BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LODGE NO. 1855	
and	Case 34 No. 42876 A-4515
J.W. HEWITT MACHINE CO., INC.	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Frederick Perillo, on behalf of the International Association of Machinists and Aerospace Workers Lodge No. 1855.
DiRenzo and Bomier, Attorneys at Law, by Mr. Howard T. Healy, on behalf of J. W. Hewitt Machine Co., Inc.

ARBITRATION AWARD

The above-captioned parties, herein the Union and the Company respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration before a Wisconsin Employment Relations Commission Arbitrator. Pursuant thereto, I heard this matter on December 13, 1989 in Neenah, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on January 26, 1990.

ISSUES:

The parties stipulated to the following issues:

1. Did the Company violate Article XIII when it calculated Don Hansen's vacation pay upon termination?

2. If so, what is the appropriate remedy?

BACKGROUND:

Don Hansen, hereinafter referred to as the grievant, was hired on March 4, 1985. His employment was terminated on May 3, 1989. Following his termination, the Company paid the grievant prorated vacation pay of $60.26 for the portion of his fifth (5th) year of service that he worked from his anniversary date of March 4, 1985 until the date of his termination, May 3, 1989.

On July 28, 1989, the grievant filed a grievance requesting "the proper vacation pay." At hearing the Union claimed the grievant had two weeks available to him for the calendar year 1989 and therefore deserved two weeks vacation pay upon termination. The Union claimed that the Company owed the grievant $361.58.

At least one other employe, James S. Luebke, was paid prorated vacation pay like the grievant. Luebke's vacation pay upon his termination was based on vacation earned in the calendar year of 1987 after May 7, 1987, which was the anniversary date of his hire. This matter was not disputed. At the time Luebke received his prorated vacation pay as noted above, the parties' labor agreement did not contain paragraph 2 of Article XIII, Section 1. B. providing for a special rate of vacation pay for employes who worked less than 1456 hours.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE XIII
Vacations

Section 1. Employees will be entitled to paid vacations according to the following plan:

A. Length of Seniority	Vacation Length
1 year completed	1 week
2 years completed	2 weeks
7 years completed	3 weeks
14 years completed	4 weeks
21 years completed	5 weeks
28 years completed	6 weeks

B. Vacation Pay. Employees will receive pay at two (2%) percent of their gross earnings from the preceding calendar year for each week of vacation, or forty-four (44) hours of pay at the employee's current straight time day rate providing the employee has worked in excess of 1,456 hours (including equivalent holiday and vacation hours paid) during the twelve (12) month period preceding his anniversary date, whichever is greater.

Employees who worked less than 1456 hours will receive pay at two percent (2%) of their gross earnings for the most recent calendar year for each week of vacation.

All employees may, at their option, take ten (10) days of their vacation on a daily basis.

C. Determination of Length of Seniority. An employee's length of seniority shall be determined from the anniversary date of his first date of employment with the Company.

Length of seniority for vacation purposes shall include:

1. Any sickness or sicknesses not covered by workmen's compensation.

2. Failure to be at work because of compensable disability arising out of employment under this Contract, provided that such disability does not exceed one year's duration.

3. Failure to be at work because of union business in connection with this Contract.

4. Time spent in the military service shall be counted as time worked for the purpose of eligibility for vacation upon return to work.

D. Proration of Vacation Time. Any employee with less than one (1) year's employment, who terminates his employment for any reason, or whose employment is terminated for any reason shall not be entitled to any vacation pay.

Any other employee whose employment is terminated voluntarily or involuntarily, permanently or temporarily, shall be entitled to his unused vacation including any accrual of vacation that may have

accumulated in the calendar year of his termination. The pay for said vacation shall be the same as set forth in Article XIII, Section 1B.

UNION'S POSITION:

The Union basically argues that vacations are both earned and taken during calendar years, not anniversary years. Accordingly, the Union feels that if an employe has a specific length of seniority pursuant to Article XIII, Section 1. A., and works in a calendar year, he is entitled to a full vacation, not part of one. Therefore, the Union claims the Company violated the agreement when it paid the grievant prorated vacation pay upon his termination instead of a full two (2) weeks. The Union requests that the Arbitrator order the Company to make the grievant whole by paying him $361.58 - the sum lost by the grievant as a result of the Company's action.

The Union maintains that the language of Article XIII is clear and unambiguous on this point. In support thereof the Union notes that Article XIII, Section 1.D. makes it clear that the vacation of a terminated employe "shall be the same as set forth in Article XIII, Section 1. B." The formula in Section 1. B. is a simple percentage formula and, according to the Union, the only place built into the agreement providing for proration of the vacation benefit. The Union adds that proration of the length of vacation is completely "fictitious"; and, in contrast to the proration of earnings contained in Section 1.B. noted above, is found nowhere in the agreement.

The Union rejects the Company's reliance on past practice in the instant case. In this regard the Union notes that past practice cannot be based upon the example of a single employe. The Union also points out that the Luebke example took place under a prior agreement. In addition, the Union argues that a clear past practice cannot modify plain and unambiguous contract language.

Finally, the Union argues that it would be grossly unfair to the employes to allow the Company to prorate the length of the vacation. The Union points out that the employes' vacation is already being prorated once because it is based on a percentage. "If the length of time is prorated as well as the amount of earnings, the proration effect on the employes' vacation will be squared in geometric progression." The Union cites a number of arbitrators' opinions for the proposition that an employer is not entitled to prorate the number of weeks of vacation pay where employes are paid on a percentage basis and/or where the contract bases eligibility on calendar years rather than anniversary years. See, e.g., Duluth Community Action, 82 L.A. 1237 (Boyer 1984); Whitake Mfg. Co., 54 L.A. 80 (Sembower 1969) (specifically rejecting use of anniversary years to determine eligibility); Southern Greyhound Lines, 50 L.A. 658 (Larkin 1968) (specifically holding that employes are entitled to full number of weeks per calendar year where contract makes no mention of prorating number of weeks of vacation).

For the reasons listed above, the Union requests that the Arbitrator sustain the grievance, and order the appropriate make whole remedy.

COMPANY'S POSITION:

The Company argues that it is clear from the contract language in Article XIII that a year of service must be completed for a vacation period to be earned (Section 1. A.), and that the year of service is calculated from the anniversary date of the first date of employment (Section 1. C.) The Company adds that both the history of the aforesaid language and its interpretation plainly establish this approach.

Applying the above standard to the grievant's case, the Company claims that upon completion of one year of service on March 4, 1986, the grievant was entitled to take one week of vacation at a rate calculated from gross earnings as of January 1, 1986 (Section 1. B.) Taking this computation through to the date of the grievant's termination on May 3, 1989, the Company argues that the grievant was entitled to two weeks of vacation after the date of March 4, 1989, based upon completion of his fourth year of service. Since the grievant took his two-week vacation for his fourth year of service on March 4, 1989, the Company claims the grievant does not accrue any additional vacation time in 1989 until he works beyond that March 4, 1989 anniversary date. The Company concludes that since the grievant worked until May 5, 1989, he accrued an additional sixty-two (62) days into his fifth year and was entitled to proration of vacation pay for that period. The Company notes that pursuant to Section 1.D. it paid the grievant for the accrual of vacation pay earned for those sixty-two (62) days.

Based on the above, the Company requests that the grievance be denied.

DISCUSSION:

The parties stipulated that there are no procedural issues and that the instant dispute is properly before the Arbitrator for a final and binding decision on its merits.

At issue is whether the Company violated Article XIII when it paid the grievant prorated vacation pay upon his termination. For the reasons listed below, the Arbitrator finds that the Company did not violate the agreement by its actions in the instant case.

Article XIII, Section 1 states that employes will be entitled to paid vacation according to an approach set forth therein. Section 1. A. provides that vacation length will be determined by length of seniority. Section 1. B. primarily establishes a method of calculating vacation pay once the vacation length has been determined.

Under Section 1. C. an employe's "Length of Seniority" is "determined from the anniversary date of his first date of employment with the Company." (emphasis supplied) Read together, Section 1. A. and 1. C provide that a year of service must be "completed" for a vacation period to be earned, and that the year of service is calculated from the anniversary date of the first date of employment with the Company.

This idea that vacation time must be earned before it is taken is supported by other references in Article XIII. Section 1. C. provides that length of seniority for vacation length purposes shall include certain instances of absence due to sickness, disability, union business and military service. By inference accrual of seniority for length of vacation purposes is interrupted by certain absences, like suspension, not specifically listed in said section.

Section 1.D. which is titled "Proration of Vacation Time" also provides support for the proposition that vacation is earned based upon seniority, which accrues for each year of service. The second paragraph of Section 1. D. states that an employe who terminates his employment "shall be entitled to his unused vacation, including any accrual of vacation that may have accumulated in the calendar year of his termination." (emphasis added)

Applying the above standard to the grievant's case, the Arbitrator finds, as argued by the Company, that after completing one year of service on March 4, 1986, the grievant was entitled to take on week of vacation at a rate calculated pursuant to the formulas contained in Section 1. B. The grievant was further entitled to two weeks of vacation after the date of March 4, 1989 based upon completion of his fourth year of service. The grievant took this vacation period and it is not in dispute. Having taken his two-week vacation for his fourth year of service which was earned as of March 4, 1989, the grievant does not accrue any additional vacation time in 1989 until he works beyond his March 4, 1989 anniversary date. Since the grievant worked until May 5, 1989, he accrued an additional sixty-two (62) days into his fifth year of service and was entitled to the proration of vacation pay for that period.

The Union rejects the above approach, and contends that calendar year, not anniversary year, determines the length of employe vacation, (emphasis supplied). The Union argues that the fact the Company may not prorate the length of vacation is made explicit in Section 1. D. which provides that the vacation of a terminated employe "shall be the same as set forth in Article XIII, Section 1. B." However, Section 1. D. does not say this. It merely states in the last sentence that "pay for said vacation shall be the same as set forth in Article XIII, Section 1. B." (emphasis added) Entitlement to vacation is a different matter, and is also addressed in Section 1. D. as follows: a terminated employe is "entitled to his unused vacation, including any accrual of vacation that may have accumulated in the calendar year of his termination." As noted previously, the length of vacation an employe is entitled to is based on length of seniority which, in turn, is computed from an employe's anniversary date. Consequently, under Section 1. D. an employe may earn prorated vacation for service beyond his anniversary date for which he will receive pay according to the provisions of Section 1. B.

The Union also argues that nowhere in the agreement does it clearly state that the Company may prorate the number of vacation weeks. However, as the discussion above indicates Article XIII read in its entirety leads to this result.

Finally, the Union cites several arbitration awards in support of its position that an employe is not entitled to prorate the number of weeks of vacation pay where employes are paid on a percentage basis and/or where the contract bases eligibility on calendar years rather than anniversary years. However, the opinions relied upon by the Union are distinguishable from the instant dispute. In Duluth Community Action, supra, the employer violated contractual vacation benefits provisions when it made a prorata deduction from the final paycheck of an employe where only an expired memorandum of understanding provided for such a deduction. In Whitaker Manufacturing Co., supra, again the employer violated the contract by making a prorata vacation allowance on an anniversary date basis rather than on calendar year since the record was clear that the parties in negotiating the applicable agreement changed the basis of computation from anniversary date to calendar year except in one instance. Finally, in Southern Greyhound Lines, supra, the employer also violated the agreement when it gave prorated vacation allowance since the employer unsuccessfully attempted to negotiate such a change in negotiations leading up to said agreement. In all three of the aforesaid arbitral opinions,

unlike the present case, bargaining history and clear contract language led to a different result.

Based on all of the foregoing, and the record as a whole, the Arbitrator finds that the answer to the issue as stipulated to by the parties is NO, the Company did not violate Article XIII when it calculated Don Hansen's vacation pay upon termination.

In light of the above, it is my

AWARD

That the grievance is denied and the matter dismissed.

Dated at Madison, Wisconsin this 16th day of February, 1990.

By _____
Dennis P. McGilligan, Arbitrator