ARBITRATION BULLETIN

Subject: Interpretation of Serious Illness Under a Compassionate Leave Clause

OCTOBER 1, 1993

IN THE MATTER OF AN ARBITRATION
BETWEEN
THE INTERMOUNTAIN SCHOOL DIVISION #38
(hereinafter referred to as the Division)
AND
THE INTERMOUNTAIN TEACHERS' ASSOCIATION NO. 36
OF THE MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as the Association)

BOARD OF ARBITRATION:
P. S. Teskey, Chairperson
G. D. Parkinson, Nominee of the Division
W. Pindera, Nominee of the Association

APPEARANCES:
R. A. Simpson, Counsel of the Division
M. Myers, Q.C., Counsel to the Association
R. Evancoi, Grievor

BACKGROUND

This matter concerns both an Association Grievance [Exhibit 2(a)] and the individual grievance of Mr. Evancio [Exhibit 2(b)] concerning the denial of a request for payment of compassionate leave on June 15 and 16, 1992 pursuant to Article 8:05 of the Collective Agreement (Exhibit 1) which reads as follows:

"Each teacher shall be allowed compassionate leave without loss of salary up to four (4) days in any school year in the case of death or serious illness of any member of the immediate family of the teacher; immediate family to include: Father, Mother, Sister, Brother, Son, Daughter, Wife, Husband, FatherinLaw, MotherinLaw, SisterinLaw, BrotherinLaw, SoninLaw, DaughterinLaw, Grandparents and Grandchildren. At the discretion of the Board, this leave may be granted on other compassionate grounds or extended beyond four (4) days."

It was agreed that the evidence concerning both grievances would be heard mutatis mutandis and that the Board was properly constituted and had jurisdiction to hear and determine the issue in dispute. It was further agreed that the Board should retain jurisdiction as to calculation of quantum should the grievance be allowed.

The only viva voce evidence was that of the grievor himself. A number of documentary exhibits were tendered by consent at the commencement of the hearing which greatly reduced the length of time necessary for the hearing itself. The facts of the matter (at least as presented to this Board) were not extensive and, to at least a certain extent, not in great dispute.

On June 10, 1992 the grievor wrote (Exhibit 3) to the Superintendent of the Division, the salient portions of which letter are as follows:

"This letter to request for compassionate leave for June 15 and 16 to accompany my father to a medical appointment in Regina
About a week ago, my father suffered a minor heart attack. An appointment has been arranged for tests in Regina at the request of his doctor.

Under separate cover, a letter from the attending physician will confirm his appointment and a need for me to accompany my father to Regina.
Thanking you in advance for your consideration of my request under Article 8.05 of the Collective Agreement."

On June 12 the grievor also supplied a form (Exhibit 5) signed by Dr. W. Wojcik, a cardiologist practicing in Regina, Saskatchewan. The relevant portion of Exhibit 5 states:

"This is to certify that my patient Alex Evancio is in need of medical care because of serious illness and needs to be accompanied by a family member because of this illness."

The response of the Superintendent (Exhibit 6) dated June 12, 1992 was as follows:

"Your letter of June 10, requesting compassionate leave on June 15 and 16 to accompany your father to a medical appointment in Regina was presented to the Intermountain School Board at its regular meeting of June 11, 1992.

In your letter, you explain that, about a week ago, your father suffered a minor heart attack and subsequently it is necessary for him to visit a doctor in Regina. The Board has considered your request and does not believe that it properly falls under the scope of Article 8.05.

The Division is prepared to grant you leave on June 15 and 16 as per Article 8.06(a) ii. Specifically a deduction of 1/X of your salary for each day absent will be made.

Please confirm if you will be taking these days under those conditions."

The grievor was allowed to take two days off but did not receive payment for same.

The other documentary medical evidence attached need not be repeated in its entirety but indicates that the grievor's father was admitted on an outpatient basis to the Hospital in Melville, Saskatchewan on May 12 after experiencing pain in his chest on the evening of May 11 after cutting his lawn. The tests done at the time were essentially negative although he was hospitalized for two days and for further assessment he was booked to see Dr. Wojcik on June 15. At that point aspirin and nitro pills were prescribed. There was no evidence of any further difficulties from the incident. On July 7 a Myocardial Perfusion Scan was performed but indicated nothing abnormal.

HIGHLIGHTS OF THE EVIDENCE

In his direct examination, the grievor testified that at the time of the events in question he was on a term contract with the Division from approximately mid March until the end of June to teach at the Roblin Collegiate in Roblin, Manitoba where he resides. His parents reside in Melville which is approximately two and one half hours southwest of Roblin and it is a further two hour drive from Melville to Regina.

The Grievor's father is retired and, as indicated in the medical reports, seventyseven years old as at the dates in question. His mother is in her seventies.

Mr. Evancio testified that after his father had suffered the chest pains and was hospitalized in Melville, he went to visit him on a weekend sometime between the middle and end of May. He visited for two days, each time making evening visits. There is some difficulty with the grievor's recollection as to the dates since upon review of a 1992 calendar, the dates of hospitalization (May 12 and 13) fell upon a Wednesday and Thursday, not upon the weekend as the grievor now recalls.

In any event, upon that visit, the grievor testified that his father looked ashen, was visibly shaken and looked "worn, weary and really upset". He was not talkative and relied upon his wife to do most of the speaking. This was a marked change from how he had previously been prior to the chest pains.

Mr. Evancio testified (and it is confirmed in the medical reports) that his father previously had been in good health all his life and it is not difficult to accept that the chest pains would have had an emotional impact upon him.

The grievor is the eldest (fortyfive years old) of three sons. His twin brothers are forty three years old and both reside in Regina. Mr. Evancio explained that as the oldest son, his father would look to him for advice or assumption of responsibilities and that it was part of the family background and tradition that that would be the case. His father expected him to play such a role.

After his initial visit to his father, the appointment with Dr. Wojcik was set in Regina (the Board does not have any details of who set the appointment or if there were any alternatives to the dates that were set). His father then approached the grievor to drive him to Regina for the appointment. His father could drive but after the chest pains he had given up driving for some months and his mother did not have a driver's license.

When his father asked him to drive him to the appointment, the grievor felt obliged to do so and also felt that his father needed the emotional and physical support.

In direct examination, the grievor indicated that the examination and tests were scheduled for June 15 and 16 but it appeared that both were concluded on June 15. However, the day had been a long one including driving from Melville to Regina and the appointment in the afternoon of June 15. The grievor could not recall exactly how long the appointment and tests took but given his father's age and his condition at the time it was decided to return to Melville the following day. The evening and night was spent with one of the brothers in Regina. On June 16 the grievor drove his parents back to Melville.

In crossexamination the grievor agreed that the May incident had occurred approximately a month prior to the Regina appointment as opposed to the week referred to m Exhibit 3 and could not recall why he had written that. He also agreed that further tests had been performed in July after his employment with the Division had ended. He could not personally recall providing the Division with any additional information subsequent to Exhibit 8. Exhibit 5 had been provided to him by an Association Representative and he had mailed it in to Dr. Wojcik (before Dr. Wojcik had seen his father) or completion of the form which was then provided to the Division.

THE ARGUMENT

In his submission, Mr. Myers stressed that the issue was the application of Article 8.05 to the facts at hand. The Article itself was not restricted to emergency or sick leave and "compassionate" should be interpreted broadly in light of the particular circumstances.

Given the age of the elder Mr. Evancio, the potential of a serious illness, and the obvious anxiety caused to the grievor's father and family, the grievor had acted reasonably and it was appropriate for compassionate leave to be granted in this instance. There was a medical basis for having the condition further investigated in Regina and, given the family background, it was not unreasonable for the eldest son to have acceded to his father's request. The grievor's participation was done for necessary emotional and physical support of his father.

Neither was it unreasonable for a seventy-seven year old individual to wish to stay overnight after the drive, the examination and the tests on June 15.

A number of authorities were furnished to the Board by Counsel.

Mr. Myers concluded by suggesting that entitlement had been established.

Mr. Simpson commenced his submission by noting that the Board was not required to determine whether the grievor should have driven his father but was required to consider whether the language of Article 8.05 provided for payment for the grievor to drive his father to a scheduled medical appointment.

Counsel referred us to pp. 8.90.3 through 90.5 of Brown & Beatty, Canadian Labour Arbitration (3rd edition) concerning bereavement leave which he argued was analogous to this type of situation.

In this instance the parties had agreed that the ambit of 8.05 went beyond death to include serious illness but that could not be extrapolated to mere transportation.

We were reminded that the grievor had been given the time off to go and what was involved was only the question of payment.

The facts were that a previously healthy individual suffered chest pains and went to the hospital. Nothing was found and he was subsequently released although referred to a cardiologist for further investigation. That appointment was not set until more than one month later and was only two weeks before the grievor's contract would have ended.

There were two brothers in Regina and there was no evidence to show that the grievor himself was required to have gone or why the appointment had to be made on June 15 during the work week. Neither had it been shown that the appointment could not wait for a few weeks.

The only evidence that there was tended to show that this was not a serious illness. Dr. Wojcik had found nothing in his examination and the further tests performed in July also came out negative.

It was understandable that there might be apprehension in the middle of May upon the part of the family but later events showed this not to be a serious illness.

We were also reminded to consider what evidence was before the Division at the time the request was made. Neither was any further information provided until well after Exhibit 8.

The onus was on the grievor to provide grounds for entitlement and he had failed to do so both to the Division and the Board of Arbitration.

Mr. Simpson's conclusion was that the grievance had to fail.

In reply, Mr. Myers suggested that compassionate leave involved different considerations than bereavement leave. The fact that the appointment had been previously scheduled should not be given too much weight and this case could not be equated to the situation of an individual driving a family member to a dentist appointment or for a minor ailment. Nor was the grievor's role simply of driving since he was providing emotional support as well. He also noted that the grievor had not been questioned during cross-examination as to whether or not there was a possibility of scheduling the appointment at a different time.

DECISION

There are some similarities but also certain differences between the instant case and the decision in Re Seine River School Division (cited above). The issue in the latter case was whether a scheduled Cesarean Section required due to the individual circumstances of Mr. Shchudlo's wife attracted payment of compassionate leave upon the basis of same being considered a "serious illness".

While at the hearing both Counsel suggested that the wording of Article 8.05 in the instant case was equivalent to the language considered by the Board in Seine River, there is some difference as will be noted by placing the two clauses together as follows:

"Article 8.05 (Intermountain)
"Each teacher shall be allowed compassionate leave without loss of salary up to four (4) days in any school year in the case of death or serious illness of any member of the immediate family of the teacher; immediate family to include: Father, Mother, Sister, Brother, Son, Daughter, Wife, Husband, FatherinLaw, MotherinLaw, SisterinLaw, BrotherinLaw, SoninLaw, DaughterinLaw, Grandparents and Grandchildren. At the discretion of the Board, this leave may be granted on other compassionate grounds or extended beyond four (4) days."

Article 8 (Seine River)
"Each teacher shall be allowed compassionate leave without loss of salary up to but not exceeding three days in the case of death or serious illness of any member of the immediate family of the teacher; immediate family to include wife, husband, son, daughter, father, mother, fatherinlaw, motherinlaw, sister, brother, grandparents. Leave without loss of salary beyond the time and for persons other than provided for herein granted at the discretion of the Superintendent."

Both clauses involve compassionate leave for death or serious illness although in the instant case, the wording goes beyond that to provide discretion to the Board to grant leave".... on other compassionate grounds." Accordingly, the issue here could include consideration of both whether there was a serious illness and, secondly, whether there were other sufficient compassionate grounds upon which the Division should have properly exercised its discretion to grant entitlement.

We do not find it necessary to repeat all of the lengthy commentary and discussion of the authorities in Seine River as the parties are aware of the previous Award. However, we would note the following extracts as found at pp. 2021 and p. 22:

"There is an element of both need and circumstance beyond the control (and we do not use the word "control" in an overly technical or restrictive sense) of the employee which gives rise to the benefit of absence without loss of pay being available. That combination of those two characteristics, we would respectfully suggest is (and must be) fluid to some degree, which idea is reflected in the entitlement in Article 8 of "up to but not exceeding three days".

Given this type of conceptual framework, it is possible that the entitlement may arise prospectively or retrospectively. For example, the serious illness contemplated may contain the potential for serious risk and need but which ultimately proves to be of shorter duration or, conversely, that first is perceived to be a simple surgical procedure might produce complications which could raise it to a different level. However, the entitlement to three days is not absolute and does depend upon the facts of each situation.

"The "need" of the individual employee which is addressed by a compassionate leave provision is not susceptible of a definition that would cover every circumstance imaginable but, rather, is very much to be determined upon the facts of each situation. The onus is upon the grievor to present those facts which establish that the "need" is consonant with the purpose of such a provision and it does not appear to us to be useful (or perhaps even possible) to attempt to list all of the situations which might be described in that manner."

As noted in the above extracts, entitlement may arise "prospectively or retrospectively". As indicated in Re Elesie, entitlement to compassionate leave is not necessarily precluded in the case of a "planned event", nor need it be confined to an immediate temporal nexus. It is the circumstances in their totality in each case which are to be considered in whether the "sympathetic treatment" as referred to in Re Elesie should be afforded to the grievor.

We also note with interest the comments at pp. 69 and 70 of Re Cameron (cited above):

"It bears repeating that the two tests to be recognized are whether it was possible or appropriate for "other arrangements" to be made by the applicant and whether all relevant considerations were taken into account by a

well informed management in rejecting the application...

...I must also conclude the employer here did not obtain enough material information regarding the other circumstances. I do not think it was possible for Mr. Cameron or his wife to make "alternate arrangements" in respect of the visit to Toronto. There were several peculiar features in this case. The specialists in Toronto had insisted for excellent reasons that the parents accompany Michael so that they could receive guidance on the methods to be used in continuing therapy at home. Another unusual circumstance was that instead of being institutionalized (as others might have been a public expense) he had spent some months in his own home, where his parents accepted responsibility for care. Yet another unusual element was that transportation of the patient could not reasonably be entrusted to strangers or even nurses; the brain damage had made him very difficult to control and when traveling by car that fact could have constituted a serious problem. All these considerations make the case distinguishable from others where it has been held that "alternate arrangements" could have been made."

Accordingly, in appropriate cases transportation to a scheduled appointment, depending upon the circumstances, may allow for entitlement. The issue becomes an evidentiary one in each instance and the onus is upon the grievor in each case to provide such evidence to the employer (either before or after the event depending upon when such evidence becomes available) and ultimately to the Board of Arbitration should the matter come to hearing to establish that there was such a need as to fall within the purpose of compassionate leave.

In this instance, the evidence does disclose that Mr. Evancio senior suffered a medical event which required admission to the Hospital in Melville on May 12, 1992. While undoubtedly that would be of concern to both the patient and the entire family, and while Dr. Frangou may have suspected a minor heart attack and further testing was warranted, the later investigation did not establish that had been the case. The medical evidence here does not have the same strength as to the potential seriousness of the situation as was the case in the Shchudlo grievance whether considered retrospectively or prospectively.

As well, the information presented to the Division at the time of the request to leave was not accurate although we also have some concern that even if it had been, the response of the Division to the initial request did not particularly explain the reasons why a minor heart attack requiring further investigation could not fall within Article 8.05. In Exhibit 8, the response to the grievance, the Division indicates that it "...does not have enough information to apply 8.05" and invites further discussion. It is difficult to understand why if there was not sufficient information as at January 11, 1993, there was sufficient information on June 12, 1992 to deny the request without further inquiry of the grievor at that point.

THE ARBITRATOR'S DECISION

Based upon the evidence before us (the configuration of facts as mentioned at p. 23 of Seine River), the Board is not satisfied that the grievor either retrospectively or prospectively has met the onus of establishing a "serious illness" as contemplated within Article 8.05. Nor are we satisfied that a sufficient basis has been established for entitlement to payment for the travel day on June 16. We are not persuaded that the "need" as demonstrated here was any more pressing than was the case put forward for the second day with respect to Mr. Shchudlo's claim and is perhaps even less concrete.

We turn now to the issue (or the second question posed at p. 12 herein) as to whether the grievor's familial obligation is sufficient to justify entitlement to payment for the June 15 absence as coming within the "other compassionate grounds" referred to in Article 8.05.

We do not have any difficulty in arriving at the conclusion that the absence was a valid one as recognized by the fact that the Division granted leave for both days pursuant to Article 8.06(a)(ii) although, in the absence of explanation by the Division, we do not understand why entitlement was granted under (ii) rather than under (i) as was the case in Re Seine River (subsection (ii) being more of a burden on the employee than (1), it would not appear sensible to "penalize" the grievor beyond the

actual cost occasioned to the Division in this type of circumstance).

Neither were we provided with information as to whether or not the grievor would have otherwise been entitled or eligible for one paid day leave of absence for "personal reasons" pursuant to Article 8.06(b)(i). If there were such entitlement (and we do not have the information to determine that), the reasons supplied by the grievor at the hearing would also qualify as valid personal reasons within that Article. Given s. 121(1) of the Labour Relations Act which requires this Board to "...have regard to the real substance of the matter in dispute between the parties and to all of the provisions of the Collective Agreement applicable to that matter...", if Mr. Evancio would have been (leaving aside for the moment this particular circumstance) entitled to claim such leave, we see no reason why payment could not be made under this Article for June 15 and we also see no reason why such entitlement could not arise retroactively despite the fact that the request for leave was made pursuant to 8.05 rather than 8.06(b).

However, the question we have to determine based upon the submissions of the parties at the hearing and in the grievances is whether those same reasons qualify as "other compassionate grounds" compelling enough for us to conclude that the Division exercised its discretion improperly.

It would be more than difficult to argue that the provision of emotional or physical care to an aged or infirm parent or relative is anything other than honorable and admirable. While e have found the circumstances here did not amount to "serious illness", the provision of such care when required may fall within the realm of "need" as on of the elements required to afford sympathetic or compassionate treatment (we refer the parties back to p. 12 and the extract from Re Seine River herein). Accordingly, that "need" could qualify as satisfying one of the necessary requirements of "other compassionate grounds" within a proper interpretation of Article 8.05.

In the instant case, no serious objection was taken to the grievor's evidence that his family background (and the related obligations of himself as eldest son) created that need in a personal sense for the grievor. We do not doubt the sincerity of his feeling of obligation to assist his father particularly in such circumstances as these which do go beyond the mundane or what may otherwise be described as the normal wear and tear of daily life (such as a dental appointment, a periodic checkup, grocery shopping, etc.). It is also not difficult for this Board to accept that the grievor's father and family were anxious about the situation and that the grievor's assistance and companionship were of comfort and utility to his father and probably the rest of his family (including himself).

Unfortunately, what we do not have is the evidence of circumstances beyond the control of the grievor to the extent such as was found in Re Cameron. As indicated previously, the medical evidence here is not as strong as in either Re Cameron or in Re Seine River. What we lack is any medical or other evidence why the further examination could not have taken place beyond June 30 or could not be scheduled for an alternate time which would have reduced or eliminated the working time required to be absent. Mr. Myers, in his submission, suggested that any individual would be anxious to take the first appointment that might be available and we appreciate that is probably true. However, personal preference does not fall within the realm of circumstances beyond control and we would require more evidence to satisfy the onus upon the grievor to show that any other time within an objectively realistic timeframe was impossible for the appointment to have been scheduled. The element of subjective perception is always important but, in this type of situation, should be buttressed by other objective evidence.

As indicated in all of the authorities concerning compassionate leave, each case falls to be determined upon its particular facts. However, in this instance, the Board is not persuaded that the grievor has established that he was entitled to payment for June 15 pursuant to Article 8.05. We stress again that we do not intend our Award in any way to be critical of the grievor for attending to his familial obligation in fact, the opposite is true but the issue is whether he is to be paid under the Article in question. We

can say that in this type of circumstance, we feel the Division did make an appropriate decision at least to the extent of allowing the time off to attend to such an obligation and we would have had considerable concern if that had not been the case. We would also indicate that, while we do not believe we can order same given the positions of the parties, it would be appropriate for the Division to give further consideration to the impact of Article 8.06(a) and (b) upon the grievor's request based upon the evidence that was ultimately presented at the Arbitration.

Based upon all of the above, the grievances are dismissed albeit our decision is restricted to the particular facts and is given in consideration of the other comments made above.