PARTIES TO DISPUTE) TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION
) THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

CONTENTS

QUESTIONS AT ISSUE

From the parties' arguments (Carrier Submission at 5; Organization Submission at 1):

Carrier's Question:

Given that the Family And Medical Leave Act ("FMLA") expressly grants employers the right to require substitution of accrued vacation for unpaid FMLA leave, did BNSF violate the National Vacation Agreement ("NVA") when it amended its FMLA policy to require that employees who have exhausted available paid sick leave substitute paid vacation leave for intermittent FMLA leaves?

Organization's Questions:

1. Does BNSF's proposed policy, requiring employees eligible for sick leave to exhaust scheduled vacation leave while taking intermittent FMLA leave, violate the National Vacation Agreement?

2. If so, does the FMLA permit the Carrier to abrogate the terms of collectively bargaining vacation and leave agreements?

3. If the answer to Question #1 is "yes", and the answer to Question #2 is "no", should Carrier be required to reinstate the vacations of any employees forced to advance scheduled vacation to cover FMLA absences; or, if the Award is rendered beyond the scheduled dates of the advanced vacation, shall Carrier be required to pay the affected employees at the overtime rate for the missed vacation?

OPINION OF BOARD

A. Facts

By letter dated October 5, 2001, the Carrier notified all BNSF General Chairmen that, effective

January 1, 2002, the Carrier was going to modify its FMLA policy to provide that it would require substitution of paid vacation for intermittent FMLA medical leaves for those employees who are entitled to paid sick leave. Carrier Exh. 3. The Carrier further advised the General Chairmen that sick leave and other available paid leave days would be exhausted before any vacation days. *Id.*[1]

By letter dated November 8, 2001, the Organization objected stating that the Carrier's announced modification violated the NVA as well as the FMLA.[2]

The parties were unable to resolve the dispute. This proceeding followed.

B. Relevant Language

FAMILY AND MEDICAL LEAVE ACT OF 1993, 29 USC § 2601, etc.

* * *

§ 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 work-weeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter

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[1] In pertinent part, the Carrier specifically advised the General Chairmen (Carrier Exh. 3):

> ... [F]or now BNSF has only modified its policy with respect to the use of paid vacation in cases of intermittent medical leaves and only for employees who are entitled to paid sick leave. The company is not now requiring substitution of vacation with other FMLA leaves. Further, BNSF has structured the new policy so that sick leave and other available paid leave days would be exhausted before any vacations days. Finally, if a particular employee elects intermittent FMLA leave so frequently that vacation days are affected, the policy gives the employee some choice in determining which vacation days to substitute for the intermittent FMLA leave. ....

According to the Carrier, this modification applied only to employees who are entitled to paid sick leave such as management employees, dispatchers and clerical employees represented by the Organization. Carrier Submission at 3. Employees who do not have paid sick leave — *i.e.*, employees represented by the BLE, UTU, BMWE, IBEW, SMWIA and BRS — are not required by the Carrier to substitute paid vacation for intermittent FMLA leave. Carrier Submission at 3, note 8.

[footnote continued]

[continuation of footnote]

The scope of this dispute is therefore limited to whether the Carrier can require employees who have paid sick leave benefits and who have exhausted "... sick leave and other available paid leave days ..." to substitute accrued vacation for unpaid *intermittent* FMLA leaves. Carrier Exh. 3. We express no opinion on whether the Carrier can do so for non-intermittent FMLA leaves or for other groups of employees. Those questions are not before us.

[2] The Organization's objection was made on behalf of the TCU and BRC General Chairmen. Carrier Exh. 5.

with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

* * *

(d) Relationship to paid leave

* * *

(2) Substitution of paid leave

(A) In general

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition

An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) of this section for any part of the 12-week period of such leave under such subsection, except that nothing in this subchapter shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

* * *

§ 2652. Effect on existing employment benefits

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

* * *

NATIONAL VACATION AGREEMENT OF DECEMBER 17, 1941

* * *

4. (a) Vacations may be taken from January 1st to December 31st and due regard consistent with requirements of service shall be given to the desires and preferences of the employees in seniority order when fixing the dates for their vacations.

The local committee of each organization signatory hereto and the representatives of the Carrier will cooperate in assigning vacation dates.

* * *

5. Each employee who is entitled to vacation shall take same at the time assigned, and, while it is intended that the vacation date designated will be adhered to so far as practicable, the management shall have the right to defer same provided the employee so affected is given as much advance notice as possible; not less than ten (10) days' notice shall be given except when emergency conditions prevent. If it becomes necessary to advance the

> designated date, at least thirty (30) days notice will be given affected employee.
>
> If a carrier finds that it cannot release an employee for a vacation during the calendar year because of the requirements of the service, then such employee shall be paid in lieu of the vacation the allowance hereinafter provided.
>
> . . .

C. The Burden

There are two competing provisions at work in this case. The contractual provisions of the NVA and the statutory provisions of the FMLA. The parties agreed that the Organization would bear the burden on the contractual question under the NVA and the Carrier would bear the burden on the statutory question under the FMLA.

In simple terms, both parties easily carry their respective burdens. Because the NVA entitles employees to vacations, the Organization has shown as a matter of contract that the Carrier cannot take away those contractually earned vacation entitlements by substituting earned vacation for intermittent FMLA leaves. On the other hand, because § 2612(d)(2) of the FMLA permits the Carrier "... to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA, the Carrier has shown that as a matter of statute it can designate earned vacation for intermittent FMLA leaves.

That kind of analysis which renders opposite conclusions obviously does not get us very far. Because of the long existing provisions of the NVA and the almost cataclysmic impact the FMLA has had on employer - employee - union relationships, that kind of analysis really helps no one. The real question here is how the FMLA blends into collectively bargained contractual relationships?

In the end, whether the parties designate their arguments as contractual or statutory and assign burdens to those arguments, this case must really be analyzed as a contract interpretation dispute. Stripped to its essence, the Organization is protesting a violation of the NVA and is arguing that in this case the FMLA does not prevail over the provisions of the NVA. Therefore, no matter how the burdens are characterized in terms of contractual or statutory and which party is assigned to which burden, ultimately, "[t]he burden in this case is on the Organization to demonstrate a violation of the Agreement." *Third Division Award 34207.* In the end, the Organization

will have to demonstrate that its interpretation must prevail.

Another observation is in order. Typically, arbitration proceedings focus upon contractual concerns arising under various agreements between carriers and organizations. Arbitrations do not usually address statutory matters, but leave those statutory questions to governing administrative agencies or the courts.[3] Thus, our traditional function as an arbitration board is to only apply the terms of the parties' negotiated language.[4] However, because of the nature of this dispute, the parties agree that this Board must consider the statutory provisions of the FMLA along with the contractual provisions of the NVA. Given that the parties have incorporated the FMLA issue into this case, our task is to read the NVA and FMLA together. Stated, differently, in deciding this case we shall view the NVA as incorporating the FMLA. Given that the Organization relies upon a contract and the Carrier upon a statute, there is no other realistic way to approach and analyze this dispute.[5]

Again, because the Organization claims that the Carrier's actions violated the NVA, the Organization must bear the ultimate burden to show that its interpretation must prevail.

D. The Showings

1. Does Clear Contract Language Resolve The Dispute?

"The initial question in any contract interpretation dispute is whether clear contract language ex-

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3 "... [T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land .... [while] the resolution of statutory or constitutional issues is a primary responsibility of courts ...." *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36, 57 (1974)

4 "Where the collective-bargaining agreement conflicts with ... [statutory provisions], the arbitrator must follow the agreement ...." *Gardner-Denver, supra*, 415 U.S. at 57.

5 *Compare Third Division Award 35979* where, with the neutral member of this Board sitting as the neutral in that case, it was held that:

> ... close review of the Organization's arguments shows that the real basis for its position concerning Claimant's entitlements is the assertion that the Carrier's actions violated the provisions of the FMLA. Therefore, this is not a dispute under the Agreement. Under the limited circumstances of this case, it is not this Board's function to determine the nuances of the FMLA. That job falls to the Department of Labor and the courts. We therefore lack jurisdiction to consider this dispute. The claim shall be dismissed.

Because the nature of the dispute and the agreement of the parties that the FMLA must be considered along with the NVA, Award 35979 does not govern this matter.

ists to resolve the matter. Because the burden is on the Organization, the Organization is therefore obligated to demonstrate clear language to support its claim ...." *Award 34207, supra.*

Clear language does not support the Organization's position. For the sake of discussion, in this part of the analysis we will assume that the Organization's interpretation of the NVA supports its position — *i.e.*, that under §§ 4 and 5 of the NVA, employees are entitled to take assigned vacations which are established based upon seniority and the expressed preferences of employees. However, § 2612(d)(2) of the FMLA states that "... an employer may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA. That language supports the Carrier's position.

"Where language yields conflicting but plausible interpretations, the language is ambiguous." *Award 34207, supra.* The point here is that the Organization's burden in this part of the analysis is to show that clear language supports its position. Given the language found in § 2612(d)(2) of the FMLA which supports the Carrier's position, the Organization cannot meet that initial burden.

2. The Rules Of Contract Construction

Because the language is ambiguous, we can turn to the rules of contract construction to attempt to ascertain the meaning of that language.[6]

The relevant rules of contract construction show the following:

First, a fundamental rule of contract construction is that interpretations which render language meaningless should be avoided. Language should be interpreted to give meaning to all clauses.[7] Our goal here, then, is to read the NVA

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[6] Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 470 ("If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators.").

[7] *How Arbitration Works, supra* at 493 ("If an arbitrator finds that alternative interpretations of a clause are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless or ineffective, he will be inclined to use the interpretation which would give effect to all provisions." ... "It is axiomatic in contract construction that an interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.'").

and the FMLA in a way that does not render provisions of either meaningless.

If the Organization's interpretation that the Carrier cannot require that employees who have exhausted available paid sick leave and other leave substitute paid vacation leave for intermittent FMLA leaves, then § 2612(d)(2) of the FMLA which states that "... an employer may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA becomes meaningless. However, if the Carrier's interpretation that it can require that employees who have exhausted available paid sick leave and other leave substitute paid vacation leave for intermittent FMLA leaves is accepted, then employees can have their vacations as provided in the NVA, but only up to the point that there have been no intermittent FMLA leave offsets. The Carrier's interpretation, while perhaps limiting employee rights under the NVA, still gives the NVA language meaning. The Organization's interpretation essentially ignores the provisions of § 2612(d)(2) of the FMLA which states that "... an employer may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA. This rule of contract construction therefore does not favor the Organization's position. The point here is to find an interpretation which does the least damage to the two provisions. That interpretation is the Carrier's view of how the language should be read.[8]

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8 The Secretary of Labor's implementing regulations cited by the Organization (Organization Exh. 12) yield the result advanced by the Carrier:

> * * *
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> ... An employee may elect, or an employer may require the employee, to substitute any of the employee's accrued paid vacation leave ... These substitution provisions are intended to allow for the specified paid leaves that have accrued but have not yet been taken by an employee to be substituted for the unpaid leave required under FMLA ... [I]f an employee does not elect to substitute appropriate paid leave when requesting FMLA leave, the employer has the right to require that the employee do so. ... If the employee does not initially request substitution of appropriate paid leave, the employer retains the right to require it. ... At the same time, in the absence of other limiting factors (such as a State law or an applicable collective bargaining agreement), where an employee does not elect substitution of appropriate paid leave, the employee must nevertheless accept the employer's decision to require it, even where the employee would desire a different result. ...

The Organization's interpretation would similarly render these provisions meaningless.

Second, another fundamental rule of construction is that specific language governs general language.[9] Here, the provisions of § 2612(d)(2) of the FMLA that "... an employer may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA is *very* specific on the issue in this case concerning the Carrier's assertion that it can require that employees who have exhausted available paid sick leave and other leave substitute paid vacation leave for intermittent FMLA leaves. The provisions of the NVA governing the rights of employees to have vacations is more general. Under this rule of contract construction, the specific provisions of § 2612(d)(2) of the FMLA govern and the Organization's position is not favored.

Third, from an interpretation standpoint, § 2652 of the FMLA relied upon by the Organization (Organization Submission at 13-14) does not require a different result. That section provides that "[n]othing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement ... that provides greater family or medical leave rights to employees than the rights established under this Act ...." Simply put, there is nothing in the cited sections of the NVA relied upon by the Organization "... that provides greater *family or medical leave* rights to employees ...." [emphasis added]. The NVA deals with employees' *vacation* entitlements — not *FMLA*-type entitlements.

The relevant regulations for § 2652 yield the same result. FMLA Regulation 29 CFR § 825.700 provides, in pertinent part [emphasis added]:

> **Subpart G — How Do Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employee Rights Under FMLA?**
>
> **§ 825.700 What if an employer provides more generous benefits than required by FMLA?**
>
> (a) An employer must observe any employment benefit program or plan that provides greater *family or medical leave rights* to employees than the rights established by the FMLA. ...

But again, the NVA does not address "family or medical leave rights". And, if Congress intended § 2652 to apply to "vacation rights"

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[9] *How Arbitration Works, supra* at 498 ("Where two contract clauses bear on the same subject, the more specific should be given precedence.").

instead of "family or medical leave rights", it could have easily and specifically said so just as it referred to "vacation leave" in § 2612(d)(2). Congress certainly knew the difference between "vacation leave" and "family leave". In § 2612(d)(2), there is specific reference to "vacation leave" *and* "family leave". The absence of a reference to "vacation leave" entitlements in § 2652 is eloquent silence heavily weighing against the Organization's position.

Fourth, another rule of contract construction comes into play here. One of the fundamental rules of contract construction is that to express one thing is to exclude another.[10] In permitting employers to substitute paid leaves for FMLA leave, § 2612(d)(2) specifically makes reference to "... vacation leave ...." However, again, in prohibiting the diminishing of existing leave rights under collective bargaining agreements, there is no mention of "vacation leave" in § 2652. The only reference in § 2652 is to "greater family or medical leave rights". Consistent with this rule of construction, because of the specific reference in § 2612(d)(2) to "vacation leave" and "family leave" and the specific reference in § 2652 to "family or medical leave rights" and the absence of a reference to "vacation" leave, it is fair to interpret § 2652 as excluding "vacation leave" from that section. Therefore, § 2652 must be read as it literally states — the prohibition is against diminishing existing "family or medical leave rights" only — not "vacation leave". The construction sought by the Organization that § 2652 prohibits the Carrier from substituting accrued vacation leave for intermittent FMLA leaves also runs afoul of this rule of contract construction.

Fifth, past practice is also an effective tool for ascertaining the meaning of ambiguous language.[11] The Carrier asserts (Carrier Submission at 4) that other railroads that are covered by the NVA, including the Carrier's predecessor,

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[10] *How Arbitration Works*, *supra* at 497: Frequently arbitrators apply the principle that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. To expressly state certain exceptions indicates that there are no other exceptions. To expressly include some guarantees in an agreement is to exclude other guarantees.

[11] "One of the strongest tools for interpreting ambiguous contract language is past practice." *Third Division Award 34207*, *supra*.

the Santa Fe, required similar, if not more expansive, substitution of vacation for FMLA leaves. However, while the Santa Fe may have required such substitution, according to the Carrier, the Burlington Northern did not and, upon the merger of the two in December, 1996, the BNSF — the Carrier herein — "... did not require substitution of paid vacation leaves". *Id.* at 7-8. Therefore, from December, 1996 until the Organization was notified in October, 2001, the practice of the Carrier was not consistent with its position in this case.

"To be a past practice, the conditions in dispute must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." *Third Division Award 34207, supra.* Past practice does not support the Carrier's position. If anything, given the passage of time from the merger of the BN and the Santa Fe, the past practice has been consistent with the *Organization's* position.[12]

So, on the question of whether the Carrier can require that employees who have exhausted available paid sick leave and other leave substitute paid vacation leave for intermittent FMLA leaves, we are left with the following: (1) reading the NVA and the FMLA together yields ambiguous language; (2) because of the ambiguity, we can turn to the rules of construction for ascertaining the meaning of the ambiguous language; (3) the Organization's interpretation that the Carrier cannot so designate paid vacation for intermittent FMLA leave renders §

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[12] Similarly, bargaining history is an often used tool for determining the meaning of ambiguous language. *How Arbitration Works, supra* at 501 ("Precontract negotiations frequently provide a valuable *[footnote continued]*

[continuation of footnote]
aid in the interpretation of ambiguous provisions"). However, in this case, there is no evidence of the parties' discussions during any negotiations which would clarify the relationship between the NVA and the FMLA. Indeed, citing the statement of S. J. King (Carrier Submission at 8-9; Carrier Exh. 12), the Carrier states that "[a]t no time did BNSF or its predecessors bargain with TCU over the adoption of any FMLA policy or the changes or modifications thereto." Bargaining history is of no help in this case.

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. ___ (No. 00-6029) (March 19, 2002) cited by the Carrier is really not on point. In *Ragsdale*, the Supreme Court determined that a portion of a FMLA regulation (29 CFR § 825.700) which stated that "[i]f an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement" was invalid as "... incompatible with the FMLA's comprehensive remedial mechanism." *Ragsdale*, slip op. at 6. That is not the dispute in this case.

2612(d)(2) of the FMLA which states that "... an employer may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA meaningless whereas the Carrier's interpretation gives both the NVA and the FMLA meaning: (4) under the rule of contract construction that specific language governs general language, the specific provisions of § 2612(d)(2) which allows the Carrier to make the offsets it seeks governs; (5) under the rule of contract construction that to express one thing is to exclude another, because of the specific reference in § 2612(d)(2) to "vacation leave" and the specific reference in § 2652 to "family or medical leave rights", it is fair to interpret § 2652 as excluding "vacation leave" from that section; and (6) past practice since the merger of the BN and Santa Fe is that no such offsets were made by the Carrier.

Thus, not all of the factors favor one party. The rules of construction are not rigid but are merely aids in ascertaining the meaning of ambiguous language. The result is not determined by a tally on a scorecard, but is determined on the basis of what constitutes "the better result".[13] In this case, on balance, the fact that the Organization's interpretation would effectively nullify § 2612(d)(2) of the FMLA which states that "... an employer may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA and the fact that § 2652 which prohibits the Carrier from diminishing certain existing leave rights does not refer to "vacation rights", but only refers to "family or medical leave rights", must receive the greatest weight. The Carrier's interpretation which, at most, dilutes employee vacation entitlements under the NVA does less violence to the NVA than the Organization's interpretation does to the FMLA.

We therefore find, on balance, that the relevant rules for ascertaining the meaning of ambiguous lan-

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[13] *How Arbitration Works, supra at* 474:
... [T]he standards of construction as used by arbitrators are not inflexible. They are but "aids to the finding of intent, not hard and fast rules to be used to defeat intent."

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Sometimes two or more of the rules of interpretation conflict in a given case. Where this is so, the arbitrator is free to apply that rule which he believes will produce the better result. ....

guage do not favor the Organization's position. But the burden is on the Organization. The Organization's position therefore cannot prevail.

3. The Organization's Other Arguments

The Organization's other well-framed arguments do not change the result.

First, the 1942 interpretations of the NVA by Referee Wayne Morse (Organization Submission at 6-11) do not require a different conclusion.

The relevant Morse Interpretation regarding § 5 of the NVA states:

> ... The language of the paragraph gives to the management the right to defer vacations. As pointed out in the contentions of the employees, the language does not mean that management can defer vacations on the basis of trivial or inconsequential reasons. What the language of the paragraph does do is lay down a statement of policy that when a vacation schedule is agreed to and the employees have received notice of the same and have made their vacation plans accordingly, the schedule shall be adhered to unless the management, for good and sufficient reason, finds it necessary to defer some of the scheduled vacations. When such a situation arises, the management is obligated to give the employee as much advance notice as possible ... The important point for the parties to keep in mind is that the primary and controlling meaning of the first paragraph of Article 5 is that employees shall take their vacations as scheduled and that vacations shall not be deferred or advanced by management except for good and sufficient reason, growing out of essential service requirements and demands.

Obviously, the 1942 Morse Interpretation arose long before the passage of the FMLA. To allow that interpretation to control this case would again, in effect, make the provisions of § 2612(d)(2) of the FMLA which permits the Carrier to "... require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA meaningless. For reasons discussed *supra* at D(2), that kind of result runs afoul of the basic rules of contract construction and should be avoided. The NVA and the FMLA must be read together. The Organization's reliance upon the Morse Interpretation forces us to ignore the provisions of § 2612(d)(2) of the FMLA. We are unwilling to do so.[14]

Second, given the analysis discussed *supra* at D(2), other arbitration decisions relied upon by the Organization (Organization

[14] The Organization (Organization Submission at 8-9) also relies upon *Third Division Awards 19659, 17737* and *12312 (Supplemental)*. Similarly, those awards arose long before the passage of the FMLA and dealt with questions of when vacations could be deferred (*e.g.*, a claimed emergency and whether qualified relief was available). Those awards did not address the issues now injected by the FMLA into the NVA.

Submission at 16-22) are not determinative of this dispute. Assuming for the sake of discussion that *Grand Haven Stamped Products*, 107 LA 131 (Daniel, 1996) and *Union Hospital*, 108 LA 966 (Chattman, 1997) can be read as support for the Organization's position, the basic contract analysis discussed *supra* at D(2) amply demonstrates that the Organization cannot carry its burden.[15]

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[15] However, close examination of the awards cited by the Organization show them to be not on point or not persuasive.

In *Grand Haven Stamped Products*, during contract negotiations after passage of the FMLA, the employer made a contract proposal with the "... apparent intention to require employees to exhaust vacation time for FMLA leaves ..." which was rejected by the union. 107 LA at 132. *Grand Haven* also dealt with a past practice and a "zipper" clause which was held to negate a claimed practice of the employer which allowed it to require employees to use accrued vacation and further addressed whether there was an impasse during bargaining which could have allowed the employer to unilaterally implement its proposal concerning requiring employees to exhaust accrued vacation time. *Id.* at 136-138. In any event, the holding in *Grand Haven* is that "[t]he right of an employer under the FMLA to exercise an option requiring employees to use such accrued vacation time is limited by the collective bargaining agreement which, in this case, does not permit the employer to diminish the beneficial value of vacation choice." *Id.* at 138. But putting aside the nuances concerning the bargaining proposals and past practice, the bottom line in *Grand Haven* is the arbitrator's conclusion that the contract in that case "... does not permit the employer to diminish the beneficial value of vacation choice." That kind of

[footnote continued]

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conclusion ignores the language in § 2612(d)(2) of the FMLA that "... an employer may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA; similarly ignores the language in the accompanying regulations that "... if an employee does not elect to substitute appropriate paid leave when requesting FMLA leave, the employer has the right to require that the employee do so"; and is not on point here because the NVA makes no reference to FMLA leave and therefore the NVA is not a "collective bargaining agreement ... that provides greater *family or medical leave rights* to employees than the rights established under this Act." To the extent the Organization relies upon *Grand Haven*, we find that award unpersuasive to change the result in this matter.

In *Union Hospital*, the arbitrator found that there was language in the collective bargaining agreement "... on the issue of applying paid time to unpaid leave ... [and] employees have been given the exclusive right to elect paid time." 108 LA at 973. Specifically, the parties in that case had a provision in their contract which stated "[s]hould special circumstances arise (i.e., personal or family illness, personal or family emergency, low census time, etc.) the nurse shall notify ... of the nurse's desire to use earned vacation and/or personal holiday time in place of uncompensated leave." *Id.* at 970. Clearly, as the arbitrator found, because of that provision "... [t]here is no doubt that an employee has obtained greater FMLA rights in the event that s/he retains the ability to determine whether to substitute accrued paid time during an unpaid leave ... [t]he CBA in this case clearly contains provisions that have expanded the employees ... FMLA rights." *Id.* at 973. In that case, because of the "greater family or medical leave rights" in the collective bargaining agreement, the employer therefore could not diminish those rights by designating time taken as vacation and personal leave time where the employee did not do so. There is no similar FMLA-type language in the NVA. *Union Hospital* is therefore distinguishable.

Third, the Organization (Organization Submission at 15-16) argues that the Carrier's interpretation allowing it to designate unused vacation leave for intermittent FMLA leave amounts to a superceding of the NVA by the FMLA. We do not see it that way. As we have analyzed this dispute, our decision is based upon a reading of the pertinent provisions of the NVA the FMLA *together* so as to give both meaning.[16]

E. Conclusion

The Organization's position that under the NVA the Carrier cannot require that employees who have exhausted available paid sick leave and other leave substitute accrued but unused paid vacation leave for intermittent FMLA leaves is understandable. The NVA establishes an employee's vacation entitlements and the Morse Interpretation states that vacation schedules shall be adhered to "and that vacations shall not be deferred or advanced by management except for good and sufficient reason, growing out of essential service requirements and demands." It therefore makes sense that employees would object to the Carrier's designating paid vacation leave for intermittent FMLA leaves. But the NVA and FMLA must be read *together* and the FMLA specifically states that the Carrier "... may require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA. These cases are decided on burdens met and rebutted. Here, the burden is on the Organization to demonstrate a violation of the relevant language. Given that language from the FMLA which specifically permits the Carrier to "... require the employee, to substitute any of the accrued paid vacation leave ... for leave provided under ..." the FMLA, the Organization cannot meet its burden.

AWARD

The Carrier did not violate the National Vacation Agreement when it amended its FMLA policy to require that employees who have exhausted available paid sick leave

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[16] The Carrier's November 30, 2001 letter does state its decision to modify its policy "... will be driven by a federal law that, in our opinion, *supercedes* any inconsistency in the bare terms of the 1940's vintage interpretation of the NVA ..." [emphasis added]. Carrier Exh. 6. During argument, the Carrier asserted that it may have inartfully used the word "supercedes". We cannot be governed by labels — else, form would rule over substance. In coming to our conclusion in this matter, we have read the NVA and the FMLA together. That is all that matters.

and other leave substitute paid vacation leave for intermittent FMLA leaves.

Edwin H. Benn
Neutral Member

Carrier Member

Mitchell Krumo, I respectfully dissent
Organization Member

Dated: August 8, 2002