BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 519, AMALGAMATED TRANSIT UNION	Case 258 No. 50423 MA-8250
and	
THE CITY OF LaCROSSE	

Appearances:
Davis, Birnbaum, Marcou, Devanie & Colgan, by Mr. James G. Birnbaum, on behalf Mr. James W. Geissner, Director of Personnel, on behalf of the City.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "City", are privy to a collective bargaining agreement providing for binding arbitration. Hearing was held in LaCrosse, Wisconsin on March 9, 1994. The hearing was not transcribed and both parties thereafter filed briefs and reply briefs which were received by May 4, 1994.

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

ISSUE

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

> Is the City violating Sections 14 and 24 of the contract by no longer paying certain employes their guaranteed time rather than their actual vacation time and, if so, what is the appropriate remedy?

DISCUSSION

The City for a number of years paid a premium to some bargaining unit employes scheduled to work more than eight (8) hours a day and who took vacation time in less than weekly increments. It did so by guaranteeing that they would be paid 40 hours a week, even if the total vacation and work time totalled less than 40 hours for a given week.

Thus, for example, if an employe was scheduled to work four ten-hour days and took off one of those days for vacation, he/she would be paid ten hours for that day, even though he/she was only charged with 8 hours of vacation. In that way, such employes were paid the guaranteed 80 hours pay per pay period provided for in Section 14 of the contract. As a result, some employes received about a week's extra vacation under this practice.

The parties in the latter part of 1993 engaged in collective bargaining negotiations over a successor contract. There, the City proposed to do away with this practice, but the Union refused to accede to it unless the City agreed to a counterproposal which provided that employes would be able to take off more individual vacation days - which was a particularly important benefit to less senior employes who have had difficulty in getting time off in the summer because more senior employes take off weeks at a time. The City rejected the counter-offer.

In a December 7, 1993, memorandum to all bargaining unit employes, City Utility Manager Keith Carlson stated:

. . .

> In an effort to make our vacation pay practices consistent with our sick leave and personal business day practice we are implementing the following change in 1994.
>
> The following shall become part of the Municipal Transit Utility Employee's Manual. **Effective date January 1, 1994.**
>
> SECTION 3 GENERAL PROCEDURES
>
> 3.05 Vacations
>
> Vacation time will be used in the following manner:
>
> > An employee scheduled off work on a full week vacation, shall use and be paid for, forty (40) hours of his/her accrued vacation balance.
> >
> > An employee scheduled off work on single day(s) of vacation, shall use and be paid for the same number of hours he/she was scheduled to work on that particular day(s), such hours to come from their accrued vacation balance.
> >
> > Extra List Operators scheduled off on single day(s) of vacation shall use, and be paid for eight (8) hours of vacation each day, such hours to come from their accrued vacation balance.
> >
> > At the end of each year, if an employee's vacation balance is less than a full day of work for that employee, he/she may be scheduled off on vacation for only the number of hours that remain. The two hour minimum shall apply in this case.

The Union then filed a grievance over this new policy on December 13, 1993, which stated, inter alia:

> Nature of Grievance (Detailed Statement): Addition to MTU Employee Manual, dated December 7, 1993. This proposed work rule, effects [sic] both hours and wages, therefore, it must be negotiated.
>
> Clause of Contract Violated. Sec. 6 Management Rights Sec. 14 Guarantee Time. Sec. 22 Rules, State Statute 111.70 Settlement Desired: For the City not to implement this proposed work rule, but to negotiate it as required by law.

The City denied the grievance and implemented the changes noted in the December 7, 1993, Memorandum effective January 1, 1993, over the Union's objection.

The parties continued to engage in collective bargaining negotiations and ultimately voluntarily agreed to a successor contract which did not expressly refer to this issue. They did so without any certification of impasse by the Wisconsin Employment Relations Commission.

The contractual vacation language remained the same as it provides in Section 14 of the present contract:

> GUARANTEE TIME
>
> All persons who report for work when requested are guaranteed a minimum wage equal to eighty (80) hours at straight time, in one pay period of two consecutive weeks. Any and all hours worked in any of the weeks in the pay period in question will be used in computing the guaranteed time. If an extra board person is called upon to work and refuses to do so for any reason, except on his/her regular days off, the guaranteed time will be reduced by the number of hours the person was privileged to work and refused to do so.
>
> Part-time employees may be used on special and intermittent type services being performed as of June 16, 1975. No part-time employee may be used until all regular, extra board operators, and regular reserve operators who have requested special or intermittent type work have received such providing they are available for the work.

. . .

Section 24 of the present contract provides:

> All regular full time employees covered by this agreement who have been employed by the LaCrosse Transit Company or the City twelve continuous months shall be given one week vacation with pay during the regular vacation period or other period approved by the City.
>
> Employees who have been employed by the LaCrosse Transit Company or the City twenty-four continuous months, shall receive two weeks vacation with pay; either during the regular vacation period or one week during the regular vacation period and the second week during another period approved by the City.
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> Employees who have been employed by the City for six years or more shall receive three weeks vacation with pay.
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> Employees who have been employed by the La Crosse Transit Company or the City fourteen (14) years shall receive four weeks vacation with pay.
>
> Employees who have been employed by the La Crosse Transit Company or the City twenty years or more shall receive five weeks vacation with pay.

> Employees who have been employed by the La Crosse Transit Company or the City thirty (30) years or more shall receive six weeks vacation with pay.
>
> In 1975 all vacations shall be calculated at 40 straight time hours. Effective January 1, 1976 all vacations shall be computed at the same straight time hours per week maximum without overtime as required by the Fair Labor Standards Act as amended April 8, 1974. Vacations as outlined in the foregoing will be based on the year or years worked prior to October 1 of the year in which the vacation is earned.
>
> Prior to May, 1, or as soon as practical thereafter, of each calendar year, the utility manager will consult with all regular employees entitled to vacations and from such consultations the Municipal Transit Utility Board shall establish a working schedule for vacation periods. The Municipal Utility Board, in determining the vacation schedules, will respect the wishes of the employees as to the time of taking vacations insofar as the needs of the service will permit. However, the City shall allow no less than three (3) operators to be on full week vacations at any one time during the months of May through September.
>
> Employees may split up two (2) weeks vacation each year.
>
> Time for taking vacations shall be chosen by the employees on a seniority basis during the vacation period and shall be taken on consecutive days and consecutive weeks unless the Municipal Transit Utility Board and employees agree on a different division of vacation time, or employees may trade weeks after the vacation pick has been made with the Board consent.

. . .

There is no past practice or maintenance of standards proviso in the contract.

In support of the grievance, the Union argues that both the express language of the contract and past practice require the City to pay guarantee time; that the City is obligated to negotiate a change in the contract and to reach impasse before it can change such a contract provision; and that the City is attempting to obtain in arbitration "a contract concession it was unsuccessful in obtaining in negotiation".

The City, in turn, avers that its prior vacation policy was "simply a historical mistake" and that no past practice existed; that it "fulfilled any obligation to negotiate when it met at reasonable times and bargained in good faith"; and that an arbitrator is precluded from granting the grievance because Section 3 of the contract precludes an arbitrator from adding to the contract.

"Historical mistake"? Hardly. The City's prior past practice of paying the guaranteed time rather than actual vacation time was just that - a past practice which lasted about 13 years.

The nub of this case therefore turns on whether such a past practice can

be unilaterally abrogated when a contract terminates and when there is no past practice or maintenance of standards clause in the contract.

While there is a divergence of arbitrable opinion on this issue, Arbitrator Richard Mittenthal has presented the most salient work on the general subject of past practice and when, and under what circumstances, it can be terminated. See, "Past Practice and the Culmination of Collective Bargaining Agreements", Proceedings of the NAA (1961).

He writes:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>
> The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, they must have the practice written into the agreement if it is to continue to be binding.

That is the very situation here since: (1) the past practice of paying guaranteed time was apart and not expressly referenced in the contract; and (2), the City announced in negotiations that it would no longer follow that practice. Accordingly, and in the face of such a timely repudiation, it was incumbent upon the Union, in Arbitrator Mittenthal's words, to "have the practice written into the agreement if it is to continue to be binding."

That is true irrespective of whether a technical impasse was reached over this issue since the burden shifted to the Union in negotiations to obtain contract language to secure this benefit. Having failed to do so there, there is no basis for awarding that benefit here.

In light of the above, it is my

AWARD

That the City is not violating Sections 14 and 24 of the contract by no longer paying certain employes their guaranteed time rather than their actual vacation time; the grievance is therefore denied.

Dated at Madison, Wisconsin this 22nd day of June, 1994.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator