BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
TEAMSTERS LOCAL UNION NO. 579	:	Case 6 No. 49283 MA-7886
and	:	
VILLAGE OF DICKEYVILLE	:	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John J. Brennan, on behalf of Teamsters Local No. 579.

Karrmann, Buggs, Baxter & Novak, Attorneys at Law, by Mr. Stephen Buggs, on behalf of the Village of Dickeyville.

ARBITRATION AWARD

Teamsters Local Union No. 579, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Village of Dickeyville, hereinafter the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Employer subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on August 27, 1993, in Dickeyville, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by October 13, 1993. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issues and have left it to the Arbitrator to frame the issues to be decided.

The Union would state the issues as follows:

> Is the Village in violation of the collective bargaining agreement and/or past practice by its failure to pay the grievant one-third of his earned vacation?

The Employer would limit the issue to whether it violated the parties' Collective Bargaining Agreement.

The Arbitrator concludes that the issues to be decided may be stated as follows:

> Did the Employer violate the parties' Collective Bargaining Agreement when it refused to pay the Grievant one-third of his earned vacation? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 1991-94 Agreement are cited:

> ARTICLE 12 - VACATIONS
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> . . .
>
> 2. Vacation eligibility shall be determined as of the Employee's Anniversary Date of each year for the preceding year and shall be taken in the employee's anniversary year following. Vacation pay for each week shall be at forty (40) times the employee's then hourly rate of pay.
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> 3. All vacations shall be taken during the employee's anniversary year in which they are due. There shall be no carryover of unused vacation, unless the employee's vacation is canceled by the Village due to a necessity. The Village will have the option of allowing the employee to carryover the unused vacation or pay out the unused vacation at the employee's straight time hourly rate. The employee shall schedule and take at least two-thirds (2/3) of his/her earned vacation pay and time off. Up to one-third (1/3) of the earned vacation may be paid out without time off at the normal rate of eight (8) hours per day or forty (40) hours per week.
>
> . . .
>
> ARTICLE 30 - MAINTENANCE OF STANDARDS
>
> Section 1. Protection of Conditions. The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained during the term of this Agreement at not less than the highest

> minimum standards in effect at the time of the signing of this Agreement, and conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.
> It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from the date of error.

. . .

BACKGROUND

The Village of Dickeyville employs two full-time employes in its Public Works Department and, also at times, a part-time employe. The Union represents the employes of the Public Works Department and the present contract is the parties' initial collective bargaining agreement. The Agreement covers the period May 1, 1991 to April 30, 1994, and was signed by the parties on May 28, 1992.

The Grievant, Dale Neis, is the Director of Public Works, a non-supervisory position, and is in the bargaining unit covered by the Agreement. Neis directs his own work and that of the other employes in the Department. Neis' employment anniversary date is November 7, and, pursuant to the parties' practice at the time, he had eleven (11) days of unused vacation he had carried over from 1991 at the time the parties' Agreement was signed.

In addition to the vacation he had carried over, under the Agreement Neis was entitled to fifteen (15) days of vacation for 1992. Neis requested and used sixteen (16) days of vacation by November 7 of 1992, leaving him with a balance of ten (10) vacation days. No request by Neis to take vacation was denied by the Employer during this time period. Neis requested that he be paid for his vacation days and that request was considered by the Village Board at its November 11, 1992, meeting. The motion before the Board at that meeting was to pay Neis for one-third of the unused days and that motion failed.

Neis filed a grievance based upon the denial of his request, claiming he was entitled to payment for one-third of the twenty-six days he had on the books when the Agreement was signed. The grievance was denied and the parties proceeded to arbitration of their dispute before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Grievant is entitled to payment for 8.65 days, i.e., one-third of the twenty-six vacation days he had coming when the parties' Agreement was signed.

In support of its position, the Union first argues that Article 30, Maintenance of Standards, became effective with the signing of the Agreement and mandated that the eleven days Neis carried over from 1991 per the practice not be lost. Further, the Employer never proposed in bargaining that carryover vacation was forfeited or that employes would begin accruing vacation "with a clean slate." The wording of Article 12, Section 3, post-dated the carryover, and cannot be used to delete benefits that had already accrued.

Second, the Union notes that the Agreement was signed May 28, 1992, and that Neis' anniversary year ended November 7th. That would mean that Neis had to use twenty-six days of vacation during that period, the busiest part of the year for the Public Works Department. Also, Neis used sixteen days of vacation during that time and the Employer did not object to his using one of his carryover days. However, now the Employer contends it is not required to count those carryover days or make payment on them as unused days.

Third, the Union contends that it was not possible for Neis to use all twenty-six vacation days during the period May 28 to November 7, 1992 and still complete the work that needed to be done. The Employer is now punishing Neis for being attentive to his duties and making sure the Department fulfilled its obligations to the Village residents. Neis correctly concluded that he could not take more vacation than he did, given the work the Department had scheduled and the need to work around the other employe's vacation. This is supported by Neis' letter to the Village President in September of 1992 asking that the part-time employe be given more hours. (Union Ex. No. 1) Further, due to the need to take water tests at the water treatment plant five days a week, it is necessary that one of the full-time employes be working at all times. While it is true in the most technical sense that the Employer did not cancel Neis' vacation, it cannot be argued that Neis' decision not to take more vacation was the result of anything other than necessity.

Contrary to the Employer's argument, the use of the term "may" in Article 12, Section 3, does not make the paying of the earned benefit optional with the Employer. The option referred to is either to allow the carryover or to pay it out, and the Employer is proposing to do neither. The Employer's argument that it did not deny Neis' vacation requests, and that the one-third payout provision is thus not applicable, ignores the fact that Neis could not take vacation and still fulfill his job duties. Thus, his vacation was "cancelled due to a necessity" within the

spirit and intent of that language. Lastly, the Employer's argument that it at some point determined carryover was allowable, but must be used first, is not supported by the evidence. Regardless, Neis had twenty-six days of vacation coming and was entitled to cash out one-third.

Employer

The Employer's position is that under the provisions of the parties' Agreement, Neis is not entitled to a payout for his unused vacation.

First, the Employer asserts that the practice of allowing the carryover of unused vacation was specifically changed by the language of the Agreement. Not only that practice, but many other conditions of employment were changed by the parties' first contract. The Union has insisted that the Employer meet all of its obligations in the Agreement regardless of prior practice. Both parties are bound by all of the provisions of the Agreement. The provisions in question were discussed in bargaining and the employes were aware of them when the contract was signed.

The wording of Article 12, Vacations, Section 2, of the Agreement, is clear that vacations "shall be taken in the employee's anniversary year following." No meaning can be given those words other than that an employe must take his vacation during an anniversary year. Article 12, Section 3, is also clear and unequivocal that "There shall be no carryover of unused vacation, unless the employee's vacation is cancelled by the Village due to a necessity." There is no claim that the Employer cancelled Neis' vacation for any reason.

While the rule of no carryover is clear, it is softened somewhat by the sentence following it in Section 3:

> The Village will have the option of allowing the employee to carryover the unused vacation or pay out the unused vacation at the employee's straight time hourly rate.

That language gives the Employer an option and does not say the Employer shall either allow carryover or pay out wages for unused vacation. The Employer may do either or neither. Where, as here, it chooses not to exercise its option, the employe must live with the contract.

The Employer asserts that the Union proposed the language of Article 12 that is now in question, and the parties ultimately incorporated into the Agreement. The employes must live with that language and the language is clear enough that the employe was put on notice as of May 28, 1992, that this is what would happen if he did not take all of his vacation and if he did not ask the

Employer ahead of time whether it would allow him to carryover unused vacation or else pay him for it.

The Employer also contends that if the Union had desired to make it mandatory for the Employer to either allow carryover of unused vacation or pay the employe for it, it could easily have proposed wording to that effect, e.g., it could have said "shall" instead. That it is optional with the Employer is further illustrated by the last sentence of Section 3:

> "Up to one-third (1/3) of the earned vacation may be paid out without time off at the normal rate of eight (8) hours per day or forty (40) hours per week."

Again, the word used is "may", and not "shall".

The wording in Article 12 is so clear that this grievance must fail regardless of any desire on the Arbitrator's part to restore a lost benefit. While it may not seem fair for an employe to lose vacation time, the answer is that fairness lies in the entire Agreement. All of the provisions were subject to bargaining and the final result represents some give and take on both sides. There are provisions that both parties were aware they will have to live with at the time the Agreement was signed.

In its reply brief, the Employer notes that it did permit Neis to carryover his unused vacation from 1991 and that he could have taken it at anytime up to November 7, 1992. However, the contract language is clear that at the end of the employe's anniversary year, there will be no carryover of unused vacation. Contrary to the Union's assertion that the Employer is trying to take away benefits from Neis, the Employer allowed him to carryover vacation into the period covered by the contract and up to his next anniversary year, in spite of the clear contract language.

The Employer also disputes the Union's assertion that it was "impossible" for Neis to use all of his vacation by his anniversary date. The evidence only shows that Neis felt he was busy and needed to complete certain work. While some work would not have been completed, there is no evidence that essential tasks would not have been performed had Neis taken all of his vacation. There was a part-time employe working during the summer months, and it was only if the other full-time employe was not working on a weekday that Neis would have to be present to do the tests at the water treatment plant. Those tests take no more than an hour per day. Neis did not request to take additional vacation days and he was never told by any Village official he could not use more vacation than he did take. Even assuming the projects Neis felt were essential had to be completed, there were enough other days available on which he could have taken vacation. Further,

the language of Article 12 does not state that an employe may carryover unused vacation if it is "impossible" to take it during his anniversary year, rather the parties agreed to language that provides it cannot be carried over unless it is "cancelled by the Village due to a necessity". The Union is attempting to expand that clear language to cover situations of the employe's own making and they are clearly not covered. Finally, the Employer disputes any allegation that it is trying to punish Neis. It asserts that it is only asking that the employes live up to the clear provisions of the Agreement, just as the Union requires that the Employer be bound by all of the provisions of the Agreement.

DISCUSSION

It is initially noted that the Grievant was allowed to carry over eleven days of unused vacation from 1991 into 1992. That was consistent with the existing practice prior to the parties' reaching agreement in May of 1992 on their first contract. 1/ With the carryover of eleven days and the fifteen days the Grievant had earned for 1992, he had a total of twenty-six days of vacation he could use by November 7, 1992. This, the Employer does not dispute. Rather, the dispute is over what happens if an employe does not use all of the vacation he has coming by his anniversary date. In this case, the Grievant used only sixteen of the twenty-six days he had available, and eleven were from 1991.

There has been considerable argument made about whether it was possible for the Grievant to have scheduled all of his vacation time before November 7, 1992. The undersigned agrees with the Employer that the wording of Article 12, Section 3, of the Agreement is clear and unambiguous that there will be no carryover of unused vacation unless the Village cancelled the employe's vacation due to a necessity. In this instance, the Grievant made his own determination that he did not have time to take more vacation due to work projects he felt needed to be completed. The Village did not cancel his vacation; rather, he made that choice on his own. The third sentence of Section 3, "The Village will have the option of allowing the employee to carryover the unused vacation or pay out the unused vacation. . .", gives the Employer those options where it has cancelled an employe's vacation requests pursuant to the preceding sentence. Since there was no cancellation of the Grievant's vacation by the Village in this case, those options do not pertain.

The above analysis and conclusions do not, however, resolve this dispute. The last two sentences of Article 12, Section 3,

1/ It should be clear that this carryover was unique in that it was due only to the existence of the practice at the time of negotiating a first contract and was totally unrelated to the carryover provided for in Article 12, Section 3.

provide as follows:

> The employee shall schedule and take at least two-thirds (2/3) of his/her earned vacation pay and time off. Up to one-third (1/3) of the earned vacation may be paid out without time off at the normal rate of eight (8) hours per day or forty (40) hours per week.

Those two sentences are independent of the preceding sentences in Section 3 dealing with what happens when the Village cancels an employe's vacation due to a necessity, and have nothing to do with when carryover is allowed. The wording is clear, and when read together, those two sentences require that the employe take at least two-thirds of his/her earned vacation as time off and give the employe, not the Employer, the option of taking up to one-third of his/her vacation in pay rather than time off. To interpret the last sentence of Section 3 as giving the Employer the option of paying out one-third of an employe's earned vacation, rather than allowing the employe to take it as time off, would be contrary to the intent expressed in the wording of the second sentence of Section 3 referring to cancelling vacation "due to a necessity." If it were at the Employer's option, the Employer could cancel up to one-third of an employe's vacation time for any reason and instead, pay it out. 2/

Where an employe takes less than two-thirds of his/her vacation as time off by the employe's anniversary date, and there has been no cancellation of vacation by the Village, the employe's contractual right is limited to receiving pay for one-third of the earned vacation he/she initially had coming to use during the employe's anniversary year and the rest is lost. In this case, the Grievant had twenty-six days of earned vacation he could use by November 7, 1992, and he took only sixteen days as time off. Pursuant to the last sentence of Article 12, Section 3, he had the option of taking one-third of his twenty-six vacation days, 8.66 days, in pay and the balance not taken as time off was lost.

2/ To construe the last sentence of Section 3 as giving the Employer that unfettered option would also be contrary to the express limitations on the Employer's rights in that regard set forth in Article 12, Section 6:

> 6. The Village President and Council shall not arbitrarily deprive an employee from taking vacation during the calendar year. In doing so they shall be guided by the good of the Village service and orderly conduct of the work and functions of the department. . .

There is no specific time line in Section 3 for employes to exercise their option of taking up to one-third of their vacation in pay.

Here, it appears the Grievant made his request for the payout option immediately upon passing his anniversary date, since his request was considered at the Village's November 11, 1992, meeting. Thus, he made a timely request in that regard.

Based upon the above, it is concluded that the Employer violated Article 12, Section 3, of the Agreement when it refused to pay the Grievant for one-third of the twenty-six vacation days he had earned and available to use by November 7, 1992.

On the bases of the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The Village of Dickeyville is directed to immediately pay the Grievant, Dale Neis, for 8.66 days of vacation at the rate of eight hours pay per day in conformance with Article 12, Section 3, of the parties' Agreement.

Dated at Madison, Wisconsin this 17th day of December, 1993.

By David E. Shaw /s/
David E. Shaw, Arbitrator