BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL 662	Case 1 No. 46176 A-4826
and	
STANWOOD CORPORATION	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Naomi E. Weld, Riley, Prenn & Ricci, S.C., by Mr. Stephen L. Weld, on behalf of the Company.

ARBITRATION AWARD

The above-entitled parties, herein the Union and Company, are privy to a collective bargaining agreement providing for final and binding arbitration. Hearing was held on November 18, 1991, in Eau Claire, Wisconsin. The hearing was not transcribed and briefs were filed by January 23, 1992.

Based upon the entire record, I issue the following Award.

ISSUE

Since the parties were unable to jointly frame the issue, I have framed it as follows:

> Did the Company violate Article 26 of the contract when it failed to grant vacation pay in 1991 to those former employees who worked at its Boyd, Wisconsin, facility from June 15, 1990, onward and, if so, what is the appropriate remedy?

DISCUSSION

The Company, a maker of wood products, sold its former Boyd, Wisconsin, facility on April 25, 1990, to Two Marks Acquisition Corporation, herein Buyer, which reopened the facility under its name. At that time, the Buyer hired many of the Company's former employees pursuant to the agreement it reached with the Company providing:

> "19. Seller's Employees: Within six (6) months of the closing, Buyer shall hire substantially all of the Seller's employees employed at the Boyd operation."

The Buyer subsequently did so by hiring about 20-25 former Company employees out of its approximately 35 person complement.

The Company itself does not have any financial interest in the Buyer's operation and is not involved in any way with it.

In April, 1991, Charles W. Smoot on behalf of the Company met with and told the Boyd employees that he had sold the facility and that the Buyer had agreed to hire "a substantial" number of them. Smoot testified without contradiction that he never used the word "layoff" in his talk and that the employees considered themselves terminated. The Company subsequently did not grant any vacation pay to the former Boyd employees who worked from June 30,

1990, onward on the ground that they were not on the Company's payroll on June 15, 1991.

Union Representative James J. Newell and Smoot subsequently met on June 13, 1991, over the sale, with Smoot ultimately agreeing that the Boyd employees could be recalled to its Stanley facility "just as if they had been laid off by the Company" if any openings occurred before October 25, 1992. However, the parties were unable to agree upon whether they should be granted vacation pay for the time worked from June 15, 1990, as the Union requested. As a result, the Union filed the instant grievance on June 21, 1991.

In support thereof, the Union maintains that the former Boyd employees are entitled to vacation pay because they have recall rights under the contract, thereby evidencing their continued employment with the Company, and that full vacation pay is called for because the contract does not provide for any proration. Alternatively, the Union contends that if they are not considered to be in the Company's employment, they are entitled to unused vacation under the Company's practice of prorating vacation "when an employee missed a lot of work due to leave of absence or various other reasons "because they only missed three weeks of work due to the closing". As a remedy, it requests that all of the affected employees be paid for whatever vacation time they had coming, along with interest on any such sums owed.

The Company, in turn, argues that vacation under Article 26 of the contract is to be paid only if employees are working on June 15, 1991, and that since all of its former Boyd employees had terminated their employment with the Company by that date, they failed to meet this condition of entitlement. The Company adds that these employees were not on temporary layoff; that Smoot in fact never agreed to treat them as laid off; and that no past practice calls for the proration of vacation benefits for employees who are not on the payroll as of June 15.

The resolution of this issue turns upon Article 26 of the contract, entitled "Vacation", which provides:

> "Each full-time employee who qualifies and is in the Company's employment on June 15 shall earn vacation according to the following schedule:

Length of Continuous Service	Benefit
After 3 months of service	8 hours straight time pay
After 6 months of service	16 hours straight time pay
After 9 months of service	24 hours straight time pay
After 12 months of service	40 hours straight time pay
After 3 years of service	80 hours straight time pay
Effective June 15, 1990, After 14 years of service	120 hours straight time pay
Effective June 15, 1991,	

After 13 years of service	120 hours straight time pay
Effective June 15, 1992, After 12 years of service	120 hours straight time pay

> A plant-wide vacation period of one (1) week will be scheduled the end of June each year. Employees with vacation accumulated as of the plant-wide shut down shall receive pay for the plant-wide shut down week (up to a maximum of 40 hours). Any remaining vacation time shall be scheduled by the employee after the June vacation period and before May 31 of the next year. Vacations shall be scheduled with the approval of the immediate supervisor.
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> All vacation shall be taken on a current year basis and may not be accumulated beyond one year. Vacation pay shall be paid at the employee's regular rate of pay at the time the vacation is taken. Any employee who leaves his/her employment shall receive pay for vacation accumulated, but unused, as of the prior June 15.
>
> Vacations shall be taken in a minimum of one (1) day increments."

Since the employees here were not working for the Company on June 15, 1991, this language supports the Company's claim that they are barred from receiving vacation from June 15, 1990, onward and up to the time that the Company sold its Boyd facility.

The Union nevertheless argues that they were on layoff status on June 15, 1991, and that they hence are entitled to vacation pay.

I disagree, as Smoot testified that he never used the word "layoff" when he spoke to the Boyd employees and there is no indication in this record that said employees ever thought otherwise.

The only possible contrary indication is Smoot's agreement to the Union's proposal to treat them "just as if they had been laid off by the Company". But that acknowledgement must be considered in a context which also shows that the employees for all other practical purposes were in fact terminated because of the sale of the Boyd facility. Moreover, even though Smoot agreed to treat them "just as if they had been laid off", he did so after he had earlier rejected the Union's request that they be given the vacation benefit sought here. As a result, he agreed to give them layoff rights on the express condition that they not be given vacation pay. 1/

This is why there is no merit to the Union's assertion that the Boyd

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1/ Since the situation here involves a termination rather than a layoff or other temporary absence from work, some of the cases cited by the Union - Dunphy Boat Corporation, L.E. Gooding, 13 LA 880 (1950); Furniture Employer's Council of Southern California, Edgar L. Warren, 23 LA 488 (1954); Solar Chemical Corporation, James J. Mellen, 56 LA 99 (1971); McQuay-Norris Manufacturing Co., Verner E. Wardlaw, 7 LA 671 (1947); Des Moines Railway Co., Judson E. Piper, 18 LA 823 (1952); and Allied Corporation, Gerald Cohen, 80 LA 680 (1983) - are inapposite.

employees were still working for the Company on June 15, 1991.

The Union also urges that because Article 5, Section 3, of the contract does not refer to the sale of facilities as constituting one of the nine listed grounds for breaking an employee's seniority, the employees herein therefore retain their seniority and hence are still employees.

This point would be well taken if there were any evidence that the parties ever specifically agreed that termination would not end one's seniority. But there is no such evidence. As a result, it is far more likely that termination is not listed under this part of the contract because the common law of the shop - i.e., a rule so well-known in labor relations that it does not need any specific reference in a collective bargaining agreement - recognizes that but for disciplinary matters which can be grieved, completely terminating one's employment relationship normally brings with it the loss of one's seniority.

The Union is more on target in pointing out that the Company in the past has prorated vacation for employees who do not work an entire year because they were on leaves of absences, work related injuries, medical leave, etc. Thus, Smoot testified "You had to work to get it" and that employees had to work at least 1800 hours, provided that they were still on the payroll on June 15.

The contract on its face, though, does not refer to this 1800 hour requirement, 2/ hence showing that the Company itself over the years has not adhered to the literal language of Article 26, as nothing therein provides that employees are to receive vacations only if they first meet said requirement. Hence, the Company's practice is the common law of this shop because it reflects how the parties have effectively amended the literal language of Article 26 to provide for an 1800 hour requirement which does not otherwise appear there.

The Company therefore has recognized that vacations are an accrued benefit and that one did not have to work the entire year to get it. That being so, the same principle must be applied here because the former Boyd employees also earned this accrued benefit by working for the Company from June 15, 1990, to the time that the Buyer took over the Boyd plant and because said employees may have worked more than 1800 hours.

Unlike these other situations, though, the Boyd employees were not on the payroll on June 30, 1991. The penultimate question therefore becomes whether this accrued benefit should be lost when they were severed from employment before that date through no fault of their own.

There is ample authority for both sides of this question, as the parties have cited various cases to support their respective positions.

The most persuasive, I think, is the one rendered by Arbitrator Robert G. Howlett in Vulcan Corporation, 28 LA 633 (1957), where he found that terminated employees were entitled to vacation pay even though they were not employed on the May 31 date provided for in the contract. He reasoned that the employer's position "flies in the face of the philosophy of substantial performance" because "it was the Company and not the employees who made the decision" that employees could not work on May 31. He added that each of the grievants "had

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2/ While Article 9, entitled "Leave of Absence", notes that any leave of absence shall be deducted from one's vacation credits, it does not provide for this threshold requirement.

done his part" by working the required number of hours needed for vacation entitlement; that they were prevented from working more hours only because of circumstances beyond their control; and that "it is proper to give recognition to the fact that the employees have performed their part of the bargain."

These same principles hold true here. Indeed, the facts here are even stronger since there is a past practice which grants vacation pay to employees who work at least 1800 hours even though they, too, may have missed work for several weeks or months out of the year. Accordingly, I find that the same prorated vacation benefit must be paid to those employees who worked at least 1800 hours for the Company from June 15, 1990, onward and who were terminated from the Company's employment by June 15, 1991.

In this connection, it is true that Smoot never agreed to this when he discussed it with Newell and that ordinarily a party cannot obtain in arbitration what it failed to get in negotiations. Here, however, we are dealing with an accrued benefit which came into being before the instant dispute arose. Hence, it cannot be denied merely because the Company does not want to grant, as Article 3 of the contract, entitled "Business Transfer or Closing", states, "In the event of a business transfer or closing, the employees and union shall retain all rights and remedies available under law."

I also am mindful of the various cases cited by the Company for its contrary proposition. None of those cases, however, involved the kind of past practice found here of granting pro-rated vacation benefits to employees who did not work for an entire year and, to one extent or another, they all contained either different facts or different contract language.

Hence, one of those cases - Briggs v. Electric Auto-Lite Co., 37 Wis. 2d 275 (1967), is distinguishable because the contract there contained express exceptions - relating to death, retirement, layoff, leaves of absence, and military service - to the eligibility date, thereby showing that the parties had specifically bargained over that very issue when they agreed to that contract language. That did not happen here since the instant contract is totally silent on this question and since the parties did not bargain over how Article 26 was to be applied in such circumstances.

In another, Rexnord, Inc., 80 LA 703, (Flaten, 1983), the union had earlier unsuccessfully sought language in contract negotiations expressly providing for pro-rata vacation benefits under certain circumstances. Furthermore, the contract there expressly stated that employees who leave their employment "for any reason whatsoever shall not be entitled to vacation pay." Said language was determinative of the issue because Arbitrator Flaten stated that, "the Employer itself acknowledges that there would be an obligation to grant pro-rata pay if it were not for the contrary language in the contract. . ." Here, no such similar language exists.

Pollock Company, 87 LA 325 (1986), is also relied upon by the Company. There, Arbitrator Laurence M. Oberdank found that a plant closure was "tantamount to discharge", and that employees therefore were not entitled to vacation pay because the contract expressly provided that an employee was not entitled to any vacation if he/she "quits, retires, is discharged or dies. . ." prior to the eligibility date.

I do not agree that a plant closing is "tantamount to discharge", as the word "discharge" is a term of art in the common law of the shop which generally means that an employee is being terminated for something he/she did and personally brought about; that is why almost all contractual just cause

provisions use the phrase "discharge". 3/ Furthermore, this case differs from Pollock because there is no contract language here which lists the various circumstances under which vacation pay is not to be paid.

Also distinguishable is Marshalltown Instruments, Inc., 85 LA 123 (1985), where arbitrator John R. Thornell ruled that vacation pay did not have to be paid to employees who experienced plant closure because the contract provided that no vacation benefits would be paid to employees who "for any reason" other than retirement or death terminated their employment before the December 31 eligibility date. That situation is again different from here because the parties there expressly bargained over said issue when they agreed to the phrase "any reason". That is not true here.

Hillman Transportation Co., 46 LA 929 (1966), also contains significantly different language. For while arbitrator Charles L. Mullin Jr. there denied requested vacation pay, he did so because employees only worked three months of a calendar year and because they had to work a full year under contract language which pegged vacations to "any calendar year during the term of this Agreement." In addition, Arbitrator Mullin found that the union knew in prior contract negotiations that employees could lose their jobs and that its failure to obtain necessary language meant that vacations could not be pro-rated for employees who did not work the entire calendar year. Here, the Union did not know when it entered into the contract that the Company might terminate its Boyd operations and it therefore cannot be faulted over failing to then bargain over this matter.

Also not on point is Duquesne Brewing Co., 60 LA 643, (1973), where Arbitrator David C. Altrock ruled that terminated employees were not entitled to vacation pay because the contract required them to be "actually employed by the Employer during such succeeding calendar year. . ." and because the grievants there were "not employed in the calendar year succeeding their termination." Here, we are not dealing with whether employees must work after their vacation entitlement, but whether they are entitled to such entitlement upon the sale of the Company's facility.

The facts here also differ from those in Plymouth Locomotive Workers, 90 LA 408 (1988), which the Company also cites. There, Arbitrator Robert Bressler ruled that employees were not entitled to any vacation pay from the prior owner because the contract provided that employees "with broken service must return to work for a continuous year before again becoming eligible for vacation" and because the grievants there had not done so after the plant was sold and after they continued working for a new employer. That is not true here.

Arbitrator Bressler also ruled that such vacation need not be paid because the employees were not still working for the prior employer on the July 1 contract eligibility date which stated:

> "Any employee terminating his employment with the Company before July 1st automatically forfeits his selection selected by the Company."

While this language is similar to that found here, all of the employees in that case apparently received eight (8) full weeks of vacation in 1987 - five (5)

3/ Indeed, that is why Article 6 of the contract here provides that, "The Employer shall not discharge or suspend any employee without just cause."

from their prior employer and three (3) from their new employer. That, of course, was an extraordinarily generous benefit. It thus is readily understandable why Arbitrator Bressler ruled that they were not entitled to any further vacation, particularly when the Union there had entered into an agreement with the prior employer which supposedly settled the vacation dispute in its entirety. None of that is true here.

In conclusion, I therefore find that the parties in the contract negotiations leading to Article 26 never bargained over the matter in dispute; that a past practice exists of granting accrued vacation benefits to employees who do not work a full year, but who nevertheless work at least 1800 hours; that said practice augments the literal language of Article 26 which does not expressly limit vacation entitlement in that fashion; and that the employees herein who worked at least 1800 hours should be treated the same and should be granted pro-rated vacation pay even though they were not employed on June 15, 1991, only because the Company terminated them before then.

In light of the above, it therefore is my

AWARD

1. That the Company violated Article 26 of the contract when it failed to grant vacation pay in 1991 to those former employees who worked at its Boyd, Wisconsin, facility from June 15, 1990, onward and who thereafter worked at least 1800 hours.

2. That as a remedy, the Company shall pay pro-rata vacation pay to said employees who worked at least 1800 hours between June 15, 1990, to the time that the Company turned over its Boyd facility to the Buyer.

3. That to resolve any questions which may arise over application of this Award, I shall retain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin this 16th day of April, 1992.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator