BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
AFSCME COUNCIL 40 FIELD STAFF UNION	Case 21
and	No. 41424 A-4376
WISCONSIN COUNCIL 40, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	

Appearances:
Mr. Gregory N. Spring, President, and Mr. Jack Bernfeld, Secretary, Field Staff Union, 5 Odana Court, Madison, Wisconsin, appearing on behalf of the Union.
Podell, Ugent & Cross, S.C., Attorneys at Law, 207 East Michigan Street, Milwaukee, Wisconsin, by Ms. Nola J. Hitchcock Cross, appearing on behalf of the Employer.

ARBITRATION AWARD

AFSCME Council 40 Field Staff Union, hereinafter Union or FSU, and Wisconsin Council 40, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter Employer or Council, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing in the matter was held on September 11, 1989, October 26, 1989, and December 11, 1989, in Madison, Wisconsin. The record was transcribed and was closed on April 4, 1990, upon receipt of post-hearing briefs.

ISSUE:

The Union frames the issue as follows:

Is the Employer properly administering Article IX - Vacations of the parties' collective bargaining agreement?

If not, what is the appropriate remedy?

The Employer states the issue as follows:

1. Was the grievance timely filed?

2. If not, is it arbitrable and, even if the grievance is arbitrable, is retroactive relief barred because the grievance was untimely filed?

3. Did the vacation accumulation notices issued to Miller, Wilson, Lowe, Isferding and Pfeifer in 1988 violate Article IX, Section 9.05, of the parties' collective bargaining agreement?

4. If so, what is the appropriate remedy?

The Arbitrator frames the issue as follows:

1. Was the grievance timely filed?

2. Did the Employer violate the collective bargaining agreement by issuing the "use it or lose it" vacation memos to Miller, Wilson, Lowe, Isferding, and Pfeifer in 1988?

3. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE VI - GRIEVANCE PROCEDURE

6.01 Steps in Procedure: Any difference or misunderstanding that may arise between the Council and the Staff Union shall be handled as follows:

Step 1: The employee, accompanied by a representative of the Union, shall present the grievance orally to the Executive Director within thirty (30) work days of the date the employee knew, or should have known, of the facts giving rise to the grievance. The Executive

Director shall orally respond to the employee and the Union within two (2) work days following the date that the grievance was presented.

Step 2: If a satisfactory settlement is not reached as a result of Step 1, the employee or the Staff Union may, within ten (10) work days following the Director's oral response, submit a written grievance to the Executive Director. The Executive Director shall issue a written response within ten (10) work days following receipt of the written grievance.

Step 3: If a satisfactory settlement is not reached as a result of Step 2, the employee or the Staff Union may, within ten (10) work days following receipt of the Step 2 response, appeal the matter in writing to the Personnel and Finance Committee. The Personnel and Finance Committee shall meet with the aggrieved employee and representatives of the Staff Union within fifteen (15) work days following receipt of the appeal, and shall issue a written response within ten (10) work days following such meeting.

Step 4: If a satisfactory settlement is not reached as a result of Step 3, the Staff Union may appeal the matter to arbitration by notifying the Executive Director of its intent to arbitrate the matter within twenty (20) work days following the Step 3 response.

A) Selection of an Arbitrator: If the parties are unable to mutually agree upon an arbitrator within ten (10) work days following receipt of the notice of appeal, either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff to hear and decide the matter.

B) Decision of Arbitrator: The decision of the arbitrator shall be final and binding on both parties. The function of the arbitrator shall be limited solely to the interpretation, application, or enforcement of the provisions of this Agreement, and in reaching a decision, the arbitrator shall not add to, delete from, or otherwise modify or amend any of the provisions of this Agreement.

6.02 Union Grievances: The Council recognizes that the Union shall have the right to file general grievances.

6.03 Discipline and Discharge: An appeal of discipline or discharge may be initiated at Step 3 of the Grievance Procedure. A copy of any written disciplinary action taken against an employee shall be provided to the employee and the Union in a timely fashion. Written memoranda of discipline shall become null and void after twelve (12) calendar months if no further infraction of the same nature occurs.

6.04 Time Limits: Saturdays, Sundays and paid holidays shall not be considered when computing time limits set forth in the Grievance Procedure. Time limits may be extended by mutual consent.

6.05 Costs: The Council will pay the usual costs of up to three (3) staff representatives (which includes the grievant) who participate in grievance or arbitration meetings; provided, however, that in the event such meetings are conducted on a Saturday, Sunday or holiday, no daily per diem or overtime will be paid. Except as noted above, each party will bear all expenses associated with presenting its proof. Costs for the arbitrator, meeting rooms, or other costs related to the hearing, if any, shall be borne equally by the parties. The costs of a court reporter and transcript shall be borne by the party requesting such services. If the parties mutually request such services, or if both parties request a copy of the transcript, such costs shall be borne equally by the parties.

ARTICLE IX - VACATIONS

9.01 Rate of Earning: Each Staff Member shall earn vacation at the rate of three (3) weeks per year during the first three (3) years of employment, four (4) weeks for the fourth (4th) year through the fourteenth (14th) year, and five (5) weeks of paid vacation after fourteen (14) years.

9.02 **Use of Vacation:** Staff Members shall be entitled to use vacation any time during the year in which it is earned, except that during a Staff Member's probationary period, such use of vacation shall be permitted only with the expressed permission of the Executive Director.

9.03 **Notice:** The Executive Director shall be given advance notice by a Staff Member of his/her intention to use vacation. The Executive Director shall have the authority to require a postponement of a Staff Member's vacation when good and sufficient reason(s) exist.

9.04 **Vacation Records:** The Executive Director shall maintain a record of all used and unused vacation credits for each Staff Member, and shall forward a written report of such vacation credits to each Staff Member on or about his/her anniversary date each year.

9.05 **Vacation Carryover:** Each Staff Member's unused vacation shall be carried forward to the following anniversary year as earned vacation credits, as hereinafter set forth.

A) **Limitation:** Staff Members shall not be permitted to carry more than twenty (20) vacation days forward from one anniversary year to the next, except as provided in Subsection (b). Vacation computations shall be made in accordance with the following example:

EXAMPLE

Anniversary Date: 5/1/80

Vacation Balance 4/30/86: 16 Days

Vacation Earned 5/1/86-4/30/87: 20 Days

Vacation Taken 5/1/86-4/30/87: 14 Days

Total Vacation Accumulation 4/30/87: 22 Days

Maximum Vacation Carryover Into 5/1/87-4/30/88, Anniversary Year: 20 Days

Excess Vacation Carryover: 2 Days

B) Excess Vacation: In the event a Staff Member has more than twenty (20) accumulated vacation days to his/her credit at the end of any anniversary year, the Executive Director shall have the authority to order that Staff Member to use such excess vacation carryover above the twenty (20) day maximum. Such order by the Director shall be in writing, and shall inform the Staff Member that such vacation time must be used within a certain period of time, which shall not be less than six (6) months. If such vacation is not then used within the defined period, the Director shall have the authority to cancel all excess vacation carryover.

C) Pro-ration Upon Termination: For purposes of vacation usage, each Staff Member will be credited with the full amount of annual vacation earnings effective on his/her anniversary date of employment. In the event that the Staff Member terminates employment before completing a full anniversary year, he/she shall be credited with the prorated amount of vacation earned, and any days used in excess of this amount shall be deducted from termination pay, or if termination pay is not sufficient, from the final salary check.

BACKGROUND:

The parties' 1985-86 collective bargaining agreement contained the following language in Article IX:

ARTICLE IX - VACATIONS

9.01 Rate of Earning: Each Staff Member shall earn vacation at the rate of three (3) weeks per year during the first three (3) years of employment, four (4) weeks for the fourth (4th) year through the fourteenth (14th) year, and five (5) weeks of paid vacation after fourteen (14) years.

9.02 Use of Vacation: Staff Members shall be entitled to use vacation any time during the year in which it is earned, except that during a Staff Member's probationary period, such use of vacation shall be permitted only with the expressed permission of the Executive Director.

9.03 Notice: The Executive Director shall be given advance notice by a Staff Member of his/her intention to use vacation. The Executive Director shall have the authority to require a postponement of a Staff Member's vacation when good and sufficient reason(s) exist.

9.04 Carryover: Each Staff Member's unused vacation shall be carried forward to the following year as earned vacation credits and a record of all used and unused vacation credits due shall be maintained by the Executive Director. The Executive Director shall have the authority to direct a Staff Member to use any vacation credits, current and previously accumulated, which exceed thirty (30) days (six 6 weeks). Such order by the Director shall be in writing and shall inform the Staff Member that such vacation shall be used within a certain period of time (not less than six 6 months). If such vacation is not then used within the defined period, the Director shall have the authority to cancel vacation credits which exceed six (6) weeks.

During the negotiation of the parties' 1987-88 collective bargaining agreement the language of Article IX was changed, as reflected in the Relevant Contract Language Section, supra.

On January 8, 1988, Greg Spring, President of the FSU, received the following memo from Bob Lyons, the Council's Director:

TO: Greg Spring

FROM: Bob Lyons

RE: Sick Leave and Vacation Accumulation

I have attached a compilation of your sick leave and vacation earnings as of your most recent anniversary date of employment. The notes preceded by an asterisk (*) indicate any sick leave or vacation that you have used since your anniversary date according to the vouchers you submitted.

In the future, I will issue an update of your sick leave and vacation accumulation on or about your anniversary date each year.

Please remember that the current Staff Union contract limits vacation carryover from one anniversary year to the next to a maximum of twenty (20) days. **Please note that I intend to strictly enforce this provision of the contract**. I hope that you will take all of the vacation that you earn and thereby avoid having any vacation days cancelled.

Please be sure to check your own records and notify me immediately if they differ from the attached compilation.

Please call if you have any questions in this regard.

Attachment

cc: Greg Spring, President, FSU

Attached to the memo, which was dated January 7, 1988, was a report of Spring's sick leave and vacation earnings.

At this time, Spring also received copies of memos that were sent to other FSU staff members. There were three different memo formats as represented by the following memos to James Ellingson, Darold Lowe, and Phil Salamone:

TO: James Ellingson

FROM: Bob Lyons

RE: Sick Leave and Vacation Accumulation

I have attached a compilation of your sick leave and vacation earnings as of your most recent anniversary date of employment. The notes preceded by an asterisk (*) indicate any sick leave or vacation that you have used since your anniversary date according to the vouchers you submitted.

In the future, I will issue an update of your sick leave and vacation accumulation on or about your anniversary date each year.

Please note that as of your most recent anniversary date, your total vacation accumulation exceeded the twenty (20 day maximum permitted by the Staff Union Contract. **Pursuant to the provisions of Article IX, Section 9.05 (A) and (B) of the contract, you will not be permitted to carry more than twenty (20) days of vacation forward into your next anniversary year, which begins on September 24, 1988, and all vacation days in excess of the twenty (20) day maximum will be cancelled on that date.**

I hope that you will make every effort to use enough earned vacation between now and your next anniversary date to avoid having any vacation days cancelled.

Please be sure to check your own records and notify me immediately if they differ from the attached compilation.

Please call if you have any questions in this regard.

Attachment

cc: Greg Spring, President, FSU

TO: Darold Lowe

FROM: Bob Lyons

RE: Sick Leave and Vacation Accumulation

I have attached a compilation of your sick leave and vacation earnings as of your most recent anniversary date of employment. The notes preceded by an asterisk (*) indicate any sick leave or vacation that you have used since your anniversary date according to the vouchers you submitted.

In the future, I will issue an update of your sick leave and vacation accumulation on or about your anniversary date each year.

Please note that as of your most recent anniversary date, your total vacation accumulation exceeded the twenty (20 day maximum permitted by the Staff Union Contract. I hope that you will make every effort to reduce your vacation accumulation to the level allowed by the contract.

If your vacation accumulation exceeds the twenty (20) day maximum on your next anniversary date of March 17, 1988, you will be directed to use your excess vacation accumulation or have it cancelled, pursuant to the provisions of Article IX, Sections 9.05 (A) and (B) of the contract.

Please be sure to check your own records and notify me immediately if they differ from the attached compilation.

Please call if you have any questions in this regard.

Attachment

cc: Greg Spring, President, FSU

TO: Phil Salamone

FROM: Bob Lyons

RE: Sick Leave and Vacation Accumulation

I have attached a compilation of your sick leave and vacation earnings as of your most recent anniversary date of employment. The notes preceded by an asterisk (*) indicate any sick leave or vacation that you have used since your anniversary date according to the vouchers you submitted.

In the future, I will issue an update of your sick leave and vacation accumulation on or about your anniversary date each year.

Please remember that the current Staff Union contract limits vacation carryover from one anniversary year to the next to a maximum of twenty (20) days. **Please note that I intend to strictly enforce this provision of the contract**. I hope that you will take all of the vacation that you earn and thereby avoid having any vacation days cancelled.

Please be sure to check your own records and notify me immediately if they differ from the attached compilation.

Please call if you have any questions in this regard.

Attachment

cc: Greg Spring, President, FSU

While each memo indicated that there was attachment, Spring did not receive a copy of any attachment to any memo, save his own.

Subsequently, the Employer issued additional memoranda concerning vacation usage and vacation carryover. Spring did not receive any further documents concerning his vacation status until May 10, 1988. On or about May 27, 1988, Spring talked to Lyons regarding Spring's concern that the document was incorrectly directing Spring to use certain vacation credits. There was also some general discussion concerning vacation memoranda sent to other staff members. Spring agreed that Sec. 9.05 provided Lyons with a mechanism to cancel vacation carryover in excess of 20 days. However, there was no discussion concerning the method of computing this carryover, nor was there any discussion of any other employe's vacation status.

On June 1, 1988, Spring hand delivered the following to Bob Lyons:

June 1, 1988

To: Bob Lyons

From: Greg Spring

Re: Vacation Accumulation

This letter is written to confirm our recent conversation regarding my May 5, 1988 Vacation Accumulation Notice (attached). Therein, the implication is that if I do not use twenty (20) vacation days by February 1, 1989 I will be subject to some forfeiture. Since I did not have more than twenty (20) accumulated vacation days at the end of my anniversary year I should not be subject to any cancellation. In our discussion, you agreed with that position. Therefore, in the hopes of avoiding any future dispute of this nature, I want to document the fact that the attached notice does not constitute a directive to "use or lose" vacation pursuant to Section 9.05 of the Agreement.

If you have any questions on this matter, please call me.

enclosure

cc: Jack Bernfeld, FSU Secretary

Lyons responded by issuing the following memorandum which was received by Spring on June 9, 1988:

June 8, 1988

TO: Greg Spring

FROM: Bob Lyons

RE: Vacation Accumulation

I have your June 1, 1988, memo regarding vacation accumulation.

I concur with your statement that since you did not have more than twenty (20) accumulated vacation days on the books at the end of your anniversary year, you are not now subject to having any vacation cancelled.

Those individuals who do have more than twenty (20) accumulated vacation days at the end of the anniversary year receive a memo along with the form which advises them of the number of days that are subject to cancellation and the date that such cancellation will occur. Copies of those memos are forwarded to you as president of the Field Staff Union. Based upon our recent phone conversation, I understand that you concur that those memos are proper and in compliance with the applicable provisions of the collective bargaining agreement.

Please call if you have any additional questions in this regard.

cc: Sam Gillispie
Jack Bernfeld
Mary Ann Connors

On July 14, 1988, FSU Representatives Spring, Lowe, and Bernfeld met with Council Director Lyons and Associate Director Sam Gillispie. During that meeting, the parties discussed the administration of the vacation benefit and Spring distributed the following response to Lyons's letter of June 8:

To: Bob Lyons

From: Greg Spring

Re: Vacation Carryover

I have prepared this memorandum in order to clarify the Field Staff Union's position with regard to the interpretation of Section 9.05 of the 1987-88 labor agreement between the parties.

A review of our prior communications on this matter may be useful as a backdrop for today's discussions. On May 27, 1988, we spoke regarding my vacation accumulation notice dated May 5, 1988. On June 1, 1988

I hand-delivered a memo to you confirming that conversation. The purpose of my memo was to address my particular concerns as a staff representative not necessarily as the FSU's President. However, I do believe that it is an appropriate assumption on your part that the FSU's position would be the same as that expressed in my June 1 memo for all staff members who have twenty (20) or fewer days of vacation carryover.

Later on June 1, 1988 I received by mail copies of a memo, dated May 6, 1988 from you to Brothers Lowe, Wilson and Pfeifer. Your June 8, 1988 memo to me implies that we discussed the calculations involved for cancelling excess vacation carryover and that I had concurred with your method of calculation. Until I received the memo to Lowe, Wilson and Pfeifer on June 1st, I did not know your method of calculating excess vacation carryover for employees with more than twenty (20) days of vacation carryover. I do not recall nor do my records indicate that we discussed this matter between June 1 and June 8. In any event, it is sufficient to note that the Union does not concur with your method of calculating excess vacation carryover.

The contract is quite clear as to how that calculation is to be made. Applying the example in Section 9.05 A to Brother Lowe we see the following:

Anniversary Date: 3/17/71
Vacation Balance 3/16/87: 33-1/2 days
Vacation Earned 3/17/87-3/16/88: 25 days
Vacation Taken 3/17/87-3/16/88: 20 days
Total Vacation Accumulation 3/16/88: 38-1/2 days
Maximum Vacation Carryover Into 3/17/88-3/16/89, Anniversary Year: 20 days
Excess Vacation Carryover: 18-1/2 days

Pursuant to Section 9.05 B) "... the Executive Director shall have the authority to order the Staff Member to use such excess vacation carryover above the twenty (20) day maximum." Accordingly, you could order Brother Lowe to use 18-1/2 days, not the 43-1/2 days indicated in the Vacation notice. Similar miscalculations have been made in the Vacation Notices to other staff members. Perhaps a change in the Vacation Notices format to parallel the contractual language would alleviate this problem.

Of course, if the problem is more fundamental than the Notice's format, the Union is willing to discuss it and hopefully resolve the problem on an amicable basis.

On July 15, 1988, Gillispie issued the following to FSU staff member Mike Wilson:

July 15, 1988

TO: Michael Wilson

FROM: Sam Gillispie, Associate Director

RE: Vacation Carryover

I'm writing in regards to your request to only take twenty two (22) days vacation and not be required to use the other nine and one-half (9-1/2) as you were previously notified in memorandums dated May 5 and 6, 1988. In a meeting on July 14, 1988, with the Field Staff Union Officers, your request to carry over the nine and one-half (9-1/2) days was discussed.

Unfortunately, the Field Staff Union and Council 40 do not share the same interpretation of the contract as regards to vacation carryover. It was thus not possible to reach an agreement regarding an extension of time on your vacation carryover and you will be expected to take vacation in accordance with the earlier memos that you received from Bob Lyons.

If you have any questions, please do not hesitate to contact me.

SG:mac

cc: Bob Lyons

On July 17, 1988, Wilson issued the following to Gillispie:

Re: Vacation Carryover

Dear Associate Director Gillispie:

The work load does not now permit vacation time off as scheduled in August, without consideration to another ten (10) days off between now and the start of school.

What do you suggest I do. I will file a grievance on any vacation credits cancelled by Council 40 on or after my 1989 anniversary date.

We have had extensive conversation/meeting regarding this matter. To now send a memo denying the extension is not responsive under the circumstances.

On Friday, August 12, 1988, the FSU filed an oral grievance with Lyons on vacation carryover. In response, Lyons issued the following:

8/17/88
4:45 p.m.

Dode:

When we spoke yesterday a.m., I neglected to give you the Step One response to the vacation carryover grievance that you and Jack presented last Friday. Since our paths didn't cross yesterday afternoon or today, and since Jack is out of state on vacation, I thought it best to leave you this note in lieu of an oral response.

The grievance is denied because:

1.It is untimely, and

2.It lacks merit -- no violation of the contract has occurred.

Bob

On August 29, 1988, the FSU submitted the following written grievance:

August 29, 1988

To: Bob Lyons

From: Jack Bernfeld

Re: Vacation grievance

The Field Staff Union (FSU) hereby submits a written grievance, pursuant to Step 2 of the grievance procedure contained in the parties collective bargaining agreement, involving the Council's interpretation and application of Article IX - Vacations.

It is the position of the Union that the Council is not applying the provisions of Article IX - Vacations correctly. Our concern particularly relates to Section 9.05 of the contract. It is apparent from our discussion of this issue on July 14, 1988, that we disagree about the method by which vacation carryover is calculated. Our position regarding the correct interpretation of the contract was clearly stated to you on July 14, 1988 and in President Spring's letter of the same date.

We request that the Council cease and desist from improperly interpreting and applying our labor agreement and that the Council provide corrected vacation statements to all effected employees. If any employee has or should suffer a loss of vacation as the result of the

Council's misinterpretation of the contract, then we also request that said employees be made whole.

We contend that our grievance is timely and we do not understand the basis of your assertion to the contrary. In any event, this is obviously an ongoing grievance. Please note that your Step One reply was untimely.

If you have any questions, please feel free contact me or any other officer of the FSU.

On September 13, 1988, Lyons issued the following response to the written grievance:

Date: September 13, 1988

To: Jack Bernfeld, Secretary, Field Staff Union

From: Bob Lyons, Executive Director

Re: Vacation Carryover Grievance

This will serve as the Step 2 response to the above-captioned grievance, which I received on August 29.

The method that Council 40 uses to calculate vacation accumulations and vacation carryover is consistent with the provisions of the collective bargaining Agreement. It is also consistent with the discussions which occurred during the last round of bargaining that resulted in the new vacation carryover language. Your grievance, therefore, lacks merit.

Additionally, it is Council 40's position that your grievance was not filed in a timely manner. As early as March 10, 1988, the Field Staff Union (FSU) was notified regarding the method that Council 40 was using the calculate vacation carryover. On that date, I sent Brother Wilson a memo advising him that his vacation accumulation exceeded the twenty (20) day maximum allowed by the contract and notifying him of the method that would be used to cancel his excess vacation days. A copy of that memo, as well as a copy of the work sheet detailing Brother Wilson's vacation computation, was forwarded to FSU President Greg Spring. In May and June 1988, similar memos were sent to at least three other members of the FSU advising them that they were subject to vacation cancellation if they did not reduce their total vacation accumulation to twenty (20) days by their next anniversary date of employment. Once again, copies of the memos and the work sheets detailing the vacation computations were forwarded to FSU President Spring. Individual members of the FSU, as well as the President of your organization knew or should have known the method that Council 40 was using to compute vacation carryover s early as March 10, 1988. Your grievance was

not filed until August 12, 1988. That is well in excess of the thirty (30) work day time limit specified in the contract.

I would also like to take this opportunity to respond to Brother Spring's memo of July 14, 1988, regarding vacation carryover. I did not respond earlier, because I had no desire to "wave a red flag." Now that a grievance has been filed, a response seems appropriate, however.

I did speak with Brother Spring by phone on May 27, 1988, regarding his vacation accumulation. During the course of that conversation, we agreed that he was not subject to vacation cancellation, because his total accumulation did not exceed twenty (20) days on his most recent anniversary date. We also specifically discussed the "use it or lose it" memos sent to other members of the Staff who did have accumulations in excess of twenty (20) days on their most recent anniversary dates. Brother Spring advised me during that conversation that he did not take issue with those memos. His memo of June 1, and my June 8 response, confirm that conversation. I most certainly did not believe that I was speaking to "Greg Spring, individual employee" during the course of that conversation. Brother Spring received copies of the memos and vacation computation work sheets sent to other employees solely because he was and is the President of the FSU. I discussed those memos with him solely because he has a representational interest in the matter as President of the Union. In short, I believe that the Union was aware of the method that was being used to compute vacation carryover and concurred that it was proper. I am a bit perplexed, to put it mildly, by the change in position as evidenced by the belated filing of the August 12 grievance.

Accordingly, for the reasons noted above, the grievance is denied.

RWL/dmk
opeiu-39
afl-cio

cc: Sam Gillispie, Associate Director
Greg Spring, President, FSU

On September 21, 1988, FSU Secretary Bernfeld issued the following to Charles "Skip" Handl, Chairperson of the Council's Personnel and Finance Committee:

Charles "Skip" Handl, Chairperson
Personnel and Finance Committee
3419 Menasha Avenue
Manitowoc, WI 54220

Re:Field Staff Union - Vacation grievance, Step 3 appeal

Dear Mr. Handl,

Pursuant to Step 3 of the grievance procedure contained in the parties' collective bargaining agreement, the Field Staff Union (FSU) hereby appeals its vacation grievance to the Personnel and Finance Committee.

I have enclosed a copy of the Union's written grievance which was submitted at Step 2.

Please contact me or any other FSU officer so that the Step 3 meeting can be arranged.

On November 3, 1988, Chairperson Handl issued the following to FSU President Spring:

Mr. Greg Spring, President
Council 40 Field Staff Union
1121 Winnebago Avenue
Oshkosh, WI 54901

Re: Vacation Carryover Grievance

Dear Brother Spring:

> This will serve as the Step Three response to the above noted grievance, which the Personnel and Finance Committee heard in Madison on October 21, 1988.
>
> The Committee does not believe that the grievance was filed in a timely manner. In addition, the Committee believes that Director Lyons properly interpreted the Collective Bargaining Agreement when he sent vacation cancellation memos to several members of the staff. We do not accept the Union's interpretation of that language.
>
> Accordingly, the grievance is denied.

On November 13, 1988, FSU Secretary Bernfeld issued the following to Director Lyons:

> Re:Notice of Intent to Arbitrate the "Vacation grievance"
>
> Dear Mr. Lyons:
>
> This letter is written in accordance with Step 4 of the parties' contractual grievance procedure and shall serve to notify you that the Union (FSU) intends to arbitrate the "Vacation Grievance".
>
> Please contact President Spring regarding the selection of an arbitrator.

Thereafter, the matter was scheduled for arbitration.

POSITIONS OF THE PARTIES:

Union:

Timeliness

The timeliness issue raised by the Council is whether or not the grievance of August 12, 1988 was filed in a timely manner. Apparently, the Council takes the position that the FSU, or its members, should have grieved vacation notices and reports within 30 working days after their issuance. The Union disagrees.

It was at the meeting of July 14, 1988, that the parties first recognized that there existed a dispute regarding the proper administration of Sec. 9.05. While the Council argues that the Union filed its grievance at the First Step on August 29 or July 14, such argument is incorrect. Rather, the record clearly demonstrates that the First Step of the grievance, i.e., the oral Step, was filed on August 12, 1988. The Union timely filed its grievance twenty-one (21) working days thereafter. Accordingly, the Union has filed its grievance within 30 work days of the date the employe knew, or should have known, of the facts giving rise to the grievance as required in Sec. 6.01 of the collective bargaining agreement. While the Council asserts that between May 6 and August 29, nothing occurred related to the vacation issue, this assertion is incorrect. The record demonstrates there were significant discussions and analyses of this issue between these dates. The Union did not sit on its hands for several months, but rather, acted timely and responsibly.

The Employer cannot reasonably argue that the dispute was known before July 14, 1988. The first notices and reports issued under the new vacation provision were allegedly distributed on or about January 7, 1988. These vacation notices and reports were not distributed in accordance with the contractual requirements which dictate that such be provided "on or about his/her anniversary date" as set forth in Sec. 9.04 of the collective bargaining agreement. No employe had a January anniversary date. The January notices and reports had no meaning, were not properly issued, and related to odd time frames. When Spring received his first notice and report on January 8, 1988, he discussed the confusing nature of the document with Lyons and was assured that he was not under any directive to use vacation. With that assurance, what basis would there be for a grievance? At that time, Spring had received only the cover memos provided other employes. He did not have the accompanying reports containing specific vacation time accumulated, used, and subject to cancellation. There was, therefore, no way to determine the propriety of the memos of the other employes.

When Spring received a report concerning his vacation time on May 10, 1988, no notice was attached. Concerned about the apparent directive to use vacation contained in the report, Spring telephoned Lyons on May 27 and was assured that he (Spring) was not under any directive to use vacation. While there was a general discussion concerning directives to use excess vacation carryover, no specific employes were discussed other than Spring. The Employer's assertion that at the time of the May 27, 1989 telephone call that Spring had already received the Miller, Wilson, Lowe, and Pfeifer "use or lose it" memos is not supported by the record. Indeed, Spring had not received

notices or reports concerning any other employes and, therefore, a discussion about specific employes was not possible. Moreover, the Employer's description of Spring's comment to Lyons is creative at best. The record demonstrates that Spring told Lyons that he could not be ordered to use or lose vacation because Spring did not have more than twenty (20) days of carryover vacation from his prior anniversary date. The fact is that Lyons agreed that under the contract Spring could not be ordered to use such vacation carryover.

Spring received notices and reports concerning employes Wilson, Pfeifer, and Lowe on June 1, nearly one month after they were allegedly sent; he received information concerning Isferding on June 20. Lyons's reply of June 8, 1988, raised a suspicion that there may be a dispute between the FSU and the Council concerning administration of the vacation provision. Rather than leap into a grievance before the July 14 meeting, the Union determined that the best course was to find out whether there was, indeed, a dispute or merely confusion about the form. During the meeting of July 14, 1988, the Union, for the first time, understood that there was a dispute with the Council concerning the administration of vacation. Thus the most reasonable interpretation of when the Union knew or should have known of the existence of a dispute is that such event occurred on July 14, 1988.

Assuming arguendo, that the Union's grievance was tardy, it should not be found to be untimely. The Council's notices and reports constitute continuing improper directives to use vacation and, as such, the notices and reports constitute continuing violations of the contract. Each day that the employes suffered under the improper notices and reports constitutes a new violation of the contract.

While the Council would have the Arbitrator believe that they strictly adhered to the contractual time frames for filing and processing grievances, the evidence demonstrates otherwise. As reflected in Union Exhibits 24, 27, 28, 29, and 30, the Council has not made much effort to respond to grievances in a timely manner. The Council offered no evidence to demonstrate that there was a mutual agreement to extend such timelines. The Employer apparently believes that the Union has to follow the timelines but that the Council can ignore them with impunity. The Employer admits that Step 3 meetings have never taken place on time. Why? Apparently, it is not convenient for the Council to meet within the established timelines. The Arbitrator cannot find that the Union is bound to a standard that has been ignored in the past, particularly when it is the Employer who has done the ignoring. Contrary to the argument of the Employer, the grievance is timely.

Merits

The parties have agreed that regardless of how the Arbitrator decides the issue of timeliness, she has the authority to rule on the merits of the grievance. The record is clear that the grievance is valid and that the Employer did not properly administer the vacation provision, Article IX of the agreement.

Section 9.05 of the parties' 1987-88 agreement is clear and unambiguous. Indeed, language contained therein contains an example to avoid competing interpretations. The instant grievance involves the misapplication of this provision to Staff Representatives Lowe, Isferding, Pfeifer, Wilson, and Miller. In all cases, the Employer ordered these representatives to use more vacation than necessary or face the cancellation of vacation (Union Exhibits 17 through 22).

At issue is whether or not the Council can direct employes to use, or face the loss of, vacation that is not excess vacation carryover at any time. The Council's confusion concerning the issue rests, in part, on an apparent misunderstanding of the different types of vacation. The contract defines three (3) vacation categories:

1. Current anniversary year vacation allocation;

2. Carryover vacation, that is, vacation earnings carried forward from one anniversary year to the next;

3. Excess vacation carryover -- that is, carryover vacation that exceeds twenty (20) days.

Despite the fact that the contract precisely defines these different types of vacation, the Council would have the Arbitrator disregard these categories and lump all vacations into one pot. The contract clearly does not contemplate such an approach and outcome.

The Employer believes that the contract permits it to add vacation which has not been earned into the equation for calculating excess vacation carryover. The Union maintains that the language does not provide for the inclusion of such prospective vacation earnings. There is not the slightest inference in the language of the agreement that unearned vacation can enter into the calculation of excess vacation carryover. Even Director Lyons admits that this line item "doesn't appear in the contract." To accept the Employer's

interpretation would require the Arbitrator to add that line item to the agreement, which addition would violate Sec. 6.01, Step 4(b) which states as follows:

> "The decision of the Arbitrator shall be final and binding on both parties. The function of the Arbitrator shall be limited solely to the interpretation, application or enforcement of the provisions of this Agreement, and in reaching a decision, the Arbitrator shall not add to, delete from, or otherwise modify or amend any of the provisions of this Agreement."

The Council's misapplication of the contract caused Lowe and Miller to lose vacation contrary to the provisions of the contract. The Union's interpretation of the provision offers "a single, obvious and reasonable meaning" to the terms of the agreement and examples of that interpretation follow precisely the examples set forth in the agreement.

Given the clear and unambiguous language of Article IX, the extensive parole evidence offered by the Employer regarding bargaining history is irrelevant and should be given no weight. The attempt by the Employer to "prove" that the contract language does not mean what it says must be disregarded. Assuming arguendo, that the Arbitrator finds that the language is not clear and unambiguous, the grievance should be sustained on other grounds.

Since the language in dispute in the instant case was newly bargained as part of the 1987-88 agreement, there is no past practice to rely on in determining the intent of the vacation carryover language. Under the 1985-86 agreement, there was a grievance as to the application of the vacation language which was settled on a nonprecedential basis. Under the terms of that settlement neither party waived "any arguments with respect to the merit, or lack thereof, of the grievance. It is evident that the parties changed the vacation language to make the language clearer and to avoid future grievances. Only the Union's interpretation of the language accomplishes this intent.

A review of the bargaining history demonstrates that such evidence supports the Union's position. The parties exchanged proposals relating to vacation carryovers, modified them, dropped them, resurrected them, and ultimately accepted and ratified one version. That final version was developed during informal meetings between Lyons and Lowe. The record is clear that the substantive language changes in Secs. 9.04 and 9.05 were drafted by Lyons. It is axiomatic that it is incumbent upon the proponent of a contract provision to explain what is contemplated or to use language which does leave the matter in doubt. Where doubt exists, any ambiguity not removed by any other rule of interpretation may be removed by construing the ambiguous language against the party who proposed it. Accordingly, if the Employer intended to include unearned vacation credits in the carryover calculation, it was incumbent upon Lyons to specify the inclusion in the example that he drafted. He did not do so.

The Employer asserts that at the meeting of January 29, 1987, that the FSU continued to accept the vacation carryover proposal which had been part of the tentative agreement. Such assertion is blatantly untrue. As Spring testified at hearing, the vacation issue was one of the major reasons why the Union rejected the first tentative agreement. After the rejection of the initial tentative agreement, the FSU submitted written proposals to the Council. Included in these proposals was the demand to reinstate the 30-day vacation carryover. While the Council argues that on February 21, 1987, the parties were in agreement on the vacation carryover matter, the Council fails to identify what the agreement was or why the parties continued to bargain for two more meetings over this issue.

The Council asserts that its interpretation of the vacation language is correct because it refused to allow the Union to drop its proposal for carryover "over and above" without prejudice. The Council further contends that the Wilson grievance was unrelated to the Union's carryover proposal. Both assertions are erroneous. More importantly, however, the whole issue as to whether the proposed withdrawal was prejudicial is irrelevant. The fact is that the parties reached an agreement on alternative language which is the subject of this arbitration. The Council is simply trying to divert the Arbitrator's attention away from the fact that the contract language regarding carryover is clear and unambiguous. In its recitation of the bargaining history, the most noteworthy item in the Council's brief is that it totally ignores the one meeting that is relevant, i.e., the meeting attended only by Lyons and Lowe wherein the language now before the Arbitrator was conceived. The Council argues that the language is ambiguous and that Lowe should have known what Lyons's intent was, in spite of the fact that it makes no claim that Lyons ever expressed his intent. Lyons, an admittedly skilled and meticulous negotiator, did not draft ambiguous language. Rather, Lyons drafted the language carefully and meticulously, as is evidenced by the insertion of the example into the contract. The Union merely asks that the Council follow the language which is has drafted.

Lowe testified that it was his belief that the language developed by

Lyons "would provide a 20-days carryover over and above our annual accumulation." The Employer offered no evidence that Lyons said anything during his meetings with Lowe that would indicate that Lowe's belief was unfounded. Lowe further testified that the Union gave up several items in exchange for the vacation language. Lyons's memo to the Employer's bargaining committee also documents the agreements reached in those informal meetings. The Employer's contention, now, that the Union made the above concessions, reduced the carryover from 30 days to 20 days and moreover agreed to the Employer's interpretation of what constituted excess carryover is ludicrous.

The Council asserts that it was the parties' mutual intent to reduce vacation accumulation. A more accurate assertion would be that it was Council's intent to reduce the vacation carryover, but it was the Union's intent to clarify the language. And, in fact, both parties achieved their goals. The Council reduced the carryover from 30 to 20 days and the Union got crystal clear contract language governing vacation carryover.

The Employer's interpretation of the vacation carryover provisions has been inconsistent. Lyons's memo of June 8, 1988 is a clear admission that he accepted the Union's interpretation regarding carryover in cases where the employe does "not have more than twenty (20) accumulated vacation days on the books at the end of your anniversary year" (Union Exhibit 40). In such instances, Lyons agreed at that time, prospective vacation earnings are not part of the vacation carryover calculation. By the time of the hearing, the Council altered their interpretation of the contract. Contrary to his earlier view, Lyons testified that in such instances prospective vacation earnings could be added when determining excess vacation carryover. He asserted under cross-examination that he has authority to order an employe with 0 days of vacation at the end of an anniversary to use vacation in the following year. The Council's interpretation is absurd and, therefore, cannot be given effect herein.

The Union admits that in the contrived scenario suggested by the Council, it is conceivable that employes could accumulate up to 57-1/2 days. By looking at the vacation notices that led to the instant grievance, one sees that had the employes quit at the completion of their anniversary year, the Council would have made the following vacation payouts:

1.Lowe -- 38-1/2 days (Employer Exhibit 17);

2.Isferding -- 24-1/2 days (Employer Exhibit 18);

3.Pfeifer -- 21-1/4 days (Employer Exhibit 19);

4.Wilson -- 26-1/2 days (Employer Exhibit 21;

5.Miller -- 36 days (Employer Exhibit 22).

Each payout is considerably less than 57-1/2 days.

The Council asserts that Spring acknowledged in his testimony that the FSU interpretation means a significant increase in the carryover from the past. Not surprisingly, the Council provides no transcript page at which we can locate Spring's alleged testimony. Spring did testify that the "carryover should have been handled the same." Given the fact that the limit on vacation carryover days was reduced from 30 to 20 days, Spring's testimony supports the Union's position that the current language provided a decrease in the carryover while at the same time clarifying the language.

The Union respectfully requests that the Arbitrator sustain the grievance, order the Employer to cease and desist from violating the contract, order the Employer to rescind all improper vacation notices and reports, and order the Employer to make all employes whole for all vacation that they lost or unwillingly took as a result of the Employer's violation of the contract.

Employer:

Timeliness

The parties collective bargaining agreement clearly and unequivocally requires "the employee, accompanied by a representative of the Union, shall present the grievance orally to the Executive Director within thirty (30) work days of the date the employee knew, or should have known, of the facts giving rise to the grievance" (Article 6.01). It is undisputed that no grievance was filed until August 29, 1988. Even if one were to interpret the July 14, 1988 discussion to be an oral agreement, that was still well beyond the 30 work-day period after even the last "use it or lose it" memo was issued during the first week of May, 1988. The provisions of Article 6.01 are not discretionary.

The FSU's argument that the grievance was not late because they were not aware of the Employer's position until August 29, 1988 is not persuasive. There is nothing in the contract which requires that the grievance-filing clock starts ticking only after the FSU President knows and understands the facts which individual grievants have clearly known and understood for months. The

"use it or lose it" memos were mailed out far in advance, the first as early as January, and a copy was mailed to the FSU President, Greg Spring. The memos were of the same type they had been receiving for years and were received by the FSU Bargaining Committee members who would certainly have understood immediately if they believed that they were being directed to take vacation in violation of the newly negotiated contracted provision. Moreover, each of the memo recipients are professional Union staff representatives who understand their contractual obligations to file grievances in a timely manner. These individuals clearly knew and understood the meaning of the "use it or lose it" memos, but made no timely objection in any form. Rather, the went about their business representing workers and scheduling their vacation in accordance with the "use it or lose it" memos that they had received.

While the FSU argues that they should not be held to the contractual time limits because the Council has been lax in the timeliness of their responses or they have been lax in calling the FSU in violation in the past, the facts clearly establish that the Council has always been strict on the initial 30-day time period which is, of course, the most important because it gives the Council notice of the problem.

The FSU does not dispute the fact that the Council has consistently required strict adherence to the contractual deadline for grievance initiation. With the undisputed mandatory directive of the contract's grievance initiation time limit language and the undisputed fact that the Council has never allowed deviation from this contractual deadline, the Arbitrator must find the grievance to be untimely. It is important to remember that the Council has agreed to allow a decision on the merits in any case. The significance of a timely issue is to hold the grievants accountable for their untimeliness. Grievants cannot sit on their rights in violation of the contract and then expect specific relief in the form of an award of damages in this case.

Merits

In the present case, the Council has agreed that, if the Arbitrator finds the grievance to be untimely filed, the Arbitrator can decide the merits. The untimely filing would bar remedy of specific cases presented in the individual "use it or lose it" memos.

The question is not whether the Council is properly administering Article IX, as the FSU words its proposed issue, but rather, whether the "use it or lose it" memos sent to individuals listed by the FSU were in violation of Article IX.

The language contained in Subsection (A) clearly prohibits vacation carryover of more than 20 days into the employe's subsequent anniversary year. The following Subsection (B) merely describes the mechanics of the notice and discretion of the Director with regard to vacation cancellation. To enforce the provision, the Director must notify the staff of the amount which must be used in order to comply with the contractual 20-day limit.

It is axiomatic that where the Arbitrator finds alternative interpretations of a clause are possible, the Arbitrator must select the one which gives meaning and effect to all of the provisions in the contract. Only the Council's interpretation gives effect to the full contract provision. The FSU argument allows exception to the "limitation" to totally eliminate the "limitation" altogether, thus rendering Subsection (A) a nullity. Such a construction must be avoided.

In construing a contract, the Arbitrator must, if possible, ascertain and give effect to the mutual intent of the parties. The contract negotiations in all of the circumstances leading up to the negotiations are invaluable in interpreting the new language in the collective bargaining agreement. It is absolutely clear that the parties' mutual intent was to reduce vacation accumulation. Under the FSU interpretation, the result is quite the opposite. Whereas under the prior contract employes could accumulate no more than 30 days, the FSU now urges that employes may accumulate up to 57-1/2 days.

The parties' intent is manifested in various sources: the express language of the agreement, statements and proposals made at precontract negotiations, bargaining history, and past practices. Arbitral decisions make it clear that it is the Arbitrator's primary duty to enforce the parties' intent even if such intent is at odds with the literal meaning of the contractual words without regard to the facts and circumstances of the bargain. In the present case, the parties' mutual intent could not be clearer. The Council focused solely on reduction of vacation carryover. While the FSU initially proposed an increase in carryover, it immediately dropped that demand in the first session. Later, the cost of the entire package was shifted solely to arrive at the 20-day carryover limitation. As Spring acknowledged at hearing, the FSU interpretation means a significant increase in the carryover from the past. Clearly the parties did not intend such an increase. If they had, they would have written such an increase into the language.

The FSU urges the Arbitrator to interpret the Sec. 9.05 20-day carryover limit as really meaning that there is a 45-day carryover limit, since the

employes may maintain their 25-day annual balance for their current anniversary year, together with the 20 days of carryover from their prior anniversary year. This interpretation does not conform to either the spirit or the letter of Sec. 9.05 of the contract. While Subsection (B) of Sec. 9.05 discusses how the excess vacation carryover is cancelled, the introductory sentence makes it clear that staff members are not permitted to carry over more than 20 vacation days. These are not "excess" vacation days, this is all vacation days. The term "excess vacation days" is used in Subsection (B), but is not used in the overriding lead-in sentence which governs the entire provision and which clearly prohibits the staff from carrying over more than 20 days into a subsequent anniversary year.

The FSU wrote up, proposed, and twice attempted to gain acceptance of language to allow carryover of vacation above the allowed carryover "over and above" current annual accumulation. The FSU did not gain such acceptance and twice attempted to withdraw their proposal "without prejudice." The FSU should not be allowed to gain through arbitration that which they clearly attempted but did not secure in negotiation.

Bearing in mind the Council's rejection of the FSU's proposal to allow the Director to order use of only "previously accumulated" vacation days and the Council's refusal to allow the FSU to withdraw this proposal "without prejudice," the second tentative agreement differed from the first in that it doubled the vacation carryover by increasing it from 10 to 20 days. In exchange for this doubling, the FSU, dropped its wage demand by .1 per cent, delayed payment of retiree health insurance premium from January 1, 1987 to January 1, 1988, and dropped separate reimbursement for oil and oil filters. In addition, compromise was reached on automobile insurance. Both parties clearly understood that this "payment" did not buy an increase of vacation carryover from 10 days to 45 days, but only from 10 days to 20 days. History of the negotiations makes it impossible to believe that the Council would have intended the interpretation of the vacation carryover language submitted by the Union herein.

Clearly, the parties mutually intended the interpretation which is advocated by the Employer herein. Only after the new Executive Director came on board and relations between the parties began to deteriorate did the FSU come up with the novel interpretation which contradicts the bargaining history, the FSU's subsequent actions, and, of course, the clear language itself.

The grievance should be dismissed in its entirety.

DISCUSSION:

Timeliness

The grievance is a Union grievance which was filed on August 12, 1988 and challenges the Employer's application of Sec. 9.05 of the parties' collective bargaining agreement. Specifically, the Union alleges that the Employer's improper calculation of excess vacation for employes Lowe, Pfeifer, Wilson, Miller, and Isferding subjects these employes to a loss of earned vacation, contrary to the provisions of Sec. 9.05

Assuming arguendo, that these employes received notice of the Employer's calculation of their excess carryover on or about January 7, 1988, the Union's grievance is not untimely. The notices served to warn the affected employe that the Employer believed that the employe must use a specified amount of vacation before the employe's next anniversary date to avoid cancellation of excess vacation credits. These "use it or leave it" notices, 1/ if in error, cause injury to the employe, by improperly directing the employe to take vacation and/or subjecting the employe to an improper cancellation of earned vacation. Thus, the "facts" giving rise to the grievance began upon the date that the employe received the notice and continued until the point in time that the affected employe knew, or should have known, that the Employer had, in fact, cancelled the earned vacation. It not being evident that, at the time that the grievance was filed, the Employer had, in fact, notified any employe that the Employer had cancelled vacation pursuant to the notices, the Undersigned has found the Union's grievance to be timely.

Merits

At issue, is the interpretation and application of Sec. 9.05 of the parties' 1987-88 collective bargaining agreement, which language governs vacation carryover. The Union and the Employer agree that the provision sets limitations upon an employe's right to carryover more than 20 days vacation. In dispute, is the method of calculating the vacation carryover.

The differences in the respective positions is illustrated by the following example involving employe Lowe:

1/ These notices consisted of a cover memo and attached vacation usage and accumulation report.

EMPLOYER'S CALCULATION

VACATION

TOTAL UNUSED VACATION EARNINGS AS OF 3/17/87 ..... 33-1/2 days
per memo issued 12/29/87
Amount earned 3/17/87 to 3/17/88 (2.08 days per month)..... 25 days
Total earnings as of 3/17/88..... 58-1/2 days
Days used 3/17/87 to 3/17/88..... 20 days

MARCH 31 - 1 DAYS	JULY 24,31 - 2 DAYS	FEBRUARY 1,15 - 2 DAYS
APRIL 6,7,29 - 3 DAYS	AUGUST 21,18 - 2 DAYS	MARCH 1,14 - 2 DAYS
MAY 8 - 1 DAY	SEPTEMBER 25 - 1 DAY	
JUNE 12,14,19 - 3 DAYS	JANUARY 18,25,29 - 3 DAYS	

TOTAL UNUSED VACATION EARNINGS AS OF 3/17/88 ..... 38-1/2 days

Amount earned 3/17/88 to 3/17/89 (2.08 days per month)..... 25 days
Total available vacation days for period 3/17/88 to 3/17-89. 63-1/2 days
Maximum vacation carryover into anniversary year beginning 3/17/89..... 20 days
Amount of vacation that must be used before 3/17/89 to avoid cancellation of excess vacation credits..... 43-1/2 days

UNION'S CALCULATION

Anniversary Date: 3/17/71
Vacation Balance 3/16/87: 33-1/2 days
Vacation Earned 3/17/87-3/16/88: 25 days
Vacation Taken 3/17/87-3/16/88: 20 days
Total Vacation Accumulation 3/16/88: 38-1/2 days
Maximum Vacation Carryover Into 3/17/88-3/16/89, Anniversary Year: 20 days
Excess Vacation Carryover: 18-1/2 days

As a review of the above reveals, there is a dispute as to whether vacation earned during the 1988-89 anniversary year is to be included in the computation of excess vacation carryover to be used by March 17, 1989.

When the parties agreed to the language of Sec. 9.05, they expressly agreed that "Vacation computations shall be made in accordance with the following example:"

EXAMPLE

Anniversary Date: 5/1/80

Vacation Balance 4/30/86: 16 Days

Vacation Earned 5/1/86-4/30/87: 20 Days

Vacation Taken 5/1/86-4/30/87: 14 Days

Total Vacation Accumulation 4/30/87: 22 Days

Maximum Vacation Carryover Into 5/1/87-4/30/88, Anniversary Year: 20 Days

Excess Vacation Carryover: 2 Days

Application of this example to Lowe's case, as well as the application of the other provisions of Sec. 9.05, which govern the computation of vacation carryover, demonstrates that the Union's computation of excess vacation carryover is correct.

On March 16, 1987, Lowe had accumulated 33-1/2 vacation days. Under the provisions of Sec. 9.05, Lowe had the unfettered right to carry over 20 days into the next anniversary year, i.e., 1987-88. The remaining 13-1/2 days were "excess vacation" subject to the cancellation provisions of Sec. 9.05(B). Pursuant to Sec. 9.05(B), on March 17, 1987, or thereafter, the Employer had the right to issue a directive to Lowe ordering Lowe to take the 13-1/2 days of "excess vacation" within a certain period of time, not less than six months after the directive, or suffer the loss of the 13-1/2 days.

On March 16, 1988, Lowe had accumulated 38-1/2 vacation days. Under the provisions of Sec. 9.05, Lowe had the unfettered right to carry over 20 of these days into his 1988-89 anniversary year. As of March 17, 1988, the balance of the 38-1/2 days, i.e., 18-1/2 days were "excess vacation" subject to the cancellation provisions of Sec. 9.05(B). Thus, on March 17, 1988, or thereafter, the Employer had the right to issue a directive to Lowe ordering Lowe to take the 18-1/2 days of "excess vacation" within a certain period of time not less than six months of the directive or suffer the loss of the 18-1/2 days. As the Union recognizes, the Employer had the right, on May 6, 1988, to issue Employer Exhibit No. 17 (attached hereto as Appendix "C"), ordering Lowe to take the 18-1/2 "excess vacation" days prior to March 17, 1989 or suffer cancellation of the same.

The language of Sec. 9.05 clearly and unambiguously provides that the 25 days earned during Lowe's 1988-89 anniversary year are not subject to cancellation until after the calendar year in which they are earned. In reaching the conclusion that the provisions of Sec. 9.05 are clear and unambiguous, the Undersigned has given consideration to the fact that vacation carryover is expressly identified as "unused vacation" which is carried forward to the following anniversary year as earned vacation credits. Clearly, vacation earned during an employe's 1988-89 anniversary year cannot be considered "unused" until the end of the employe's 1988-89 anniversary year. The conclusion that a current year's vacation earnings are not subject to cancellation during the term of the current year is also supported by the example set forth in Sec. 9.05(A) which clearly reflects vacation computations made at the end of the anniversary year 1986-87. Moreover, the language of Sec. 9.05(B) clearly mandates that excess vacation is to be based upon "vacation days to his/her credit at the end of the anniversary year."

As the Employer argues, Sec. 9.05(A) contains a statement that "Staff Members shall not be permitted to carry more than twenty (20) vacation days forward from one anniversary year to the next . . ." However, this statement is followed by the clause "except as provided in Subsection (b)." Clearly and unambiguously, Subsection (B), provides a mechanism for carrying over "excess vacation" in addition to the twenty-day vacation carryover provided for in 9.05(A). Thus, contrary to the argument of the Employer, the provisions of Sec. 9.05 do not clearly prohibit vacation carryover of more than 20 days into the employe's subsequent anniversary year.

The language in dispute is language which was bargained during the negotiation of the parties' 1987-88 collective bargaining agreement, which agreement governs the instant dispute. Given that the disputed language does not predate the parties' 1987-88 contract, there is no past practice to indicate that the parties intended Sec. 9.05 to be given any meaning other than that reflected in the clear contract language. Nor does the evidence of the parties' 1987-88 contract negotiations persuade the Undersigned that the parties intended Sec. 9.05 to be given any construction other than that reached herein.

As the record demonstrates, the language incorporated into the 1987-88 collective bargaining agreement was substantially the same language as Lyons presented to Lowe during an "informal" bargaining session between Lowe and

Lyons. It is not evident that, from the time Lyons proposed the language until the Union accepted the language, that there were discussions which demonstrated that either party intended the language to be given any effect other than that reflected in the plain language of the provision.

According to Lyons, prior to the "informal negotiations" between Lyons and Lowe, the Employer consistently maintained the position that current year vacation earnings would be subject to cancellation, consistent with prior agreements. 2/ However, as the record demonstrates, Lowe, rightly or wrongly, believed that on January 29, 1987, during the first negotiation session following the Union's rejection of the parties' first contract settlement, the Employer made a proposal which indicated that vacation carryover would provide a "safety net" over and above annual accumulation. 3/ Given Lowe's understanding concerning previous Employer proposals, Lyon's proposed language cannot be considered to be such a shocking change in position that it is incredible that Lowe would have understood the Employer's language to have exempted current vacation earnings from the cancellation provisions. Assuming arguendo, that Lowe's understanding of the Employer's position on January 29, 1987 was in error, it is not so uncommon for parties to "bend" previously inflexible negotiation positions to reach a settlement that one may reasonably conclude that it is incredible that the other Union bargaining representatives, who were not privy to Lyons's and Lowe's "informal negotiations," would have understood the language of Sec. 9.05 to have exempted current year vacation earnings from cancellation.

While it may be true that Lyons did not believe that the language exempted current vacation earnings from cancellation, that is the effect of the plain language. While mutual mistake may serve as a basis for reformation of contract language, a unilateral mistake does not.

The Wilson vacation grievance which was settled in May, 1988, after the execution of the parties' 1987-88 agreement, arose during the term of the 1985-86 agreement and was settled on a "No Practice/No President" basis. 4/ Accordingly, the settlement is not relevant to a determination of the parties' mutual intent with respect to Sec. 9.05 of the 1987-88 agreement.

In summary, the Employer misapplied the provisions of Sec. 9.05 when it calculated the amount of vacation which had to be used to avoid cancellation of excess vacation credits on the vacation report to Jim Miller, dated December 29, 1987; 5/ the vacation report to Mike Wilson, dated May 5, 1988; 6/ the vacation report to Darold Lowe, dated May 5, 1988; 7/ the vacation report to Dan Pfeifer, dated May 5, 1988; 8/ and the vacation report to Helen Isferding, dated June 15, 1988. 9/ The Employer violated the provisions of Sec. 9.05(B) when the Employer issued the 1988 "use it or lose it" vacation memos attached to the aforementioned reports which directed Miller to use more than 16 vacation days by August 1, 1988, or suffer the loss of the same; which directed Wilson to use more than 6.5 vacation days by February 15, 1989, or suffer the loss of the same; which directed Lowe to use more than 18.5 days by March 17, 1989, or suffer the loss of the same; which directed Pfeifer to use more than 1.25 days by March 19, 1989, or suffer the loss of the same; and which directed Isferding to use more than 4.5 days by April 1, 1989, or suffer the loss of the same. 10/

While it may be that some of these employes were coerced into taking vacation that they were not required to take at that time, there is no remedy for these employes. They received the vacation for which they were entitled. Those employes who did not chose to follow the Employer's directive "to use it or lose it" and subsequently suffered cancellation of vacation above the amounts permitted by the contract, are entitled to have this vacation restored for use in accordance with the provisions of the collective bargaining

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2/ The Arbitrator notes that the prior vacation language, unlike the current language, expressly provides that "The Executive Director still have the authority to direct a Staff Member to use any vacation credits, current and previously accumulated, which exceed thirty (30) days (six 6 weeks)." (Emphasis supplied)

3/ T, Vol. III, p. 83-84. FSU Exhibit No. 75.

4/ FSU Exhibit No. 72.

5/ Employer Exhibit No. 22. (Attached as Appendix "A".)

6/ Employer Exhibit No. 21. (Attached as Appendix "B".)

7/ Employer Exhibit No. 17. (Attached as Appendix "C".)

8/ Employer Exhibit No. 19. (Attached as Appendix "D".)

9/ Employer Exhibit No. 18. (Attached as Appendix "E".)

10/ As Lyons acknowledged at hearing, the notices were intended to say "You have to use it, or I'm going to take it away" (T, Vol II, p. 151).

agreement.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The grievance was timely filed.

2. The Employer violated Sec. 9.05 of the collective bargaining agreement by issuing the "use it or lose it" vacation memos to Miller, Wilson, Lowe, Isferding, and Pfeifer in 1988.

3. The Employer is to immediately correct the vacation reports attached to the 1988 "use it or lose it" memos sent to Miller, Wilson, Lowe, Isferding, and Pfeifer to comport with the requirements of Sec. 9.05 as set forth above.

4. The Employer is to immediately restore to Miller, Wilson, Lowe, Isferding, and Pfeifer any vacation which was cancelled as a result of the Employer's misapplication of the provisions of Sec. 9.05 to the vacation reports which were issued in 1988, for use in accordance with the provisions of the collective bargaining agreement.

5. The Undersigned will retain jurisdiction for a period of 30 days solely for the purpose of resolving any dispute with respect to the remedy set forth herein.

Dated at Madison, Wisconsin this 2nd day of July, 1990.

By _____
Coleen A. Burns, Arbitrator