IN THE MATTER OF ARBITRATION BETWEEN

SAFEWAY, INC. – MILK PLANT	)	
	)	
and	)	
	)	AWARD
TEAMSTERS LOCAL UNION NO.455	)	
	)	
Grievance of Mark Davis	)	
	)	

Before Arbitrator Frederick G. Ihrig

STATEMENT OF THE CASE

On June 4, 2010, Mark Davis ("Grievant") filed a grievance (Jt Ex 3) against his employer, Safeway, Inc. Milk Plant ("Company"), alleging that he had been punished for using the Family Medical Leave Act and that his seniority rights had been violated pursuant to the provisions of the Collective Bargaining Agreement, ("CBA") in existence between the Company and his union, Teamsters Local Union No. 455, ("Union"). The parties were unable to settle the grievance and it was referred to the undersigned for resolution pursuant to Article 6 of the CBA.

A hearing was held at the offices of the Union in Denver, Colorado on March 7, 2011. The Union was represented by Martin Buckley, Esq., of the firm Berenbaum, Weinshienk, P.C. and the Company was represented by Camille Torres, Esq., Torres Law Offices, LLC. Testimony on behalf of the Union was provided by Chuck Halliburton, President of Local 455, Joe Sutton, a retired Milk Plant Maintenance Technician and the Grievant. Susan Detwiler, Safeway Milk Plant Superintendent, testified on behalf of the Company. All witnesses testified under oath administered by the Arbitrator and were subject to both direct and cross examination. An audio recording of the hearing was made by the Arbitrator for his own use and benefit and post-hearing briefs were timely filed by the parties.

FACTS

The Company operates a Milk Plant in Denver, Colorado that is part of a major Distribution Center. The Grievant has worked for the Company at the Milk Plant for approximately ten years and is currently a Maintenance Technician. He normally works Monday through Friday on the second shift from 2:00 p.m. to 10:00 p.m. Testimony established that the Milk Plant does not normally work on Saturday, but employees will be scheduled to work on Saturday when business needs so require.

The Grievant has a son who suffers from severe chronic asthma that he contracted in 2002 and requires Grievant to periodically take a leave of absence pursuant to the provisions of the Family Medical Leave Act, ("FMLA") in order to care for him. During the week of May 31, 2010, Grievant was scheduled to work Tuesday through Friday of that week but also signed up to work the holiday shift on Monday, the 31st. On the evening of Tuesday, June 1, Grievant came home to discover that his son was having a asthma attack, and the nebulizer prescribed for him had to be administered by Grievant. Grievant called the Company to notify them that he would not be in the following day, June 2, and possibly also June 3 if necessary to care for his son. Because of his son's illness, Grievant requested intermittent FMLA leave for Wednesday, June 2nd and possibly Thursday the 3rd. Grievant subsequently called again to report that he would also need to be off on the 3rd to care for his son. Upon his return on the 4th, and consistent with prevailing policy, Grievant requested and received vacation pay for the two days rather than take them as unpaid leave.

During that same week, the Company determined that it needed to schedule three employees to work on Saturday the 5th of June because it had a special "blow mold" replacement project scheduled for that day and Company employees were needed to assist the vendor with this undertaking. Pursuant to the requirements of the CBA, the Company sought volunteers to work the Saturday in question. When it became apparent that no volunteers were forthcoming, the Company required two junior employees to work that day based on their seniority. Upon his return from his FMLA leave, Grievant was advised by his supervisor that he would have to work on Saturday, his normal day off, even though there were other employees with less seniority who were not forced to work. The reason given Grievant was that because he missed two days for an illness as set forth in Article 15 of the CBA, the Company could require him to work at a straight time rate rather than at a premium rate it would have to pay if an employee with less seniority was required to work that day. Grievant worked the Saturday shift as ordered and subsequently filed the grievance that is the subject of this hearing.

ISSUE

Upon selecting the undersigned to hear and decide this grievance, the parties executed a Stipulation Agreement setting forth the specific issues to be decided and the limitation on the authority of the arbitrator in deciding such issues:

1. Whether Safeway violated the parties' CBA by scheduling the Grievant to work on his normally-scheduled day off, Saturday, June 5, 2010.
2. Whether Safeway violated the parties' CBA by paying the Grievant straight time for the hours he worked on Saturday, June 5, 2010.
3. Whether Safeway scheduled the Grievant to work on Saturday, June 5, 2010 in retaliation for the Grievant requesting leave under the FMLA earlier that week.

The stipulation further states that the arbitrator should confine himself to deciding whether Safeway's conduct violated the CBA, and not decide whether Safeway violated the FMLA although he may consider it in the factual context of the grievance. If the arbitrator determines that the Company violated the CBA, he shall decide what remedy is appropriate for such violation consistent with the parties collective bargaining agreement and arbitral case law.

APPLICABLE CONTRACT PROVISIONS

ARTICLE 1
RECOGNITION

The Employer recognizes the Union as the sole collective bargaining agency for all employees employed in its Milk Plant in Denver, Colorado, in the following classifications o employment: All Milk Plant production and maintenance employees, including licensed maintenance technicians and working foremen but excluding janitors, office and clerical employees, laboratory technicians, all guards, professional and supervisory employees as defined in the Act.

ARTICLE 6
GRIEVANCE AND ARBITRATION

* * *

An arbitrator appointed under the terms of this Article shall not have the power or authority to add to, subtract from or alter, amend or modify any provision of this Agreement.

ARTICLE 15
WORKWEEK

* * *

Days off shall be designated by the Employer, who agrees to post on or before noon Friday, the work schedule for the following week. The posted schedule may be changed if the scheduled employee is unable to report for work because of injury illness or when the employee is absent on jury duty or on funeral leave.

* * *

If schedules are changed after Friday, overtime shall be paid for change of hours and/or days worked off the posted schedule. This shall not be applicable if the schedule must be changed because an employee is absent because of illness or injury or because the employee is serving on a jury or is on funeral leave.

ARTICLE 40
RIGHTS OF MANAGEMENT

Any of the rights, powers and authority the Employer had prior to entering into the Collective Bargaining Agreement are retained by the Employer, except as expressly and specifically abridged, delegated, granted or modified by this Agreement.

POSITION OF THE PARTIES

The Union – The initial argument of the Union is that the CBA expressly lists the specific reasons the posted schedule may be changed and that none others are, therefore, allowed. The CBA states, in Article 15, that the posted schedule may be changed only in certain circumstances, namely, "If the scheduled employee is unable to report for work because of injury, illness, or when the employee is absent on jury duty or on funeral leave." Furthermore, according to the Union, the CBA states that if schedules are changed after Friday, overtime shall be paid for change of hours and/or days worked off the posted schedule. Once again, the only exception to the overtime rule is if the schedule must be changed because an employee is absent because of illness or injury or because the employee is serving on a jury or is on funeral leave. According to the Union, the absences of the Grievant on the dates in question do not fall within the listed categories of reasons why the schedule can be changed because he was exercising his statutory right to take FMLA leave in order to care for his ill son and this is not a specifically listed reason for the exceptions listed in Article 15.

The Union also argues that the Company response to the grievance in question, "Denied – it is permissible to treat FMLA in the same way as any other authorized time off," clearly fails to recognize that the FMLA provides different, and additional rights to employees than those

defined in the CBA as this cannot be squared with the language of the FMLA that also includes dealing with the birth of a child, or the placement of a child, or caring for the spouse, son, daughter or parent of the employee, if one has a serious health condition. In order to treat FMLA leaves the same as any other time off, according to the Union, the language contained in Article 15 would have to state that expressly. Accordingly, the Union argues that if the parties intended to carve out a broader exception to the rule against changing scheduled days off in order to include absences due to FMLA they would have so provided in the language of Article 15.

Citing the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), the parties have written into the CBA specific conditions to the rule concerning exceptions to changing schedules and there is no exception for FMLA leave written into the CBA. There is no exception for FMLA leave to care for a seriously ill family member listed in the CBA as an exception to the posted rule and any such modification can only occur as the result of collective bargaining and the mutual agreement of the parties. If the company wanted the right to include absence due to FMLA leave as an additional exception to the general rule covering schedule changes, it should have raised that issue at the bargaining table. Furthermore, the Union contends that for the arbitrator to agree with the position of the Company relative to this issue, he would be required to add language to Article 15 and such action would violate the limitations placed upon him by the language contained in Article 6 of the CBA.

The Union also contends that the parties have a well-established binding past practice of not requiring an employee who is absent due to FMLA leave to work his scheduled day off as both the Grievant and Joe Sutton have, on numerous occasions over many years, taken time off for FMLA leave and, until the event causing this grievance, have never been required to work on their scheduled day off to make up for the time missed. This custom and past practice has all the necessary elements for an enforceable binding practice in that it has a long history, it has been consistently applied, and it involves terms and conditions of employment. The Union

A final argument by the Union is that the Grievant was improperly retaliated against for having exercised his right to take a FMLA lave. In support of this argument, the Union contends that the Grievant had never before been required to work his scheduled day off after taking intermittent FMLA leave to care for his ill son. On this occasion he was forced to come in on his day off for the purported reason of helping the two junior employees make repairs to the blow mold machine. According to testimony from the witness, however, he was never assigned to help the other employees repair the blow mold but rather performed routine preventative maintenance tasks and cleaned up the shop and was never instructed to assist on the blow mold machine. The alleged need to have the Grievant work on Saturday was therefore a

pretext for retaliating against him for having taken off time during the week for FMLA purposes. Furthermore, the Union contends that the reason given by the Company for requiring him to come to work on Saturday, June 5, can be found in notes made by management on Grievant's hourly intermittent FMLA leave form that indicates he was "called in and worked Saturday to make up time," which is different from being called in to assist other employees on a specific project such as the mold replacement.

In further support of its contention that the Company retaliated against the Grievant is the fact that he was scheduled to work that Saturday from 2:00 p.m. until 10:p.m. which are the hours he regularly works. However, the work on the mold replacement was scheduled for the morning shift from 6:00 a.m. until 4:00 p.m. If he was really needed to work on the blow mold machine the Union questions why he was not scheduled during that time. Clearly, the Union contends, work on the blow mold was not the true reason the Grievant was required to come to work on his scheduled day off. Accordingly, the Union argues that the only logical conclusion that can be drawn from the facts of this case is that the Company was punishing the Grievant for taking days off under the FMLA and perhaps sending him a signal that if he continued to exercise his FMLA rights he might be subject to further retaliation.

For the forgoing reasons, and based on the evidence in the record, the Union submits that the Company's actions in requiring the Grievant to work his scheduled day off on June 5, 2010, at straight-time rates violates the CBA, established practice, and the Grievant's right not to be unjustly disciplined in retaliation for the exercise of his protected right to take FMLA leave. The appropriate remedy is for the Arbitrator to issue a cease and desist order, requiring the Company to stop violating the contract by requiring employees who take FMLA leave to work their days off. In addition, the Grievant should be paid back pay of one-half his regular rate times the number of hours he worked on June5, 2010.

The Company – The Company contends that this case is clearly a case of contract interpretation and, as such, the Union bears the burden of proving the Company violated either an explicit provision of the CBA or a binding past practice. The Company also states that the Union attempts to carry its burden of proof by offering two main arguments: 1) that the Company's actions violated a binding past practice between the parties; and 2) that the Company retaliated against the Grievant for exercising his rights under the Family Medical Leave Act, and in this case, the Union has failed to carry its burden in relation to either of its proffered arguments.

Concerning the alleged past practice the Company contends that the Union has the burden to prove by a preponderance of evidence that a past practice existed in this case because a past practice represents an implied agreement by mutual conduct. The clear and unambiguous language of the CBA supersedes even an arguable past practice and the CBA and

arbitral authority prohibit the Arbitrator from granting the grievance. Furthermore, the language of Article 15 clearly evinces the parties intended to apply Article 15 as proffered by the Company and the Company has not exercised its contractual rights in an arbitrary or capricious manner.

Concerning past practice, the Company argues that the essential elements generally include proving, "the practice is unequivocal, clearly enunciated and acted upon and reasonably ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." This case poses the issue of whether the Company violated any provision of the CBA (whether express or implied by a legally-binding past practice) by scheduling an employee to work their normal non-scheduled day when the employee missed work upon requesting intermittent FMLA because of a family member's illness. A follow-up issue is whether the Company violated any provision of the CBA by paying the employee straight time in such circumstances.

With this understanding, the only relevant evidence presented by the Union involves evidence related to Joe Sutton who also requested intermittent FMLA the same week as the Grievant. As established at the hearing, Mr. Sutton's case is unique in that he has gone on record of not being able to work on Saturday as he does not have anyone to care for his wife on that day. Furthermore, Mr. Sutton has previously stated that if required to work on Saturday, his day off, he will request FMLA leave and the Company will be required to grant it. Therefore, his situation is unique to him and cannot be used as establishing a past practice as it is limited to him and is a function of circumstance.

With the exception of evidence regarding Mr. Sutton's unique circumstances, the Union failed to present any additional relevant evidence to support its argument that a legally enforceable past practice exists, and the Union has failed to carry its burden of proving a past practice exists which has created an implied contractual prohibition on the Company's right to schedule employees who miss work because of a family member's illness. In the absence of a clearly enunciated, readily ascertainable past practice delineated with clarity and supported by concrete facts and evidence, the Arbitrator simply cannot find a contractually binding past practice.

The Company further contends that even if the Arbitrator concludes that a binding past practice does exist, the clear and unambiguous language of the CBA supersedes an otherwise binding past practice. The language of Article 15 is clear, unambiguous and devoid of any language limiting its application solely to circumstances involving the employee's own illness, and the Arbitrator must enforce the parties negotiated, clear and unambiguous language even if he disagrees with such language or considers it inequitable. Furthermore, granting the Union's grievance would severely restrict the Company's fundamental right to schedule work

and such a restriction cannot rest upon conjecture and argument but must be premised upon a definite or distinct term of the CBA. In the absence of such a negotiated definite and distinct term, granting this grievance would violate the clear restrictions on the Arbitrator set forth in Article 6.

Additionally, a review of the explicit language of Article 15's rescheduling provisions definitely establishes the validity of the Company's interpretation as it states:

> ...The posted schedule may be changed if the scheduled employee is unable to report for work because of injury, illness, or when the employee is absent on jury duty or on funeral leave.
>
> If schedules are changed after Friday, overtime shall be paid for change of hours and/or days worked off the posted schedule. This shall not be applicable if the schedule must be changed because an employee is absent because of illness, injury or because the employee is serving on a jury or is on funeral leave

Clearly, the parties' experienced negotiators considered limitations upon Article 15's application and negotiated two specific circumstances where the application of its rescheduling provisions was limited to the employee themselves. First, the Company may only reschedule an employee if the employee is unable to report to work because "the employee is absent on jury duty or on funeral leave." Likewise, the Company is only permitted to pay the rescheduled employee straight time if the employee is unable to report to work because the "employee is serving on a jury duty or is on funeral leave." These expressly negotiated limitations appear in the same sentence as the rights of the Company to reschedule an employee who cannot report to work due to illness. Certainly, had the parties intended a similar limitation on the provision permitting the Company to reschedule due to injury or illness, the parties would have explicitly stated such an intention as they did regarding jury duty and funeral leave. The parties could easily have drafted Article 15 to state, "the posted schedule may be changed if the scheduled employee is unable to report for work because the employee is injured, ill or absent on jury duty or funeral leave." However, the parties did not negotiate such a limitation upon the application of Article 15. The experienced parties expressly limited the application of Article 15 to "the employee's" participation in jury duty and "the employee" being on funeral leave. The same parties did not include such an express limitation on situations where an employee is unable to report to work due to injury or illness and one can only conclude the parties intended no such limitation.

The Company also contends that the invocation of its negotiated rights is not harsh, absurd, arbitrary or capricious. Rather, it is sound business judgment in fully utilizing the Company's right to maximizing straight time scheduling hours. Likewise, according to the Company, such actions are not inherently unreasonable inasmuch as the Company is treating an employee who has missed work because of a family member's illness the same as the

Company would treat the employee if he or she missed work because of their own illness. The Union has failed to carry its burden of proving the Company violated any provision of the parties' CBA whether express or the result of a binding past practice.

The Company also rejects the Union claim that the Grievant was retaliated against for taking FMLA intermittent leave when it scheduled him to work on Saturday, his regular day off. This claim does not stand the test of logic according to the Company. The evidence presented at the hearing established that the Grievant had been requesting intermittent FMLA leave an average of once-a-month since early 2009. If the Company sought to retaliate against him for requesting such leave one would assume the Company would have taken such action prior to June of 2010. Accordingly, the Company contends that the Union has failed to meet the burden it has to establish retaliation against the Grievant in this matter.

DISCUSSION

The first issue to be determined by this Arbitrator is whether Safeway violated the parties CBA by scheduling the Grievant to work on his normally-scheduled day off, Saturday, June 5, 2010. In support of its argument that the Company did, in fact, violate the CBA, the Union has relied, in part, on its claim that a binding past practice wherein employees who took intermittent FMLA leave for various lengths of time for a number of years were never required to work on their day off. Citing the cases of the Grievant and Joe Sutton, the Union has argued that because neither was ever required to perform work on their scheduled day off prior to this incident, the Union claims that the necessary elements of a binding past practice have been established in that it has all the necessary elements for an enforceable binding practice as it has a long history, it has been consistently applied and it involves terms and conditions of employment

This Arbitrator does not concur with the argument of the Union. While agreeing that past practice can and does impact the meaning of contract language where applicable, the generally accepted requirements of this concept involve a more comprehensive standard. There are several variations of this standard, but in general for a past practice to be binding on both parties, it must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice and be accepted by both parties. Celanese Corp of America, 24 LA 168, at 172 (Justin, 1954).

There is no credible evidence to support a conclusion that the Grievant or Joe Sutton was never required in the past to work their scheduled days off during weeks they took FMLA leave solely because the Company understood and agreed that to do so would violate the CBA because of a past practice management understood and agreed to. Even the testimony of

Chuck Haliburton only established that he did not recall any employee who had taken FMLA in the past of ever being required to work on his/her scheduled day off in order to make up time lost while on the leave. It never supported the Union's argument that the reason for not working the employee on his/her scheduled day off was solely on the basis of management knowing and agreeing that it would be in violation of an accepted past practice that precluded such an assignment. The mere fact that such an assignment was not made does not establish that it was because of an established past practice. Clearly, the generally accepted requirements for establishing a binding past practice do not exist in this situation and cannot be relied on to support the position of the Union.

Having concluded that past practice of a binding nature does not exist relative to this issue, it is therefore necessary to examine the specific language of Article 15 that is in question, and determine the meaning as it impacts the grievance now before me. Each party has thoroughly argued its case and also suggested that for me to rule in favor of the other I would be in violation of the restrictions placed upon me in Article 6 in that I would be forced to add to, subtract from or alter, amend or modify any provisions of the CBA, and this is specifically prohibited by language contained in Article 6. To this statement I would respectfully disagree.

Based on evidence provided at the hearing, the language at issue in Article 15 has been in existence for a number of years. According to the testimony of Mr. Haliburton, the exact same language existed when he first came to work for the Company in 1979 and was never specifically discussed during the subsequent negotiations when he was a business agent for the Union beginning in 1986. No oral or documentary evidence was submitted at the hearing that established the original date for the language as it currently exists but it has been established that the language originated sometime prior to 1979.

This Arbitrator is skeptical of the Company argument that its "experienced" negotiators considered limitations upon Article 15's application and negotiated two specific circumstances where the application of Article 15's rescheduling provisions was limited to the employees themselves as is the case of both jury duty and funeral leave. Given that the language was first negotiated at least fourteen years PRIOR to the implementation of the FMLA it is too much of a stretch for this Arbitrator to accept the argument that negotiators, even extremely experienced negotiators, could have anticipated a far reaching law that contains multiple provisions like those contained within FMLA. Furthermore, experienced negotiators who, in fact, sought to provide for future laws or regulations impacting the provisions of Article 15 would have insisted on the inclusion of language that would have clearly spelled this out. The language as it currently stands is too close in wording to commonly used phrases that spell out provisions for inclusion or exclusion relating to a broad range of rights and/or benefits that are contained in collective bargaining agreements covering many industries.

This Arbitrator would also take note of the fact that the Company did not proffer any testimonial evidence from anyone with specific responsibility for labor relations who could have provided a stronger opinion relative to both the interpretation of the language in question, but also a more in-depth analysis of the bargaining history involving the many provisions of Article 15. While recognizing that such an individual may no longer exist or be available, the reliance on a relatively new supervisory employee who had a short history dealing with labor relations at this location did not convey a strong sense of confidence in the value of her opinion. Her testimony came across to this Arbitrator as someone wanting/needing to control costs and seeing a possible opportunity by focusing on language that could possibly aid her quest.

In the final analysis of this provision, it is the opinion of this Arbitrator that the language set forth in the second and fourth paragraphs of Article 15 on page 19 of the CBA concerning the change of the posted schedule and also how employees are to be paid for days worked off the posted schedule does not apply to employees who miss their normal shift schedule because they were caring for a family member pursuant to specific provisions of the Family Medical Leave Act. Nothing in the language itself or the bargaining history of the parties suggests or supports a conclusion that it applies to FMLA related absences. To rule otherwise would be to add additional provisions to the CBA and such action is prohibited by the provisions of Article 6.

Another issue to be resolved is; "Whether Safeway scheduled the Grievant to work on Saturday, June 5, 2010 in retaliation for the Grievant requesting leave under the FMLA earlier that week." In this regard, this Arbitrator is persuaded by the argument of the Company. The Grievant contends that the mere fact he worked on routine matters while working on the Saturday in question he was actually not needed to assist on the work for which he was scheduled and, therefore, the Company was retaliating against him for taking the two days of FMLA leave earlier in he week. The Company response that three employees were originally needed to perform the work in question but that it turned out that only two were actually needed once the work began, without more, provided a rational explanation for the fact the Grievant did not perform the scheduled work. Furthermore, given that the Grievant has taken numerous FMLA days in the past without adverse action indicates to me that no retaliation was involved in this assignment. The claim of retaliation by the Company against the Grievant is, therefore, rejected.

The Union has asked for a cease and desist order against the Company by requiring the Company to stop violating the contract by requiring employees who take FMLA leave to work on their days off. While acknowledging that the issuance of some form of injunctive relief may be available to arbitrators unless specifically prohibited by the CBA or an appropriate court, it is my opinion that such a remedy is not currently required in this matter. Having ruled that the Company has violated the language of Article 15 as set forth above, there is no need at this

time to expand the remedy to the issuance of a cease and desist order in that this award clearly establishes that the Company was in violation of the CBA relative to its action expanding the definition of "illness" to include those involving FMLA leaves. On the other hand, a continuation of this practice by the Company could result in the issuance of such a remedy by an arbitrator where the issuance of back pay awards fails to stop the practice.

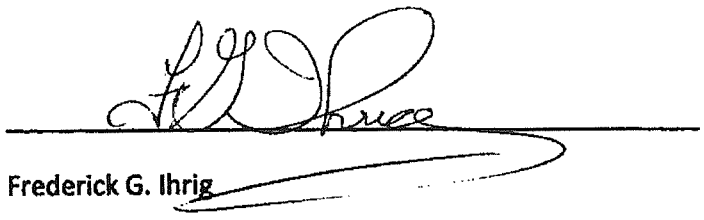
AWARD

For the reasons set forth above, it is the award of this Arbitrator as follows:

The Company violated the parties' CBA by scheduling the Grievant to work on his normally-scheduled day off, Saturday, June 5, 2010.

The Company violated the parties, CBA by paying the Grievant straight time for the hours he worked on Saturday, June 5, 2010 and he is to be made whole for all hours worked as the result of this violation.

The Company did not improperly retaliate against the Grievant pursuant to the provisions of the CBA when it scheduled him to work on Saturday, June 5, 2010.



Frederick G. Ihrig

6-15-11

Date