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The Common Law of the Labor Agreement: Vacations*

Roger I. Abrams†
Dennis R. Nolan‡

Professors Abrams and Nolan are currently completing a treatise on labor arbitration entitled American Labor Arbitration, to be published by West Publishing Company. The authors intend the treatise to be a restatement and critical analysis of the common law of the labor agreement, i.e. those standards used by labor arbitrators to resolve grievance disputes. The Industrial Relations Law Journal is pleased to preview the treatise by presenting the chapter on vacations and vacation pay.

PREFACE

A labor arbitrator resolves a grievance dispute by applying a body of established principles—the common law of the collective bargaining agreement—to a particular fact situation.1 An arbitral jurisprudence has evolved on a case-by-case basis over the past half-century. When labor and management bargain collectively and agree to an arbitration mechanism for dispute resolution, they legitimately can expect that their chosen neutral will apply this body of standards in interpreting their written product.2

Although the collective bargaining agreement is broad in scope and rich in complexity, each provision generates common disputes. The ways that arbitrators have resolved these disputes can be analyzed systematically. Parties typically include vacation clauses in their agreements, for example. This Article will examine the principles employed by arbitrators in resolving vacation disputes as a subset of the common

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2. Id. at 566. Similarly, the arbitrator can assume that the parties anticipated that the customary standards of arbitral adjudication should be applied. Golay & Co., 59 Lab. Arb. (BNA) 1245, 1247-48 (1972) (Volz, Arb.) (“Therefore, the question must be resolved by considering the vacation provisions in the light of the generally accepted concepts relating to vacation benefits, with which the parties must be presumed to have been familiar when they negotiated the language in question.”). Cf: Nolde Bros., Inc. v. Local 358, Bakery & Confectionery Workers Union, 430 U.S. 243, 255 (1977) (“Parties must be deemed to have been conscious of the presumption of arbitrability when they agreed to an arbitration clause.”).
law of the labor agreement. In most instances, those principles correctly measure the parties' mutual intention; in some instances, analysis of those principles suggests that alternative approaches are advisable.

I

Vacations and Vacation Pay: An Overview

Until World War II, vacations with pay were uncommon in American industry. During and after the War, wage increases were controlled by law, and management and unions bargained for paid vacations as a permissible substitute for wages. The length of a paid vacation was calculated according to a common formula; employees with one year of service were entitled to one week of vacation and those with five years of service were given two weeks of vacation. Today, provisions for paid vacation are included in almost every collective bargaining agreement and the "one-for-one; two-for-five" standard of the 1940's has been greatly expanded. Most current agreements provide for up to five weeks paid vacation for employees with substantial continuous service with the employer.

At one time, there was substantial controversy as to the purpose and intent of paid vacation clauses. Management viewed a paid vacation as a reward for long, faithful and continuous service to the company. Vacation pay was seen as "a gratuity bestowed on an employee by a benevolent employer in order that the employee may enjoy a bit of leisure and recharge his batteries before returning to the daily grind." By comparison, unions saw vacation pay as a fringe benefit, an important part of the total money package. These polar conceptions of the nature of the paid vacation were reflected in the opposing parties' arguments to arbitrators concerning the interpretation of vacation provisions.

The prevailing modern view is that a paid vacation is compensation to workers for services performed in the form of "deferred wages

5. In its survey of major collective bargaining agreements, the Bureau of National Affairs reported in 1978 that 53% of its sample contained provisions for five weeks vacation. 2 Collective Bargaining: Negotiations and Contracts (BNA) 91:1 (1978).
6. Mead Paper, 70 Lab. Arb. (BNA) 186, 189 (1978) (McIntosh, Arb.) (early concept of vacations as giving employees "a chance to rest, relax and recuperate after months of work"); Phalo Corp., 52 Lab. Arb. (BNA) 837, 839 (1968) (Murphy, Arb.) (rejecting this "old notion" as "outmoded").
VA CATION DISPUTES

earned or vested on a day to day basis.”

As Arbitrator John Hogan stated in Bachmann Uxbridge Worsted Corp., “A dollar bargained is still a dollar whether it is paid as wages for work performed or in lieu of wages during the vacation period. It is an accrued right in either case.”

Paid vacations benefit both the employees and the employer. Rested employees are more productive; employee morale is enhanced by a paid vacation. Because the length of a vacation is generally tied to the number of years of service, vacation provisions promote loyalty to the employer and reduce costly turnover.

The right to a paid vacation arises from the collective bargaining agreement. The precise terms of the vacation provision determine the employee’s entitlement. As Arbitrator Thomas Erbs stated in Schnuck’s Baking Co., “Employee rights to vacation are creatures of contract and, as such, contractual language must be examined very closely in order to determine not only the right of the employee to vacations but the restriction, if any, on how and when they can take such vacations.”

Under a typical vacation provision, employees work to earn their vacation during an accounting period or base year, and receive their paid vacation during some later period, often referred to as the vacation year. For example, a contract clause might stipulate that an employee must work a specified number of hours or weeks during a calendar year in order to receive paid vacation during the next calendar year. Work requirements act as an incentive to an employee to “stay on the job”; “vacation pay holds out a reward to . . . employees for faithful attendance through the course of the year.” In the absence of additional qualifications expressed in the agreement, an employee’s right to vacation pay vests once the contractual eligibility requirements have been met.

Contract stipulations on eligibility for vacations often require interpretation in the context of a particular dispute. The “generally un-

derstood" concept "in industrial relations that a vacation is an earned equity" will be a useful guide to interpretation. As Arbitrator Marlin Volz noted in *Golay & Co.*, one of the "generally accepted concepts relating to vacation benefits" is that once an employee has qualified for paid vacation "a forfeiture of such accrued vacation benefits must rest on clear contractual language. Any doubt is to be resolved in favor of the employee since the law abhors forfeitures."  

Vacation clauses in collective bargaining agreements give rise to complex problems of contract interpretation. Sometimes disputes arise because parties have not drafted their vacation clause with sufficient clarity and competence. Even when parties write a comprehensive vacation clause, questions arise concerning eligibility for paid vacation, proration of vacation benefits, computation of the length of vacation and the amount of vacation pay, and the scheduling of vacations.

An important threshold caveat is in order: there is an almost infinite variety of vacation plans. In this as in other areas, arbitrators must decide each case on the basis of the particular language of the contract at hand, interpreted in the light of generally understood concepts of the nature of vacation pay and the distinctive context of the parties' collective relationship. Established past practice will often be useful in determining what the parties intended by their contract reference.

## II

**Eligibility for Vacation**

Employees qualify for paid vacations by fulfilling service requirements fixed by the terms of the collective bargaining agreement. Typically, an agreement contains two types of eligibility requirements: (1) a threshold minimum service requirement and (2) a work requirement that must be fulfilled during a specified accounting period or base year.

Contracts often provide that an employee is not entitled to any

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18. Illinois Powder Mfg. Co., 26 Lab. Arb. (BNA) 37, 38 (1956) (Kadish, Arb.) (vacation clause "fails to resolve all of the important questions . . . including the one submitted").
22. *See infra* text accompanying notes 86-106.
23. *See infra* text accompanying notes 107-35.
vacation prior to serving at least a full year as an employee.\textsuperscript{25} The anniversary date of hire ordinarily is used as the measure for determining whether the minimum service qualification has been met.\textsuperscript{26} Some contracts contain a single eligibility date for new hires providing, for example, that employees with "one year or more seniority on January 1 of the vacation year will receive one weeks vacation with pay. . . ."\textsuperscript{27}

In \textit{Stackpole Carbon Co.}, Arbitrator Thomas Cooley interpreted a contract clause that required an employee to serve "three months" in order to qualify for paid vacation.\textsuperscript{28} The grievant worked the full months of March and April; she was laid off on the last work day of May, prior to the Memorial Day holiday. The arbitrator rejected the Company's argument that the minimum service clause required the grievant to report to work on the first day of the fourth month in order to qualify for vacation pay, reasoning that the parties could have stated that requirement expressly if that was their mutual intention. Recognizing the controversy as one between two "common sense, man-on-the-street" readings of the contract clause, the arbitrator ruled the grievant was entitled to vacation pay since "she completed all the work she was scheduled, or expected, to perform in [the three month] period."\textsuperscript{29}

The second common contract eligibility stipulation, base year work requirements, raises more difficult problems. Contracts customarily provide that an employee must work a certain amount of time or a percentage of available time during a specified accounting period or base year in order to qualify for a paid vacation to be taken during some later period. The contract service requirement may be expressed in terms of a certain number of work hours, work weeks, days of work, or a specified percentage of scheduled work days or shifts. For example, the contract between Ajax Rolled Ring Company and the Iron Workers, Shopmen's Local 508, provided that employees "must have worked for the Company during the year next preceding their latest anniversary date of employment a total of at least 1560 clock hours" to be eligible for vacations.\textsuperscript{30} When an agreement includes a clear statement of the amount of service required in a certain accounting period, the arbitrator's inquiry is comparatively simple. Did the employee meet the required service during the specified period of time?

\textsuperscript{28} 68 Lab. Arb. (BNA) 67 (1977).
\textsuperscript{29} \textit{Id.} at 68.
\textsuperscript{30} Ajax Rolled Ring Co., 71 Lab. Arb. (BNA) 460, 461 (1978) (Daniel, Arb.).
The arbitrator faces a more difficult task when the parties have failed to specify the accounting period for determining eligibility. The two commonly expressed accounting periods are the calendar year and the anniversary year, but how should the arbitrator rule when the parties have failed to indicate their choice? An established practice might be useful in ascertaining the parties' intention. In the absence of such evidence, some arbitrators have adopted the calendar year as an accounting period, noting that under the "prevailing industrial method of calculating vacations," the anniversary date "is used more commonly to determine whether employees have fulfilled a minimum service requirement."

In interpreting paid vacation clauses, arbitrators correctly have focused their inquiry on the terms of the parties' agreement, although, admittedly, the language the parties employed may not be crystal clear. The fact that a contract clause is "unfair" is immaterial. Vacation rights are grounded in contract, not equity. Similarly, "[i]f the language [of the contract] is clear and unambiguous, there is no choice but to apply it to the case presented, irrespective of personal views as to the wisdom of the provisions."

Parties tend to write ambiguous vacation eligibility provisions. As a general rule, arbitrators should construe contract language subject to more than one reasonable reading in a manner that avoids forfeiture or reduction of a paid vacation. In such situations, doubts as to the meaning of the contract language should be resolved in favor of the employee. "[T]he party urging a forfeiture under a contract has the burden of proving that such was the unmistakable intention of the parties. . . ."

When, if ever, may an employee be deemed to have qualified for paid vacation without actually working the minimum amount of time?

33. International Paper Co., 65 Lab. Arb. (BNA) 572, 576 (1975) (Moore, Arb.) (union's argument "primarily based on emotional appeal for a remedy in equity" is rejected.) Similarly, in Modecraft Co., 44 Lab. Arb. (BNA) 1045, 1048-49 (1965), Arbitrator Samuel Jaffee denied a claim for vacation benefits based on the "agreed specifics" in the contract, despite the fact that the grievant's illness rendered him incapable of accumulating the necessary hours of work. "Impossibility of performance" did not excuse performance.
specified in the vacation eligibility clause? Most such situations involve employees who were on strike, layoff, or leave of absence during the relevant accounting period. A well-drafted contract clause requiring a minimum amount of "work" should provide the complete answer to these questions.39

The basic purpose of vacation pay—to provide deferred wages for services previously rendered—is the touchstone for determining eligibility where employees fall short of the minimum work hours required under the contract.40 Thus arbitrators should not credit strike time towards vacation pay work eligibility. Employees do not accrue time, or perform work, while on strike.41 Similarly, employees do not satisfy work requirements for paid vacation while they are on layoff or on leave status,42 unless the contract clause so provides.43 Vacations are earned through work and not through layoff or leaves.

If an employee fails to meet the work eligibility requirement because of an extended excused absence as a result of an illness, he is not entitled to paid vacation even though he was incapable of meeting the contractual requirement.44 He has not earned his vacation.45 On the other hand, arbitrators have ruled that the paid hours spent by a union officer on grievance processing should be counted towards a vacation work requirement.46 Otherwise, the union officer would suffer a "penalty" for activities undertaken for the "mutual benefit" of both parties in the agreement.47

42. Frye Copysystems, Inc., 65 Lab. Arb. (BNA) 1249, 1250 (1975) (Yarowsky, Arb.). Some contracts do stipulate that work time lost through involuntary absences will be counted towards work eligibility requirements, and the arbitrator must follow the parties' direction. Border Queen, 35 Lab. Arb. (BNA) 560, 564 (1960) (Brown, Arb.). Likewise, if the vacation provision does not contain any work requirements, time on layoff should not reduce vacation. Peterbilt Motors Co., 66 Lab. Arb. (BNA) 160, 162 (1976) (Williams, Arb.).
44. Modecraft Co., 44 Lab. Arb. (BNA) 1045 (1965) (Jaffee, Arb.).
46. Magor Car Corp., 2 Lab. Arb. (BNA) 474 (1945) (McCoy, Arb.).
47. International Shoe Co., 15 Lab. Arb. (BNA) 139, 142 (1950) (Kelliher, Arb.).
III
ACTIVE EMPLOYEE REQUIREMENT

A recurring scenario in the arbitration of vacation disputes involves the employee who has satisfied the work eligibility requirement during the accounting period, but who is no longer on the active payroll of the company at the time of the vacation period. The employee may have quit his employment or retired; he may be on layoff or leave status; he may have been discharged for cause. Arbitrator George Cheney explained in *American Smelting & Refining Co.* that, depending on contract language, "vacation benefit rights may be absolute, or they may be contingent property rights subject to being divested on condition subsequent . . . ." Does the failure to maintain active employee status warrant a forfeiture of vacation pay?

If the parties have addressed the active status issue in their contract, the arbitrator must follow their direction. For example, if the vacation clause states that an employee must be "in the employ" of the company at a specific time or on the "active payroll" on a certain date and the contract requirement is not fulfilled by the voluntary action of the employee (for example, by a voluntary quit), the arbitrator generally should uphold management's denial of vacation pay. On the other hand, if the contract does not expressly stipulate that the employee must maintain active status as of a certain time to qualify for paid vacation, the arbitrator should not imply a requirement. A "pre-supposition of accrued pay" is appropriate.

Arbitrator David Altrock in *Duquesne Brewing Co.* followed to the letter a contract requirement that employees be "actually employed by the Employer" during the year in which the vacation is taken. Since the company's brewery closed in December, 1972, and all employees were terminated, the Arbitrator ruled that no one was "actually employed" during the 1973 vacation year. While severance pay was available to the employees, no vacation pay was due. The Arbitrator stated:

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53. See infra text accompanying notes 57-63.
“Vacations . . . are provided for employees, not former or ex-employees” under the contract.\textsuperscript{57}

There is serious question whether Arbitrator Altrock’s purely literal reading of the active employee requirement appropriately assessed the parties’ intention. An employer bargains for an active employee requirement to encourage employees to remain in their jobs after fulfilling contractual work requirements, i.e. to assure job continuity. An employee who voluntarily fails to meet the active employee requirement should be held to have forfeited his right to vacation pay; he has left his job and failed to give the company the stability in the workforce for which it bargained. However, when the employee’s failure to meet an active employee requirement is the result of management’s decision, for example, to close a facility and terminate all employees, vacation pay otherwise earned should be paid.\textsuperscript{58} As Arbitrator Adolph Koven explained in \textit{Gordon Broadcasting Co.}:

When one party to a contract prevents or hinders performance requisite under the contract for the creation or continuance of a right in favor of the other party, the party initiating the preventing or hindering act is properly liable, unless the prevention or hindrance is caused or justified by the conduct of the other party.\textsuperscript{59}

Important accrued contract benefits should not be voidable at management’s discretion, unless it is clear that the parties intended such a result.\textsuperscript{60} “What is granted by contractual arrangement may not be withdrawn unilaterally.”\textsuperscript{61} It is obvious that when management has closed a plant, it no longer has an interest in the job continuity of its workforce. The active employee stipulation is inapposite in such a situation.

This distinction between a voluntary failure to meet an active employee requirement and a management caused or controlled failure to meet such a requirement may be a useful guide to contract interpretation, assuming the employee has otherwise fulfilled stipulated work requirements. Vacation pay should be due if an employee fails to meet an active employee requirement because of involuntary separation from employment by discharge, layoff or forced retirement.\textsuperscript{62} There is

\textsuperscript{57} Id. A contrary result was reached by Arbitrator Robert Gibson where the contract also contained a provision granting earned vacation pay to employees on indefinite layoff. Continental Can Co., 76 Lab. Arb. (BNA) 1212 (1981).

\textsuperscript{58} L. Hyman Co., Inc., 13 Lab. Arb. (BNA) 800, 803 (1949) (Brecht, Arb.).

\textsuperscript{59} 38 Lab. Arb. (BNA) 1005, 1013 (1962).

\textsuperscript{60} Id. at 1012.


little reason to believe that the parties contemplated that the employer should be allowed to avoid paying accrued vacation benefits by separating the employee from his job. Management may have the contractual right to discharge for just cause, layoff for lack of work, or retire an employee at a specified age, but it would be unreasonable to conclude that the parties contemplated that in addition to separation from employment, management could withhold "banked" vacation money. 63 "Vacation should be regarded as an earned right rather than a gratuity given or withheld for punitive purposes." 64

By comparison, if the vacation provision contains an express active employee requirement and the employee quits his job or voluntarily retires, the denial of vacation pay should be upheld by the arbitrator. 65 The employee, by choice, is not employed. The employer's interest in job continuity protected by the active employee requirement is clearly implicated, and the arbitrator must follow the contract stipulation. Employees who choose to leave their posts will be held to have forfeited their accrued vacation pay.

A more difficult case is presented when the employee dies after meeting the work eligibility requirement. Should vacation pay be paid to the deceased's beneficiary, even if the employee did not meet the active employee requirement included in the vacation provision? The employee had earned the vacation pay and did not voluntarily fail to meet the active employee requirement. 66 On the other hand, the employer did not prevent the employee from fulfilling the job continuity qualification, and thus there is less reason to excuse the failure to meet the active employee requirement. "[D]eath terminates . . . the employee's . . . length of continuous service with his employer with inexorable finality." 67 Considering arguments both ways, the better view is to award vacation benefits. The deceased employee performed the work necessary to earn the vacation payment, and the employer's inter-

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63. Keene Corp., 61 Lab. Arb. (BNA) 468, 472 (1973) (Barone, Arb.) (vacation benefits "vested" and may not be "arbitrarily denied an employee"). But see, Whittet-Higgins Co., 15 Lab. Arb. (BNA) 13 (1949) (Healy, Arb.) ("active payroll" eligibility requirement applied literally to deny vacation pay to laid-off employees.)

64. Liberty Plating Co., 9 Lab. Arb. (BNA) 505, 508 (1947) (Fearing, Arb.).


66. American Meter Co. Inc., 44 Lab. Arb. (BNA) 126, 127 (1965) (Kreimer, Arb.). If the provision does not contain an active employee requirement, none should be implied and the deceased's estate should receive the earned vacation pay. Burnham Corp., 46 Lab. Arb. (BNA) 1129 (1966) (Feinberg, Arb.).

est in job continuity certainly can only extend as long as the employee is able to work. The accrued benefit should be paid.

IV
PRORATION OF VACATION BENEFITS

Arbitrators are sometimes asked to decide whether an employee who has not fully satisfied the work eligibility requirements should receive a prorated or proportionate vacation benefit. Some collective bargaining agreements expressly provide for proration, and the arbitrator must follow the contract. In the absence of such an express provision, arbitrators should not imply a proration of vacation benefits unless the parties’ past practice would support such a determination.

By comparison, arbitrators have awarded prorated vacation pay in plant closure situations in the absence of express contract language to the contrary. Vacation pay is earned and deferred compensation. While a company may retain the managerial prerogative to shut down, it is obligated to pay accrued vacation pay amounts at the time of the closure.

V
LENGTH OF VACATION

Almost universally, the length of an employee’s vacation and the amount of vacation pay due are determined by the number of years of service for the employer. Contract clauses typically provide for step increases in the length of paid vacation based on the number of years of continuous service with the company. While an employee’s anniversary date of hire is generally used to determine the number of years

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69. Fireman-Webster Inc., 43 Lab. Arb. (BNA) 303, 305 (undated) (Dworkin, Arb.).
of service, some contracts include a single unit-wide "milestone date" for the determination of the length of continuous service.

One issue commonly raised in arbitration concerning the "continuous service" reference in contract vacation clauses is whether the employer can deduct from the employee's years of service periods of time the employee was not at work. For example, can periods of layoff, extended illness absences or time lost due to strikes be deducted? While this problem is analogous to the work eligibility requirement issue discussed above, the "continuous service" reference and the work eligibility requirement serve different purposes; thus different treatment of employee non-work periods may be appropriate.

A work eligibility requirement is included in a vacation clause to insure that an employee has actually worked for his vacation and thus has earned vacation pay as a form of deferred wages. By comparison, management will bargain for a "continuous service" reference to encourage long-term employee loyalty and discourage turnover. The fact that years earlier an employee missed work for a considerable period of time because of illness or layoff should not be considered in counting the number of years of employee service measured by the employee's anniversary date of hire. The employee has remained "loyal" and has not left the company's service. Similarly, an employer should not be allowed to deduct time lost while on strike in calculating the length of an employee's continuous service. Arbitrator Sidney Cahn has noted "the generally accepted principle in labor relations that absent any contractual provision to the contrary . . . an employee is considered 'employed' for vacation purposes for the entire period of his employment in order to determine the length of paid vacation to which he is entitled." In all instances, of course, a clear contract stipulation that certain periods of absence should or should not be counted towards continuous service would control. In the absence of an unambiguous contract reference, past practice may prove useful to the arbitrator in resolving disputes of this nature.

77. Acro Switch Co., 14 Lab. Arb. (BNA) 256, 258 (1949) (Cornsweet, Arb.).
78. See supra text accompanying notes 39-47.
82. Hempfield Area School District, 58 Lab. Arb. (BNA) 525, 528 (1972) (Cahn, Arb.).
84. National Cash Register Co., 64 Lab. Arb. (BNA) 103 (1975) (Brown, Arb.).
A related issue involves the obligation of a successor employer to count an employee's years of service with a predecessor company in determining the length of vacation. If the successor employer has expressly agreed to recognize this prior service, the arbitrator will enforce the voluntary undertaking. However, in the absence of proof that the parties intended their contract reference to "years of service" to include service for an employer other than the contracting party, the arbitrator should not give the provision such a reading.

VI
COMPUTATION OF VACATION PAY

A particularly troubling issue faced by arbitrators in resolving vacation disputes is determining the rate at which an employee should receive vacation pay. If the employee worked at different rates of pay during the course of the year, should vacation pay be set at some average rate of pay? At the current wage rate? Under a contract clause that based vacation pay on the rate of the employee's "regular job," Arbitrator Charles Reynard ruled that an employee permanently transferred to a lower-rated job one week before his vacation appropriately was paid vacation pay at the lower rate. On the other hand, when an employee was temporarily transferred to a lower paying job, Arbitrator Whitley McCoy held that he should receive vacation pay at the rate he received a majority of his time during the year.

What rate of pay should be used when the employee has been working on an incentive pay or piece-rate basis? When the method of calculation of vacation pay is specified in the collective bargaining agreement, the arbitrator must follow the contract direction. Regrettably, parties do not always specify how vacation pay is to be calculated. Prior practice often aids the arbitrator in calculating vacation pay when presented with an ambiguous contract reference. In the absence of express contract guidance or definitive practice, the arbitrator should read the vacation pay clause to provide for continuation of

89. Milwaukee Press & Machine Co., 65 Lab. Arb. (BNA) 549, 553 (1975) (Sinicropi, Arb.) ("While equity and the common practice may be different than what has occurred here, the contract and the negotiations between the parties dictate another result.")
the employee's current rate of compensation through the vacation period.\textsuperscript{91}

When the amount of vacation pay is expressed as a percentage of the "earnings" of an employee over a certain period of time, overtime pay, holiday pay\textsuperscript{92} and vacation pay\textsuperscript{93} earned in that period should be included in the calculation. Incentive bonuses should also be included.\textsuperscript{94}

The almost consistent trend of arbitral authority is that all monetary benefits paid to an employee pursuant to the provisions of a collective bargaining agreement and incidental to his employment relationship are to be treated as earnings and included in the employee's earnings for the purpose of vacation pay. Any exceptions from the generally accepted meaning of the phrase "straight time earnings" should be expressly set forth by specific contract language.\textsuperscript{95}

Arbitrator Morrison Handsaker, in \textit{Carbon County, Pennsylvania}, interpreted the contract phrase "regular straight-time hourly rate" to require the inclusion of a shift differential in the computation of vacation pay for second- and third-shift employees, reasoning that the contract term was intended to set vacation pay at the rate the workers normally received for their regular work.\textsuperscript{96} By comparison, Arbitrator Murray Rohman in \textit{Nalco Chemical Co.} excluded shift differential from the computation of vacation pay,\textsuperscript{97} where there was a long-standing and consistent prior practice to that effect.

Interpreting a contract provision that expressly stated that funeral pay should not be included in the calculation of vacation pay, Arbitrator Clair Duff in \textit{American Window Glass Co.} ruled that vacation pay

\textsuperscript{91} Prince Kuhio Resort Hotel, 54 Lab. Arb. (BNA) 689, 691 (1970) (Tsukiyama, Arb.). ("better reasoned" approach "in favor of pay rates in effect when the vacation is taken ... upon the theory that vacation pay is essentially compensation to the employee for earnings lost during the period when his ... vacation is taken."); Olin-Mathieson Chemical Corp., 24 Lab. Arb. (BNA) 116, 117-19 (1955) (Reynard, Arb.). \textit{Contra} Magor Car Corp., 11 Lab. Arb. (BNA) 556 (1948) (Trotta, Arb.).

\textsuperscript{92} Master Weavers Institute, 11 Lab. Arb. (BNA) 745 (1948) (Livingston, Arb.). \textit{Cf.} Freuhauf Corp., 50 Lab. Arb. (BNA) 545 (1968) (Strong, Arb.) (contract specified inclusion of pay for hours worked; pay for unworked holidays not included).


\textsuperscript{94} Schneider Metal Mfg. Co., 4 Lab. Arb. (BNA) 100 (1946) (Updegraft, Arb.). By comparison, Arbitrator Harry Dworkin excluded from the vacation pay calculation amounts tendered by the employer to a tax-free pension plan, reasoning that such payments were "not part of the wage structure." \textit{Seven-Up Bottling Co.}, 37 Lab. Arb. (BNA) 790, 793 (1961).


from the previous year should be included in the present year's vacation pay calculation. He applied the contract interpretation principle *expressio unius est exclusio alterius*.

In contract interpretation this principle means that when the parties have expressly included a clear provision in regard to a specific subject in one part of the contract, and then have omitted any similar provision in another part of the contract, they have, by including it in one part and failing to mention it in the other, effectively excluded its application from that other portion. Funeral pay has been specifically excluded from gross earnings in computing vacation pay and no similar provision excludes vacation pay from the previous year.

The question of the applicable rate of vacation pay also arises when an employee takes a vacation after the effective date of a contract increase in wage rates. In such cases, management customarily argues that since vacation pay is deferred wages, the correct rate of pay is the one in existence when the employee worked to meet the contract's eligibility requirements, i.e. the rate prior to the effective date of the wage increase. Some arbitrators reject this argument, reasoning that the method of calculation must be consistent with the "basic purpose of vacation pay which is to compensate employees for loss of pay while on vacation, so that they might receive while not working the same wages they would have received had they worked." Other arbitrators apply the rule that "when a provision for vacation pay is changed, it will not be given a retroactive effect unless the agreement expressly so provides . . . ." Under this latter approach, once vacation pay vests, it cannot be taken away or increased in amount, unless the parties have clearly indicated that this is their intention.

Arbitrator Ted Tsukiyama, in *Prince Kuhio Resort Hotel*, suggested an alternative approach: In the absence of contract direction, vacation pay should be calculated at the rate received at the time the vacation is earned if employees retain the right to control when that vacation is taken. Thus, employees allowed to self-schedule vacations should not be able to take advantage of increased rates of pay by delaying their vacations until the higher rates apply. On the other

99. Id. at 107-08.
hand, "where the Company reserves the prerogative of ultimate determination of when the employee may take his vacation, [vacation should be paid] at the later pay rate in effect when the vacation is taken." \(^{104}\)

Sometimes a question arises as to when an employee should receive his vacation pay. Should the vacation pay be tendered on the last payday prior to the vacation or at some other time? "Traditionally, the vacation allowance or vacation pay has been usually payable at the time the vacation is taken." \(^{105}\) Express contract language stipulating the time of the vacation payment will be controlling. \(^{106}\) Past practice may prove useful in resolving these disputes when contract language is inconclusive. \(^{107}\)

### VII

**Scheduling of Vacations**

Perhaps as important as the right to a paid vacation is the prerogative to schedule that vacation. To the employee, a vacation may be incalculably more valuable if it is available when one may indulge his heart's desire concerning those relaxations and pleasures which sometimes seem to be among the things that make life worth living, than if it must be lost whiled away . . . puttering around the house. \(^{108}\)

To management, the right to schedule vacations may be essential to insure productive efficiency and orderly operations. Arbitrators have generally held that management retains the right to schedule employee vacations in the absence of express contract language or established past practice limiting this managerial prerogative. \(^{109}\) However, management may be held to have abused its discretion if employees are treated unfairly or in a discriminatory manner. \(^{110}\) Arbitrators may require management to give employees reasonable advance notice as to the scheduling of vacations. \(^{111}\)

A common vacation clause provides for employee choice in the

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104. *Id.*
scheduling of vacations with the limitation that management may refuse a requested vacation time because of production or operational needs.\textsuperscript{112} "This type of provision is widely referred to throughout industry . . . as 'a veto' . . . by management of vacation schedule preferences."\textsuperscript{113} Clauses protecting employee choice, but reserving to management the right to schedule vacations to meet operational considerations, might support a "one man, one week" rule,\textsuperscript{114} i.e. a management rule prohibiting more than one employee in a department taking vacation at one time. Similarly, the scheduling of vacations to reduce the "summer bulge" in vacations,\textsuperscript{115} or to avoid layoffs,\textsuperscript{116} or to meet demand during a "peak production period"\textsuperscript{117} would be allowed, as long as management proves a business necessity.\textsuperscript{118} "[T]here must be a plausible showing that there was some particular requirement of operations . . . which rendered it not feasible to grant the vacations at the time requested."\textsuperscript{119} As Arbitrator John Sembower stated in \textit{Vanadium Corp. of America}:

There are all kinds of degrees of production necessity, just as there are all kinds of degrees of desire which contribute to making a vacation the refreshing experience that it is intended to be. But it does seem that the kind of production exigency envisaged by these parties is more than a mere speculation, or a preference, or even a convenience.\textsuperscript{120}


\textsuperscript{114} United States Steel Corp., 46 Lab. Arb. (BNA) 887, 890 (1966) (Gilden, Arb.). \textit{Compare} Carling Brewing Co., 46 Lab. Arb. (BNA) 715, 717 (1966) (Kates, Arb.) (flat "one man, one week" rule rejected; however, individual preferences would give way to the employer's good faith judgment as to manpower needs to preserve orderly operations of the plant).

\textsuperscript{115} Laclede Steel Co., 54 Lab. Arb. (BNA) 506, 506-08 (1970) (Kelliher, Arb.).

\textsuperscript{116} Ford Motor Co., 3 Lab. Arb. (BNA) 826, 828 (1945) (Shulman, Arb.).

\textsuperscript{117} Schnuck's Baking Co., Inc., 73 Lab. Arb. (BNA) 813, 816 (1979) (Erbs, Arb.) (bakery could prohibit employees from taking vacations during holiday weeks because of high demand for products); 220 Television, Inc., 58 Lab. Arb. (BNA) 1090, 1093 (1972) (Kesselman, Arb.) (vacations scheduled denied on basis of need to staff production of two telethons); Continental Can Co., 35 Lab. Arb. (BNA) 836, 840 (1960) (Miller, Arb.).


\textsuperscript{119} Alan Wood Steel Co., 36 Lab. Arb. (BNA) 488, 490 (1961) (Gill, Arb.) (some arbitrators have required a stronger showing of management's business need. \textit{United States Steel Corp.}, 59 Lab. Arb. (BNA) 268, 270 (1972) (Friedman, Arb.) ("persuasive explanation for a lowered quota" required); Reynolds Metal Co., 44 Lab. Arb. (BNA) 475, 478 (1965) (Tonque, Arb.) ("convincing evidence" of impact on "operating requirements" must be shown).

\textsuperscript{120} 38 Lab. Arb. (BNA) 389, 394 (1962).
Some contracts require management to give "consideration"\textsuperscript{121} or "due regard"\textsuperscript{122} to employee preferences, or to "endeavor" to schedule vacations at times requested by employees "insofar as practicable."\textsuperscript{123} Under these clauses, management need not grant employee preferences when it has a business reason for denying the requests. If the vacation clause gives management the right to "assign vacation periods in accordance with its sole judgment," the arbitrator should uphold scheduling decisions made reasonably and in "good faith,"\textsuperscript{124} i.e., "without discriminating against any employee unfairly."\textsuperscript{125}

A recurring issue involves management's right to require all employees to take vacation during a specified period, for example, during a planned summer shutdown. Scheduling vacations during a shutdown is deemed one of the inherent "prerogatives which management nearly always exercises in its desire and attempt to operate an efficient and profitable business."\textsuperscript{126} Management should be held to retain the right to schedule vacations in this way unless the exercise of the prerogative is inconsistent with the intent of the parties as expressed in their agreement.\textsuperscript{127} When the contract contains an express clause protecting employee choice in the scheduling of vacations, management may not compel employees to take vacation during a certain limited period.\textsuperscript{128} The employer does not have the right to schedule a shutdown simply "to get vacations out of the way," when the provision preserves employee choice in vacation scheduling.\textsuperscript{129}

In \textit{Sherwin-Williams Co.}, Arbitrator Peter Kelliher interpreted a vacation clause which provided that "vacations as far as possible will be granted at the time most desired by the employee," but also reserved to management "the right to allot the vacation period . . . to insure the orderly operation of the plant . . . ."\textsuperscript{130} Holding that the employer could not require employees to take vacations during a plant shutdown,

\textsuperscript{121} Envirotech Corp., 73 Lab. Arb. (BNA) 48, 50 (1979) (Nutt, Arb.).
\textsuperscript{122} Wheeling Wholesale Grocery Co., 59 Lab. Arb. (BNA) 686, 688 (1972) (Bernstein, Arb.).
\textsuperscript{123} Vulcan Materials Co., 73 Lab. Arb. (BNA) 687, 690 (1979) (Taylor, Arb.).
\textsuperscript{124} United Telephone Co., 64 Lab. Arb. (BNA) 906, 911 (1975) (Hedges, Arb.).
\textsuperscript{125} Federal Bearings Co., 38 Lab. Arb. (BNA) 1244, 1247 (1962) (Berkowitz, Arb.).
\textsuperscript{127} Aro, Inc., 30 Lab. Arb. (BNA) 225, 229 (1958) (Livengood, Arb.).
\textsuperscript{129} Vanadium Corp. of America, 38 Lab. Arb. (BNA) 389, 394 (1962) (Sembower, Arb.). \textit{Cf.} South Carolina Indus., Inc., 65 Lab. Arb. (BNA) 745, 748 (1975) (Williams, Arb.) (company could not require employees to take vacations during shutdown to prevent their absence from being charged to its unemployment compensation experience rating).
\textsuperscript{130} 18 Lab. Arb. (BNA) 934 (1952).
the Arbitrator reasoned that "the parties must be presumed to know the
general wording necessary to express an intent that the Company has
the unilateral right to shut down the plant for vacation purposes."\textsuperscript{131} Here the parties have employed language "of individual selection by
the employee subject only to the Company's veto if it believes that his
absence will affect the orderly operation of the plant during the period
requested."\textsuperscript{132} Since the parties stipulated that the grievant's absence
during his requested vacation period would not have impacted on or-
derly operation, the grievance was granted.\textsuperscript{133}

Umpire Harry Shulman, in his much-cited decision in \textit{Ford Motor
Co.}, ruled that employees were entitled to refuse to take their vacations
during a period of indefinite layoff.\textsuperscript{134} He reasoned that a vacation
during an indefinite and extended layoff was not a vacation at all:

A vacation is a period of rest between periods of work. A layoff is a
period of anxiety and hardship between periods of work. The tremen-
dous difference lies in the assurance of the vacationer that he will re-
turn to work at the end of his vacation and the equal assurance of the
employee on layoff that he does not know when he will return to work.
The basic difference, with its financial, emotional, and psychological
implications, is not obliterated by a form of words or by the receipt of
income for a part of the indefinite period of layoff.\textsuperscript{135}

Since the collective agreement provided for a "vacation," the Umpire
held that employees could elect to wait until after their recall to work
before taking their vacations.\textsuperscript{136}

\section*{VIII
CONCLUSION}

Vacation disputes challenge the labor arbitrator to illuminate the
often shadowy intent the parties expressed in the language of their
agreement in order to resolve their pending disputes. Over the years,
arbitrators have developed the body of principles to be used in the pro-
cess of private adjudication of vacation disputes.

Adjudicating vacation disputes is not a mechanical process; there
is much room for arbitral judgment of intent and expectation. Un-
derstanding the nature of vacation pay as earned and deferred compensa-
tion, the arbitrator will read the parties' contract so as to protect both
accrued rights and expressed qualifications on those rights.

By applying the body of established vacation principles, the arbi-

\begin{small}
\textsuperscript{131} \textit{Id.} at 935.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} 3 Lab. Arb. (BNA) 829 (1946).
\textsuperscript{135} \textit{Id.} at 831.
\textsuperscript{136} \textit{Id.}
\end{small}
trator serves the needs of both management and labor. Collective nego-
tiation is not an error-free process, and, even when the parties
stipulate qualifications with precision, they contemplate that individual
cases arising under their agreement will require arbitral interpretation
and application of their contractual mandate. Their chosen neutral
will continue their collective bargaining process by applying the es-
tablished standards in resolving disputes concerning vacations and va-
cation pay.

137. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581
(1960).