BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
TEAMSTERS LOCAL UNION NO. 43	:	Case 22 No. 49685 A-5112
and	:	
MODERN BUILDING MATERIALS, INC.	:	

Appearances:
Mr. Charles G. Schwanke, President, appearing on behalf of the Union.
Mr. William J. Sweeney, Representative, appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union are parties to a 1993-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve the vacation pay grievance of Don Hoff.

The undersigned was appointed and held a hearing on October 12, 1993, in Kenosha, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on November 2, 1993.

Issues:

1. Did the Company violate the collective bargaining agreement by its calculation of the grievant's 1992-93 vacation payout?

2. If so, what remedy is appropriate?

Relevant Contractual Provisions:

ARTICLE 27. VACATION

An employee who has completed at least one (1) year of continuous service shall be entitled to a vacation with pay, subject to any conditions stated in this Article. Time lost on Worker's Compensation shall count toward vacation earned, provided however, that such employee must have performed twenty-six (26) weeks of work in the applicable preceding year involved. Vacation time is considered as time worked.

A. The vacation schedule shall be:

Years of Service	Amount of Vacation
One (1) year	One (1) week
Three (3) years	Two (2) weeks
Five (5) years	Three (3) weeks

Twenty (20) years Four (4) weeks

B. "Earned vacation" is that vacation for which the employee became eligible on the anniversary date. "Accrued" vacation is that vacation for which a terminating or laid off employee may be eligible based on the employee's service after an anniversary date, as applicable, before the employee's next anniversary date. (See below conditions under which such employee may be eligible for all or part of an accrued vacation.) Accrued vacation is calculated under the following formula:

$$\frac{\text{No. of weeks worked after anniversary date}}{52 \text{ weeks}} \times \text{vacation based on continuous company service}$$

All employees eligible to receive vacation pay shall receive their vacation payment on their anniversary date. The company shall withhold state and federal income taxes, and the other taxes provided by law, from vacation pay.

. . .

Discussion:

Grievant Don Hoff had worked for the Company for seven years when about September 29, 1992, he was injured while at work. The grievant claimed Worker's Compensation. He was paid under the Company's disability policy, however, from October 21, 1992 through April 20, 1993. This was because the Company's Worker's Compensation carrier denied the grievant's claim for Worker's Compensation; at the time of the hearing a dispute over the status of the grievant's compensability was still pending.

This matter involves not the disability as such, but the grievant's eligibility for vacation pay in 1993. The grievant's anniversary period applicable was April 28, 1992 through April 27, 1993. The facts are not significantly in dispute. On May 18, 1993 the Company paid the grievant his

vacation pay based on a gross calculation that resulted in a total of $459, which after deduction of Social Security taxes netted $423.88. The Company arrived at this conclusion by means of the following calculation:

18 wks worked / 52 total weeks	=	.34615%
	Earned vacation %	

$11.05	Hourly Rate
x 120	Hours (3 wks @ 40)
$1326.00	Maximum Vacation

Earned Vacation

$1326.00	Maximum
x .34615%	Earned %
$ 459.00	Earned Vacation $

Company Representative Bill Sweeney stated that he instructed the Company's accountant to calculate the grievant's eligibility for vacation by giving him "the benefit of the doubt on everything." Sweeney stated, and introduced in evidence a calendar to support, that the grievant was found by this method to have performed actual work in part or all of 18 weeks in the eligibility year in question.

The Union contends that in the past the Company has always calculated employes' full vacation at 40 hours per week, and that the absentee calendar introduced by the Employer showing the grievant's working days shows 36 weeks of combined work and Worker's Compensation (or disability) time. The Union argues that the grievant thus has more than 26 weeks of time in under Article 27, assuming that the time marked as Worker's Compensation will in fact be resolved as such in the parallel dispute. The Union further contends that vacation time is considered as time worked, adding to the total. The Union contends that the grievant should be made whole for the full three weeks of vacation which he would normally earn, to a total of $1,326.00.

The Company contends that the grievant did not work 26 weeks in the applicable year, and that the first paragraph of Article 27 requires 26 weeks of actual work before Worker's Compensation begins to count toward vacation earned. The Company argues that the exhibit it introduced showing dates of the grievant's work is consistent with the Union's evidence from paycheck stubs, and that those stubs demonstrate 18 weeks of actual work, five check stubs from an insurance company which do not demonstrate actual work, and two paycheck stubs one of which is outside the year in question and the other of which is for vacation pay earned during the proceeding anniversary year, unrelated to this matter. The Company further contends that even if the Union's interpretation of Article 27 is upheld, a monetary remedy could not be calculated until the outcome of the parallel dispute determines whether some of the time involved is includable as Worker's Compensation time. The Company requests that the grievance be denied.

I agree with the Company's interpretation of the 26-week work requirement, upon review of the contract language. The sentence "Time lost on Worker's Compensation shall count toward vacation earned, provided however, that such employe must have performed 26 weeks of work in the applicable preceding year involved" would be meaningless in the Union's interpretation. That is because if the 26 weeks of "work" do not require actual work, but instead allow for the possibility that that time is Worker's Compensation time,

then any amount of Worker's Compensation time could replace the actual work within those 26 weeks, thus making the entire sentence pointless. The Company's interpretation, however, requires merely that I find that "work" means "work." This is the plain language of Article 27, and there is no reason to interpret it otherwise. The sole exception that might apply, which follows in the sentence stating that "Vacation time is considered as time worked," serves to support the Employer's position, by impliedly excluding other kinds of time as not being considered as time worked for this purpose.

The consequence is that the Employer was entitled to make the calculation it made of the grievant's work time in 1992-93. Reviewing Employer's Exhibit 1, I can find no error in the Employer's calculation of weeks in which the grievant is credited with having worked. I note that this document is also consistent with the grievant's own payroll records, and supports Sweeney's contended instruction to the accountant to err on the side of inclusion of time as work time; several of the weeks marked on this calendar can only be tallied in the 18 week total the Company reached if even one day of work was treated as a full week for this purpose. I conclude, accordingly, that the Company has at a minimum fulfilled its obligations under Article 27, and has perhaps acted more generously than it might have.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Company did not violate the collective bargaining agreement by its calculation of vacation pay for Don Hoff in 1992-93.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 21st day of January, 1994.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator