

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

AAF-McQUAY, INC.,)	
)	Civil Action No. 5:02CV0068
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
UNITED ELECTRICAL RADIO AND MACHINE WORKERS OF AMERICA (U.E.) LOCAL 123,)	
)	By: Samuel G. Wilson
Defendant.)	Chief United States District Judge

Plaintiff AAF-McQuay, Inc. (“McQuay”) brings this action against defendant United Electrical Radio and Machine Workers of America, Local 123 (“the union”), a union representing employees at McQuay’s facility in Verona, Virginia. McQuay seeks to vacate an arbitration award in a dispute between McQuay and the union. The union counterclaims, seeking enforcement of the arbitration award and attorney’s fees. The court has jurisdiction under § 301 of the Labor Management Relations Act (“LMRA”). See 29 U.S.C. § 185(a). For the reasons stated, the court finds that the arbitrator exceeded the scope of her authority in awarding backpay for the time period before the grievance was first presented to McQuay and vacates that portion of the award. The court enforces the remaining portions of the award.

I.

McQuay manufactures commercial and industrial air conditioner compressors at its facility in Verona, Virginia. Local 123 is the exclusive bargaining representative of the employees who construct and repair these compressors. Under the collective bargaining agreement (“CBA”) negotiated between McQuay and the union, the compressor employees are placed into job classifications and paid a wage rate based on that classification. The employees who construct

new compressors, known as Compressor Assemblers, have a salary rating of Class 9.

At some point in the mid-1990s, McQuay's compressors began to break down during use and customers began returning the compressors to McQuay's plant for repairs. Because of the volume of compressors that were failing, McQuay began pulling Compressor Assemblers off the line and having them repair or recondition the returned compressors. The repairing and reconditioning procedure was more complex, required greater skill and involved greater occupational risks than the initial assembly procedure.

On October 8, 1998, McQuay and the union executed a signed Memorandum of Understanding that created a new job classification, the Compressor Repairer. Compressor Repairers were defined as employees who repaired and reconditioned returned compressors. Compressor Repairers received a higher Class 11 salary. The Memorandum of Understanding also provided that "this understanding . . . is not intended to alter or modify the Labor Agreement in any other way nor to establish a practice or set a precedent." Section VIII(j) of the 1997 CBA, in effect when the Memorandum of Understanding was executed, provided: "When management assigns an employee to a job other than his regular job . . . he will be paid (1) the corresponding rate of the higher job if assignment is to a higher pay grade job, or (2) his regular rate, if the assignment is to the same or lower grade job." After the Memorandum of Understanding was signed, Compressor Assemblers who were assigned to repair or recondition compressors were paid the Class 11 salary.

In 2000, McQuay and the union began to negotiate a new CBA. During the negotiations, the union attempted to have the Compressor Repairer job classification included in the CBA. Ultimately, the union dropped that demand and the 2000 CBA contained the same job

descriptions as the earlier 1997 CBA, including Compressor Assemblers with Class 9 salaries, but not Compressor Repairers with the higher Class 11 salaries. The 2000 CBA also contained an identical § VIII(j), providing for increases in wages when employees are temporarily assigned to a higher paying job. On April 14, 2000—the same day the 2000 CBA became effective—McQuay sent a letter to the union stating that the “Compressor Repair classification will be recognized as part of the Compressor Assembly classification . . . but employees currently in the Compressor Repair classification will have their wages frozen until such time that they leave the classification or the wages of the Compressor Assembler achieve a level equal to or greater than the wages for the Compressor Repair.” The following day, McQuay sent another letter to the union regarding the pay for Compressor Repairers. This April 15, 2000 letter stated that “the company agrees to grant the annual cross the board increases to the personnel currently holding these [Compressor Repairer] positions for the lifetime of this labor agreement.”

Several months after the 2000 CBA came into effect, a group of Compressor Assemblers filed a grievance claiming they were entitled to Class 11 wages while assigned to repair and recondition compressors but were only receiving Class 9 wages. McQuay rejected the grievance, and the union demanded arbitration.

After conducting a hearing, the arbitrator issued a written award for the union. The arbitrator concluded that “Compressor Assemblers should have been paid Labor Grade 11 wages when performing compressor repair work and this increase in salary, in accordance with Section VIII(j) of the parties’ contract as well as the past practice between the Union and McQuay International, must continue until the parties’ current contract is renegotiated.” McQuay then filed this action, asking the court to vacate the arbitration award. McQuay argues that the

arbitrator ignored the CBA's plain language and bargaining history; ignored the CBA's express limitations period; and impermissibly expanded the remedies available to the union. The union brought a counterclaim, arguing that the arbitration award is valid and asking the court to enforce it. The court will address these arguments in turn.

II.

McQuay first argues that the arbitrator ignored the plain language of the CBA and the parties' negotiating history. McQuay asks this court to vacate the arbitration award because the award is not supported by the record and is outside the scope of the arbitrator's authority.

A court cannot overturn an arbitration award because of perceived legal or factual errors in the award. Mountaineer Gas Co. v. Oil, Gas & Atomic Workers Int'l Union, 76 F.3d 606, 608 (4th Cir. 1996). A court may vacate an award only if it "violates well-settled and prevailing public policy, fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's own notions of right and wrong." Id. The reviewing court should examine "(1) the arbitrator's role as defined by the CBA; (2) whether the award ignored the plain language of the CBA; and (3) whether the arbitrator's discretion in formulating the award comported with the essence of the CBA's proscribed limits." Id. Even if this court is convinced the arbitrator committed serious error, the court cannot vacate the award if the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

Here, the court finds that the arbitrator's award draws its essence from the CBA and is within the scope of the arbitrator's authority. The arbitrator provided the rationale for her decision, including a citation to the specific CBA provision authorizing her award. The arbitrator

determined that the job classification “Compressor Repairer,” while not explicitly contained in the CBA, existed as part of the parties’ past practice. Therefore, the arbitrator found that Compressor Assemblers who performed the higher paid jobs of Compressor Repairers were entitled to the higher wage rate under § VIII(j) of the CBA.

It is recognized in this circuit that “[a]n employer’s established past practice can become an implied term of a collective bargaining agreement.” Bonnell/Tredegar Ind. v. NLRB, 46 F.3d 339, 344 (4th Cir. 1995). A past practice becomes part of the CBA when it has “ripened into an established and recognized custom between the parties.” Id. (internal quotations omitted).

McQuay, however, argues that even if some past practice existed before the 2000 CBA took effect, the negotiating history of the 2000 CBA proves that a permanent Compressor Repairer job classification does not exist. To support its argument, McQuay points to the fact that the union attempted to have the Compressor Repairer classification included in the CBA, but ultimately withdrew that demand. As the arbitrator notes, however, the April 14 and April 15 letters from McQuay—after the new 2000 CBA had taken effect—suggest that the Compressor Repairer job classification still existed. Relying on this evidence of custom and past practice between the parties, and on the language in § VIII(j) of the CBA, the arbitrator found that Compressor Assemblers should have been paid Class 11 wages when performing the work of Compressor Repairers.

Although this court may have reached a different conclusion, it is clear that the arbitrator considered the plain language of the CBA along with established customs implicitly included in the contract in reaching her decision. Since the arbitrator was “arguably construing or applying the contract and acting within the scope of [her] authority,” the court cannot vacate the award.

Misco, 484 U.S. at 38.

III.

McQuay also argues that the award should be vacated because the arbitrator ignored the CBA's express limitations period—which McQuay contends barred the union's claims. The CBA states that “[f]or efficient and effective handling of grievances, the following steps will be adhered to.” The agreement then lists four steps—Informal Step, Step 1, Step 2 and Step 3—containing time frames in which the grievance must be brought before various officials within the company. If the grievance is not resolved at the end of Step 3, the union may seek arbitration. McQuay argues that the union violated the Informal Step, which provides that employees “shall discuss the grievance with the supervisor as soon as is possible, but no later than ten (10) working days after the incident giving rise to the grievance.” CBA § XIV(2)(d)(2). McQuay presented evidence to support its argument that the union failed to comply with the Informal Step procedure and the union did not present any evidence to contradict it.

Even if the union failed to follow the procedures contained in the Informal Step, however, the CBA does not provide an express remedy for the failure to comply and thus the arbitrator was not required to find the union's claims procedurally barred. The Supreme Court has instructed “[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.” United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

Section XIV(2)(d)(2), the only CBA section that contains remedies for failing to follow grievance procedure, provides that “[if] a grievance is not referred to the next step within three

(3) working days following the Company's written reply at Steps 1 through 2 inclusive, it shall be considered as settled on the basis of the Company's last answer" This language clearly applies only to Steps 1 and 2—which require formal presentation of the grievance to management in writing.

Thus, because there is no express remedy in the CBA for failure to comply with the Informal Step, the decision of what remedy is appropriate is squarely within the arbitrator's discretion. This court can vacate the award only if the arbitrator's choice of remedy is not even arguably consistent with the CBA. Misco, 484 U.S. at 38. Here, nothing in the arbitrator's award is inconsistent with the CBA's express remedies for procedural violations. Moreover, the fact that the CBA specifically bars arbitration if Step 1 or Step 2 procedures are violated—but does not similarly do so for the Informal Step—could be read to suggest that a violation of the Informal Step procedure is not intended to bar the union from arbitration. Therefore, the arbitrator's decision not to bar the union's grievance from arbitration at least arguably draws its essence from the CBA. Accordingly, the court cannot vacate the award on this ground.

IV.

Finally, McQuay contends that the arbitrator impermissibly expanded the scope of the remedy available under the CBA. McQuay points to CBA § XIV(3)(d) which provides that any arbitration award "shall not be made prior to the date that the grievance was presented at the first step of the Grievance Procedure." McQuay asserts that the first time a grievance was presented to the company was September 20, 2000. The union does not dispute this. However, the arbitrator's award states that employees performing Compressor Repairer work should have been paid the higher Class 11 wage rate "commencing April 14, 2000, the date of the parties' present

Collective Bargaining Agreement.”

The court finds that the arbitrator’s award of backpay between April 14, 2000 and September 20, 2000 does not draw its essence from the CBA. The plain language of the CBA limits the start date of any backpay award to the date the grievance procedure is first initiated—in this case September 20, 2000. There is no evidence of any past practice or custom between the parties that differs from this plain language in the CBA. As the Fourth Circuit has noted, “there are limits to what arbitrators may do.” United Mine Workers of America v. Island Creek Coal Co., 179 F.3d 133, 137 (4th Cir. 1999). The arbitrator may not ignore the plain language of the contract. Upshur Coals Corp. v. United Mine Workers of America, 933 F.2d 225, 228 (4th Cir. 1991). This is particularly true where, as here, the CBA expressly prohibits the arbitrator from modifying or adding to the agreement. See id. Because the award of backpay from April 14, 2000 to September 20, 2000 is inconsistent with the plain language of the CBA, that portion of the arbitrator’s award does not draw its essence from the agreement. Accordingly, the court will vacate the portion of the arbitration award that provides backpay for any time period before September 20, 2000.

VI.

The United Electrical Radio and Machine Workers of America counterclaims seeking enforcement of the arbitration award and attorney’s fees. For the reasons stated above, the court will enter an order enforcing the portion of the arbitration award that was not vacated. Attorney’s fees, however, can be awarded only against a party who challenged the arbitrator’s award “without justification,” for example through vexatious litigation. United Food and Comm. Workers v. Marval Poultry Co., 876 F.2d 346, 350 (4th Cir. 1989). The court finds that

McQuay's challenge to the arbitration award was justified and denies the union's request for attorney's fees.

V.

For the reasons stated, the court finds that the arbitrator exceeded the scope of her authority in awarding backpay before September 20, 2000 and vacates the portion of the award that provides backpay for any time period before September 20, 2000. The court enforces the remaining portions of the award. The union's request for attorney's fees is denied. An appropriate order will be entered this day.

ENTER: This 25th day of February, 2003.

CHIEF UNITED STATES DISTRICT JUDGE

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AAF-McQUAY, INC.,)	
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v.)	<u>FINAL ORDER</u>
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UNITED ELECTRICAL RADIO AND)	
MACHINE WORKERS OF AMERICA)	By: Samuel G. Wilson
(U.E.) LOCAL 123,)	Chief United States District Judge
)	
Defendant.)	

In accordance with the accompanying memorandum opinion, it is **ORDERED** and **ADJUDGED** that the award of the arbitrator is enforced in part and vacated in part. This case is stricken from the docket of the court.

ENTER: This 25th day of February, 2003.

CHIEF UNITED STATES DISTRICT JUDGE