No.

[1] See Snow, Carlton J., Contract Interpretation: The Plain Meaning in Labor Arbitration, 55 Fordam L. Rev. 681, (1987), for an analysis of the parol evidence or plain meaning rule.

PAST PRACTICE AND EXTERNAL LAW [2]

The contract does not refer to external law and does not have a past practice clause. There is a 20-year past practice of employees voluntarily working seven consecutive days in a calendar work week without a continuous 24-hour break. The Employer unilaterally discontinued the practice on the ground that it violated a longstanding state statute which states in pertinent part: "Every employee shall receive a continuous 24 hour rest period in any seven day calendar work week."

The statute adds that employers will be fined $50 for each violation and that an employer during a year can request for each employee eight one-day exemptions to work seven continuous days without a 24-hour break based upon "business necessity." All of the Employer's earlier exemption requests have been granted. The Employer now claims that there is no business necessity for doing so now.

Both the Employer and Union sent separate letters to the state agency which administers the statute asking whether employees could voluntarily agree to work seven continuous days without a 24-hour break. They never received a reply. The same state agency several years earlier in response to an employee complaint informed the Employer: "The law states the following: 'Employees must be given twenty-four consecutive hours of rest every calendar week.'"

A former General Counsel for that state agency testified without contradiction that he, with the then-Department head's approval, three years earlier issued a letter stating that employees working elsewhere for another employer could voluntarily work seven consecutive days without a day's rest without violating the statute. (The state agency has not issued any formal opinion disagreeing with that prior letter.) He added "the state's primary purpose is to make sure overtime is voluntary."

He further stated that the agency for "years and years and years" did not give written or oral confirmations that an employer's request for an exemption had been granted in spite of the agency regulations calling for such confirmation. He also said that such requests always were

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[2] The question of whether external law should be considered has been addressed by the following:

> Bernard Meltzer, Ruminations About Ideology, Law and Labor Arbitration, 20 Proceedings of the NAA 1 (1967; Robert Howlett, The Arbitrator, The NLRB, and The Courts, 20 NAA 67 (1967); Richard Mittenthal, The Role of Law in Arbitration, 21 NAA 42 (1968); Michael I. Sovern, When Should Arbitrators Follow Federal Law?, 23 NAA 29 (1970); David Feller, The Coming End of Arbitration's Golden Age, 29 NAA 97 (1976); and Ted St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 30 NAA 29 (1977).

granted without any investigation, and that the requester was free to proceed with the assumption that the agency had approved the request.

The Union grieved and states that the past practice controls; that the arbitrator has no jurisdiction to consider external state law; and that the statute "allows employees to volunteer to work on their day of rest." The Employer states that you are required to consider state law; that you cannot order the Employer to violate state law; and that state law prevails over the agreement or any past practice.

Question:

Would you sustain the grievance?

Green Light = Yes; Red Light = No.

NO-FAULT ABSENTEEISM POLICY

The Employer, a coal company, unilaterally adopted a no-fault absenteeism policy 20 years ago calling for terminating any employee who over the course of his or her employment attains seven separate absences regardless of their duration (exclusive of FMLA-protected reasons). The Employer has terminated all 10 employees who violated the policy and arbitrators have sustained the discharges of all those miners. In doing so they all cited prior awards including the initial 1998 arbitration award upholding the no-fault attendance policy.

The grievant, who has been employed for 25 years and has a good work record, over 20 years experienced seven separate short-term absences (totaling 100 days) caused by illnesses that were not protected under the FMLA and he was terminated when he missed work and saw his doctor for a non-FMLA protected illness. He then grieved his discharge.

The Employer states that the discharge must stand because the grievant violated the no-fault absenteeism policy and because all prior arbitrators sustained its policy. The Union argues that those awards are not binding precedent and that the Employer wrongly terminated the grievant under the contractual just cause provision which requires an individualized determination as to whether it has been violated in this case.

You discover in your review of the prior arbitration cases that the original 1998 arbitration award cited by subsequent arbitrators has been misinterpreted. For while that award upheld the no-fault policy and denied the grievance, it recognized that there had to be exceptions to the policy which the subsequent arbitrators never addressed.

Question:

Would you sustain the grievance?

Green Light = Yes; Red Light = No.

JUST CAUSE

Question:

Has application of the "just cause" standard changed over time?

Green Light = Yes; Red Light = No.