
IN THE MATTER OF ARBITRATION BETWEEN

THE VULCAN COMPANY

&

UNITED STEELWORKERS Local No. 9432-1

(Grievance: Advance Vacation Checks)

AWARD OF THE ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties AWARDS as follows:

For the reasons set forth in the attached Decision, the, the Company violated the parties' mutually accepted past practice and violated Article 2 Section of the Agreement, when it completely eliminated the practice of providing advance vacation pay. No monetary remedy is appropriate.

May 26, 2023
Brookline, Massachusetts

Gary D. Altman

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ARBITRATION DECISION AND AWARD

Introduction

The Vulcan Company ("Employer" or "Company") and United Steel Workers Local 9432-1 ("Union") are parties to a Collective Bargaining Agreement. Under the Agreement, grievances not resolved during the grievance procedure may be submitted to arbitration. The parties presented their case in Arbitration before Gary D. Altman, Esq., on January 25, 2023. The Union was represented by Alfred Gordon O'Connell, Esq., and the Employer was represented by Sarah C. Spatafore, Esq. The parties had the opportunity to examine and cross-examine witnesses and to submit documentary evidence. The parties submitted written briefs after the conclusion of the testimony.

Issue

The parties agreed that issues in dispute should be framed as follows:

1. Is the grievance procedurally arbitrable?

2. Did the Company violate the collective bargaining agreement when it stopped offering advance vacation pay? If so, what shall be the remedy?

Facts

The Company is in the business of manufacturing tools used in construction, and has been in business since 1908. The Company employs approximately 33 employees. Vulcan's production and maintenance employees are represented by USW Local 9432-1. The Company and Union have had a long standing collective bargaining relationship, and have been parties to many collective bargaining agreements. The most current Agreement covers the period of April 22, 2021 through April 24, 2024.

Both Union and Company witnesses testified that prior to 2022, the Employer paid employees with checks, which were distributed weekly to employees at the Company. This meant that if an employee was on vacation, and away from work, they would not be able to pick up their check (it would be mailed to them or retained at the Company if requested). Employer and Union witnesses testified that it was not uncommon for employees to take multi-week vacations each year to travel outside the country, and that some employees would ask to be paid their vacation pay up front, since they would not be at the work site to receive their checks. While neither party could identify when this practice began, both parties testified that employees would request and the Company would provide those employees their vacation pay checks in advance of their vacations. [redacted], Vulcan Production Supervisor, testified that there were times when such check requests were denied because the request was not given with enough notice.

[redacted], Vulcan's Controller/Treasurer, testified that, in 2021, the Company decided to use ADP, a third party payroll Company, to process the Company's payroll,

which allowed for direct deposit, rather than having to issue weekly checks to employees. Mr. [redacted] testified that he discussed the change in the payroll processing at a staff meeting on December 16, 2021. Mr. [redacted] explained that either at that meeting or shortly thereafter, all employees, including bargaining unit members, were given paperwork to enroll in direct deposit. Employees were advised that this was not mandatory, and employees could still continue to receive paper checks that would be issued on Fridays. Mr. [redacted] testified that the issue of providing vacation checks in advance was not discussed at this meeting.

Mr. [redacted] and Mr. [redacted], Production Supervisor, testified that they followed up with bargaining unit members either individually or in small groups in the following week to make sure they understood the direct deposit option, and to answer any questions. Mr. [redacted] testified that he also told several employees, though not all, that vacation advances would no longer be allowed. When asked, Mr. [redacted] could specifically recall telling [redacted], that because of direct deposit, employees could no longer receive their vacation pay prior to their vacations. Mr. [redacted] testified that he may have also mentioned the issue of vacation advances to [redacted], the Union's grievance chair, but did not notify Union President [redacted] ([redacted]) [redacted], who was out on a medical leave of absence. Mr. [redacted] testified that he was still checking in periodically and visited the facility from time to time. The Company did not notify [redacted], Steelworker's Union representative.

The change to direct deposit was implemented in January 2022 but employees still had the option not to enroll and still receive paper checks. At the time of the arbitration, all but four employees had enrolled in direct deposit. There is no dispute that no grievance was filed when the Company switched to the direct deposit payroll processing in the beginning of 2022. There was apparently no issue of advance vacation pay until the Fall of 2022.

In September 2022 three bargaining unit employees, [redacted], [redacted], and [redacted] [redacted], approached a Company representative seeking advance vacation pay. The employees were going on a three-week vacation out of the country. [redacted] was on direct deposit at the time, but [redacted] and [redacted] were not. The Company denied their requests.

[redacted] [redacted] and Union President [redacted] spoke with Operations Manager [redacted] and then with Treasurer/Controller [redacted] and were told that the Company was having some financial hardship and could not afford to produce vacation advances. After the meeting the Union filed the present grievance on September 19, 2022. The grievance alleges a violation of "Article 1.1 and any other provisions of the Agreement that may be found to apply."

Steps 1 and 2 of the grievance process happened simultaneously on September 19. President [redacted] represented the Union and Operations Manager [redacted] heard the grievance on behalf of the Company. The Union argued that the Company was violating the contract by failing to give the vacation advances by "not giving vacation checks all at once." The Company denied the grievance[1]:

[1] There was no discussion of timeliness of the grievance at the meeting, nor any reference that the grievance was untimely in the grievance answer.

> The Company will not be giving vacation checks out in a lump sum before the employee goes on vacation. The Company is no longer in a position to advance employees their vacation checks. The company offers weekly direct deposit of employee's payroll checks through our payroll company ADP. If an employee is away on vacation they can still receive their weekly pay check directly into their bank account, via direct deposit, without coming in to pick up their check or having the Company mail it to them.

On September 26 the parties had a Step 3 grievance meeting. At the meeting were the attendees from the prior meeting, and also Mr. [redacted], for the Union, and Mr. [redacted] for the Company. Mr. [redacted] testified that prior to the meeting he suggested to Mr. [redacted] to amend the grievance to include a violation of Article 2 and to reference a violation of the parties' past practice, and this was done. Mr. [redacted] testified that Mr. [redacted] responded that the Company was "not a bank" and simply was not going to give vacation advances anymore, and that there was no discussion of the timeliness of the grievance. The Company denied the grievance, and wrote:

> The Company no longer provides lump sum advances on vacation pay prior to leaving on vacation. The Company offers every employee the option of receiving their vacation pay via a weekly direct deposit from our payroll company, ADP, or via a weekly check mailed to their place of residence or if requested held at the company until their return.

The Union then pursued the grievance to arbitration.

Relevant Provisions of the Collective Bargaining Agreement

ARTICLE 2 – RECOGNITION

In accordance with and subject to the provisions of the National Labor Relations Act, the Company recognizes the Union as the exclusive bargaining agency of the production and maintenance employees, including truck drivers, shipping department employees, and leaders, but excluding office clerical employees, professional employees, unskilled student Summer help not to exceed three (3) employees in number ("Summer" to consist, for purposes of this paragraph, of the months of June, July and August), guards and supervisors as defined in the Act, for the purpose of collective bargaining in respect to rates of pay, hours of work, and conditions of employment, the aforesaid bargaining unit being the bargaining unit referred to in the Certification of Representation issued by the National Labor Relations Board in Case No. 1-RC-15, 278.

ARTICLE 6 – GRIEVANCE PROCEDURE AND ARBITRATION

Time Limits

A grievance must be initiated within five (5) scheduled workdays after the occurrence of the alleged event, or within five (5) scheduled workdays after the aggrieved employee became aware of such event. The limitations herein may be extended at any Step by mutual agreement by the representatives involved in such Step.

If a grievance is not referred or appealed to the next Step within the specified time limits, it shall be considered settled on the basis of the Company's answer.

If the Company does not answer the grievance within the time limits described in this Article, the grievance shall be settled with the remedy requested by the Union.

ARTICLE 20 MANAGEMENT RIGHTS

Except as there is contained in this Agreement an express provision specifically surrendering, curtailing, or limiting the rights of discretion of the Company, all rights, functions and prerogatives of management formerly exercised or exercisable by the Company remain vested exclusively in the Company. Without limiting the generality of the foregoing, the Company reserves to itself exclusively, subject only to any express provisions of this Agreement specifically to the contrary, the management of the plant; the maintenance of discipline, order and efficiency; the determination of production, operational and other policies; the determination of methods, products, processes and places and means of manufacture; the direction of the working force and the assignment of work; the right to hire, suspend, transfer, promote, demote, or discharge or otherwise discipline employees; the right to lay off employees for lack of work or for other reasons; the right to grant merit increases within established rate ranges; and the right to promulgate and enforce all reasonable rules relating to operations, safety measures, and other matters.

* * *

Position of the Parties

Summary of the Union's Position

The Union first maintains that the grievance was timely filed, and is procedurally arbitrable. The Union contends that it has long been recognized that a party can waive the right to challenge the timeliness of a grievance if it does not raise this issue at the appropriate time. The Union states that in the present case the Union met with the Company to hear the grievance at Step 1 and Step 2 and the Company never raised any concern that the grievance was not timely filed. The Union states that the parties met again at Step 3 to discuss the grievance, and, although the parties discussed the merits of the grievance, the Company

never claimed that the grievance was untimely, and never did so in its written denials of the grievance. The Union further states that evidence demonstrates that, at no time prior to the arbitration hearing, did the Company ever assert that the grievance was untimely filed. The Union states that the Company, by waiting until the hearing to raise this affirmative defense, has waived its ability to contend that the grievance is not procedurally arbitrable. The Arbitrator must therefore proceed to consider the merits of the case.

The Union states that that in December of 2021, the Company notified that it would be changing to direct deposit of weekly payroll. The Union maintains that there may have been some discussion with individual employees that this would eliminate the need for employees needing advance vacation checks, but that the Union was never informed of any such changes. The Union states that there was nothing in writing and the evidence is inconclusive whether all employees were told that advance vacation checks would be prohibited, and that this would be the case even for those who elected not to receive direct deposit. Moreover, the Union contends that the grievance actually occurred in September of 2022, when an employee asked and was denied advance payment of his vacation pay, and the grievance was filed immediately after the Company's denial. The Union concludes that, based on all the circumstances, the grievance was filed in a timely manner.

The Union argues that the Company's contention that the grievance should be dismissed because the Union failed to cite Article 2.1 in its original grievance, is without merit. The Union maintains that the Agreement does not

require that a grievance must specifically allege a violation of particular contract section. Moreover, the Union asserts that the grievance maintained that the Company violated the Agreement by denying vacation advances, thus the Company certainly knew the nature of what the Union was challenging.

The Union maintains that there is no dispute that there was a long standing practice of providing vacation pay in advance of an employee's vacation, in those situations in which an employee made a request for such payment. The Union states that even though there is no specific contract provision on advance vacation pay, Article 2.1 of the CBA specifically references the Company's obligation to bargain with the Union over "rates of pay, hours of work, and conditions of employment." The Union contends that arbitrators routinely find that an employer violates the contractual recognition clause when it changes a long standing condition of employment without first negotiating with the Union. The Union argues that vacation pay is clearly a condition of employment, and the Company violated the Agreement when it unilaterally changed the long standing practice of providing advance vacation pay to employees.

Summary of the Company's Argument

The Company first contends that the grievance is not procedurally arbitrable. The Company points to Article 6, Section 6.5(a) of the Agreement that provides that grievances must be filed "within five (5) scheduled workdays after the occurrence of the alleged event, or within five (5) scheduled workdays after the aggrieved employee became aware of such event." The Company argues that the

"occurrence" giving rise to any grievance first occurred in December of 2021 when employees were notified that the Company would no longer be providing employees the option of advance vacation pay checks. The Company points to the testimony of the Union Vice President, who acknowledged that the Company told him that it would no longer be offering employees the option of receiving their vacation checks in advance of their vacations.

The Company contends that under Article 6, Section 6.5(a) of the Agreement, the Union had five working days to file a grievance contending that this alleged change violated the parties' Agreement. The Company maintains that the Union did not file this grievance until September 19, 2022, nine months after they were notified of the impending change and after the alleged change went into effect. The Company thus concludes that the grievance was not filed until well beyond the time period set forth in the parties' Agreement, and thus the grievance is not arbitrable.

The Company also maintains that even if the grievance was filed in a timely manner, the grievance must be denied. The Company states that there is no language in the parties' Agreement that provides that employees are entitled to receive their vacation payments in advance of their vacations. The Company states that Article 1.1, the only provision cited by the Union in its grievance, makes no mention of requiring that past practices must continue. Article 1.1, speaks only to the purpose of the Agreement, which is to maintain harmonious labor relations.

The Company contends that the Union failed to introduce any evidence that the Company's decision to stop advance vacation pay checks negatively impacted labor relations.

Moreover, the Company contends that Article 1.2 deals with the purpose of the Agreement, and does not limit the Company from exercising its management rights. The Company contends that Article 20, the management rights provision of the parties' Agreement, vests with the Company the right to promulgate rules and policies relating to operations of the Company, and stopping advance vacation pay was a proper exercise of its management rights.

The Company also points to Article 6, Section 6.3 that provides that any grievance at the Second Step "shall state the employee's claim, and, to the extent then apparent, the grounds for the grievance or the reasons for the claim on which he is relying. The Company contends that Article 2 was not raised by the Union until the Arbitration hearing, and that at Step 2 in the process, the Union had only cited Article 1.1 of the Agreement. The Company argues that the Union's effort to raise Article 2 as a basis of its case must be rejected.

The Company further argues that even if Article 2 is considered, it still cannot be found that the Company violated this provision. The Company states that Article 2 simply states who is in the bargaining unit and asserts that the USW is the "exclusive bargaining agency." The Company states that the Company, in the past, brings changes and/or issues to local Union leadership, and did so in the present case. The Company states that the evidence shows that the Company notified the Local Union Vice President, about this change in advance, and no grievance was filed at the time.

Finally, the Company argues that the prior issuance of advance vacation checks was not a mutually accepted past

practice. The Company points to testimony for its witnesses that although advance checks have been issued in the past, it was, at best, informal and inconsistent, and that there was no obligation on the Employer to provide advance notice to the Union or to continue this informal practice of providing advance vacation checks. The Company argues that there is no merit to the Union's claim that the Employer did not recognize the Union as the bargaining representative of the bargaining unit members with regard to this dispute, and there was no violation of Article 2 or any other provision of the parties' Agreement.

Discussion

I. Procedural Arbitrability

The Employer initially claims that the Association did not file its grievance in a timely manner. As a general matter, when a grievance has not been filed within the contractual time limits, the claim will be dismissed. The establishment of time periods for filing grievances reflects the parties' intent to resolve disputes in a prompt and efficient manner. The time periods are as much a part of the Agreement as any other terms. It is, therefore, inappropriate to ignore procedural requirements simply to respond to the merits of a grievance.

The Company points to Article 6, Section 6.5(a) of the Agreement that provides that grievances must be filed "within five (5) scheduled workdays after the occurrence of the alleged event, or within five (5) scheduled workdays after the aggrieved employee became aware of such event." The issue is what was the date of the occurrence of the event that triggered the grievance. The Company states that the occurrence and awareness of the change was the December

2021 meeting, and the days that followed, when the Company announced that it would be moving to direct deposit and also would no longer be providing advance vacation checks.

It cannot be found that at the December meeting it was clearly expressed to bargaining unit members or, more importantly, to the Union, that there would no longer be advance vacation checks. The initial announcement to employees had to do with direct deposit of pay checks, not advance vacation checks. Indeed, Mr. [redacted] testified that the issue of no longer providing vacation checks in advance was not discussed at this meeting. Some employees may have been told after this meeting that the Company no longer would be providing advance vacation checks. Nothing was in writing, and telling a few employees of this proposed changes is not sufficient notice that would amount to an "occurrence" that would trigger the filing of a grievance on the issue of advance vacation pay.

The first real "occurrence" that advance vacation pay would no longer be provided was in September 2022 when three employees requested and were denied advance vacation pay. It must be concluded that this was the "occurrence" and "awareness" that actually gave rise to the present grievance. There is no dispute that a grievance was filed soon thereafter. Accordingly, the grievance that was filed on September 19, 2022 was within the contractual time lines, and was timely filed. Based on the facts of the present case it cannot be said that the Union exceeded the time period for filing the present grievance. It must therefore be concluded that the grievance is arbitrable.

II. Merits of the Grievance

The issue in dispute is straightforward: was the Company contractually obligated to continue providing advance vacation pay to those bargaining unit employees who requested such payment. There is no dispute regarding the operative facts in the present case. For many years employees who requested to be paid their vacation pay in advance of their vacations were provided the pay by the Company. The working conditions for the employees have obviously changed as a result of the Company's decision to stop this long standing practice. The issue in dispute is whether this change violated the parties' Agreement.

The Company is correct; there is no language in the parties' Agreement that specifically addresses advance vacation pay. The absence of any such language in the parties' Agreement, however, does not end the inquiry. It has been long recognized by labor arbitrators that implied contractual provisions may arise through established past practices. Specifically, when a collective bargaining agreement is silent on a particular matter an established past practice will constitute a separate and binding obligation. *Phillips Petroleum Co. 24 LA 191 Merrill* (1955).

> Sometimes an established past practice is regarded as a distinct and binding condition of employment, which cannot be changed without the mutual consent of the parties. Its binding quality may arise either from a contract provision that specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices that have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions.

> Richard Mittenthal, "*Past Practice in the Administration of Collective Bargaining Agreements*", Arbitration in Practice, ILR Press, p.195.

Whether a practice amounts to a mutually accepted past practice is a question of fact that must be determined in each and every case. It is easy to contend that there is an established past practice; it is more difficult to prove its actual existence. The burden of proof rests squarely on the shoulders of the party asserting the existence of the practice. Moreover, strong proof is required as it is not the arbitrator's responsibility to theorize on what the parties' practice should be, or, to write the parties' agreement.

In the present case, the Union has met its burden of proof that there has been an established past practice between the parties. Specifically, there can be no dispute that for many years employees have, when they requested, received vacation pay in advance when they are leaving the country to take their vacations. There is no dispute that both employees and the Company knew of this practice; it is not as if this was a mistake that the Company became aware of, and sought to correct going forward in 2021.

It is true that the Company changed to direct deposit at the end of 2021. The evidence does not show that the third party payroll provider could no longer process advance vacation payments. It was not required that all employees switch to direct deposit, and it is conceivable that if employees knew that they would be precluded from receiving advance vacation pay they may not have elected direct deposit. Moreover, it has not been shown that the fact that the Company switched to direct deposit required

the Company to eliminate the advance vacation pay practice. The totality of the evidence demonstrates that there was a mutually accepted practice for advance vacation pay and this change, even if minimal, had an impact on the working conditions and benefits of bargaining unit employees; it is a mandatory subject of bargaining.

This is not to say that every request for advance vacation pay was provided. Specifically, Mr. [redacted] credibly testified that if employees did not provide the Company with sufficient notice for advance pay the request would be denied. There indeed may be legitimate and reasonable reasons for the Company to deny advance vacation pay in certain situations. Mr. [redacted]'s response that the Company was "not a bank", is not a situation in which the Company considered the merits of a particular request, rather the Company imposed a total elimination of the practice.

Article 2, the Recognition Clause, provides that the Union is the exclusive bargaining agent for employees working for the Company. The Union, therefore, has the responsibility to negotiate working conditions and compensation for all employees in the bargaining unit. The Company's unilateral action violated the parties' mutually accepted past practice, and also violated the Union's rights as the exclusive representative of members of the bargaining unit to negotiate over mandatory subjects of collective bargaining.

> The view that well established past practices are deemed to be a part of the agreement, unless specifically excluded, is common knowledge both in the field of industrial relations and an arbitration procedure...Where experience suggests that such practices are too rigid or become outmoded or

> impractical...modification must be accomplished through negotiation rather than through unilateral action. E.W. Bliss Co., 24 LA 214, 219 (Dworkin 1955)

The established past practice of advance vacation pay requires modification through negotiations and not the unilateral determination to totally eliminate this pay practice during the term of the existing contract.

Conclusion and Award

For the reasons set forth above, the Company violated the parties' mutually accepted past practice and violated Article 2 Section of the Agreement, when it completely eliminated the practice of providing advance vacation pay. No monetary remedy is appropriate.

May 26, 2023
Brookline, Massachusetts

Gary D. Altman