BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 1658, AFSCME, AFL-CIO	Case 21 No. 47733 MA-7373
and	
STURGEON BAY SCHOOL DISTRICT	

Appearances:
Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54220-0370, for the Union.
Pinkert, Smith, Weir, Jinkins & Nesbitt, by Mr. Roger Pinkert, for the Distri

ARBITRATION AWARD

Local 1658, AFSCME, AFL-CIO, hereafter the Union, and Sturgeon Bay School District, hereafter the District, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On July 1, 1992, the Union filed a request, in which the District concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance relating to vacation accrual. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing was held in the matter in Sturgeon Bay, Wisconsin, on October 16, 1992; it was not transcribed. The District and Union filed written arguments on November 23 and December 17, 1992, respectively; the District filed a reply brief on January 19, 1993, while the Union waived its right to reply.

ISSUE:

Did the employer violate Article 13 of the collective bargaining agreement when it denied Russell Cross a third week of vacation, to be taken during the period between August 23 and September 8, 1992? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE:

Article 13 - Vacations

Each regular full-time twelve (12) month employee and each regular part-time twelve (12) month employee covered by this Agreement shall have a vacation with pay when schools are not in session. Payment to part-time twelve (12) month employees will be based on their regular part-time work week.

In determining vacation schedules, the administration shall respect the wishes of the eligible employees on a seniority basis as to the time of taking their vacation insofar as the needs of the Board of Education will permit. Vacations may be taken at times other than normal summer vacations, subject to approval by the Superintendent of Schools. Vacations shall be non-cumulative and must be taken within the calendar year.

Vacations will be awarded as follows:

One (1) week - after first six (6) months of continuous service. (This week may be retained for use after second six (6) months of continuous service at employee's discretion.)
One (1) week - after second six (6) months of continuous service.
Two (2) weeks - after two (2) years of continuous service.
Three (3) weeks - after nine (9) years of continuous service.
Four (4) weeks - after fifteen (15) years of continuous service.

If a holiday should occur during a vacation, an additional day of vacation will be granted.

BACKGROUND:

At hearing, the parties stipulated to the following statement of facts:

As a matter of past practice employees who attained sufficient years of service to have earned an additional increment of vacation, that is an additional week, were allowed to take that week of vacation in the same calendar year in which sufficient continuous service had accumulated, if there was enough summer time (non-school year time) for the employee to take the time off prior to the first day that children would attend. This was conditioned on the employee's pre-school year preparation being completed. This has been the case for as long as the school district now has records, since 1892, and before.

In the subsequent calendar year the employee so affected was allowed to take a full vacation allotment.

In early February, 1992, Russ Cross, Maintenance I/Building Engineer with a date of hire of 8/23/82, inquired of Ron Stierman, Administrative Assistant/Support Services, whether he would be receiving three weeks of vacation in calendar year 1992, with the third week to be taken between 8/23 and the start of school on 9/8. Stierman discussed the request with Superintendent Jerry Kain, who, after considering its effects, objected. Stierman then notified Cross the request was denied, which denial the Union grieved.

POSITIONS OF THE PARTIES:

In support of the position that the grievance should be sustained, the Union asserts and avers as follows:

Pursuant to the language of the collective bargaining agreement, the grievant is entitled to fair and uniform treatment. Fair and uniform treatment here requires the employer to abide by the stipulated past practice.

There is no dispute that, under the stipulated past practice, the grievant would be entitled to the additional week of vacation, provided it could be taken

before school started. But when the employer denied the grievant this vacation in February, the employer could not have known whether the grievant would have his work finished in time for school. The employer never submitted any evidence to show that letting the grievant take an added week's vacation after August 23 would in any way interfere with preparations for school. The employer simply refused the request because it didn't like the past practice.

The grievant is entitled to uniform application of the written agreement and the associated past practices. The past practice here is clear and stipulated. Denying the grievant uniform application of that practice violates the agreement.

As remedy the grievant should receive one week's vacation in addition to the three weeks he would be entitled to on January 1, 1993.

In support of its position that the grievance should be denied, the District asserts and avers as follows:

Mr. Cross is considered a regular employee which is defined as a person hired to fill a regular full-time position. A full-time position is deemed 1,800 hours or more in a calendar year (see Article 2 of Contract, Page 1). Therefore, Mr. Cross's status as a regular employee who is entitled to vacation time as listed under Article 13, is based on a calendar year.

The Union is attempting to receive something they did not bargain for. That is, they are attempting to receive an extra weeks' vacation during a calendar year after an employee's anniversary date but before the end of the calendar year. This language is nonsensical. It means that during the same calendar year that the employee was entitled to only two (2) weeks vacation, he is granted an extra week because of his anniversary. Nothing in the language of the Contract refers to anniversary date. The employee is deemed a regular employee based on calendar year and also must take vacations based on a calendar year. By the Union now attempting to change this to vacation entitlement based on an anniversary date, they are in fact attempting to receive something that was not bargained for and that is an additional weeks' vacation.

If Mr. Cross's claim is allowed, he would receive three (3) weeks vacation in 1992 and three (3) weeks vacation in the calendar year 1993. If the parties intended him to be able to receive additional vacation upon completion of his anniversary date, that would have been stated in the contract.

The intent of the contract is to recognize that at the end of the 9th year of employment (anniversary date) an employee, is eligible for three (3) weeks vacation which is to commence during the next calendar year.

The Union waived its rights to file a reply brief. In its reply brief, the District posits further as follows:

> The past practices discussed by the Union offer no aid at all in interpreting the contract. Moreover, the Arbitrator should not even consider such purported practices, in that the relevant contractual language is sufficiently clear and unambiguous to make irrelevant the entire question of past practices.
>
> The contract language is clear on its face -- an employe receives three weeks vacation after nine years service, with all three weeks to be taken in the same calendar year. There is nothing in the contract regarding an additional weeks' vacation to be squeezed in between the anniversary date and the end of the calendar year.
>
> The Union does not argue that the language is unclear, only that the extra vacation -- unbargained for, but apparently received by some -- be extended to all personnel. Nothing in the contract supports this expansion of the explicit language.
>
> Moreover, the fact that an anniversary date allows an employe to complete vacation time before the start of school has no bearing on the language in question. Further, the purported practice fails the standard test for past practices, in that it is not sufficiently unequivocal, accepted by both parties, and readily ascertainable.
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> Through this impermissible use of past practice, the Union seeks an unwarranted expansion of the explicit terms of the agreement. The grievance should be denied.

DISCUSSION

This case involves the degree to which a purported past practice regarding vacation accrual may be used by the Union to interpret contract language which the District contends is clear and to the contrary.

The District contends that the contractual language is sufficiently clear and unambiguous as to make unnecessary -- and even improper -- recourse to such extrinsic evidence as the purported past practice. The District argues that the contractual provision awarding vacation based on years of continuous service, coupled with the mandate that vacations be taken within the calendar year, inescapably leads to the conclusion that the calendar year, and not the anniversary date, is the benchmark by which vacation is allocated. There being no ambiguity on this point, the District asserts, further consideration of the purported past practice is unwarranted.

I do not share the District's sense of the degree of ambiguity in the terms of Article 13. Indeed, to the contrary, I do find the language ambiguous. The measurement of how much vacation is due is "years of continuous service" -- a measurement which, by definition, involves the employes' anniversary date. Yet the vacation awarded must then be used on a calendar year basis.

This is not to say that the language at issue would, by itself, necessarily produce the purported practice which the Union seeks to continue. But it is to say that, by itself, the language is sufficiently ambiguous as to make appropriate consideration of extrinsic evidence.

As the District notes, it is well-settled that past practices are to be given weight only when they are unequivocal, known to and accepted by both parties, and readily ascertainable. In the case at hand, the District argues, the purported past practice does not meet those terms, and thus should be disregarded.

At hearing, the parties stipulated that "as a matter of past practice," employes who had attained sufficient years of service to have earned an additional week of vacation were given that extra week in the same calendar year in which the benchmark was passed, provided there was enough time before school's start for the employe to take, and complete, the vacation without affecting his or her duties. The parties further stipulated that "this has been the case for as long as the school district now has records, since 1982, and before."

I believe that a practice which the parties stipulate has been in effect for at least ten (10) years meets the test for a valid past practice. I further believe that this practice involves an employe benefit, rather than a basic management function, and that it is thus within the standards of generally accepted arbitral theory to hold this custom to be binding, unless and until it is properly regulated, modified or terminated.

The final issue is remedy. The union has proposed that the employer grant the grievant an extra, fourth week of vacation for calendar year 1993, to be taken according to the contractual provisions regarding scheduling. The District, apart from its opposition to the grievance itself, has not commented on the particulars of the remedy.

Accordingly, on the basis of the relevant contractual language, the stipulated past practice which interprets that language, and the arguments of the parties, it is my

AWARD

1. That the grievance is sustained.

2. That the District shall grant to Russell Cross an extra, fourth week of vacation for calendar year 1993, to be taken in accordance with the contractual provisions regarding scheduling.

Dated at Madison, Wisconsin this 2nd day of February, 1993.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator