BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MANITOWOC COUNTY INSTITUTIONAL EMPLOYEES, LOCAL 1288, AFSCME, AFL-CIO,	Case 222 No. 43106 MA-5898
and	
MANITOWOC COUNTY	

Appearances:

Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221, appearing on behalf of Manitowoc County Institutional Employees, Local 1288.

Alan M. Levy, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Manitowoc County.

ARBITRATION AWARD

Manitowoc County Institutional Employees, Local 1288, AFSCME, AFL-CIO (hereinafter Union) and Manitowoc County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an arbitrator appointed by the Wisconsin Employment Relations Commission. On November 9, 1989, the Union filed a request with the Commission to initiate grievance arbitration in this matter. The County concurred in said request. Prior to the formal appointment of an arbitrator, the parties agreed to hold scheduling of hearing in this matter in abeyance to provide the parties an opportunity to resolve this matter through negotiations. On January 23, 1990, the Commission formally appointed James W. Engmann, a member of its staff, as the impartial arbitrator in this matter. Hearing in this matter was originally scheduled for March 15, 1990, but was postponed to May 15, 1990, at the request of the parties. Prior to said date, the parties agreed to hold the hearing in this matter in abeyance pending their efforts to settle this matter. On April 23, 1991, the parties advised the arbitrator that a hearing in this matter should be scheduled. A hearing was scheduled for June 12, 1991, but was postponed to July 18, 1991, at the request of the parties. The hearing scheduled for July 18, 1991, was also postponed at the request of the parties. A hearing in this matter was held on October 7, 1991, in Manitowoc, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. Said hearing was transcribed and the transcript was received on October 31, 1991. The parties submitted briefs, the last of which was received on December 16, 1991, and they waived the filing of reply briefs. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

The Union and the County had a collective bargaining agreement covering the year 1988. In the spring of 1988, the County determined that the Health Care Center was running a growing deficit. The County made changes to deal with the deficit, including changing administrators and operating methods. The County also applied pressure on the Union to make concessions in employe wages. The parties began negotiations and entered into an interim agreement effective July 1, 1988, which included changes to reduce costs. One result of these negotiations was that the standard work day for direct care employes was

changed from eight hours to seven and one-half hours with an unpaid lunch break. This change remained in full force until January 1, 1989, at which time the affected employes were returned to an eight hour day.

Prior to the change in the work day, vacation days were calculated at eight hours per day. From July 1 to December 31, 1988, the time the work day was seven and one-half hours, the County calculated vacations days based on seven and one-half hours. When the eight hour work day returned on January 1, 1989, the County again calculated vacation days based on an eight hour day. The Union grieved the County's calculation of vacation days using seven and one-half hours during the last half of 1988, alleging a violation of Article 14, Section A, of the agreement. The grievance was processed in accordance with the grievance procedure and is properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

The 1988 collective bargaining agreement between the parties contained in relevant part the following:

ARTICLE 9 - DEFINITIONS OF EMPLOYEES

A. Regular Full-Time: A regular full-time employee is a person hired to fill a regular full-time position. Full-time employes are eligible to receive all benefits in this Agreement.

. . .

ARTICLE 14 - VACATIONS

A. Each employee shall earn vacation in the following manner:

One (1) week vacation upon completion of one (1) year service.
Two (2) weeks vacation upon completion of two (2) years' service.
Three (3) weeks vacation upon completion of eight (8) years service.

Upon completion of nine (9) years of service, the employee shall be granted an additional one (1) day per year for each year of continuous service completed from the ninth (9th) year through the eighteenth (18th) year so that effective with the completion of the eighteenth (18th) year of service, such employee will be entitled to five (5) weeks of vacation.

The Interim Agreement made the following relevant changes:

ARTICLE 9 - DEFINITIONS OF EMPLOYEES

A. Regular Full-Time: A regular full-time employee is a person hired to fill a regular full-time position. Full-time employes are eligible to receive all benefits in this Agreement. A regular full time employee shall be defined to mean an employee working seven and one-half (7-1/2) hours per day, one thousand nine hundred

fifty (1,950) hours per year.

ISSUE

The parties stipulated at hearing to framing the Issue as follows:

Whether the employes were paid vacations in 1988 and 1989 correctly under the contract and modifying agreement.

If not, what is the remedy?

POSITIONS OF THE PARTIES

The Union argues that employes are entitled to enter into an agreement knowing full well the intention of the other party; that the employes asked whether vacations would be affected; that they were told "no"; that the Union, having bargained in good faith for a 1988 agreement, painfully negotiated and agreed to an interim concessionary agreement; that a major concession was the shorter work day with an unpaid meal period; that other concessions were made; that the employes recognized the Employer's problem and made their contribution to solve the problem; that the employes did more than their share of belt tightening; that they abided by the interim agreement; that the Employer greatly benefitted from the interim agreement; that part of the interim agreement, as expressed by the County, is that there would be no change in vacations, except the documented changes regarding staffing and replacements; that the Employer gave meaning to the vacation language by stating that there would be no effect from the interim agreement; that the employes are entitled to rely on that statement as an expression of the effect of the agreement, the basis upon which it will be implemented; that the credibility of the County's main witness is to be questioned; and that the employes are entitled to vacation accrual for the term of the agreement on the same basis as before the interim agreement. Therefore, the Union requests the arbitrator to order that the grievance be upheld, that the affected employes have the lost vacation proration differential reinstated and that separated employes be paid for that differential at their last applicable wage of 1989.

The County argues that it appropriately calculated the 1989 vacation in a manner which reflected the reduced hours worked by certain employes under the concessionary contract; that the relevant concession was that certain employes worked a seven and one-half hour day rather than an eight hour day; that the calculation of vacation entitlement is a necessary and inevitable consequence of that concession; that employes are contractually guaranteed a fixed number of "days" or "weeks" or vacation, not "hours"; that the number of days or weeks of entitlement is determined as a function of longevity; that the County did not modify the vacation schedule guaranteed by the contract; that assuming the workday reduction had continued, it would be absurd for an employe to argue that, although working a 37 1/2 hour week, the employe is entitled to a 40 hour week vacation; that, as the concession lasted only several months, by the time the effect of the temporary reduced workday was felt, the employe had returned to an eight hour day; that, thus, the impact on vacation accrual created a perception of a further concession, a perception unsupported by fact or logical contractual interpretation; that, moreover, the language of the concessionary agreement supports the County's action; that the language reflects a contractual year premised on seven and one-half for all days, work and vacation; and that the Union has failed to establish that the County orally modified through promise the inevitable and necessary effect of the hours reduction on vacation entitlement. Therefore, the County requests that the grievance be denied.

DISCUSSION

In essence, the question before this Arbitrator is whether employes should have accrued vacation days equal to seven and one-half or eight hours per day during the time when the work day was changed from eight to seven and one-half hours per day.

On the face of the contract, the answer is fairly straight forward. By closely reading the unchanged language of Article 14 - Vacations, it is clear that one week of vacation equals five days. 1/ While Article 14 does not define the number of hours in a day or a week, the amended language of Article 9 - Definitions of Employees defines a day as seven and one-half hours. Thus, an employe entitled to one week of vacation would receive five days of vacation under Article 14 at the rate of seven and one-half hours per day under Article 9 for a total of 37-1/2 hours per vacation week. This is consistent with the amended language of Article 9 defining a year as 1950 hours which, when divided by 52 weeks per year, yields 37-1/2 hours per week.

If this was the entire record, the case would be over. But the Union argues that there was no specific agreement to change the vacation accrual rate. The Union points to a question posed by a member of the bargaining unit to the County's corporation counsel-personnel director regarding vacation. The record does not indicate the context in which the question was asked, nor does it specify what, exactly, was asked. The bargaining unit member who asked the question was not called to testify. The Union characterizes the question in several ways: whether the accrual rate for vacations would be changed, whether vacations would be affected, whether vacation days would be prorated and whether vacations would be touched. Three bargaining unit members testified that the answer received from the corporation counsel-personnel director was "No".

And the Union is right. There was no specific agreement to change the vacation accrual rate. And, indeed, the vacation accrual rate was not changed. Employes still received one week of vacation after one year of service, two weeks of vacation after two years of service and so on. The accrual rate as defined in Article 14 - Vacations did not change as a result of the interim agreement because the accrual rate is stated in weeks and days, not in hours. So if the question was posed to the County's corporation counsel-personnel director as to whether the accrual rate for vacations would be changed, the correct answer was "No" because it did not. The same is true of the question

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1/ Said section reads in part:

> Upon completion of nine (9) years of service, the employee shall be granted an additional one (1) day per year for each year of continuous service completed from the ninth (9th) year through the eighteenth (18th) year so that effective with the completion of the eighteenth (18th) year of service, such an employee will then be entitled to five (5) weeks of vacation.

Under said language, ten additional vacation days are received, bringing the total vacation allotment to five weeks. As three weeks of vacation are allotted following eight years' service, the additional vacation allotment is two weeks which, divided into the additional ten vacation days, equals five days per week.

regarding proration; the employe did not receive prorated weeks of vacation but continued to receive vacation weeks of five days each.

As to the question of whether vacation days would be "affected" or would be "touched" by the interim agreement, the answer of "No" was also correct, at least in the sense that employes still received the same number of vacation days as they had when they worked the longer day. But in another sense, vacation days were changed. From July 1 through December 31, 1988, vacation days were accrued at the rate of seven and one-half hours per day, instead of at the rate of eight hours per day, as was true before and is true since those dates. This is what the Union is grieving. But vacation days were also changed in another way, a way which balances with the accrual rate: during that time, vacation days were taken at the rate of seven and one-half hours per day. That is, during the time in question, not only were vacation days accrued at the rate of seven and one-half hours a day, but when employes took vacation days, they were charged for only seven and one-half hours, not eight hours. Therefore, from July 1 through December 31, 1988, employes who had earned vacation days in 1987 to be taken in 1988 earned vacation days at the rate of eight hours a day. But when employes took vacation days from July 1 through December 31, 1988, they were only charged for seven and one-half hours vacation, leaving a balance of an extra one-half hour for each vacation day.

If the Union's argument is that vacation days were not "affected" or "touched" by the interim agreement, then employes should have been charged for eight hours of vacation for each day of vacation taken from July 1 through December 31, 1988. They were not, and the Union does not grieve that change; instead, the Union grieves only that the accrual of vacation should have continued at the rate of eight hours per day. Under the Union's argument, taken to its logical conclusion, employes would earn vacation from July 1 through December 31, 1988, at the rate of eight hours per day but would take vacation at the rate of seven and one-half hours per day. The Union offers no authority to read the contract, as modified by the interim agreement, in such an inconsistent manner. Absent specific language to the contrary, vacation is accrued and used at a consistent rate; in this case, either at the rate of seven and one-half hours per day or at the rate of eight hours per day.

Thus, vacation was changed by the interim agreement in the sense that by agreeing to change the work day, the parties also agreed to change the vacation day. As Article 14 - Vacations states the number of weeks of vacation an employe is entitled to based upon the employe's longevity, and as Article 9 - Definitions of Employees, as modified in the interim agreement in effect from July 1 through December 31, 1988, defines a work day as seven and one-half hours and a work year as 1950 hours, both of which equal 37-1/2 hours per week, and as the County was consistent in calculating both the accrual and the charging of vacation days during that time at the rate of seven and one-half hours per day and 37-1/2 hours per week, and as the employes continued to receive the number of weeks of vacation they were entitled to based upon their longevity, this arbitrator finds no violation of the contract as modified by the interim agreement. 2/

2/ The Union may feel it is unfair that when employes took a vacation day of eight hours in 1989, they received only seven and one-half hours paid vacation for each vacation day earned from July 1 through December 31, 1988; however, when these employes earned eight hours per vacation day in 1987, they were only charged seven and one-half hours per vacation day taken from July 1 through December 31, 1988, leaving them a balance of one-half hour per vacation day.

For the reasons stated above, the Arbitrator issues the following

AWARD

1. The employes were paid vacation in 1988 and 1989 correctly under the contract and modifying agreements.

2. The grievance in this matter is denied and dismissed.

Dated at Madison, Wisconsin, this 18th day of February, 1992.

By _____
James W. Engmann, Arbitrator