

IN THE MATTER OF THE ARBITRATION BETWEEN

RECEIVED BMS-

30 OCT 03 1:23

GENERAL DRIVERS,)	FEDERAL MEDIATION AND
WAREHOUSEMEN, HELPERS &)	CONCILIATION SERVICE
INSIDE EMPLOYEES,)	CASE NO. 08-57396
LOCAL 346,)	
)	
)	
)	
Union,)	
)	
and)	
)	
FERGUSON ENTERPRISES, INC.,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

For the Employer:

Timothy W. Andrew
Andrew & Branski, P.A.
Attorneys at Law
300 Lonsdale Building
302 West Superior Street
Duluth, MN 55802

Robert T. Torgerson
Hanft & Fride, P.A.
Attorneys at Law
1000 U.S. Bank Place
130 West Superior Street
Duluth, MN 55802-2094

On August 26, 2008, in Duluth, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by failing to provide some bargaining unit members with a step increment in wage rates.

FACTS

The Employer sells plumbing, heating and lighting supplies at facilities located throughout the United States. One of its facilities is located in Duluth, Minnesota, where it has forty-five employees. The Employer's operation of the Duluth facility began with its acquisition of Westburne Supply, Inc., which, hereafter, I may refer to as the Employer's predecessor or merely as "Westburne."

The Union is the collective bargaining representative of ten employees of the Employer who work at the Duluth facility in warehouse and shipping classifications, such as that of Stockman, Receiving Clerk and Truck Driver. The Union has represented employees in these classifications for at least thirty years, and, during that time, it has bargained with the Employer or Westburne to establish the terms and conditions of their employment. The labor agreement now in effect was negotiated by representatives of the Union and the Employer. By its terms, it has a duration from February 1, 2008, through January 31, 2011. Hereafter, I may refer to it as the "current labor agreement" or as the "2008-11 labor agreement." The labor agreement that preceded the current labor agreement, effective from February 1, 2005, through January 31, 2008, was also negotiated by representatives of the Union and the Employer. The labor agreement that was effective from February 1, 2001, through January 31, 2005, was negotiated by representatives of the Union and Westburne. Thus, though the evidence does not establish the exact date of the Employer's acquisition of Westburne, it appears to have occurred during the duration of the 2001-2005 labor agreement.

The present dispute requires an understanding of the provisions that establish the hourly wage rates for bargaining unit members -- Article 23, Sections A and C -- not only as those rates are established by the current labor agreement, but also as they were established by the preceding agreement, the 2005-08 labor agreement. Below are set out Sections A and C of Article 23 as they appeared in the 2005-08 labor agreement:

ARTICLE 23

Classifications and Rates of Pay: The following shall be the minimum rates of pay in the various classifications of work:

A. CLASSIFICATIONS

	<u>Effective</u> <u>02-01-05</u> (.42 Inc.)	<u>Effective</u> <u>02-01-06</u> (.43 Inc.)	<u>Effective</u> <u>02-01-07</u> (.44 Inc.)
Foreman	\$14.32	\$14.75	\$15.19
Stockmen & Receiving Clerks	\$14.32	\$14.75	\$15.19
Warehouse & Order Fillers	\$14.32	\$14.75	\$15.19
Truck Drivers	\$14.32	\$14.75	\$15.19

The City Desk position was deleted from the Collective Bargaining Unit effective February 1, 2001.

It is further understood and agreed that any associate receiving a higher rate than specified herein shall likewise receive the above-mentioned increases.

C. PROGRESSION: Any new associate hired after ratification shall be employed under the following procedure:

Start-First year	70% of the applicable wage rate
Start Second year	80% of the applicable wage rate
Start Third year	90% of the applicable wage rate
Start-Fourth year	100% of the applicable wage rate

Thus, all classifications received the same hourly rate at the top, but "any new associate hired after ratification" of the 2005-08 labor agreement was paid 70% of the top rate during

the year following the date he or she was hired (hiring date"). At each anniversary of that employee's hiring date, his or her wage rate increased -- to 80% of the top rate during the second year of employment, to 90% of the top rate during the third year of employment, and to the top rate after three years of employment.

For many years, the labor agreements between the Union and the Employer or Westburne have used substantially the same method of establishing hourly wage rates, using substantially* identical language. At least since the 1980s, there has always been a single top rate for all classifications, and the preamble that describes how "progression" to that rate is to be attained has been identical. Thus, every labor agreement has used the same language preceding the description of the step increments:

Any new associate ["employee" under Westburne] hired after ratification shall be employed under the following procedure:

There have, however, been changes in the number of steps in the progression. The several contracts that set progression from February 1, 1989, through January 31, 1998, did so in four steps, always using the same language that was used in the 2005-08 labor agreement -- from the starting rate, "70% of the applicable wage rate," then during the second year, "80% of the applicable wage rate," then during the third year, "90% of the

* The contracts between the Union and the Employer have referred to employees as "associates," and the contracts between the Union and Westburne have referred to them as "employees."

applicable wage rate," and finally, after three years, "100% of the applicable wage rate."

The labor agreement that was effective between February 1, 1998, and January 31, 2001, increased the number of steps in the progression, though it still retained the same preamble -- "Any new employee hired after ratification shall be employed under the following procedure." That agreement provided for a starting step at 60% of the top rate, with 70% during the second year, 80% during the third year, 90% during the fourth year and 100% after four years.

The next change in progression came with the next labor agreement, the one effective from February 1, 2001, through January 31, 2005. The parties agreed to return to the previous progression scheme, 70% at the start and increments to 80% during the second year of employment, 90% during the third year of employment, and 100% after three years. The parties presented the following evidence about the bargaining that led to that change.

Joseph Sitek testified that he has been the General Manager of the Duluth facility for more than thirty years -- both before and after the Employer acquired it from Westburne. He has participated in bargaining since 1983. Roderick E. Alstead testified that he is Vice President and a Business Agent for the Union and that he has represented the Union in bargaining, not only for the current labor agreement, but for at least the previous two -- the 2001-2005 agreement and the 2005-2008 agreement. Sitek testified that at the start of negotiations for the 2001-05 labor agreement, the Union, as it usually did,

opened bargaining by presenting a one-page summary of its bargaining positions, dated December 4, 2000. That document shows that the Union sought a general wage increase for each year of the new agreement, and, in addition, the following change in progression:

Progression - Eliminate one year off of the progression and everyone not at 100% roll up one step.

In response to this proposal to change the progression, the Employer gave the Union a similar one-page summary, providing the following:

Progression - Start 1st year 70% of applicable wage rate
Start 2nd year 80% of applicable wage rate
Start 3rd year 90% of applicable wage rate
Start 4th year 100% of applicable wage rate

We will move all employees currently at 60% to 70% - no other changes. [The preceding sentence is in italics.]

Sitek testified that, as a result of these negotiations for the 2001-05 change in progression, all current employees then at the 60% step were moved to the 70% step at ratification, but that no other current employees were moved up a step.

Alstead's testimony about bargaining for the 2001-05 change in progression was substantially the same as that of Sitek. Alstead noted, however, that the actual text of the 2001-05 labor agreement did not include the italicized sentence in the Employer's response set out just above, which expressly limited step movement by force of the amended contract to those at the 60% step. I note that, after ratification of the 2001-05 labor agreement, the Employer hired a new employee at the 100% rate because of his prior experience, but I find that that

hiring is not relevant to the present dispute about step advancement of employees already employed at the time of ratification.

As noted above, the 2005-08 labor agreement, the first negotiated after the Employer's acquisition of the Duluth facility from Westburne, did not change the number of steps in the wage progression, and the language of the preamble to the listing of progression steps in Article 23 remained the same as it had been for many years -- "Any new associate hired after ratification shall be employed under the following procedure."

Alstead testified that he was the Union's chief negotiator during bargaining for the current labor agreement. On December 3, 2007, Union members met, as they customarily did before the start of bargaining, to plan their bargaining positions for the forthcoming negotiations. Again, they prepared a one-page summary of the changes they would seek as they bargained for the current labor agreement (hereafter, the "Summary of Union Proposals"). The third item on the Summary of Union Proposals is set out below:

Article 23 - Wages:

Effective	Effective	Effective
02-01-08	02-01-09	02-01-10
\$1.00	\$.75	\$.75

Longevity: C. Progression -- shorten to two years.

Alstead testified that, during the Union's planning meeting of December 3, 2007, the members talked about having this change in progression apply to all current members of the bargaining unit.

The first meeting between representatives of the parties as they began bargaining for the current labor agreement was held on January 23, 2008. Alstead was the Union's chief negotiator, and the Employer was represented by a bargaining team that included Sitek and David N. Meeker, an attorney for the Employer. Alstead presented the Summary of Union Proposals, which, as described above, proposed with respect to progression, "shorten to two years."

Sitek testified that he and the Employer's bargaining team interpreted this language to mean 1) that the Union was proposing that any reduced number of progression steps listed in the new contract would still be preceded by the same preamble that had been used continuously in all preceding contracts since the 1980s, i.e., that the newly "shortened" number of steps would still be preceded by the preamble, "Any new associate hired after ratification shall be employed under the following procedure," and 2) that, for current employees, as in previous years, there would be no change in the sequence and percentages of their progression, but 3) that, as in the past, current employees would be entitled to have their percentage progression calculated, using whatever new top wage rate the parties eventually agreed to, as expressed in Section 23(A).

Sitek also testified as follows about the January 23 bargaining session. The Employer's representatives caucused after they received the Summary of Union Proposals. They decided that, because it had been difficult to hire new employees, they would agree to the Union's proposal about

shortening the progression to two years, thereby increasing the starting step for an employee hired after ratification of the new agreement to 80% of the top rate during the first year of employment, to 90% during the second year of employment and to 100% after two years of employment. After the caucus, the two bargaining teams resumed their discussions, and the Employer's representatives told the Union's representatives that the Employer agreed to the Union's progression proposal -- to "shorten to two years."

There is a substantial conflict in the testimony of the witnesses who testified about the parties' discussions of the Union's progression proposal at the meeting of January 23, 2008. I summarize their testimony as follows. Alstead testified that, when he gave the Summary of Union Proposals to the Employer's representatives, he told them that the change in progression would be "win-win" because it would make it easier for the Employer not only to hire new employees but to retain current employees. He testified that when he made that remark, Sitek and Meeker made no response, except that each of them nodded his head. Alstead testified that the Employer then gave the Union its bargaining proposals, that the parties caucused, that they reconvened the meeting, that the Employer's representatives agreed to the Union's progression proposal, and that Alstead then said, "good the people will be happy to get an increase."

Kreg M. Ostby testified that he and Alstead were the members of the Union's bargaining team for the current labor agreement. He corroborated Alstead's testimony that Alstead had

informed the Employer's representatives that the Union proposed to shorten the progression for current employees as well as new employees and that Sitek and Meeker responded by nodding their heads.

Sitek testified that when he received the Summary of Union Proposals, the Union's representative did not inform the Employer's representatives that they intended the change in the number of progression steps to apply to current employees. He testified that, after the caucus, when the Employer's representatives told the Union that they agreed to shorten the progression, no Union representative informed them that the Union intended the shortened progression to apply to current employees.

Kevin L. Shimmin, Operations Manager at the Duluth facility, testified that he was a member of the Employer's bargaining team in negotiating the current labor agreement. He testified that he was present at the bargaining meeting of January 23, 2008, that he interpreted the Union's progression proposal in the the Summary of Union Proposals -- "shorten to two years" -- to mean that the reduced number of steps would apply only to those hired after ratification of the new labor agreement. Shimmin corroborated Sitek's testimony that no Union representative informed the meeting that the Union intended its proposal to apply to current employees.

The parties' representatives met three more times in bargaining -- on January 30, 2008, on February 15, 2008, and on March 19, 2008. During the last meeting, they were assisted by

a mediator. They did not discuss progression again because both sides thought that subject had been settled at the meeting of January 23, 2008. They disagreed about the total economic "package" of increased costs, some of it to be allocated to wages and some to benefits, including pensions. At their last meeting, on March 19, 2008, the parties discussed a total package offer to pay an additional \$0.85 per hour during the first and third years of the contract (with an increase of \$0.80 during the second year) -- to be allocated between wages and benefits as the Union chose. The Union's representatives took the position that they could not recommend that members ratify a new contract that included some of the Employer's proposals.

The mediator suggested that, nevertheless, the Union conduct a ratification meeting, asking members to vote on the tentative agreements reached plus the Employer's final offers on matters not tentatively agreed to, at which meeting members would be informed that the Union's representatives did not recommend either a favorable or unfavorable vote. The parties agreed to use that procedure.

On April 4, 2008, the Union conducted such a ratification meeting, and an agreement was ratified by a majority of one vote. On March 28, 2008, as the Union prepared for the ratification meeting of April 4, 2008, Meeker sent Alstead the following email:

Enclosed is the document I believe you requested utilizing just the proposals, not a strike and add to the whole agreement, showing T/A items and the "Employer Proposal" noted for our Proposals 5, 6, 7 and 10 on this new sheet (formerly 6, 9, 10 and 14 on January 30, 2008

list of Management and Union proposals). I am disappointed that we could not get to a resolution that your bargaining committee could positively recommend. Please keep Joe [Sitek] and me advised as to how we are moving forward.

Below are set out relevant parts of the document sent with Meeker's email (hereafter, the "Ratification Document"):

MANAGEMENT PROPOSALS
March 28, 2008
COLLECTIVE BARGAINING AGREEMENT
[THE EMPLOYER AND THE UNION]

These proposals of Ferguson Enterprises, Inc. ("Ferguson" or "Employer") are the result of the negotiating sessions of January 23, 2008, January 30, 2008, February 15, 2008 and the mediation session of March 19, 2008. Changes noted are to the current Collective Bargaining Agreement [the 2005-08 agreement]. It is understood that the Union intends to put this proposal to a vote of the bargaining unit members though agreement could not be reached on all issues.

[I omit the list of tentative agreements and several proposals of the Employer that had not been agreed to.]

UNION PROPOSALS:

. . .

- 3.(A) Article 23, Classifications and Rates of Pay, Paragraph A. Wages are part of economic package of Employer proposal 10.

- 3.(C) T/A 1/23/08 -- Article 23, Classifications and Rates of Pay, Paragraph C. Progression to full rate has been shortened from 4 years [sic] to 2 years. Progression shall be: Start - 80%; at 1 year - 90%; at 2 years 100% of full rate in contract.

Alstead testified that, at the ratification meeting of April 4, 2008, the Union's bargaining committee remained neutral -- neither recommending for or against ratification. He also testified that he presented the Ratification Document to the members and explained that five or six current employees would benefit from the agreement about progression, achieving a step

advancement of an extra 10%. Alstead testified that he thought "we were voting the offer" and not "the existing contract language." On cross-examination, he conceded that the Ratification Document does not expressly state that current employees are to advance in progression and that he did not ask Meeker to clarify what he had written about progression in the Ratification Document.

On April 7, 2008, Alstead sent Meeker the following letter:

The Company's offer was ratified on 4-4-08. For the disbursement of the "08" total package the membership wants it allocated as follows:

8% increase to Pension Contribution
7% increase to H & W
7% increase to Dental
\$.30 increase to Across the Board Wages

Several employees should be moved up in the wage progression as agreed to effective 02-01-08.

The "09" and "2010" total package increase will follow the above, but will be dependent on what the H & W and Dental premiums do.

If there are any questions as to the above calculations or corrections, please contact me. If not, please make the agreed changes in the Collective Bargaining Agreement and send me a copy for review.

On April 18, 2008, Meeker sent Alstead the following email:

Rod, attached hereto is a clean PDF copy of the 2008-2011 CBA, and redlined copy showing the changes made to the 2005-2008 CBA as a result of our 2008 negotiations. I have also attached a detailed breakdown of the anticipated utilization of the increases over the life of the contract, a document which Joe originally pulled together and which I thought would be helpful to you.

Please review and let me know if there are any changes required or if you have any questions. . .

If there are no changes necessary, I have sent the clean copy to you in PDF form so that you can run off the necessary number of copies for signature. . . .

On April 20, the parties executed the new labor agreement in the same language as that contained in the "PDF" file that accompanied Meeker's email to Alstead of April 18, 2008.

Below are set out Sections A and C of Article 23 as they appear in the current labor agreement (with the wage increases adjusted for later reductions in premium for health and dental insurance):

ARTICLE 23

Classifications and Rates of Pay: The following shall be the minimum rates of pay in the various classifications of work:

A. CLASSIFICATIONS

	<u>Effective</u> <u>02-01-08</u> (.34 Inc.)	<u>Effective</u> <u>02-01-09</u> (.25 Inc.)	<u>Effective</u> <u>02-01-10</u> (.26 Inc.)
Foreman	\$15.53	\$15.78	\$16.04
Stockmen & Receiving Clerks	\$15.53	\$15.78	\$16.04
Warehouse & Order Fillers	\$15.53	\$15.78	\$16.04
Truck Drivers	\$15.53	\$15.78	\$16.04

If effective February 1, 2009, or February 1, 2010, the premium rates actually put into effect for the health and welfare plan or the dental plan listed in Article 28 do not increase at the 7% rate assumed in the Employer contribution rates listed in Article 28, then the difference between the amounts listed in Article 28, and any lower amount actually paid by Employer for health and welfare or dental premiums, shall be calculated and paid as an increase to the hourly rates stated above effective February 1, 2009, or February 1, 2010, respectively.

The City Desk position was deleted from the Collective Bargaining Unit effective February 1, 2001.

It is further understood and agreed that any associate receiving a higher rate than specified herein shall likewise receive the above-mentioned increases.

C. PROGRESSION: Any new associate hired after ratification shall be employed under the following procedure:

Start-First year	80% of the applicable wage rate
Start-Second year	90% of the applicable wage rate
Start-Third year	100% of the applicable wage rate

Thus, Section 23(C) of the new labor agreement retained the preamble that had been used for many years, providing that the progressions listed after the preamble are to be paid to "Any new associate hired after ratification."

On May 14, 2008, Alstead wrote Meeker the following letter:

It has been brought to my attention that the Company has not paid the retro on the total package or moved members up the wage progression as agreed to per Contract negotiations and letter to you dated April 7, 2008. Please be advised that if this doesn't happen by May 23, 2008, charges will be filed against [the Employer] with the N.L.R.B.

On May 29, 2008, Alstead sent Sitek the following letter grieving the non-payment of the new progression to current employees:

Consider this letter a grievance filed on behalf of the Bargaining Unit. The Company has failed to move employees up in wage progression as agreed per negotiations. The Union proposed to the Company during negotiations to shorten the wage progression (Article 23C). The Company agreed. It was understood that this would not only be for new hires, but for current employees that haven't reached one hundred percent (100%) of the hourly wage. . . .

Eventually, the parties agreed to resolve the dispute through grievance arbitration rather than through N.L.R.B. proceedings.

Sitek testified that, after ratification of the new labor agreement, the Employer decided to increase the wage rate of two

current employees who were still being paid at the 70% starting progression step, as it had been under the 2005-08 contract, to the new 80% starting progression in order that those employees not be paid at a lower rate than employees newly hired after ratification. Sitek explained that a similar upward movement had occurred under the 2001-05 contract when the starting step had been increased from 60% to 70%. At that change, then current employees who were at the 60% starting step were moved to the new starting step of 70%. As noted above, however, that movement was expressly agreed to during bargaining at a bargaining session -- though it was not expressed in the language of the labor agreement, as executed.

DECISION

The Union makes the following argument about the conflict in the evidence -- whether Alstead explained during the bargaining session of January 23, 2008, that the Union intended its progression proposal, "shorten to two years," to mean that current employees would also have the benefit of that reduction in the number of steps. The Union argues that the account of its witnesses, Alstead and Ostby, should be accepted rather than the account of the Employer's witnesses, Sitek and Shimmin, because the account of Alstead and Ostby is consistent with Alstead's later behavior -- 1) that he explained to the Union members at the ratification meeting on April 4 that current employees would have the benefit of the change and 2) that his letter of April 7 to Meeker accurately stated his understanding, when he wrote that "several employees should be

moved up in the wage progression as agreed to effective 02-01-08."

The Employer argues that the account of Sitek and Shimmin should be accepted -- that, at the meeting of January 23, Alstead did not say that the Union intended current employees to benefit from the change in progression. The Employer argues that its primary concern during bargaining was about total package cost and that making the new progression apply to current employees would have caused a substantial increase in costs. It argues that the Employer's quick acceptance of the Union's progression proposal, "shorten to two years," during the caucus that occurred just after Alstead's alleged explanation shows that no such explanation was made. Sitek testified that the Employer never calculated the extra cost of making shortened progression apply to current employees because the Employer was never informed that the Union intended the new progression to apply to current employees.

The Employer argues that Alstead's statement in his letter to Meeker of April 7 -- that "several employees should be moved up in the wage progression as agreed to effective 02-01-08" -- did not identify what employees Alstead was referring to and thus is vague and so ambiguous that it failed to indicate that Alstead was referring to current employees. The Employer also argues that the Union was aware of the total package cost that the parties finally agreed to -- all of which cost was referred to in the Ratification Document as allocated to the hourly wage increase, to pensions and to insurance

premiums and none of which was allocated to progression increases for current employees.

The Union argues that, if I find on this fact issue that Alstead explained the Union's intention that its progression proposal apply to current employees, I should determine the parties' actual bargain from the oral agreement implied by the Employer's acceptance of the proposal and not from the text of the written contract as finally adopted. The Union urges that enforceable contracts should derive from agreements actually intended, even if such actual intent is indicated orally during bargaining rather than in written language.

Alternatively, the Union argues that if I find that the evidence does not show that the parties reached an oral agreement to apply the progression proposal to current employees, I should rule that the parties reached no agreement on the subject because they did not have a "meeting of minds," i.e., a common understanding of their bargain about the change in progression. The Union urges that, in that circumstance, the written contract was, at best, the expression of the Employer's mistake about the parties' agreement, resulting from a misunderstanding of the Union's progression proposal. The Union urges that in such a case I should rule that the parties reached no agreement on the subject and should return to bargaining.

The Employer argues that the parties' bargain about the change in progression is expressed in the written language of Article 23, which the parties adopted by their execution of the written contract on April 20, 2008. That language used

the preamble that had been in place for at least twenty years, which states that the progression schedule listed below is to apply to employees hired after ratification. The Employer argues that, as the Union concedes, that language had been applied in the past so that current employees remained in the progression schedule in place at the time of their hiring. Though an exception occurred when the parties adopted a shortened progression schedule with the 2001-05 contract, that exception was expressly stated in written documents exchanged during bargaining.

The Employer argues that the rule of contract interpretation that should be applied in this case is the parol evidence rule, which excludes evidence about oral declarations made during bargaining if such evidence attempts to vary a bargain expressed in written contract language they have adopted.

I make the following rulings. First, the testimony about what was expressed at the January 23 bargaining session is inconclusive. Nothing in the evidence indicates any reason to doubt the honesty of Alstead, Ostby, Sitek and Shimmin -- the witnesses who testified whether Alstead did or did not explain the Union's progression proposal. It may be that one side or the other was at fault -- either that Alstead did not speak clearly or that, if he did, the Employer's witnesses failed to listen. Accordingly, I find that the representatives of neither negotiating team understood and intended what those on the other negotiating team understood and intended when, at the January 23 meeting, they agreed to the Union's progression proposal -- "shorten to two years."

In many disputes about contract interpretation, the language discussed in bargaining is the language actually used in the final draft of the executed contract. In the present case, however, the final draft of the labor agreement, as executed, was used neither during negotiations nor at the ratification meeting of April 4. It is possible that, if the parties' proposals had been cast in the text of a final draft of the agreement, the present dispute about the meaning of the change in progression could have been avoided.

Nevertheless, the parties did execute a contract that included the language of Section 23(C). Resolution of this dispute requires application of the principles of contract interpretation that apply when parties to a contract have an agreement about language, but a dispute about the meaning of the language used in their executed contract.

Even though both parties accepted the language of the Section 23(C), it is clear that they did not have a mutually understood agreement about the substantive meaning of the language they agreed to accept.

The primary rule used by the courts in disputes about contract interpretation is to enforce what contracting parties intend by their bargain -- to give effect to an intention that was mutually understood by them when, in bargaining, they had a "meeting of minds" about the promises they exchanged. This rule assumes that the interpreter will be able to find such a mutually intended bargain, either by a bare reading of clear language or by reading ambiguous language with the aid of

extrinsic evidence -- usually evidence about bargaining history or past practice.

In many disputes about contract interpretation, however, it becomes apparent that the bargaining parties never achieved a meeting of minds about substance. In such cases, the bargainers reach an agreement about language without having a mutual understanding of the meaning of the language they agree to use. The courts cannot enforce the parties' agreement about language by giving effect to their mutually understood bargain, because a true meeting of minds about substantive intent is lacking in such cases.

Nevertheless, the courts have developed rules of contract interpretation that apply despite the failure of a mutual understanding about the substantive meaning of the language the parties have agreed to adopt. Necessarily, these rules abandon the primary rule -- to enforce what was mutually intended -- though usually without an express acknowledgement that something not mutually intended is being enforced.

For example, the rule that requires enforcement of clear language according to its clear meaning is often applied even though one party had a good faith misunderstanding of the language, both at the time of bargaining and at the time of contract execution. Because one party had such a good faith misunderstanding of clear language, the application of this rule will enforce a bargain not mutually intended.

Interpreters applying this "plain meaning" rule do not usually explain the rationale underlying enforcement of the

clear meaning of the language in dispute, despite one party's misunderstanding of the language. The rule appears, however, to be based at least partly on a concept of fault -- that the stability of contracts requires a rule that presumes both parties' understanding of clear language even when, by inattention, inadvertence or negligence, one party fails to understand the clear language used. By this rule, the courts enforce a presumption that understandable language means what it says, despite a contention by one of the parties that something other than the apparent meaning was intended by that party. The rule is practical; it brings order to contract construction by excluding all of the clear language contained in the contract as a subject properly eligible for dispute. The rule may be practical, but it is also equitable; if language is truly clear and unambiguous, both parties to a contract should understand its meaning clearly and unambiguously and, thus, know how they are bound when they execute the contract. The losing party is the one "at fault" -- the one that failed to understand plain language.

Another rule of contract construction, also apparently based on a concept of fault, is the rule that when language is not clear and unambiguous, it will be construed against the party that proposed the language. Here again, the rule seems to be based on practical as well as equitable considerations. Enforcement of this rule is practical because it promotes careful drafting of language and careful disclosure of what the drafter intends by proposed language. Enforcement of the rule is also

equitable because the party "at fault" for failure to take such care is the one against which the ambiguity is construed.

I rule that the language of Section 23(C) is unambiguous, interpreted as the parties themselves have previously interpreted substantially the same language -- that employees newly hired after ratification are to have their progression calculated using the shortened number of steps, but that current employees will continue to have their progression calculated according to the progression in effect at the time they were hired. Thus, I apply the "plain meaning" rule, notwithstanding the Union's argument that because it understood the language to mean something different, there was no meeting of minds needed to form a binding contract.

I also make the following ruling. Even if the evidence supported the Union's argument that Alstead, at the January 23 meeting, explained the Union's progression proposal as having a meaning different from the plain meaning of Section 23(C) as finally adopted, the parol evidence rule applies in this case. Though the title of the rule suggests that it is a rule of evidence, it is, in effect, a rule of contract interpretation, as thus described in the following excerpt from Black's Law Dictionary, 1006 (5th Ed.):

Parol Evidence Rule. This evidence rule seeks to preserve the integrity of written agreements by refusing to permit contracting parties to attempt to alter import of their contract through use of contemporaneous oral declarations. Under this rule, when parties put their agreement in writing, all previous oral agreements merge in the writing and a contract as written cannot be modified or changed by parol evidence, in the absence of a plea of mistake or fraud in the preparation of the writing. . . . [Citations omitted.]

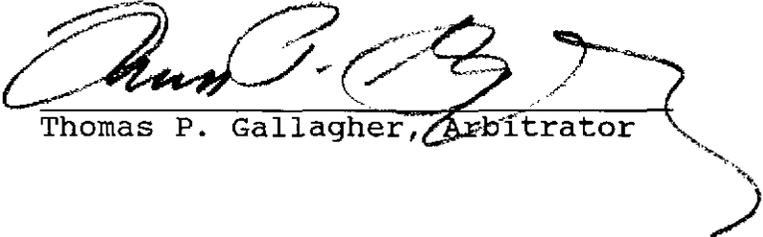
Certainly, the facts of this case do not indicate fraud, and, indeed, neither party makes such a claim. Though rules of contract interpretation permit relief from the parol evidence rule in the case of "mistake," clearly a mistaken belief that an oral agreement was reached that is different from the written agreement is not the kind of mistake for which relief is available. Relief from such a mistake would undermine the salutary effect of the parol evidence rule and its adjunct the plain meaning rule -- to give stability and integrity to written contracts -- thus making written agreements subject to revision whenever a party claimed it intended a different oral agreement. Rather, the "mistake" for which relief from the parol evidence rule may be obtained is one made in reducing to writing a bargain that both parties agree was reached during oral negotiations.

I conclude that the new progression schedule established by Section 23(C) of the new labor agreement applies only to employees hired after April 4, 2008.

AWARD

The grievance is denied.

October 29, 2008


Thomas P. Gallagher, Arbitrator