BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
UNICARE HOMES, INC., d/b/a CARE CENTER EAST NURSING HOME	Case 7 No. 44145 MA-4648
and	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150	

Appearances:
Mr. Thadd M. Hryniewiecki, Union Representative, on behalf of Local 150.
Mr. C. William Isaacson, Attorney for the Employer, Care Center East Nursin

ARBITRATION AWARD

According to the terms of the 1990-92 collective bargaining agreement between Unicare Homes, Inc., d/b/a Care Center East Nursing Home (hereafter Employer) and Service Employees International Union, Local 150, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the scheduling of vacation time off across weekends after May 1, 1990. The undersigned was designated arbitrator and made full written disclosures to which no objections were raised. Hearing was held at Fond du Lac, Wisconsin on September 19, 1990 and no stenographic transcript of the proceedings was made. The parties filed their written briefs by October 18, 1990 and waived the right to file reply briefs herein. After October 18th, the undersigned exchanged the parties' briefs.

ISSUES:

The parties were unable to stipulate to the issue or issues herein but they agreed to allow the undersigned to frame the issue(s) herein. Based upon all of the relevant evidence herein and the parties' arguments thereon, I find and conclude that the issues shall be as follows:

1. Did the Employer violate the agreement or past practice when, in approximately May 1990, it ceased scheduling employe vacations requested to cover an entire work week (5 days) and include both the weekend before and the weekend after vacation?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE V - METHOD OF WAGE PAYMENT

Section 3 - Eight (8) hours per day and forty (40) hours per week shall constitute a workweek. The nursing home operates twenty-four (24) hours per day, seven (7) days per week. Employees must work weekends as the needs of the department require. The Employer will provide employees hired prior to January 1, 1990 with every other weekend off, and employees hired on or after January 1, 1990 with every third weekend off except in cases of emergency as determined by the Administrator.

ARTICLE XII - VACATIONS

Section 1 - All employees covered by this Agreement shall, upon completion of continuous service for the periods hereinafter specified, become entitled to annual vacations with pay for period indicated

. . . .

Section 3 - Vacations shall be granted on the basis of total seniority within a given department, provided employees exercise such rights during the sign-up periods listed in this Section. The employee must list his/her first and second choice when requesting vacation periods. An employee who submits his/her vacation request after the above date is not automatically precluded from taking a vacation during

the applicable period but is subject to department staffing and may not exercise seniority. Approval for times other than those specified below will be granted on a first-come, first-served basis, staffing permitting. Such requests made at times other than those specified below will be made at least three (3) weeks in advance of the date the vacation will be given. The Employer will respond in writing within two (2) weeks of receiving the request.

Employee Requested By:	For Vacation Scheduled During:	Approved By Dept. Manager
November 1	January 2 - March 31	December 1
February 1	April 1 - June 30	March 1
May 1	July 1 - September 30	June 1
August 1	October 1 - December 23	September 1

Employer reserves the right to cancel any vacation during an emergency situation.

ARTICLE XV - MANAGEMENT

The Employer has the sole and exclusive right to determine the number of employees to be employed, the duties of each of these employees, the nature and place of their work, whether or not any of the work will be contracted out as long as the contracted work shall not dissipate the classification, and all other matters pertaining to the management and operation of the nursing home.

BACKGROUND:

The 1987-89 agreement contained the following language in Article V, Section 3 - Method of Wage Payment:

. . .

Section 3: Eight (8) hours per day and forty (40) hours per week shall constitute a work week. The nursing home operates twenty-four (24) hours per day, seven (7) days per week. Employees must work weekends as the needs of the department require. The Employer will attempt to distribute the weekend time off evenly in each job classification, and in doing so will make reasonable efforts to provide employees with every other weekend off. Seniority shall prevail in providing forty (40) hours of work. The one-half (1/2) hour daily lunch period is not included except as noted in Section 2, above.

This language was amended by the parties in their 1990-92 agreement (that in effect here), to reflect the language quoted above in the "Relevant Contract Provisions" Section.

The parties stipulated that the 1990-92 agreement was negotiated and the parties reached complete agreement in December, 1989. As of May 1, 1990, the parties stipulated, the 1990-92 contract had been printed and signed by the parties.

After May 1, 1990, the Employer posted a new Vacation policy, as follows:

VACATION POLICY - NURSING ASSISTANTS

Vacations in the nursing department for Nursing Assistants may be taken in one day increments. The number of hours of vacation time that you are eligible for will be in accordance to the number of days that you average in a schedule.

Eg. If you work 10 days / 2 weeks; one weeks vacation would be equal to 40 hours or 5 separate days off.

Eg. If you work 5 days / 2 weeks; one weeks vacation would be equal to 20 hours or 2 days and 4 hours off in separate days.

One day increments must be taken Monday - Friday. If a weekend is requested off, a full weeks vacation must be used. (5 consecutive days).

One person per shift, per weekend will be eligible for weekend vacation time. This will be based on seniority. Only one weekend per three month period, as outlined in the contract, will be granted, unless no one else has submitted for weekend time off.

> Management will provide for each employee the computation, based on your average work week for the past year, the number of hours you are eligible for if taken in separate days or in week increments (5 consecutive days). This will be updated when vacation time is used or on your anniversary date pay period.
>
> With the number of employees that are in the nursing department, chances are that there will not be many restrictions for days requested off during the week. If conflicts should arise, the people highest in seniority would have first option for those days off.
>
> One day vacations (sic) days must be submitted 3 weeks prior to the master schedule being posted, in order to allow the scheduler one week in order to prepare the master schedule. Vacations in one week increments need to continue to be submitted within the guidelines specified in the contract. Eg. Vacations July-Sept. need to be in by May 1.
>
> No person will be penalized for time taken under the old policy prior to June 1, 1990.

It is undisputed that the Union has no quarrel with the above-listed requirements that only one employe per weekend is allowed vacation and that employes can take only one weekend off every three months.

FACTS:

Prior to May 1, 1990, the Employer had delegated the authority to schedule vacations, first to Pam Zank and then to Pat Seible. During this period and until the Fall of 1989, the Union's witnesses stated that when they had requested one week's vacation they had been allowed to take off both the weekend before and the weekend after their vacation.

The Employer submitted uncontradicted evidence that the Employer has denied employe vacation requests under the contract language that existed prior to 1990 in the Summer months (according to the seniority of the employe) because mandatory staffing levels would have been endangered. In the Summer of 1989, also, the Employer required employes to select and work an extra weekend, selected on the basis of seniority, to avoid the Employer's falling below required staffing levels during the month of July. Also, it is undisputed that twelve years ago (prior to the tenure of Zank and Seible) Union Bargaining Committee Member Weider took two week's vacation and she was allowed to take both adjacent weekends off. The evidence also showed that under the contract language as it existed prior to 1990, all employes generally received every other weekend off, with the exceptions stated above and except in the case of emergencies. Also, the Employer has always granted employe - arranged trades without question or problems. In the past, the Employer has also allowed employes to take weekends off adjacent to their vacations if staffing levels would allow it.

During negotiations for the 1990-92 agreement, the Union initially proposed to change the language of Article V, Section 3 so that employes would be assured of receiving every other weekend off, not dependent upon the Employer's "reasonable efforts". The Employer, on the other hand, indicated at bargaining that it wanted employes to work every weekend. The language which now constitutes Article V, Section 3 represents a compromise reached in negotiations between the parties.

It is undisputed that the parties did not discuss the impact that the change in the language of Article V, Section 3 would have on employe vacation requests. Union witnesses who were members of the Union's Bargaining Committee stated that at the time of agreement and until May 1, 1990, they did not believe that vacation requests would be affected by the changes made in the language of Article V, Section 3. In contrast, Employer's Administrator, Ms. Diette, a member of the Employer's Bargaining Committee for many years, stated that she understood that under the new language of Article V, Section 3, the Employer could require employes hired before January 1, 1990 to work every other weekend but that the Employer must give these employes every other weekend off, while those hired after January 1, 1990 could be required to work two weekends in a row while the Employer was required to give these employes every third weekend off. Ms. Diette stated that the new weekend off requirements of Article V, Section 3 are more restrictive of the Employer since thereunder the Employer must grant the described weekends off rather than (as under the old contract language) merely making "reasonable efforts" to grant weekends off.

POSITIONS OF THE PARTIES:

Union:

The Union contended that effective May 1, 1990, the Employer arbitrarily and unilaterally discontinued the long-standing and well-established past practice of allowing employes to schedule their vacations over two consecutive weekends so that employes could receive nine consecutive days off, by using only five vacation days off. The Union supported this contention by the testimony of employes Strook and Weider who stated that prior to May 1, 1990, they had been allowed to schedule one week's vacation across two weekends, thus getting nine consecutive days off but using only five vacation days. These witnesses further stated that after May 1, 1990, the vacation schedule was taken over by the Director of Nursing, who, they believed, was unaware of the past practice regarding vacation scheduling and denied employe requests to schedule vacation across two weekends. The Union witnesses also testified that they understood the intent and application of Article V, Section 3 to have remained the same as it was before the language therein was changed in the 1990-92 agreement. Since both of these witnesses had served on the Union's bargaining committee during the relevant period of time, the Union argued that the practice which existed prior to the change in the language of Article V, Section 3 should nonetheless be confirmed and continued. The Union, in support of this argument, quoted from various published arbitration awards and cited other awards as well as one of the Supreme Court's "Steelworkers Trilogy" cases. The Union therefore requested that the grievance be sustained, and the Employer be ordered to suspend its presently-effective vacation scheduling policy, and to return to the policy in effect prior to May 1, 1990 (retroactive to May 1, 1990) so that if any vacation days were lost by employes, those days would be restored to the employes' vacation banks.

EMPLOYER:

The Employer argued that it is not possible in many instances to allow employes two consecutive weekends off at its facility which must provide 24-hour-a-day nursing home care to its up to 131 geriatric residents. For this reason, in response to the Union's initial proposal on the subject, the Employer sought to change the language of the 1990-92 agreement at Article V, Section 3 which the Employer argued, allowed it to require employes hired prior to January 1, 1990 to work every other weekend and to require those hired after January 1, 1990 to work two consecutive weekends with the third weekend off, "except in cases of an emergency as determined by the Administrator." Previously, in the 1987-89 agreement, Article V, Section 3 had provided that the Employer would make "reasonable efforts" to provide all employes with every other weekend off. Thus, the change in language, the Employer asserted, makes it clear by implication that the Employer can require employes to work the weekends they are not off.

Further, the Employer contended that no provision of the effective agreement otherwise prohibits it from scheduling employes to work as described above. In this regard, the Employer noted that Article XV - Management, gives the Employer the right to manage the work schedule, that Article XII, Section 3 - Vacations, reserves the Employer's right to cancel vacations during an emergency situation and that Section 5 thereof allows the Employer to schedule vacations so that adequate service can at all times be given to residents.

The Employer also argued that any past practice that might have been effective prior to the parties' agreed-upon change in the language of Article V, Section 3, is now irrelevant due to the language change made in the 1990-92 agreement. The Employer asserted that the Union was aware that the bargained-for change in Article V, Section 3 would result in the Employer scheduling employes on weekends they were not required to be off. In addition, the Employer pointed out the evidence showed that the Employer has made every effort to try to accommodate employe requests to be off on weekends which coincide with their vacation requests. But as the "needs of the department require", the Employer urged, it must be able to schedule employes to work on weekends that they are not required to be off pursuant to Article V, Section 3. Since in the Employer's view, the clear language of the contract supports the Employer's position herein and since there is no clear contractual language which requires a contrary conclusion, the Employer sought the denial and dismissal of the grievance.

DISCUSSION:

The central issue in this case is whether the change (negotiated into the 1990-92 labor agreement)in the language of Article V, Section 3 - Method of Wage Payment, on its face, allows the Employer to schedule employes hired prior to January 1, 1990 to work every other weekend with every other weekend unscheduled, and to schedule employes hired on or after January 1, 1990 to work two consecutive weekends with the third weekend unscheduled. Although the language of Article V, Section 3 does not directly state when the Employer can require employes to work weekends, it does affirmatively and clearly state when employes can expect to be guaranteed a weekend off (except in cases of an emergency). Thus, by implication, the changed language of Article V, Section 3 appears to allow the Employer to schedule employes to work the weekends they are not guaranteed off (absent an emergency). I note, in addition, that the statements at the beginning of Article V, Section 3 not only define the work week, but Section 3 also states that the nursing home operates 24 hours a day,

7 days per week. Section 3 then emphasizes:

> . . . Employees must work weekends as the needs of the department require . . . .

This sentence, in my opinion, coming as it does, immediately before the sentence in Section 3 at the center of the dispute herein, impliedly indicates that employes must be available to work the weekends they do not have off and shows that this was the intent of the parties. Further, Article XII - Vacations states:

> . . . Vacation periods may be scheduled by the Employer as the requirements of adequate service dictate. . . .

This sentence, subject to consideration of the employes' vacation request by the Employer, makes it clear that the requirements of providing adequate 24 hour service can take precedence over employe vacation requests. Thus, employe vacation requests could conceivably be denied to insure adequate service is rendered to residents. Finally, I note that no provision of the labor agreement appears to otherwise restrict the Employer's rights under Article XV - Management ". . . to determine the number of employees to be employed . . . ."

In addition, the evidence of bargaining history here, tends to support the Employer's case. In this regard, I note that during the negotiations for the 1990-92 agreement, the Union made the initial proposal to change the language of Article V, Section 3 to allow employes every weekend off. The Employer's representatives stated that discussions then centered upon the Employer's view that its facility could not operate properly under those conditions. The Employer then made a counterproposal that employes should work every weekend. Sometime thereafter, the parties compromised on the language which now appears in the 1990-92 agreement.

The Union presented no evidence to contradict the Employer's bargaining history evidence. Rather, Union witnesses merely stated that they did not believe agreement to change the language contained in Article V, Section 3 would result in employes being denied weekends off adjacent to a one week vacation, and that in negotiations, the parties never discussed what, if any, impact the language change in Article V would have on employe vacation requests.

Finally, the evidence adduced by the Union regarding past practice 1/ is inconclusive to show that a consistent past practice existed prior to the changes in Article V, Section 3. Rather, the Employer offered uncontradicted evidence that it only allowed employes to have two consecutive weekends off around a one week vacation when staffing levels otherwise allowed it. The Employer also presented uncontradicted evidence that under the old language of Article V, Section 3, it had denied employe vacation requests during the summer months when staffing levels fell and, that in the Summer of 1989, the Employer required all employes to work an extra weekend during the month of July to meet staffing needs. After the 1990-92 contract was agreed upon and executed, the Employer notified employes (in its Vacation policy) that employes hired prior to January 1, 1990 could no longer expect to have off both weekends on either side of a one week vacation, and it consistently denied vacation requests that did not comport with its policy.

Based upon all of the relevant evidence and arguments herein, the grievance lacks merit and I find that the Employer did not arbitrarily or unilaterally change any relevant practice or violate the agreement and I issue the following

AWARD

The Employer did not violate the agreement or any past practice when in approximately May, 1990, it ceased scheduling employe vacations requested to cover an entire work week (5 days) and include both the weekend before and the weekend after vacation.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 21st day of December, 1990.

By _____
Sharon Gallagher Dobish, Arbitrator

1/ In cases such as this where the language of the agreement is clear on its face, evidence of past practice or bargaining history will not be considered if it is offered to vary the clear meaning of contractual language. However, such parole evidence is admissible and will be considered if it is offered to support the unambiguous language of the agreement.