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Roger I. Abrams

Dennis R. Nolan

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Resolving Holiday Pay Disputes In Labor Arbitration

*Roger I. Abrams***
*Dennis R. Nolan****

Originally, hourly employees were paid only for time actually worked, reducing their paychecks when management shut down operations during holidays. Today paid holidays are a significant part of the compensation package and are generally assured under collective bargaining contracts. Disputes over the interpretation of holiday pay provisions comprise a significant portion of the arbitrator's caseload. This Article examines a series of recurring holiday pay issues and the body of arbitration opinions which treat them, and sets out decisional principles to guide in their resolution. The Article also suggests ways for the parties to avoid holiday pay controversies when negotiating collective agreements.

INTRODUCTION

COLLECTIVE BARGAINING and labor arbitration form the foundation of national labor policy.¹ Negotiations between management and its employees' chosen representative produce collective bargaining agreements which order the workplace, setting forth the terms and conditions of employment.² Contractual disputes arise during terms of those agreements, and the industrial partners universally have adopted arbitration as the most efficient mechanism for resolving those controversies.³

On a case-by-case basis over the past half century, labor arbitrators have created a body of principles for resolving the disputes

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** Professor of Law, Case Western Reserve School of Law. B.A., Cornell University (1967); J.D., Harvard University (1970).

*** Professor of Law, University of South Carolina School of Law. B.A., Georgetown University (1967); J.D., Harvard University (1970); M.A., University of Wisconsin-Milwaukee (1974).

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1. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); Labor-Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1976).

2. See Labor-Management Relations Act §§ 8(a)(5), 8(b)(3), 29 U.S.C. §§ 158(a)(5), (b)(3) (1976).

3. In its survey of major collective bargaining agreements, the Bureau of National Affairs reported in 1983 that 97% of its sample contained an arbitration provision. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS (BNA) 51:5 (1983). See generally Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983).

that arise under collective bargaining agreements.⁴ Arbitral principles for the interpretation of contract provisions reflect an accommodation of the legitimate but conflicting interests of management and labor. This common law of the labor agreement can be systematically restated and analyzed.⁵

One type of dispute commonly resolved through the arbitration process involves employee claims to holiday benefits. While holiday benefits constitute only a small part of a contract's compensation package, disputes concerning entitlement are quite significant to the employees involved. Moreover, when management has refused to pay the benefit to the entire work force, the amount of money at stake may be substantial. This Article reviews and, where warranted, criticizes the principles used by arbitrators in addressing claims for holiday pay. In addition, it suggests guidelines for resolving recurring holiday pay disputes.

I. HOLIDAYS AND HOLIDAY PAY IN GENERAL

Almost all collective bargaining agreements include clauses providing paid holidays for employees.⁶ Traditionally, hourly employees were not paid for days, such as holidays, on which work was not scheduled. The only benefit of a holiday was relief from work, a dubious benefit for employees who needed every day's pay to make ends meet.⁷ Unions sought pay for unworked holidays to protect hourly employees from financial loss when plants closed on such occasions.⁸ The unions' goal was to secure a "level paycheck" for employees, that is, constant compensation even if the week contained an unworked holiday.⁹ "Holiday pay was initially intended to assure that the take-home pay of an em-

4. See Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 U.C.D. L. REV. 551 (1981).

5. See Abrams & Nolan, *The Common Law of the Labor Agreement: Vacations*, 5 IND. REL. L.J. 603 (1982).

6. The Bureau of National Affairs reported that 99% of its sample contracts contain a paid holiday clause. 2 COLLECTIVE BARGAINING: NEGOTIATIONS AND CONTRACTS 58:1 (1978).

7. *Inland Steel Co.*, 20 Lab. Arb. (BNA) 323, 324 (1953) (Updegraff, Arb.).

8. Traditionally, no deductions have been made from the earnings of salaried employees in weeks in which holidays occur and in which no work was performed. It was not until 1947 that paid holidays for hourly-paid employees came into American industry via the collective bargaining process. In that year, the United Automobile Workers signed agreements calling for six paid holidays which were not worked.

Chardon Rubber Co., 71 Lab. Arb. (BNA) 1039, 1039 (1978) (Gibson, Arb.).

9. *Illinois Bell Tel. Co.*, 20 Lab. Arb. (BNA) 165, 170 (1952) (Davis, Arb.) (objective to "protect the integrity of the paycheck").

ployee . . . should not be diminished when the [h]oliday was observed on a day that he was scheduled to work and would have worked had not the holiday been observed."¹⁰ A real holiday could be celebrated by employees, secure in the knowledge that their Friday paychecks would reflect a full week's pay.¹¹

The prevailing modern view is that pay for unworked holidays is part of the bargained-for contractual compensation package. In addition to earning regular wages, employees work throughout the year for other compensation benefits, such as paid holidays.¹² Holiday benefits are earned fringe benefits, not gratuities bestowed by a grateful employer.¹³

Entitlement to holiday pay depends upon the terms of the collective bargaining agreement. If the contract provides for pay for an unworked holiday, an employee may have a claim enforceable in arbitration. If the contract does not provide for a holiday benefit, the arbitrator cannot create one out of whole cloth simply because it might be fair and equitable.¹⁴ The "deal" struck by the parties at the negotiation table must control.¹⁵

Paid holiday clauses list those holidays on which work will not be regularly scheduled and explain how employees may qualify for paid unworked holidays. Typically, entitlement to holiday pay turns on fulfillment of a stipulated pattern of work surrounding the holiday.¹⁶ The most common eligibility formulation requires work or attendance on the day before and the day after the holiday. The parties may also include a threshold minimum serv-

10. *Airtherm Products, Inc.*, 67 Lab. Arb. (BNA) 666, 675 (1976) (Neas, Arb.) (one purpose of holiday pay is "ensuring the employee's normal income during a period he is prevented from working his normal work schedule because of closing the plant in observance of a holiday."); *General Cable Corp.*, 37 Lab. Arb. (BNA) 934, 940 (1961) (Killion, Arb.).

11. *Outboard Marine Corp.*, 54 Lab. Arb. 112, 115 (1969) (Kesselman, Arb.); *California Metal Trades Ass'n*, 11 Lab. Arb. (BNA) 788, 789-90 (1948) (Kerr, Arb.) ("Otherwise a holiday would be a source of sorrow.").

12. *Tennessee Dickel Distilling Co.*, 69 Lab. Arb. (BNA) 189, 190 (1977) (Cantor, Arb.) ("It is a common concept that fringe benefits, such as holidays, are earned by the [employee's] . . . overall employment commitment.").

13. *Price Bros.*, 60 Lab. Arb. (BNA) 990, 991 (1973) (Gibson, Arb.); *John Deere Tractor Co.*, 9 Lab. Arb. (BNA) 20, 21 (1947) (Gorder, Arb.).

14. In some cases, an established past practice of regularly paying employees for unworked holidays might give rise to an enforceable claim in arbitration. *Cf. Advance Die Casting Co.*, 65 Lab. Arb. (BNA) 810 (1975) (Gundermann, Arb.) (right to bonus based on past practice). However, no reported arbitration opinions treat this particular issue.

15. *Leewall Sportswear Co.*, 53 Lab. Arb. (BNA) 1165, 1169 (1969) (Dworkin, Arb.).

16. *Tennessee Dickel Distilling Co.*, 69 Lab. Arb. (BNA) 189, 190 (1977) (Cantor, Arb.).

ice requirement for holiday pay eligibility. Despite the apparent simplicity of a typical holiday clause, disputes over the interpretation and application of work eligibility requirements are common. As Arbitrator Lewis Kesselman noted, "holiday pay clauses have provided considerable employment for arbitrators as the number of published awards on the subject will attest."¹⁷ A few examples will illustrate this point.

If an employee was absent on one or both qualifying days and was denied holiday pay, the question may arise whether the employee should have been excused from the work requirement under the terms of the parties' collective bargaining agreement. The situations most commonly brought to arbitration involve employee absences caused by illness and leaves.¹⁸ Additionally, questions arise whether an employee should be held to have forfeited holiday pay by arriving late, leaving work early, or refusing to work overtime on a qualifying day.¹⁹ Other recurring issues involve the payment of holiday pay for holidays occurring while an employee is on layoff or honoring another union's picket line,²⁰ and for holidays observed on a nonscheduled workday or during an employee's vacation.²¹ Finally, disputes over the date on which a contract holiday should be observed²² and the calculation of the amount of holiday pay due²³ are sometimes brought to arbitration.

On occasion confusion arises concerning the distinction between pay due for holidays not worked and premium pay for work performed on a holiday. Contracts generally provide for a premium rate for holiday work. The source of misunderstanding may lie in the contractual use of the undefined phrase "holiday pay" without explaining whether such phrase refers to pay for holidays worked or holidays not worked.²⁴ As in many matters brought to arbitration, clearly drafted provisions would obviate this confusion.

17. *Outboard Marine Corp.*, 54 Lab. Arb. (BNA) 112, 115 (1969) (Kesselman, Arb.).

18. *See infra* notes 44-67 and accompanying text.

19. *See infra* notes 68-79 and accompanying text.

20. *See infra* notes 80-106 and accompanying text.

21. *See infra* notes 107-14 and accompanying text.

22. *See infra* notes 115-28 and accompanying text.

23. *See infra* notes 129-38 and accompanying text.

24. *Rangaire, Inc.*, 66 Lab. Arb. (BNA) 755, 757 (1976) (Woodward, Arb.).

II. CONTRACTUAL ELIGIBILITY REQUIREMENTS

Holiday pay clauses commonly impose work requirements which must be met before an employee qualifies for holiday pay. For example, under some contracts employees must meet a minimum service requirement before becoming entitled to receive holiday pay.²⁵ The practical effect of these threshold requirements may be to exclude probationary employees from holiday pay eligibility.²⁶ In the absence of an express minimum service stipulation, however, an arbitrator should not imply such a requirement.²⁷

Employees may be tempted to "stretch" holidays by, for example, taking off the day after a Thanksgiving holiday to create a four-day weekend. The employer's operations are necessarily disrupted. To insure a full complement of workers on the days surrounding a paid holiday,²⁸ management commonly bargains for eligibility stipulations requiring that an employee work, or be in attendance, the day before and the day after the holiday.²⁹ Arbitrators have recognized that the customary intention of the parties in including a surrounding days work requirement is to deter em-

25. *Westover Fabrics, Inc.*, 5 Lab. Arb. (BNA) 735 (1946) (Wallen, Arb.) (13 weeks of service required).

26. *Compare Motch & Merryweather Mach. Co.*, 51 Lab. Arb. (BNA) 724, 728 (1968) (Dworkin, Arb.) ("The paid holiday benefit is not normally extended to employees on probationary status."), *with Airtherm Prods., Inc.*, 67 Lab. Arb. (BNA) 666 (Neas, Arb.) (probationary employees generally covered by holiday pay provisions).

27. *Airtherm Prods., Inc.*, 67 Lab. Arb. (BNA) at 670. However, a consistent past practice of denying holiday pay to probationary employees under an ambiguous contract reference may provide a basis for determining that the parties' intent was to limit the benefit to nonprobationary workers. *Interstate United Corp.*, 60 Lab. Arb. (BNA) 128 (1972) (Sloane, Arb.).

28. *Airtherm Prods., Inc.*, 67 Lab. Arb. (BNA) at 675 ("Traditionally, the eligibility rules have been written to assure management a continuity of the work force during a holiday week."). Arbitrator John Day Larkin offered the following explanation of the origin of the surrounding days requirement in *Zion Indus. Co.*, 41 Lab. Arb. (BNA) 414, 415 (1963):

It was initially designed to prevent employees from extending a holiday into a short vacation, particularly those holidays which occur just before, just after, or near a weekend. Employers complained that too many employees were taking the holidays for trips out of town, or for excess "celebrating." Some wanted to leave early to get on the road; others recovering from a "hangover" the day after. It all added up to excessive absenteeism which the employers sought to remedy by the introduction of this language into agreements with the unions. Such language is now common to practically all collective bargaining agreements.

29. While the "day before and day after" formulation is the most common qualification, some contracts provide that the employee, to be eligible for the paid unworked holiday, must work either of the surrounding days, *Young Spring & Wire Corp.*, 41 Lab. Arb. (BNA) 991 (1963) (Hunter, Arb.), or during the holiday week or month, *Peavy Co.*, 43 Lab. Arb. (BNA) 539 (1964) (Traynor, Arb.).

ployees from "stretching" a holiday into a "mini-vacation."³⁰ An eligibility requirement should be interpreted and applied in light of this purpose.³¹

However, the precise language of the work requirement may indicate an additional purpose—the parties may be seeking to insure timely attendance on the surrounding days.³²

The precise contractual language of the clause adopted by the parties determines whether holiday pay is due.³³ As Arbitrator Samuel Kates stated in *Gregory Galvanizing & Metal Processing, Inc.*, "there is no inherent right to holiday pay, and none exists except as it may be set forth in the labor agreement."³⁴ If employees do not meet the contract work requirement, holiday pay does not accrue.³⁵ If a contract clause contains no express excuses to the work eligibility requirement, none should be implied³⁶ in the absence of a consistent past practice by management of allowing such excuses.³⁷ If the parties have spelled out particular excuses and omitted others, the arbitrator must follow their direction by recognizing the express, and repudiating omitted excuses.³⁸ For the same reason of fidelity to the contract, in the absence of a contractual work eligibility requirement, none should be implied by the arbitrator.³⁹ "[A] benefit codified in contract terms must be expressly modified if it is to be contingent upon certain requirements."⁴⁰

30. McCord Corp., 57 Lab. Arb. (BNA) 153, 156 (1971) (Belshaw, Arb.); Columbiana Pump Co., 51 Lab. Arb. (BNA) 481, 483 (1968) (Teple, Arb.).

31. Otten Mfg. Co., 55 Lab. Arb. (BNA) 579, 580 (1970) (Davis, Arb.).

32. Deltrol Corp., 66 Lab. Arb. (BNA) 145, 148 (1976) (Jones, Arb.).

33. Tennessee Dickel Distilling Co., 69 Lab. Arb. (BNA) 189, 190 (1977) (Cantor, Arb.) ("The test, in all instances, is the relationship of the parties as crystallized in their negotiated agreement."); Mastermade Furniture Corp., 50 Lab. Arb. (BNA) 921, 924 (1968) (Wolf, Arb.).

34. 46 Lab. Arb. (BNA) 102, 105 (1966); *see also* Kramer Trenton Co., 75 Lab. Arb. (BNA) 651, 653 (1980) (Tener, Arb.); Young Spring & Wire Corp., 41 Lab. Arb. (BNA) 991, 993 (1963) (Hunter, Arb.).

35. Motch & Merryweather Mach. Co., 51 Lab. Arb. (BNA) 724, 730 (1968) (H. Dworkin, Arb.).

36. Matlock Truck Body and Trailer Corp., 70 Lab. Arb. (BNA) 1273, 1274 (1978) (Warns, Arb.); Belknap, Inc., 69 Lab. Arb. (BNA) 599 (1977) (Teple, Arb.).

37. American Ship Bldg., 69 Lab. Arb. (BNA) 944 (1977) (Ruben, Arb.); Etched Metal Co., 53 Lab. Arb. (BNA) 431 (1969) (Kabaker, Arb.); Ford Motor Co., 11 Lab. Arb. (BNA) 1181 (1948) (Shulman, Arb.).

38. Amelco Corp., 72 Lab. Arb. (BNA) 528, 530 (1979) (Tanaka, Arb.); Borg-Warner Corp., 54 Lab. Arb. (BNA) 436, 437 (1970) (Edes, Arb.).

39. Buffalo Bd. of Educ., 68 Lab. Arb. (BNA) 921, 924 (1977) (Dennis, Arb.); Union Biscuit Co., 17 Lab. Arb. (BNA) 117, 180 (1951) (Townsend, Arb.).

40. Kramer Trenton Co., 75 Lab. Arb. (BNA) 651, 653 (1980) (Tener, Arb.).

Holiday pay is a valuable bargained-for benefit. If the contract clearly and expressly provides for pay for an unworked holiday, the benefit should not be denied unless the clause contains an equally clear statement of eligibility qualifications which were not fulfilled.⁴¹ If the eligibility language is ambiguous, the arbitrator should interpret the clause so as to avoid the forfeiture of the holiday pay benefit.⁴² As Arbitrator Peter Kelliher stated in *Amron Corp.*, "holiday payments represent part of the cost of the 'package deal' that is bargained for during negotiations . . . Arbitrators and courts of law do not uphold forfeitures of valuable rights and payments in the absence of clear and precise language."⁴³

A. Attendance On Qualifying Days: Illness and Leaves

Many businesses experience severe employee absenteeism the day before and the day following a holiday. "Almost invariably the [employee's] excuse is sickness."⁴⁴ Does the company violate the holiday pay provision when it refuses to pay an ill employee for an unworked holiday? If the contract clause contains a surrounding days work requirement with no express excuses to its fulfillment, the arbitrator must deny the claim in the absence of a clearly established past practice of allowing an excuse for illness.⁴⁵ If the provision contains a clear qualification requirement, it must be respected. An arbitrator should not imply exceptions to the contract requirements.⁴⁶ Similarly, if the contract enumerates specific excuses, those not falling within the listed categories should not be deemed to satisfy the work requirement.⁴⁷ On the other hand, an established practice of excusing the work requirement on certain grounds should bind the employer to continue to excuse absences for those reasons.⁴⁸

41. *Lima Elec. Co.*, 71 Lab. Arb. (BNA) 74, 76 (1978) (Kabaker, Arb.) ("[T]he right to deny Holiday Payment must be based upon clear and unequivocal language in the Labor Agreement.").

42. *Columbus Show Case Co.*, 57 Lab. Arb. (BNA) 167, 168 (1971) (Hertz, Arb.).

43. 47 Lab. Arb. (BNA) 582, 583 (1966).

44. *Weil-McLain Co.*, 64 Lab. Arb. (BNA) 625, 627 (1975) (Hadlick, Arb.).

45. *Matlock Truck Body and Trailer Corp.*, 70 Lab. Arb. (BNA) 1273 (1978) (Warns, Arb.); *Belknap, Inc.*, 69 Lab. Arb. (BNA) 599, 603 (1977) (Teple, Arb.); *L. Grossman Sons*, 19 Lab. Arb. (BNA) 347 (1952) (Parkman, Arb.).

46. *Matlock Truck Body and Trailer Corp.*, 70 Lab. Arb. (BNA) 1273 (1978) (Warns, Arb.); *Belknap, Inc.*, 69 Lab. Arb. (BNA) 599 (1977) (Teple, Arb.).

47. *Timken Co.*, 75 Lab. Arb. (BNA) 801 (1980) (Morgan, Arb.); *Amelco Corp.*, 72 Lab. Arb. (BNA) 528 (1979) (Tanaka, Arb.).

48. *American Ship Bldg. Co.*, 69 Lab. Arb. (BNA) 944 (1977) (Ruben, Arb.); *Cole Steel Equip. Co.*, 56 Lab. Arb. (BNA) 43 (1971) (Jaffee, Arb.).

Often the parties include language in their agreement stating that an "excused" or "justified" absence on a qualifying day does not result in the forfeiture of holiday pay. The absent employee bears the initial burden of giving "sufficient explanation to enable [management] to determine if the excuse is justifiable or not."⁴⁹ If the employer has deemed the excuse insufficient, the arbitrator will determine whether management's refusal to accept the employee's explanation was reasonable or arbitrary and capricious.⁵⁰

Under a contract requiring employees to work the surrounding days except if "unable to do so for just cause," Arbitrator Marcel Mallet-Prevost denied an employee's claim for holiday pay when he was absent the scheduled day before Memorial Day because he was "fed-up" with constant requests for help by employees operating malfunctioning machines. Acknowledging that the grievant's job irritations were very real, the Arbitrator concluded nevertheless that the "just cause" excuse required a showing of some health implications.⁵¹

A common variant of the single day illness situation involves the employee on sick leave status when a holiday is observed. If the surrounding day eligibility provision contains an express excuse for illness and does not stipulate a time period covered by the excusing circumstance, the arbitrator should sustain the holiday pay grievances of employees on sick leave.⁵²

A contract clause containing an express exception for absence caused by illness might stipulate that the employee must present proof of illness in order to qualify for holiday pay.⁵³ Under such a clause, the sufficiency of the proof may become an issue. As noted, the arbitrator will require an employee to submit more than a vague excuse for the absence,⁵⁴ even if the contract does not require particular documentation. Arbitrator Edwin Teple ruled in *Metal Forge Co.* that management could not use discretion retained under the holiday clause to accept medical excuses in a discriminatory fashion or "refuse arbitrarily to accept reliable proof of illness."⁵⁵ According to the Arbitrator, a doctor's statement is "universally recognized" as sufficient "if authenticated,"

49. Houdaille Indus., 55 Lab. Arb. (BNA) 1098, 1101 (1970) (McDermott, Arb.).

50. Interpace Corp., 58 Lab. Arb. (BNA) 1122 (1972) (Meiners, Arb.).

51. L. Gordon & Son, 67 Lab. Arb. (BNA) 1287 (1977).

52. L'Anse Creuse Pub. Schools, 63 Lab. Arb. (BNA) 544, 546 (1974) (Roumell, Arb.).

53. Cerro Copper & Brass Co., 55 Lab. Arb. (BNA) 628, 634 (1970) (Klein, Arb.) ("medically certified illness").

54. See *supra* notes 49-50 and accompanying text.

55. 53 Lab. Arb. (BNA) 682, 683 (1969).

but "the general statement of a wife that her husband was sick is not the kind of proof that the Company could be required to treat as acceptable."⁵⁶

In another case, Arbitrator Teple interpreted a holiday pay clause stating that "[t]he Company will consider absences . . . excusable for the following reasons . . ." and listing five types of absences. Management argued that since the clause only indicated that it would "consider" excuses, it retained discretion to decide whether to excuse the enumerated absences for holiday pay eligibility purposes. Rejecting that argument, Arbitrator Teple stated:

This terminology is rather common in collective agreements, and is normally used to indicate a fixed and determined future course of action. It is in the nature of a promise made by the party identified in the particular provision. The verb "will," when used in this manner, is not equivalent to "may."⁵⁷

He interpreted the contract language as constituting a "firm promise" by management to excuse an employee who was absent for one of the listed reasons.⁵⁸ While a promise to "consider" should not always be read to mean a promise to "accept," in this instance the Arbitrator was correct in his determination of the parties' intent. When management agrees that it "will consider" certain "absences excusable," it has agreed to accept the enumerated absences.

In *Allis-Chalmers Corp.*, Arbitrator Harry Platt faced the common and perplexing problem of reconciling contractual work requirements for holiday pay eligibility with a contract leave provision, in this instance a clause granting bereavement leave.⁵⁹ The company denied holiday pay to an employee who did not work the day before the holiday while on bereavement leave. Arbitrator Platt concluded, "In my judgment, to construe the day before a holiday work requirement as a requirement to work when one is on an approved bereavement leave would produce anomalous and illogical results."⁶⁰ The Arbitrator reasoned that an employee should not be forced to forfeit his holiday pay by taking his bereavement leave or to forfeit his bereavement leave by working the day before the holiday.⁶¹

56. *Id.* at 683.

57. *Columbiana Pump Co.*, 51 Lab. Arb. (BNA) 481, 483 (1968).

58. *Id.*

59. 60 Lab. Arb. (BNA) 1296 (1973).

60. *Id.* at 1299.

61. *Id.*

Arbitrator Platt's approach is fully consistent with the generally accepted rule of contract construction that the agreement should be read as a whole. When the parties provide for short-term leave for situations such as bereavement—which occur at fortuitous times without employee predesign or arrangement—the arbitrator should read the parties' work eligibility requirements as fulfilled if the employee failed to work the qualifying days because of a contractually approved leave. The contrary result should follow if the parties have "spelled out a precise definition" of the excuses to the work requirement in their holiday clause and the employee was absent for some other reason.⁶²

Under a contract provision specifying that a "reasonable excuse" would justify failure to meet the work requirements, Arbitrator Rankin Gibson ruled in *Price Brothers Co.* that personal leave, approved under another provision of the agreement, constituted such a reasonable excuse.⁶³ Similarly, an established practice of paying holiday pay to employees on approved leave should bind the employer even in the absence of an express excuse to the work requirements.⁶⁴ The contract should be read as a whole and in light of its consistent application by the parties.

When an employee has failed to work the qualifying days because he was under a disciplinary suspension, the penalty of loss of holiday pay should not be added to the loss of regular pay occasioned by the discipline.⁶⁵ Management controls the timing of the suspension, and thus the employee cannot be faulted for failing to work if he was not allowed to work.⁶⁶ Moreover, the disciplined employee can hardly be accused of "stretching a holiday on his own volition."⁶⁷

B. *Tardiness, Early Departure, and Failure to Work Overtime*

Another familiar dispute over eligibility requirements concerns an employee who is denied holiday pay because of tardiness, early departure, or failure to work overtime on one of the qualifying days. Should the arbitrator hold that holiday pay has been

62. Borg-Warner Corp., 54 Lab. Arb. (BNA) 436, 437 (1970) (Edes, Arb.)

63. 60 Lab. Arb. (BNA) 990, 992-93 (1973); *see also* Wooster Sportswear Co., 46 Lab. Arb. (BNA) 9 (1965) (Dworkin, Arb.) (similar analysis of "justifiable cause" exception).

64. Cole Steel Equip. Co., 56 Lab. Arb. (BNA) 43 (1970) (Jaffee, Arb.); American Smelting and Ref. Co., 44 Lab. Arb. (BNA) 1010 (1965) (Koven, Arb.).

65. Celotex Corp., 36 Lab. Arb. (BNA) 517 (1961) (Dworkin, Arb.); Inland Steel Co., 20 Lab. Arb. (BNA) 323 (1953) (Updegraff, Arb.).

66. Inmont Corp., 60 Lab. Arb. (BNA) 1125 (1973) (Kelliher, Arb.).

67. Watkins Trucking, Inc., 48 Lab. Arb. (BNA) 1101, 1102 (1967) (Klein, Arb.).

forfeited? The answer depends on the precise wording of the parties' contract clause and on the parties' prior application of that provision.

The prevailing understanding of surrounding days work eligibility requirements is that they are designed to prevent an employee from "stretching" the holiday. Compliance with work requirements should be judged in light of this purpose. An employee who is a few minutes tardy on the day before a holiday, but *does* report to work, is not "stretching" the holiday.⁶⁸ Similarly, the employee who leaves work early the day after a holiday is not "stretching" the holiday. In neither situation should the employee be denied holiday pay. On the other hand, an employee who leaves early the day before a holiday or arrives tardy the day after is "stretching" the holiday. Holiday pay is not due.

If the parties intend that the work eligibility requirements promote punctuality or completion of a full workshift on the days surrounding the holiday, that purpose must be evidenced in the language they include in their contract provision. If they have specified that employees must work the "full" qualifying day or "all" scheduled hours, the arbitrator should follow the contractual mandate. In light of such language, the arbitrator should uphold management's denial of the benefit to the employee tardy on the day before the holiday or the employee who leaves work early on the day after the holiday.⁶⁹ A clear and longstanding prior practice inconsistent with a literal reading of the terms of the clause may warrant a contrary conclusion.⁷⁰

In the absence of clear contract language evidencing an intention to promote punctuality, the arbitrator should assume the parties intended that their clause be read consistent with the "true spirit"⁷¹ of the contractual requirements, i.e. to prohibit the "stretching" of a holiday. Parties know how to specify that all scheduled time must be worked by expressly stipulating that the "full" workday must be worked. Use of the unmodified term "the workday" should not support forfeiture of holiday pay if the em-

68. Cerro Copper & Brass Co., 55 Lab. Arb. (BNA) 628 (1970) (Klein, Arb.); Ford Motor Co., 11 Lab. Arb. (BNA) 1181 (1948) (Shulman, Arb.).

69. Deltrol Corp., 66 Lab. Arb. (BNA) 145 (1976) (Jones, Arb.) (a "full normal day"); Margon Bros. Laundry, 14 Lab. Arb. (BNA) 201 (1950) (Fulda, Arb.) ("all scheduled hours").

70. American Ship Bldg. Co., 69 Lab. Arb. (BNA) 944 (1977) (Ruben, Arb.); Vertex Systems, Inc., 68 Lab. Arb. (BNA) 1099, 1101 (1977) (Marcus, Arb.) (considerable evidence that company made exceptions to rigid rule).

71. Vertex Systems, Inc., 68 Lab. Arb. (BNA) 1099, 1101 (1977) (Marcus, Arb.).

ployee has substantially fulfilled his work obligation.⁷²

If the contract clause is susceptible to reasonable alternative interpretations, the arbitrator should adopt the one that avoids forfeiture of the holiday benefit.⁷³ Even when the surrounding days work requirement is clearly expressed, if the evidence shows that the employee received permission to leave early on the day preceding the holiday, the benefit is due.⁷⁴ Unqualified management approval constitutes a waiver of the work requirement.⁷⁵

If an employee has failed to work scheduled overtime on one of the qualifying days and is denied holiday pay, the arbitrator again will be required to read the contract clause and determine the parties' mutual intent. If the contract clause expressly indicates how the overtime situation is to be treated, the arbitrator must follow its directive, even if the result seems harsh. In the absence of any express contract statement, the arbitrator will be required to interpret the qualifying language. Does a requirement that the employee work the day before a holiday mean that the employee must work *all* scheduled hours on that day? If so, do scheduled hours include overtime hours? A clause specifying work for the "full scheduled work shift" has been read to include all scheduled daily overtime.⁷⁶ Similarly, failure to work a scheduled Saturday overtime shift has resulted in forfeiture of holiday pay where the contract provision required an employee to work the "scheduled" workday preceding a holiday,⁷⁷ but not when the clause required an employee to work the "regular" workdays surrounding the holiday.⁷⁸

Tardiness, leaving work early, or failing to work scheduled overtime may be grounds for discipline in appropriate cases. Unless the parties have clearly expressed a nexus between holiday pay entitlement and completion of work schedules in the language of their agreement or unless the employee's actions amount to the

72. Fruehauf Corp., 54 Lab. Arb. (BNA) 947 (1970) (Tripp, Arb.).

73. Alpha Cellulose Corp., 27 Lab. Arb. (BNA) 798, 800 (1956) (Kelliher, Arb.).

74. General Metals Corp., 20 Lab. Arb. (BNA) 123 (1953) (Aaron, Arb.).

75. Alwin Mfg. Co., 38 Lab. Arb. (BNA) 632 (1962) (Sembower, Arb.).

76. C.G. Conn, Ltd., 66 Lab. Arb. (BNA) 195 (1976) (Davis, Arb.); Great Lakes Spring Corp., 12 Lab. Arb. (BNA) 779 (1949) (Kelliher, Arb.).

77. Independent Mach. Co., 60 Lab. Arb. (BNA) 1113 (1973) (Jones, Arb.) (failure to work scheduled Saturday overtime on day before holiday); J.G. Wilson Corp., 60 Lab. Arb. (BNA) 1180 (1973) (Jones, Arb.); Sargent-Welch Scientific Co., 54 Lab. Arb. (BNA) 923 (1970) (Sinicropi, Arb.) (failure to work scheduled Saturday overtime on day after holiday).

78. American Cyanamid Co., 49 Lab. Arb. (BNA) 314 (1967) (Waldron, Arb.); A.O. Smith Corp., 47 Lab. Arb. (BNA) 655 (1966) (Dworkin, Arb.).

“stretching” that eligibility requirements are designed to prevent, it would be best to leave these transgressions to the disciplinary process.⁷⁹

III. HOLIDAYS DURING NONWORK PERIODS

Arbitrators are often asked to resolve disputes involving an employee's holiday pay when the grievant was not scheduled to work during the week in which the holiday is observed. For example, the employee may be on layoff status or the bargaining unit may be on strike, or the holiday may fall on a nonscheduled day such as a Saturday or Sunday. While the parties sometimes stipulate in their agreement how these situations should be treated, most often the arbitrator is left without clear contractual guidance. In resolving these disputes, the arbitrator must read, interpret, and apply the parties' express understandings and consistent past practices to determine, as best he can, the intentions of the parties.

A. *Entitlement While On Layoff*

Whether an employee on layoff is entitled to holiday pay is a common issue in arbitration.⁸⁰ If the parties have expressly addressed this issue in the body of their agreement, the arbitrator's job is simplified. He must read and interpret the provision and apply its meaning to the case at hand.⁸¹ More typically, however, contracts provide a general work requirement but do not address the issue of holiday pay for employees on layoff status.⁸²

Since the timing of a layoff is generally at management's discretion, the arbitrator must insure that the “legitimate [holiday] pay expectations of employees” are not sacrificed by the “simple expedient” of layoff scheduling.⁸³ If a company deliberately lays off an employee to avoid paying the holiday benefit, the arbitrator should order the payment. Upon proof of such “bad faith,” the arbitrator must not allow management “to profit by its own wrong”⁸⁴ Contract language should not be interpreted to put a

79. Fruehauf Corp., 54 Lab. Arb. (BNA) 947, 950 (1970) (Tripp, Arb.); John Deere Tractor Co., 9 Lab. Arb. (BNA) 20, 21-22 (1947) (Gorder, Arb.).

80. Amelco Corp., 72 Lab. Arb. (BNA) 528, 529 (1979) (Tanaka, Arb.) (“The right to holiday pay during lay off is one of the most arbitrated issues in labor relations.”).

81. Norris Indus., 73 Lab. Arb. (BNA) 1129 (1979) (Roumell, Arb.).

82. Master Weavers Inst., 12 Lab. Arb. (BNA) 971 (1949) (Berkowitz, Arb.).

83. Allis-Chalmers Corp., 72 Lab. Arb. (BNA) 840, 845 (1979) (Goetz, Arb.); Otumwa Foundry, Inc., 30 Lab. Arb. (BNA) 1081 (1958) (Doyle, Arb.).

84. Young Spring & Wire Corp., 41 Lab. Arb. (BNA) 991, 994 (1963) (Hunter, Arb.); Seldner & Enequist, Inc., 14 Lab. Arb. (BNA) 7 (1950) (Kramer, Arb.).

“premium on evasiveness.”⁸⁵ On the other hand, if management demonstrates that it laid off the employee “in good faith and in the normal course of business,” the arbitrator should enforce the contract on its face.⁸⁶ If the employee has failed to fulfill a contractual work requirement because of such a legitimate layoff, the holiday benefit is not due.

The major controversy involving holiday pay for employees on layoff status is whether they have fulfilled the express eligibility stipulations of the contract. In resolving these disputes, arbitrators have drawn a useful distinction between two types of qualification provisions. Some contracts require an employee to work “the” regularly scheduled workday before and after the holiday; others require that an employee work “his” regularly scheduled workday before and after the holiday. The parties’ selection of the word “the” or “his” may determine the outcome in layoff cases.⁸⁷ The employee on layoff status may have worked “his” last scheduled day prior to the layoff, but did not work “the” workday regularly scheduled for employees prior to the holiday. The precise language of the clause must control.⁸⁸ Of course, there is some danger in placing such import on what might have been an accidental choice of words. However, the parties must be held to what they said. They can always clarify their language at their next set of negotiations. An arbitration award is not immutable.

Under contracts which provide that employees laid off during the week in which a holiday falls are entitled to holiday pay, the question arises as to when a layoff became effective. Typically, the aggrieved employee was given his layoff notice on the Friday prior to the week in which a holiday is observed. In *Ford Motor Company*, Umpire Harry Shulman issued the classic and much quoted formulation used to resolve these disputes: “The beginning of the lay-off . . . is not the day on which the notice of lay-off is given . . . , but rather the day on which the employee begins to lose time by virtue of the lay-off”⁸⁹ In the recurring case of the Friday layoff notice, holiday pay would be due since the employee begins losing time on the regularly scheduled Monday of

85. McKinney Mfg. Co., 19 Lab. Arb. (BNA) 73, 75 (1952) (Brecht, Arb.).

86. Great Atl. & Pac. Tea Co., 40 Lab. Arb. (BNA) 152, 159 (1962) (Scheiber, Arb.).

87. Amelco Corp., 72 Lab. Arb. (BNA) 528, 530 (1979) (Tanaka, Arb.) (“Had the word ‘his’ been used in place of ‘the’ then the Union’s position is supportable.”).

88. Chrome-Rite Co., 12 Lab. Arb. (BNA) 691, 693 (1949) (Gilder, Arb.)

89. 11 Lab. Arb. (BNA) 1181, 1189 (1948).

the workweek containing the holiday.⁹⁰

In situations involving plant closings and permanent layoff of the entire workforce, arbitrators have denied pay claims for holidays falling after the shutdown.⁹¹ Arbitrator Robert Moberly in *Infant Socks, Inc.* interpreted a clause that provided for holiday pay for laidoff employees "upon returning to work from such lay off."⁹² Reasoning that the provision clearly indicated that the employer need grant holiday pay only when it receives the benefit of resumption of the work relationship, the Arbitrator ruled that no pay was due since no employees could return to work at the closed plant.⁹³

B. *Entitlement While On Strike*

Employees on strike during the term of an agreement may not have fulfilled the contractual work requirements stipulated in the holiday pay clause.⁹⁴ Thus, they may not be entitled to pay for a holiday that falls during the strike.⁹⁵ If a strike occurs after the collective bargaining agreement has expired, no pay is due for holidays falling during the work stoppage.⁹⁶ The right to holiday pay is created by the contract. When the contract is not in effect, no holiday pay is due.

A common variant of the strike issue involves nonstriking employees who are unable to, or refuse to, cross another union's picket line, and thus do not fulfill surrounding days work requirements. In the absence of an applicable exception to the work requirements, holiday pay is not due. Arbitrator Clare McDermott in *U.S. Steel Corp.* interpreted a holiday pay clause containing an excuse to the work requirements for "good cause."⁹⁷ He ruled

90. ITT, 75 Lab. Arb. (BNA) 729 (1980) (Howlett, Arb.); Norris Indus., 73 Lab. Arb. (BNA) 1129 (1979) (Roumell, Arb.); Lear Siegler, Inc., 58 Lab. Arb. (BNA) 353 (1972) (Volz, Arb.).

91. Rheem Mfg. Co., 29 Lab. Arb. (BNA) 173 (1957) (Ross, Arb.).

92. 51 Lab. Arb. (BNA) 400, 407 (1968).

93. *Id.* at 407.

94. Packaging Corp. of Am., 62 Lab. Arb. (BNA) 1214 (1974) (Gibson, Arb.); American Brake Shoe Co., 40 Lab. Arb. (BNA) 673 (1963) (Reid, Arb.).

95. "When employees voluntarily suspend their services temporarily it would seem that the benefits provided in the Agreement would also be in abeyance for the same period," at least where eligibility requirements are not met. Kansas Bakery Employers' Labor Council, 54 Lab. Arb. (BNA) 754, 756 (1970) (Bauder, Arb.); Peavey Co., 43 Lab. Arb. (BNA) 539 (1964) (Traynor, Arb.).

96. Alliance Mach. Co., 74 Lab. Arb. (BNA) 1058 (1980) (Feldman, Arb.); Peavey Co., 43 Lab. Arb. (BNA) 539 (1964) (Traynor, Arb.).

97. 46 Lab. Arb. (BNA) 473 (1966).

that the failure of the employees to report because the plant was being picketed by other employees on an authorized strike constituted "good cause" and ordered payment for the holiday.⁹⁸ Similarly, Arbitrator Israel Treiman concluded in *St. Louis Terminal Warehouse Co.* that employee refusal to cross a picket line fell within the contract's "reasonable excuse" exception, justifying a failure to meet the contract work requirement.⁹⁹ Both decisions are hard to justify. The employees' actions were voluntary and uncoerced. They chose not to cross the lines and work. They should have been held to have forfeited holiday benefits by failing to meet the express contract work eligibility requirements. "Good cause" and "reasonable excuse" exceptions should not be read to include a voluntary decision not to report to work. If the employees are physically prevented from working, however, their failure should be excused under contract language similar to that in these two cases.

At the opposite end of the spectrum is Arbitrator A.A. White's decision in *Pearl Brewing Co.*¹⁰⁰ There the arbitrator dealt with a Teamsters Union claim for July 4th holiday pay. After ratifying a new collective bargaining agreement on July 1, Teamsters' employees refused to cross a Machinists Union picket line. Although the collective bargaining agreement contained no work eligibility requirement and expressly protected the employees' right to honor picket lines, Arbitrator White upheld the Company's denial of holiday pay because the Teamsters' employees joined in the Machinists' economic battle by honoring the line. "The loss of . . . holiday pay was one of the potential losses the union and its employees should have considered in deciding whether to support the Machinists in their economic struggle."¹⁰¹ Arbitrator White's approach can be criticized on two grounds: He, and not the parties, wrote an eligibility requirement into the holiday pay provision, and he ignored the parties' express provision protecting sympathy actions. The arbitrator should leave the drafting of eligibility qualifications to the parties and not imply such requirements for general philosophical or policy grounds.

Arbitrator Paul Hanlon adopted an alternative but equally questionable approach to the sympathy strike situation in *Com-*

98. *Id.*

99. 19 Lab. Arb. (BNA) 807 (1952).

100. 68 Lab. Arb. (BNA) 221 (1977).

101. *Id.* at 223.

mercial Sand Association.¹⁰² He ruled that holiday pay was due employees who honored a picket line because the employer failed to advise them that work was available.

An employer seeking to deny holiday pay in a situation such as this must carry the burden of proving first that as a practical matter, in spite of the strike, there was work available which could have been performed behind the picket line on the dates in question by the non-striking employees; and second, that each non-striking employee from whom holiday benefits are being withheld was directly advised that there was work scheduled and available to him on the dates in question, and that after being so advised, he voluntarily refused to cross the picket line.¹⁰³

While Arbitrator Hanlon found that there *was* available work, he granted holiday pay on the ground that the company failed to prove that employees were so advised.¹⁰⁴ Hanlon's approach is questionable; it places an affirmative notice obligation on the employer that is not based on the parties' agreement. As a general matter, employees should assume that work is available; by failing to meet established work requirements, they voluntarily forfeit their holiday pay.

If the holiday pay clause contains a work eligibility requirement, a sympathy striker should be treated like any other striker. An employee who is voluntarily unavailable for work during the period within which a holiday is observed should not be entitled to the pay benefit.¹⁰⁵ A sympathy striker "surrenders the benefit for such holiday as surely as he surrenders his pay on any other day during such period of time."¹⁰⁶

C. *Pay for Holidays Falling On Nonscheduled Workdays, During Vacations, or During Plant Shutdowns*

When a holiday falls on a day on which work is not regularly scheduled, such as a Saturday or Sunday, the question arises whether employees are entitled to holiday pay for that day. Since no work was scheduled, the employees lost no pay from their paychecks. Under a pure "level paycheck" theory, no holiday pay would be due.¹⁰⁷ Under the modern approach of recognizing hol-

102. 58 Lab. Arb. (BNA) 832 (1972).

103. *Id.* at 834.

104. *Id.*

105. *Lucky Stores, Inc.*, 57 Lab. Arb. (BNA) 149 (1971) (Eaton, Arb.); *Kansas Bakery Employers' Labor Council*, 54 Lab. Arb. (BNA) 754 (1970) (Bauder, Arb.).

106. *Safeway Stores*, 60 Lab. Arb. (BNA) 1089, 1093 (1973) (Jacobs, Arb.).

107. *See supra* notes 9-11 and accompanying text.

iday pay as a bargained-for benefit, employees should be entitled to pay when the holiday falls on a nonscheduled workday,¹⁰⁸ unless the contract stipulates to the contrary.¹⁰⁹ Holiday pay is an important monetary item, part of the compensation package. When the parties have bargained for a specified number of paid holidays, they should be deemed to have intended payment for these unworked days as long as express requirements are met.¹¹⁰

Should an employee receive holiday pay if the holiday falls during his scheduled vacation time? Again, the employee's paycheck remains "level" since, presumably, he is receiving vacation pay. On the other hand, viewing holiday pay as a fringe benefit supports the claim for holiday pay. The better approach is to conclude that holiday pay is due the vacationing employee in the absence of express contractual stipulation to the contrary.¹¹¹

An employee who takes vacation during a week containing a holiday should not forfeit holiday pay while another employee who schedules his vacation for a different week receives the benefit. A contrary result would distort manning in the workplace, inducing employees to take vacations during weeks which did not contain a holiday to avoid losing the negotiated fringe benefit.

An analogous situation involves a holiday that falls during a week in which the plant is shut down. The shutdown may prevent employees from qualifying for holiday pay under a provision requiring them to work at some time during the week in which a holiday falls.¹¹² However, where the employer controls the scheduling of the shutdown, a mass forfeiture of holiday pay should be disallowed. When employees are prevented from fulfilling contract eligibility requirements by the unilateral actions of management, the arbitrator should uphold a grievance claiming lost holiday pay.¹¹³ As Arbitrator Herbert Rossman explained in

108. Arrow Lines, Inc., 58 Lab. Arb. (BNA) 1280 (1972) (Blum, Arb.); American Smelting & Ref. Co., 65 Lab. Arb. (BNA) 1217 (1975) (Bardwell, Arb.) (birthday holiday).

109. American Can Co., 12 Lab. Arb. (BNA) 434 (1949) (Stein, Arb.).

110. *Compare* Woodward Wight & Co., 33 Lab. Arb. (BNA) 494 (1959) (Caraway, Arb.), with Milwaukee Linen Supply, 23 Lab. Arb. (BNA) 392 (1954) (Anderson, Arb.).

111. Northwestern Steel & Wire Co., 39 Lab. Arb. (BNA) 104 (1962) (Sembower, Arb.).

112. Curtiss Candy Co., 64 Lab. Arb. (BNA) 538 (1975) (Epstein, Arb.).

113. This analysis may appear to conflict with the earlier analysis of entitlement to holiday pay in the layoff context, *see supra* notes 83-86 and accompanying text (employee laid off in good faith who fails to meet contractual work requirement not entitled to holiday pay). But the situations are distinguishable. When the parties agree upon a specified number of paid holidays, they anticipate that management will not nullify the negotiated benefits through use of its power to schedule work. Thus, scheduling a plant shutdown so

Teledyne Wirz, the purpose of eligibility requirements—"to protect the Company from a disruption of production because of undue absenteeism around holiday times"—is inapposite when management has decided to shut down operations temporarily.¹¹⁴

IV. OBSERVANCE OF THE HOLIDAY

As noted, employees should be paid for contract holidays that fall on nonscheduled workdays.¹¹⁵ In addition to expecting pay for a holiday, parties generally anticipate that a holiday will be a day off from work. When the holiday is observed on a nonscheduled workday, employees do not receive this additional benefit of relief from the normally scheduled work week. Disputes over the date on which a holiday is to be observed are common.

The parties can avoid problems concerning the date of observation by addressing the issue in their agreement. As Arbitrator Sam Barone noted in *Dayton Press, Inc.*, "when the contract speaks, it speaks with authority."¹¹⁶ Contracts commonly specify that Saturday holidays will be observed on Fridays and Sunday holidays on Mondays.

In the absence of such clear direction, the arbitrator must resolve disputes over the observation of certain contract holidays by interpreting the contract reference within the context of the parties' prior practice. There are many dates possible for observing some holidays. The contract clause, for example, may simply designate "Veterans Day" or "Memorial Day" as a paid holiday. A federal or state statute or proclamation may indicate the date for

as to nullify a holiday benefit for the entire work force is contrary to the parties' mutual intent. When parties agree to nine paid holidays, they expect nine holidays and not eight because management schedules a plant shutdown during a holiday week. It would be a rare case where management could demonstrate a compelling reason for scheduling a plant shutdown in such a manner. On the other hand, the parties do contemplate that some employees will not qualify for a paid holiday if contractual work requirements are not fulfilled—they know that management may reduce the workforce through layoffs for reasons unrelated to the timing of a holiday. When the timing of a layoff is suspect, management should bear the burden of explaining the timing of its action. If management establishes that legitimate business reasons unrelated to the impending holiday mandated the timing of the layoff, holiday pay should be denied.

In both situations, management must explain the timing of its action. Management likely will be unable to present a compelling justification for scheduling a plant shutdown that nullifies a paid holiday benefit for the entire workforce. It is more likely that management will be able to present a legitimate business reason for timing the layoff of one or a few employees which results in their failure to qualify for holiday pay.

114. 77 Lab. Arb. (BNA) 691, 692 (1981).

115. See *supra* notes 108–11 and accompanying text.

116. 71 Lab. Arb. (BNA) 1034, 1036 (1978).

the legal celebration of the holiday and, in fact, different official pronouncements may designate different dates for observation.¹¹⁷ The company's past practice may suggest yet another date for the observation of the holiday.¹¹⁸ When is the holiday to be observed?

Prior practice in the workplace should be the controlling consideration in interpreting the parties' bargain if they have not clearly expressed their intent.¹¹⁹ In the absence of an established past practice, the arbitrator must give a reasonable reading to the holiday provision and seek to determine the parties' intention as to the date of observance. At times, the parties may provide a choice of observation dates. For example, the contract in *Fisher Foods, Inc.* designated holidays as "calendar or celebrated holiday."¹²⁰ Arbitrator John Drotning upheld management's right to designate Sunday as a holiday when it was the calendar date on which the holiday fell, one of the options under the contract provision.¹²¹ If the contract is ambiguous and there is no binding past practice, management may select one of the reasonable options as long as it does so in good faith.

Governmental designation of observance dates should not control unless the parties have so indicated. "Legal holidays" are not "contractual holidays,"¹²² unless the parties' agreement adopts the government designation.¹²³ An established past practice of following the government designation should guide in interpreting the parties' agreement.¹²⁴ Of course, a government proclamation of a holiday does not entitle employees to holiday pay unless the contract so provides, even if the company shuts down the plant for observance of the holiday. "Obviously, what is a paid holiday is to be ascertained from the labor contract—not from a statute pro-

117. *South Jersey Port Corp.*, 66 Lab. Arb. (BNA) 192 (1976) (Kelly, Arb.) (state observed Veterans Day on November 11; federal government proclaimed October 27 as legal holiday).

118. *A-T-O Inc.*, 72 Lab. Arb. (BNA) 408 (1979) (Shister, Arb.); *Potash Co. of Am.*, 45 Lab. Arb. (BNA) 788 (1965) (Lennard, Arb.).

119. *Frisch & Co.*, 51 Lab. Arb. (BNA) 268 (1968) (Yagoda, Arb.) (practice of celebrating three Jewish holidays as "religious holidays" granted in contract controlling).

120. 70 Lab. Arb. (BNA) 1283, 1285 (1978).

121. *Id.* at 1285.

122. *Stein, Inc.*, 71 Lab. Arb. (BNA) 125 (1978) (Klein, Arb.); *Printing Indus. of Wash., D.C.*, 42 Lab. Arb. (BNA) 843, 845 (1964) (Cayton, Arb.).

123. *Indiana Moulding & Frame Co.*, 60 Lab. Arb. (BNA) 737 (1973) (Cohen, Arb.) ("Any holiday which falls on Saturday shall be observed pursuant to national policy.")

124. *A-T-O Inc.*, 72 Lab. Arb. (BNA) 408 (1979) (Shister, Arb.).

viding for public holidays."¹²⁵

Every seven years, Christmas Eve and Christmas Day, and New Year's Eve and New Year's Day fall on either a Friday and a Saturday, or on a Sunday and a Monday. Every seven years disputes are brought to arbitration regarding observance of these paired holidays.¹²⁶ Unions claim that the fortuity of the calendar should not result in the loss of one of these treasured paid holidays. While the contract clause may stipulate that Saturday holidays are to be observed on Friday and Sunday holidays on Mondays, what should be the result when that Friday or Monday is already a holiday? Should the arbitrator apply a "domino theory" and rule that the prior Thursday or the following Tuesday should have been observed as holidays?

Arbitrators have differed as to the appropriate response to the paired holiday dispute, in part because they have not focused on the two distinct aspects of holidays—pay for an unworked day and a day off from the regular workweek.¹²⁷ The better approach is to deny a union claim for observance of the holiday during the regular workweek in the absence of contractual language addressing the question. At the bargaining table, the parties certainly have access to a calendar covering the years of the contract under negotiation. A union could easily avoid the clearly foreseeable dispute by negotiating appropriate language to deal with the problem. On the other hand, the pay for the paired holiday is part of the compensation package. Employees are entitled to pay for the contract holidays, and management has no unilateral right to reduce their number.¹²⁸ Holiday pay would be due, but employees should not receive the days off from work.

V. AMOUNT OF HOLIDAY PAY

Occasionally a dispute is brought to arbitration regarding calculation of the amount of holiday pay. For example, should employees who normally receive a shift differential receive that pay increment as part of their holiday pay? Under a contract provision requiring eight hours of pay at "regular straight time hourly

125. *Mastermade Furniture Corp.*, 50 Lab. Arb. (BNA) 921, 924 (1968) (Wolff, Arb.).

126. *Stone Container Corp.*, 58 Lab. Arb. (BNA) 973, 975 (1972) (Allen, Arb.).

127. *Compare Stone Container Corp.*, 58 Lab. Arb. (BNA) 973 (1972) (Allen, Arb.) (applying domino theory), with *Dayton Press, Inc.*, 71 Lab. Arb. (BNA) 1034 (1978) (Barone, Arb.) (rejecting domino theory); *Indiana Moulding & Frame Co.*, 60 Lab. Arb. (BNA) 737 (1973) (Cohen, Arb.) (same).

128. *Stone Container Corp.*, 58 Lab. Arb. at 975.

rates," Arbitrator William Daniel ruled in *Bertrand Products, Inc.* that a night shift premium should not be included in holiday pay.¹²⁹ He rejected the union's argument that the purpose of the holiday pay provision was to give employees the same amount of money they would have earned had they been scheduled to work the day as a nonholiday. To include the shift differential in the holiday pay computation would be illogical, the Arbitrator concluded, since it "is an inconvenience factor recognizing the less desirable working hours of the night shift" which the employees did not work on the holiday in question.¹³⁰

In *Carbon County, Pennsylvania* Arbitrator Morrison Handsaker reached a directly contrary result under a similar contract provision calling for "regular straight time hourly rate" for the calculation of holiday pay.¹³¹ Interpreting the contract phrase, he concluded that "[t]he rate of pay which a shift employee regularly gets is the day rate plus the differential."¹³² Although the Arbitrator claimed that this reading was the "generally accepted interpretation" of the term,¹³³ his conclusion is rightfully criticized. "Regular straight time hourly rate" normally means the rate of pay before shift differentials or other premiums are applied.

The outcome of cases involving the calculation of holiday pay should depend upon the precise language of the collective agreement, interpreted in the light of any well-established past practice.¹³⁴ A contract reference to holiday pay at the "regular straight time hourly rate" should not require including a shift differential. However, as a general matter parties intend to maintain an employee's pay at its customary level during a week containing a holiday. The arbitrator should set holiday pay at the employee's usual rate for his regular shift, including any shift premium, if the holiday clause does not expressly stipulate that "straight time" (or some similar formulation denoting base rates of pay) is the measure of calculation.

Bargaining history may prove useful in resolving holiday pay calculation disputes. In *Peabody Alion Division*, Arbitrator John Drotning denied a union claim that the cost-of-living adjustment

129. 66 Lab. Arb. (BNA) 586 (1976).

130. *Id.* at 587.

131. 73 Lab. Arb. (BNA) 1305 (1980).

132. *Id.* at 1307.

133. *Id.*

134. *Trabon Eng'g Corp.*, 49 Lab. Arb. (BNA) 221, 223-24 (1967) (Teple, Arb.) (pro rata holiday pay based on number of hours worked on surrounding days established by practice if contract ambiguous).

on wages should be included in the calculation of holiday pay.¹³⁵ Under the parties' prior agreement, the cost-of-living allowance had been added both to straight time hourly earnings and holiday pay. The existing contract contained revised language stating that the allowance was to be added to the base rate "for hours worked." Since holidays were not "hours worked," the Arbitrator ruled that the allowance was not applicable to calculation of the holiday pay amount. Even if the union had assumed the cost-of-living allowance would be applied the same way under the new agreement, "[b]eliefs and feelings do not supercede [sic] contract language and the language supports the [c]ompany's position"¹³⁶

What is the applicable rate of holiday pay for the New Year's Day holiday when it is observed on December 31st and a contractual wage increase is effective January 1st? In one such case, Arbitrator Sherman Dallas concluded that the company had wrongfully paid the holiday pay at the lower prior year's rate.¹³⁷

The fact that the holiday was observed on December 31, 1971 doesn't alter the fact that the holiday itself is January 1. When the parties to any labor agreement negotiate paid holidays, their major concern is the number of paid holidays *per year*. Thus, the instant agreement provides for 9 paid holidays per year, per 1972. Logically, it would follow that all 1972 holidays would be observed with all the contractual privileges associated with the year 1972, including the effective wage schedule.¹³⁸

VI. CONCLUSION

A holiday off from work can be a joyless event if an employee's expectation of holiday pay is not fulfilled. Labor arbitrators will protect these expectations if they are solidly grounded in the terms of the parties' collective agreement. On the other hand, entitlement to holiday pay may require an employee to meet eligibility stipulations. If work requirements are not met, no holiday pay is due.

A significant portion of the disputes that arise under holiday pay clauses can be avoided if the parties would deal with these

135. 73 Lab. Arb. (BNA) 1153 (1980).

136. *Id.* at 1155; *see also* Lee Norse Co., 75 Lab. Arb. (BNA) 29 (1980) (Shister, Arb.) (union bound by agreement despite claim of error in proofreading).

137. Union Oil of California, 59 Lab. Arb. (BNA) 1136 (1972).

138. *Id.* at 1138.

foreseeable controversies as part of their negotiation process.¹³⁹ But even when the parties address matters such as exceptions to surrounding days work eligibility requirements, there is work for the arbitrator to do in interpreting their contractual references and applying that meaning to the facts of the case at hand.

Deciding whether work eligibility requirements have been fulfilled is often a difficult task, but there are established guideposts for the arbitrator. The body of arbitral principles established for the resolution of holiday pay disputes may be used to interpret the language selected by the parties and assess the impact of their practice under the collective agreement. While disallowing or granting holiday pay may appear to be "unfair" in some general sense, it is the parties' arrangement which must control the resolution of holiday pay disputes. The arbitrator must read the parties' text and follow their direction. Fidelity to the contract must be the arbitrator's lodestar.

139. See Abrams, *Negotiating in Anticipation of Arbitration: Some Guideposts for the Initiated*, 29 CASE W. RES. L. REV. 428 (1979).