BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL 662	Case 1 No. 47869 A-4963
and	
ASSOCIATED MILK PRODUCERS, INC.	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, by Ms. Renata Krawczyk, appearing on behalf of the Union.
Felhaber, Larson, Fenlon & Vogt, 900 Meritor Tower, 444 Cedar Street, St. Pa

ARBITRATION AWARD

Teamsters Local 662, hereafter the Union, and Associated Milk Producers, Inc., hereafter the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances arising thereunder. The Union requested and the Employer concurred that the Wisconsin Employment Relations Commission appoint a staff arbitrator to resolve the instant grievances. The panel of arbitrators called for in Article VII, Section 3 of the contract, was waived by the parties. On September 11, 1992, the Commission designated Richard B. McLaughlin as impartial arbitrator to resolve the disputes. On October 13, 1992, William K. Strycker was designated to replace Richard B. McLaughlin. Hearing was held on October 20, 1992 in Turtle Lake, Wisconsin. The hearing was not transcribed and the record was closed on November 25, 1992, upon receipt of the parties' written arguments.

The parties were unable to agree on a statement of the issue. The parties agreed that the undersigned could frame the issue after a review of the parties' positions and the record.

ISSUE

The Union framed the issue as follows:

> Was the sick leave pay of the grievants' prorated in violation of the parties' collective bargaining agreement?

The Employer framed the issue as follows:

> Was the sick leave pay of the grievants' prorated in violation of the parties' collective bargaining agreement and past practice?

The undersigned frames the issue as follows:

> Was Article XXX of the parties' collective bargaining agreement violated when the employer prorated the grievants' sick leave pay? If so, what remedy is appropriate?

RELEVANT CONTRACT LANGUAGE

ARTICLE XXX

Sick Leave

Section 1. All employees will be guaranteed seven (7) days of sick leave per contract year, June 1 to June 1. At the end of the contract year, the employee will receive eight (8) hours of pay at the appropriate rate, times the number of days not used in that June 1 to June 1 year. For example, if an employee uses four paid sick days in a contract year, he would receive three days' pay in cash at the end of the year which are the days "left over". Should the employees request that the guaranteed sick days be "kept in the bank" the Company will arrange to do so provided the employees, as a group, vote to "bank" and advise the Employer on or before June 1, 1982.

New employees will accumulate sick leave after the first three (3) months of employment and the seven (7) guaranteed days will be pro rated to the end of the applicable contract year, June 1.

Section 2. The number of sick days that each employee has in the "bank" as a result of the terms and conditions of the previous contract, as of July 1, 1975, will remain available to be used when and if the seven (7) days in each contract year are used up, or will be paid to the employee upon termination or request. However, the number of sick days in the bank will not be added to and once the accumulation in the bank is used up, there will be no additional sick leave available over and above the seven (7) days per year as set forth in Section 1.

Section 3. The Employer shall not be liable to any of his employees for sick leave as a result of injuries they received while in gainful employment of other employers. Any employee guilty of abusing the sick leave privilege will not be compensated for any immediate time loss at the time of abuse. The Employer may request an employee to have a doctor's examination at the Employer's expense.

BACKGROUND

On June 18, 1992, nine (9) grievances were filed by individuals who received prorated sick leave during the 1991-92 contract year. The grievants were laid off at various times during the contract year (June, 1991 to June, 1992).

In the 1973-75 agreement, sick leave was earned at the rate of 1/2 day per month. Unused sick leave was accumulated to a maximum of forty-eight (48) days. In the 1975-1978 contract the opportunity to "bank" sick leave and the monthly accrual system were eliminated. Six (6) days of sick leave were guaranteed and provided to regular employes at the beginning of the contract year. Employes were paid for all unused days at the end of the contract year. In the subsequent contract (1978-81), the sick leave provisions were modified in two ways. The number of days was increased from six (6) to seven (7) and employes obtained the opportunity to "bank" unused sick leave rather than receive payment. The only change in the 1981-84 contract required employes to vote as a group in order to "bank" sick leave. This was the first contract that Business Agent Dahl negotiated with the employer. There were no changes in the sick leave language in the 1984-87 contract. The 1987-90 contract, specified that new employes could not earn sick leave during the first three (3) months of employment and that the seven (7) days would be prorated to the end of the contract year. The sick leave provisions remained unchanged in the 1990-94 contract.

Since the 1975 contract, the Employer has consistently prorated the sick leave allotment when employes have not worked a complete contract year (June 1 to June 1). Proration has occurred when an employe has been in unpaid status due to layoff or leave of absence. When employes retire or resign during the contract year, the sick leave payout is also prorated based upon time worked. Sick leave is not prorated for unpaid absences of a short duration and calculations and time periods are rounded. The factor used to prorate sick leave is 4.66 hours per month which is based upon fifty-six (56) hours (7 days x 8 hours) divided by twelve (12) months.

The Employer regularly responds to questions from employes about the status of their sick leave accounts. These explanations include the number of days available and the method by which they are calculated. Except for the cases at hand, the explanations and rationale have been accepted with no grievances being filed.

Some more recent examples of how this provision has been administered by the Employer include:

> Brian Dodge. During the 1990-91 contract year, he was on medical leave and was credited with 37 sick leave hours rather than 56 hours.
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> Orville Koser. During the 1986-87 contract year, he was on layoff status and received 32 hours of sick leave. In the 1989-90 and 1991-92 contract years, Mr. Koser was again on layoff. He received 42 sick leave hours rather than 56 hours in each contract year. In 1989-90, he used 12 hours more sick leave than he earned. This unearned amount was deducted from his next year's balance.
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> Linley Toews. During the 1989-90 contract year, he was on layoff status for all but seven weeks and received 6

hours of sick leave credits for the entire year.

H. Joseph Rammer. Because of a three month layoff during the 1989-90 contract year, he was credited with 42 sick leave hours rather than 56 hours. During the 1991-92 contract year he received 13 1/2 hours of sick leave credit because he was on layoff for the majority of the year.

Thomas Buchholz. He received 28 hours of sick leave credit during the 1989-90 contract year because he was on layoff status. During the 1991-92 contract year he only received 7 hours of sick leave credit because he was on layoff status for most of the year.

Some examples of how the provisions have been applied to retirees include:

Frank Klingelhoets. He retired on June 29, 1990 (29 days into the contract year) and received payment for 4 1/2 hours of sick leave.

Joseph Johnson. He retired on July 26, 1991 and received 9 1/2 hours of sick leave for contract year 1991-92.

George Sollman Jr. He retired on June 8, 1990 and received no sick leave pay because of the brief period of service during the 1990-91 contract year.

A group of employes had been laid off during the 1990-91 contract year and had received prorated sick leave payments. In August of 1991 an objection was raised by Union Business Agent Dahl. In a letter to the Plant Manager, Dahl questioned the proration of sick leave for the laid off employes. Union Steward Paul Ladwig met with Office Manager Wohlk to discuss the disagreement. Ladwig was provided with an explanation and examples of how sick leave had been administered in the past. No grievances were filed and the prorations remained in effect. Steward Ladwig, without providing details, told the Business Agent Dahl that the matter had been resolved. Brian Dodge, who received prorated sick leave in the 1990-91 instance, is a grievant in the present case.

POSITIONS OF THE PARTIES

Union

The Union argues that the contract language regarding sick leave is clear and should be taken at its plain meaning. The language which states: "All employes will be guaranteed seven (7) days of sick leave per contract year, June 1 - June 1" is unambiguous. The Union also argues that even if a practice of prorating sick leave existed, arbitral law is clear in holding to the proposition that, if the contract language is clear and unambiguous, arbitrators will choose the clearly expressed meaning of the agreement, irrespective of any practice. The Union cites several cases in which practices of long duration were overturned by arbitrators in favor of clear and unambiguous contract language.

In the absence of a written agreement, or when contract language is ambiguous, past practice may be used to determine policy. In order to be binding, a past practice must be 1) unequivocable; 2) clearly enunciated and

acted upon; 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The Union maintains that it was not aware of the Employer's practice of prorating sick leave. An Employer witness testified that the Union had not been notified by letter or telephone or any other means regarding the Employer's proration policy. The Union argues that the Employer's policy was not clearly enunciated prior to being acted upon.

The Union also argues that the Union did not acquiesce to the proration of sick leave. In 1991 when the Union Business Agent became aware of a similar dispute, he wrote a letter to the Plant Manager stating his interpretation of the contract language and asking that the corrective action be taken.

The Union also argues that the bargaining history of the parties supports the Union's position. In the 1973-75 collective bargaining agreement, sick leave accrued monthly with employes earning one-half day per calendar month. Beginning with the 1975-78, contract the language was changed to guarantee a specific number of sick leave days per contract year. The sick leave "bank" also came to an end during that contract period. The 1987-90 collective bargaining agreement provided for the first time that sick leave could be prorated for new employes. The Union argues that if the parties intended to allow for proration of sick leave pay for all employes, the contract language would not have specifically limited proration to only new employes.

Further, the Union points to the vacation pay provision which identifies that vacation pay is to be prorated when the full contract year is not worked by an employe. The Union also argues that the Employer was inconsistent in applying its proration policy. The Union says that the Employer claims to apply a policy in which 4.66 hours of sick leave pay per month is accrued by employes (56 hours divided by 12 months). The Union contends that Employer records show that several prorations deviate from that formula.

Employer's Position

The Employer argues that they have consistently prorated sick leave with the exceptions of short periods of absence. This system was well-known and accepted by all employes, including at least one of the grievants Brian Dodge, who had received prorated sick leave because of a layoff which had occurred several years earlier. The Employer contends that all Union employes and local Union officers knew of the practice, and that the Union's contention that the business agent was unaware, is not persuasive. The Employer argues that it is unrealistic for a business agent to be aware of all practices and contract interpretations which occur at a particular plant. The Employer also argues that a proration system is dictated by common sense. The Employer contends that inequities would exist if one employe worked the entire year and received the same sick leave amount received by another employe who worked one day during the year. The Employer disputes the Union's contention that employes earn sick leave on a monthly basis, rather employes are granted seven (7) days of sick leave each year less a prorated amount based upon times that employes are in an unpaid status.

The Employer acknowledges receipt of a letter dated August 26, 1991, from Business Agent Dahl questioning sick leave proration. The Employer reviewed the proration system with a Union Steward Ladwig. Apparently, this explanation was satisfactory to Ladwig as well as those employes who had questioned the proration because a grievance was not filed. Steward Ladwig later told Business Agent Dahl that the matter had been resolved.

The Employer argues that seemingly clear contract language can be considered ambiguous if plausible contentions can be made for conflicting interpretations, which is the case here. The Employer asserts that the

contract language has been consistently interpreted and applied in a manner acceptable to employes for over 15 years. Employes have been advised on a regular basis about sick leave account balances. It has been well known that sick leave prorations occur when employes were in unpaid status for reasons such as leaves of absence or layoff. The Employer relies on several cases which support the premise that binding past practices can be used to demonstrate that the parties have departed from the language of the contract, even when no ambiguity exists. The Employer emphasized the importance of looking beyond the language to determine the true intent of the parties. Finally, the Employer argues that the result sought by the Union would be inequitable and not reasonable.

DISCUSSION

The issue at hand is whether or not the Employer can prorate sick leave for employes who do not work a complete year. The Employer provided unrefuted testimony that it has been prorating sick leave since the language was placed in the contract (1975-78). The Union argues that the language clearly guarantees employes seven (7) sick leave days without regard to time worked during the year.

The arbitrator's primary responsibility in construing contract language is to give effect to the intent of the parties. When the language is clear and unambiguous, the arbitrator merely needs to enforce it because clear language is deemed to express the parties' intent. Ambiguous contract language is subject to more than one reasonable understanding. The Union contends that seven (7) days are "guaranteed" to employes without any qualification or restriction. The Union also argues that the only reference to sick leave proration is for new employes, thereby excluding regular employes. The Company maintains that the seven (7) days are guaranteed to employes who work the entire contract year, as evidenced by the June 1 to June 1 contract language. It is also important to recognize that, in addition to the proration component, the new employe language restricts sick leave earnings by only allowing accumulations to occur after three (3) months of employment. This change saves the Company approximately fourteen (14) hours (4.66 x 3 mo.) of sick leave for each new employe. In the present case, since there are at least two reasonable interpretations, and the language does not specifically address regular employes who work only part of a year, I conclude that the sick leave language is ambiguous.

When contract language is ambiguous, evidence of custom and past practice may be relied upon for the purpose of construing the contested language. Elkouri and Elkouri, 4th Edition, page 437. The persuasive strength of a practice in resolving ambiguity is determined by whether it is known and accepted by the parties, long-standing and consistently administered.

Shirley Wohlk has been employed by the Employer for seventeen years. Since 1984, she has served as Office Manager with responsibility for administering sick leave records as well as the payroll. Prior to becoming Office Manager, she was well aware of the method by which sick leave was administered. Ms. Wohlk provided unrefuted testimony that sick leave has been prorated in the present manner since the sick leave language was changed in the 1975-78 labor contract.

Specifically, when employes are in unpaid status for extended periods of time, for reasons such as layoffs or unpaid leaves of absence, sick leave is prorated. No deductions are made for short-term, unpaid absences. Sick leave payouts are prorated for employes who retire or resign during the contract year. Deductions occur based on the premise that approximately 4.66 hours of sick leave are earned for each month of service. Both the periods of unpaid

time and calculations are rounded. As a result, specific computations may vary.

Office Manager Wohlk further testified that she is asked on a regular basis to provide information about sick leave balances to employes. She indicated that at least one employe per week requests sick leave balance information. Sick leave balance information is also provided to retirees at the time of retirement. Since sick leave payouts occur annually, each employe is aware of the sick leave balance due at the end of the contract year. Wohlk testified, and additional evidence supports, that if employes use more sick leave time than actually earned, the employes' balance is adjusted at the beginning of the next contract year. These payouts for unused sick leave along with the resulting prorations have consistently occurred since the 1975-1978 contract was adopted. Until the instant grievances, this form of administration has not been grieved.

In addition to the testimony of Office Manager Wohlk, the Employer submitted numerous records which further substantiate the proration practice. The records show that numerous employes, who were laid off at various times, were provided with prorated amounts of sick leave. The records also show that sick leave was prorated when employes were on unpaid sick leave. Employer documents also show that retirees were provided with prorated sick leave payouts depending upon the date of retirement. None of these instances of proration generated a grievance. It is important to note that one of the current grievants, Brian Dodge, received a prorated amount of sick leave during the 1990-91 contract year. During that time, he was on medical leave and was credited with 37 sick leave hours rather than the maximum amount of 56 hours. He did not dispute the proration or file a grievance.

In a letter dated August 26, 1991 to the Plant Manager, Business Agent David Dahl stated in part:

. . .

> And on another matter regarding sick leave accumulation, I do not recall any bi-lateral agreement that says employes earn sick leave on a monthly or some other basis. The only exception is for new employes as set forth in Article XXX, Section 1, paragraph 2. All other employes are entitled to their seven days (7 days) on each subsequent June 1 as has been the practice in the past. We request that you credit employes in this manner immediately or you will leave us no alternative but to pursue the matter in accordance with Article VII.

Office Manager Wohlk testified that she met with Union Steward Ladwig to review the concern raised by Business Agent Dahl. She explained the process and the method by which sick leave was prorated. She provided examples of how this was done in the past and identified the long-standing nature of the practice. Steward Ladwig and the affected employes were apparently satisfied with the explanation because no grievances were filed and the matter was dropped. Business Agent Dahl testified that later he contacted the Steward and was told that the matter was resolved. Although Dahl assumed that the time was paid as he had requested, it is clear that the matter was resolved on the basis of the Employer's proration practice.

The Union argues that this practice is not binding because the business agent did not know about it. It is unfair and unrealistic to expect a business agent, who administers a significant number of contracts, such as Mr. Dahl, to

be aware of all of the practices and methods of administration that may exist in each local agreement. It is realistic and reasonable, however, for local union officers and the employes to be aware of known practices which are used in administering the contract. Since the introduction of the language in the 1975-78 contract, there have been countless transactions through which local union officers and employes were aware of the sick leave proration system. Mr. Dahl's lack of knowledge in this instance does not invalidate the Employer's practice.

The Union also argues that the proration policy was applied inconsistently. A review of the evidence shows that "deviations" were primarily due to the rounding of either a calculation or a time period. The basic method of calculating the proration (4.66 x unpaid time period) has been unchanged since it was implemented.

Because of the annual system of payouts, the proration of retiree sick leave payouts and periodic employe inquiries about sick leave balances, I conclude that the local union officers and the employes knew or reasonably should have known about the proration system. The unchallenged testimony of Office Manager Wohlk and company evidence show that this practice has been long-standing, consistently administered and accepted by the employes. For the reasons stated above, I conclude that contract ambiguity should be resolved in the Employer's favor, based upon the persuasive past practice present here.

The evidence with respect to negotiating history also supports this conclusion. In the 1971-73 labor contract, sick leave was earned on the basis of one-half day per month. Unused sick leave was placed in a "bank" with a maximum accumulation of forty-eight (48) days. The 1975-78 labor agreement resulted in a significant change in the operation of the sick leave benefit. Employes were provided with six days of sick leave at the beginning of the contract year. Unused sick leave was paid out at the end of the contract year. During the years of bargaining, the number of sick leave days available to employes was increased from six to seven. In the 1981-84 contract, sick leave "banking" was instituted as an option if selected by the entire employe group. In the 1987-90 contract, the language regarding new employe prorations after three (3) months of employment became a part of the contract. Business Agent Dahl testified that, since 1981 when he began negotiating contracts for the local, proration of sick leave for regular employes was not discussed. It is significant that the employes and local union officers chose not to raise the proration issue at the bargaining table particularly since sick leave was such a frequent topic of negotiations. Further, had full sick leave allotments without regard to time worked been the intent of the parties, it is highly likely that grievances would have been filed early in the life of the language by retirees or employes who had been on an unpaid leave of absence or on layoff.

While the Union provides well-articulated arguments, they do not rise to the level necessary to prevail over the long-standing past practice which began at the time the language was changed in the 1975-78 labor contract.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

The contract was not violated and the grievances are dismissed in their entirety.

Dated at Madison, Wisconsin this 15th day of February, 1993.

By William K. Strycker /s/
William K. Strycker, Arbitrator