BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
DARLEY EMPLOYEES' ASSOCIATION	Case 2 No. 44446 A-4679
and	
W.S. DARLEY & COMPANY	

Appearances:

Mr. Robert W. McKinley, McKinley & Anderson, Attorneys at Law, 821 North Bridge Street, Chippewa Falls, Wisconsin 54729, appearing on behalf of the Darley Employees' Association, referred to below as the Association.

Mr. Charles G. Norseng, Wiley, Rasmus, Wahl, Colbert, Norseng and Cray, S.C., Attorneys at Law, 119-1/2 North Bridge Street, Post Office Box 370, Chippewa Falls, Wisconsin 54729-0370, appearing on behalf of W.S. Darley & Company, referred to below as the Employer.

ARBITRATION AWARD

The Association and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the arbitration of certain disputes. The Association requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Dean Goulet. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held in Chippewa Falls, Wisconsin, on December 17, 1990. The hearing was not transcribed and the parties filed briefs by January 2, 1991.

ISSUES

The parties stipulated the following issue for decision:

> Is the Grievant, Dean Goulet, entitled to two or to four weeks paid vacation for 1991?

RELEVANT CONTRACT PROVISIONS

> ARTICLE VI
> VACATIONS
>
> . . .
>
> 2. Paid vacations will be allowed as follows for employees after one year of service:
>
> A. One to three years - One 40 hour week.
> More than three years - Two 40 hour weeks.
> More than ten years - Three 40 hour weeks.
> More than fifteen years - Four 40 hour weeks.
>
> . . .
>
> E. An employee who has completed fifteen (15) years of continuous service will be eligible for four (4) weeks of paid vacation after his anniversary date.
>
> . . .
>
> ARTICLE VII
> LEAVE OF ABSENCE
>
> A leave of absence shall be granted to any employee without impairment of his seniority rights or vacation privileges only when required by military duty, illness, or such emergency as may be allowed by the Employer.

BACKGROUND

Prior to the testimony of any of the witnesses, the parties stipulated the following facts:

> Dean Goulet is an employe of the Employer, and has been so employed in excess of fifteen years.
>
> Dean Goulet was off work approximately six months in calendar year 1989, with a non work-related injury.
>
> There is in existence a valid collective bargaining agreement between the Employer and the Association, which has been entered as Joint Exhibit 1.
>
> The labor agreement provides for four weeks of vacation for employes with more than fifteen years of service.
>
> The Association filed a grievance on behalf of Dean Goulet, which was processed through the contractual grievance procedure.

Although three witnesses testified, the facts, with few exceptions, are not in dispute.

The Employer has continuously employed the Grievant since April of 1972. In mid-January of 1989, while the Grievant was working on the muffler of his car, the jack supporting the car slipped, and the car rolled over the Grievant's hand and wrist, breaking his wrist. The Grievant was unable to work from the time of his injury until early May, 1989. He worked part-time in May and June of 1989, but had surgery on his wrist in July of 1989, and was unable to work until the following December. He worked part-time in December of 1989, and returned to full-time status in January of 1990.

At no time during the period of the Grievant's absence was he informed that his leave time was unapproved. The Employer made its contractual contribution to the cost of his health insurance throughout this period. Mary Knutson, the Employer's Personnel Manager, testified that the Employer made this contribution not because it was required to, but as a willing acknowledgement that the Grievant was a good, long-term employe.

In December of 1989, the Grievant and the Employer discussed his accumulation of vacation for 1989. The Employer informed the Grievant it wished to pro-rate his vacation benefit for 1989, based on the hours he actually worked. Such discussions continued, and in a memo dated March 7, 1990, the Employer summarized the status of the dispute thus:

> General discussion with Dean Goulet regarding vacation time earned and sick leave earned while he was off due to his injury.
>
> There are 2080 hours per year.
>
> Dean is eligible for four (4) weeks vacation.
> His anniversary date is April 10, 1972.
>
> From January thru December, 1989 Dean put in the following time:
>
> 478.72 hours worked
> 250.00 hours paid sick leave
> 144.00 hours paid vacation
> 1207.28 hours absent without pay
>
> Dean was off without pay the months of April, July, August, September, October and November of 1989. (Six months)
>
> It is the opinion of the company that Dean does not lose his vacation privilege of earning four weeks of vacation per year, but he does not earn vacation while he is off work.
>
> Taking into consideration:
>
> 478.72 hours worked
> 250.00 hours paid sick leave
> 144.00 hours paid vacation
> 872.72 actual hours for 1989
>
> If you pro-rate his vacation, Dean would have 67 hours of vacation coming and two sick days.

> Paul offered to pay Dean 2 weeks vacation or 80 hours and three sick days.
>
> The company paid for Dean's insurance while he was off work and in offering him two weeks of vacation we feel we are being more than fair to him.
>
> Dean pointed out to us that after his second time off work, according to his lawyer, it would have been very easy for him to go on worker's compensation and he would not have lost any time.
>
> Dean mentioned Jo Ann being off when she had her baby and it didn't affect her vacation.
>
> Dean stated he will have to talk to the association because whatever he decides will affect the rest of the employees.
>
> Frank mentioned the association and the company have to work on the wording of the leave of absence policy that's in the contract. This is the first time we have had an employee off for a long length of time. We are trying to be fair in resolving this issue; we can't negotiate the language that's in the current contract.

The Grievant and the Association disagreed with the Employer's position and, on March 19, 1990, filed the grievance at issue here.

W. J. Darley, the Employer's President, responded to the grievance in a letter to the Association dated May 9, 1990, which reads thus:

. . .

> The intent of the contract and the wording of the contract regarding vacation is that the number of weeks of vacation time that an employee accumulates is not affected during leave of absence; for example, if a man has worked for the company for fifteen years, and he has a year leave of absence, he does not start upon his return to work with only having one weeks vacation after a year's work, etc.
> At the same time, if a man is on a year's leave of absence, he does not get paid for any vacation days for that year's leave of absence. If the leave of absence doesn't involve a year, and he works part of that year, or has accumulated sick leave, etc., that is used during that year, then a proportionate number of vacation days would be compensated for.
>
> I'm not a lawyer; but, that's the way it sounds to me, and is my position in the matter.
>
> The next step is for you to go to an independent arbitrator if you wish to pursue the matter, which I suggest you do.

The Grievant's long-term absence is the first non work-related injury the parties have experienced. Joanne Beaufeaux was given an eight week leave of absence spanning the close of 1988 and early 1989 to care for her baby which had become ill shortly after birth. Beaufeaux continued to earn benefits through the period of her leave.

James Rose serves as an Association Committeeman, and served on the negotiating team which bargained the 1988-91 labor agreement. He testified that the parties did not discuss Article VII during those negotiations. He also testified that the first time the Employer noted any typographical error in Article VII was two to three weeks prior to the arbitration hearing.

The typographical error asserted by the Employer dates back to a change in Article VII of the parties' 1977 labor agreement. Article VII of the parties' 1976 labor agreement reads thus:

> A leave of absence shall be granted to any employee without impairment of his seniority rights for vacation privileges only when required by military duty, illness, or such emergency as may be allowed by the employer.

In 1977, Article VII was changed to read as it does in the 1988-91 agreement. No testifying witness was present during the negotiations for the 1977

agreement.

Further facts will be set forth in the DISCUSSION section below.

THE ASSOCIATION'S POSITION

The Association contends that Article VI, Section 2, a, and Article VII clearly and unambiguously entitle the Grievant to four weeks of vacation in 1991. Beyond this, the Association asserts that the contract contains "no language whatsoever . . . indicating that (the Employer) has any right or authority to prorate an employee's vacation." Contending there is no evidence to support the Employer's assertion that Article VII contains a typographical error, the Association concludes that the provision must be enforced as written. If the clear language of Article VII is to be changed, it must, the Association contends, be changed through negotiation, not grievance arbitration. Whether considered as a matter of contract or as a matter of Wisconsin law, the Association argues that the grievance is valid, and that the Grievant must be awarded four weeks of vacation in 1991.

THE EMPLOYER'S POSITION

The Employer notes that the language of Article VII the Association seeks to enforce contains a typographical error dating from 1977. Even if that error is ignored, the Employer contends that the language of Article VII can not be reasonably interpreted as the Association asserts. More specifically, the Employer argues that the parties have a long history of responding to grievances flexibly, and have treated the labor agreement as a guideline pointing to the parties' intent, not as a listing of specific and technical requirements. In this case, the Employer asserts that the intent underlying Article VII is that an employe must work to earn the vacation benefit. It follows from this, according to the Employer, that the Grievant is entitled to vacation only for that portion of 1990 he was actually working. Beyond this, the Employer argues that the grievance should be addressed as a matter of contract, not as a matter of law.

DISCUSSION

The parties agree that but for the Grievant's absence due to his wrist injury, he would have qualified for four weeks of paid vacation in 1991 under the provisions of Article VI. The stipulated issue focuses, then, on Article VII.

Article VII establishes a "leave of absence" which, if granted, "shall be granted . . . without impairment of (an employe's) . . . vacation privileges." This language clearly and unambiguously establishes that if the Employer granted a leave to the Grievant, the leave can not be used as a basis to limit his vacation entitlement. The sole interpretive issue posed on the language of the 1988-91 agreement is whether the Employer granted the Grievant a leave of absence.

The record establishes the Employer did grant the Grievant a leave of absence for the period of time he was unable to work in 1989 due to his wrist injury. The Employer made its premium contribution toward the Grievant's insurance throughout this period, permitted him to work as he was able, and never questioned that he would have a job available when he was physically capable of performing it. At no point throughout this period was the Grievant informed his absence was not approved of. Against this background, it is impossible to reach any conclusion other than that the Grievant was on an approved leave of absence for roughly six months in 1989.

The conclusion that the Employer in fact awarded the Grievant a leave of absence dictates, under the unambiguous language of Article VII, that his vacation entitlement under Article VI continued "without impairment." It follows that the Employer has no contractual basis to deny the Grievant four weeks of vacation for 1991.

Before closing, it is necessary to examine the Employer's contentions in greater detail. At hearing and through Darley's May 9, 1990, response, the Employer argued that Article VII must be read solely to protect an employe's past accrual of benefits, which are earned based on hours actually worked, not on time spent on a leave of absence. This argument has persuasive force, but is not well-rooted in the language of Article VI or VII. Article VI bases the Grievant's vacation privilege on "fifteen (15) years of continuous service." The parties have agreed that the Grievant's employment with the Employer has been continuous, and exceeds fifteen years. Thus, if his vacation privilege is to be reduced to two weeks, it must be because of the time spent off work status in 1989. As noted above, however, vacation privileges must be "without impairment" under Article VII, if a leave of absence is granted. To accept the Employer's interpretation would produce the impairment precluded by the

language of Article VII.

The Employer has also noted that its payment of the Grievant's insurance premium was gratuitous, and can not be considered the granting of a leave of absence. This argument also has persuasive force, but can not be accepted on this record. Even if the argument is accepted, the record affords no basis to conclude that the Employer denied the Grievant a leave of absence. All of the Employer's conduct during the Grievant's absence is consistent with the interpretation that his absence was approved, none is consistent with the interpretation that his absence in any way impaired his status as a continuously employed worker. If the Grievant's 1989 absence was not approved, his employment by the Employer would no longer have been "continuous," and thus he would have been entitled, under Article VI, to no vacation privilege upon his return to work, not the two weeks asserted by the Employer.

The Employer asserts that the parties, by practice, treat the contract less as a document of technical requirements than as a guide to their mutual intent. This may well be the case, but an arbitrator's duty is to give bargaining parties the benefit of their written agreement. The language of that agreement properly limits the scope of an arbitrator's judgement. To stray from that language risks turning a matter of contract interpretation into a matter of business policy. Bargaining parties make the business policy decisions, the arbitral role must be restricted to examining the language they have chosen to effect those policy decisions. In this case, that language favors the Association's interpretation, not the Employer's. It may be, as the Employer contends, that it would be better policy to prorate vacation benefits for leaves on the basis of time actually worked. This policy must, however, be secured through negotiation, not through grievance arbitration.

The Employer has asserted that Article VII contains a typographical error, which the Association should not be given the benefit of. I am not persuaded that accepting the Employer's argument would overturn the conclusions stated above. Beyond this, there is no evidence to support the Employer's assertion. Even assuming the fact that the alleged error has gone unchallenged for thirteen years can be ignored, none of the testifying witnesses could recall the negotiations for the 1977 labor agreement. Thus, the record, at most, is unclear on this point, and any doubt on this issue must be resolved against the Employer, see Abex Corp., 70-2 ARB Par. 8479 (Krimsly, 1970). There is, then, no persuasive basis to conclude that the language of Article VII reflects anything other than the parties' agreement on leaves of absence.

In sum, the Grievant's entitlement to four weeks of vacation under Article VI has not been challenged here. The record demonstrates that the Grievant took an approved leave of absence due to his wrist injury in 1989. Against this background, the clear language of Article VII requires that the Grievant be awarded four weeks of vacation in 1991.

AWARD

The Grievant, Dean Goulet, is entitled to four weeks paid vacation for 1991.

Dated at Madison, Wisconsin, this 8th day of March, 1991.

By _____
Richard B. McLaughlin, Arbitrator