

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**SARA LEE BAKING COMPANY**

**Employer,**

**and**

**TEAMSTERS LOCAL UNION, NO. 120**

**Union.**

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**ARBITRATION DECISION  
AND AWARD**

**FMCS Case No. 12-0124-52721**  
(Michael Langer Grievance)

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	August 8, 2012 Minneapolis, Minnesota
Date Record Closed:	September 28, 2012
Date of Award:	November 7, 2012

**APPEARANCES**

For the Union:	For the Employer:
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**INTRODUCTION**

This case involves the meaning of the “vacation” language of the collective bargaining agreement between the parties as applied to Michael Langer, a long-term employee who retired in 2011. The Grievance claims that Mr. Langer was entitled to vacation pay upon retirement, because vacation is accrued one year before an employee

may use it. Sara Lee Baking Company (now part of BBU, Inc.) argues to the contrary, that Mr. Langer was not entitled to any vacation pay upon retirement, because employees accrue vacation in the same calendar year in which they use it, and that Mr. Langer had used all of the vacation time to which he was entitled before he retired.

Teamsters Local Union No. 120 (“Union”) and Mr. Langer filed a grievance on October 12, 2011, under the collective bargaining agreement (“CBA”) between the Union and Sara Lee Baking Co. (“Employer” or “Company”), Union Exhibit 1, effective July 12, 2009 - July 14, 2012. The parties were unable to resolve the grievance, and the Union exercised its right to invoke arbitration. The parties duly selected the undersigned arbitrator from a list provided by the Federal Mediation and Conciliation Service.

On August 8, 2012 the Arbitrator convened a hearing at the FMCS offices in Minneapolis, Minnesota. During the hearing, the Arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. Court Reporter Valerie A. Benning, Twin West Reporting, L.L.C., recorded and transcribed the testimony. The parties agreed to file briefs simultaneously by email and U.S. mail and the Arbitrator received the briefs on September 28, 2012, whereupon the record closed.

### **ISSUE**

Did the Employer violate the Contract when it denied the Grievant’s request to be paid for unused, accrued vacation; if so, what is the appropriate remedy?

## RELEVANT CONTRACT LANGUAGE

The CBA provides that employees who work more than one year are eligible for paid vacation as follows:

One (1) Week After One (1) Year of Continuous Service  
Two (2) Weeks After Three (3) Years of Continuous Service  
Three (3) Weeks After Eight (8) Years of Continuous Service  
Four (4) Weeks After Fifteen (15) Years of Continuous Service  
Five (5) Weeks After Twenty-five (25) Years of Continuous Service  
(Article 13, Section 1.)

Section 9. Upon leaving the service of the Company except for violation of the Company's No-Rider Rule, dishonesty, drunkenness while on the job, drinking while on the job, reporting for work in an intoxicated condition, carrying firearms or dangerous weapons on Company property, possession of habit forming drugs on Company property, fighting on Company property, or commission of criminal acts on Company property, an employee who has qualified for a vacation shall receive such portion of vacation pay earned and accrued up to the time of leaving the employ of the Company. Such pay shall be computed on the basis of the average weekly earnings of such employee during the first eight (8) of the last (9) full weeks worked.  
(Article 13, Section 9, emphasis provided.)

## FACTS

The Company hired the Grievant December 16, 1974.<sup>1</sup> He worked as a Route Sales Representative (RSR) for 37 years in the Company's Red Wing division and retired July 31, 2011. At the time he retired, he believed that the Company owed him vacation time earned in 2011, which he would have been eligible to receive in 2012, had he continued working. The reason for this belief is that he began working for the Company in 1974, but was not allowed any vacation until a full year had passed, so he was always one year behind; thus, during his last year of employment (2011) he was earning vacation that would be available to him the succeeding year (2012). The Union's grievance on his

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<sup>1</sup> Thereafter, December 16 was his "anniversary date".

behalf states, accordingly, that the Employer violated Article 13 by failing to pay the grievant vacation to which he was entitled.<sup>2</sup>

Jack Konrad, Regional Sales Manager for the region where the grievant was employed, administered the vacation system the Union is grieving. He explained that employees do not accrue vacation the year before they use it, but take their vacation in the same year it is accrued. Mr. Konrad stated that the Employer has used the same vacation system at least 22 years, the entire period of his employment at the Company.<sup>3</sup> He described the process: Bidding for vacation weeks occurs at the end of each year for the next calendar year. A form, called a vacation planner, is generated and circulated for employees to choose weeks of vacation by seniority. On this form, each employee's name is listed in order of seniority, and next to each name Mr. Konrad inserts the number of vacation weeks to which that employee is entitled. If an employee reaches his anniversary date during a year in which he is entitled to an additional week of vacation under the CBA, he may use that extra week of vacation during the year without regard to his anniversary date. Thus, for example, in his 8<sup>th</sup> year (1982), a "graduation year"<sup>4</sup>, the Grievant graduated to three weeks of vacation.<sup>5</sup> Although his anniversary date was December 16, he was authorized to take all three weeks of vacation before December 16, 1982.

In 2011, the Grievant was entitled to five weeks of vacation according to the vacation planner.<sup>6</sup> He took one of these weeks in December 2010, because the Company

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<sup>2</sup> Grievance, Union Ex. 3.

<sup>3</sup> Testimony of Konrad, Transcript ("Tr.") at 49-50.

<sup>4</sup> A graduation year is a year during which an additional week of vacation is allowed, for example, after 3 continual years of service. See, Article 13, § 1.

<sup>5</sup> Union Ex. 6.

<sup>6</sup> Vacation Planner for 2011, Employer's Ex. 1.

allowed him to take an extra week with pay in advance of 2011, so he could assist his wife after she had surgery. He took an additional four weeks vacation between January 1 and July 31, 2011, and retired July 31, 2011. The Company paid him for 25 days of vacation for 2011, and it believes it overpaid him under their system, because he left halfway through the year and would not have accrued the full 5 weeks until December 2011, but it does not seek reimbursement. The Union, on the other hand, believes that the Grievant is due 15 days of vacation he had accrued from December 16, 2011 through July 31, 2012, based on its belief that the CBA calls for accrual of vacation one year in advance of vacation use.<sup>7</sup>

#### **UNION POSITION**

The Union points out that the CBA does not directly address whether vacation is accrued during the same year in which it is used, or whether it is accrued a year before it may be used. The Union argues that standard contract interpretive principles apply, and based on these principles, it is clear that vacation is accrued one year and used the next. The Union claims that other sections of Article 13 make no sense unless one assumes that vacation pay is accrued one year and taken the next, and the fact that no vacation is allowed until the employee has one continuous year of service is evidence that he is accruing vacation the first year for use during the second year. Further, the Union notes, the vacation system was not quite so clear to the Grievant's first line supervisor, Adam Hanson, whom the Grievant described as initially agreeing that a vacation payout was due him when he retired. Therefore, the Union argues, the Grievant is entitled to a portion of 2012 vacation pay because he accrued a right to it during the time he worked in 2011.

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<sup>7</sup> Union's Post-Hearing Brief, Conclusion.

## **EMPLOYER POSITION**

The Employer contends that it has consistently applied the same straightforward contract provision at issue for decades without any challenges. The Employer claims that all RSRs use their vacation time in the same year as it becomes fully accrued; thus, the vacation time the Grievant accrued in 2011 was the same vacation time he took in 2011 (and one of those weeks in advance, in December 2010). The Employer argues that when he retired before his December 16, 2011 anniversary date, he had already taken more 2011 vacation time than he accrued. The Employer claims it has not violated any provision of the CBA, and that it fully paid the Grievant for all of the vacation time he was allowed through the date of his retirement.

## **DISCUSSION AND DECISION**

Arbitrators typically resolve disputes concerning the interpretation of a collective bargaining agreement by using a sequential analysis to ascertain the intent of the parties. First, the arbitrator looks to the language of the CBA. If it is clear and unambiguous, that language should control. If that is not the case, the arbitrator should look to other indicia of the parties' intent. Among the indices that are relevant are bargaining history and past practice.

In the present matter, both parties claim the meaning of the contract is clear on its face. They agree that RSRs are entitled to vacation as set out in Article 13 and that there is no carryover of vacation from one year to the next. But they disagree about how the vacation system is to be applied. The Union claims that when Section 1 states that an employee shall be eligible for vacation after one year of continuous service, it means that by working the first year, the employee has essentially earned deferred compensation for

work performed, and it cannot be forfeited. As a result, the employee is always one year behind, so that when an employee leaves the company after 37 years, as the Grievant did, the Company owes him vacation pay that he earned during his last year. The Company, on the other hand, claims that vacation is earned in the year it is allowed, not the previous year. Section 1 states that an employee is “eligible” for a vacation after one year of continuous service, not that he has earned a week of vacation that is held in abeyance until the next year. The Company argues that the CBA contains no language supporting the Union’s theory. Because the parties each present a reasonable interpretation of the contract language as applied to the Grievant, the language is ambiguous and evidence outside the four corners of the document will be considered.

Evidence supports the Company’s belief that employees earn vacation in the year it is taken rather than that it is earned and carried over from one year to the next:

1. If the employee earned a right in his/her vacation accrual, vacation hours would carry over from year to year. The CBA does not provide for carry-over and it has never been the practice.
2. Employees who have qualified for a vacation receive vacation pay earned up to the time of leaving employment based on the average weekly earnings of the employee during the last weeks worked, not at the rate of pay from the previous year. (Section 9 “[Vacation] pay shall be computed on the basis of the average weekly earnings of such employee during the first eight (8) of the last nine (9) full weeks worked.”)
3. Regardless of the employee’s anniversary date, the employee is given credit for an extra week of vacation at the beginning of the calendar year. For

example, the Grievant earned a fifth year of vacation in 1999. He would have had 25 years of service on December 16, 1999, (December 1974-December 1999) but he was allowed 5 weeks of vacation commencing January 1999, not in December 1999, because he became eligible that year. This system supports the idea that vacation is granted on a calendar-year basis with certain stated conditions of eligibility, rather than the idea that vacation is accrued on the basis of hours worked, so employees have earned an ongoing right to it.

Although the Union makes some plausible arguments, I find the strongest argument favoring the Company's position is the past practice of the parties. In fact, "custom or past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language...Most arbitrators rely exclusively on the parties' manifestation of intent as shown through past practice and custom."<sup>8</sup> The Union was unable to establish that the Grievant was treated less favorably than other similarly situated employees. Instead, the facts are that the current method of calculating vacation benefits has been used for at least twenty-two years without any known grievances to date. By paying out vacation over the years based on the Company's methods, a practice has developed. Arbitrators will often read such practices into ambiguous contract language, deciding, in essence, that the parties must have intended such an interpretation or someone would have raised the issue sooner.

Although evidence was sparse concerning how the Company applied its vacation pay practice when an employee left its employ, and no language in the contract specifically addresses how it should be done, there is evidence from which an inference can be drawn. For example, the Grievant was eligible for and took three weeks off in

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<sup>8</sup> *Elkouri & Elkouri: How Arbitration Works* 623 (Ruben, ed., 6<sup>th</sup> ed. 2003.)

1982, even though he would not have “earned” it until December 16, 1982, based on actual time worked. The Company based its calculation on calendar years, rather than a prior year’s actual work when it granted the Grievant a third week of vacation at the beginning of 1982. From these facts, one can infer that over time, the practice has not been to tie vacation leave to the prior year’s accrual, but to grant it when certain contractual conditions of eligibility have been met.

In contract interpretation grievances like this, the Union has the burden of establishing that the Company violated the Contract, and it has not met its burden of proof. Based on the absence of language in the agreement establishing that employees would earn a certain number of hours of vacation per pay period, that the hours would be carried over from year to year, or that hours are accrued one year to be used the next, it seems most likely that the parties did not negotiate such a system. Instead, the Grievant and other employees are entitled to vacation when certain conditions have been met, such as one year of service. Their vacation is available in a graduation year at the beginning of the calendar year, even if their anniversary date is at the end of the calendar year. Past practice weighs heavily in favor of construing the CBA to include the Company’s apparent long-term vacation payout system, and I can find no compelling reason to change that practice by fiat based on the evidence in this case.

### **AWARD**

The Grievance is denied.

Dated: November 7, 2012

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Andrea Mitau Kircher  
Arbitrator