BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LAMINATED PRODUCTS, INC.	Case 5 No. 50454 MA-5174
and	
THE MIDWESTERN INDUSTRIAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 2190	

Appearances:
Mr. Robert Block, President, Laminated Products, Inc., 5718 52nd Street, Kenosh
Mr. George Graf, Attorney at Law, Murphy, Gillick, Wicht and Prachthauser, Attorneys at Law, 330 East Kilbourn Avenue, Suite 1200, Milwaukee, Wisconsin 53202, appeared on behalf of the Union.

ARBITRATION AWARD

On February 2, 1994, the Wisconsin Employment Relations Commission received a request from the Midwestern Industrial Council, United Brotherhood of Carpenters and Joiners of America, Local Union 2190, to appoint an arbitrator to hear and decide a grievance pending between the Union and Laminated Products, Inc. Following jurisdictional concurrence from the Employer, the Commission, on March 14, 1994, appointed the undersigned to hear and decide the matter. The matter was heard on May 20, 1994, in Kenosha, Wisconsin. At the conclusion of the evidentiary hearing, the parties made closing oral argument.

At the outset of the hearing, the parties stipulated to the following issue:

> Did the Company violate the collective bargaining agreement by prorating 1994 vacation of employes based on 1993 attendance records?

BACKGROUND AND FACTS

The parties to this dispute negotiated a successor collective bargaining agreement covering the period 1994 through 1998, following a series of five bargaining sessions beginning December 9, 1993, and concluding with ratification on December 29, 1993. The contract described above took effect January 1, 1994. This arbitration involves the following language, inserted into the vacation clause during the December, 1993 negotiations:

> If an employe does not average at least forty (40) hours a week in a calendar year, his vacation pay for the next year will be based on the average hours worked per week during the previous year. Example: An employe averages 30 hours a week in the previous year. If he would normally be entitled to 80 hours for the next year, he would receive 30/40 of the 80 hours or 60

> hours vacation pay for the next year. Loss of time because of a work-related injury or layoffs will not be counted against this calculation.

The dispute in this proceeding is over the Company's application of the language set forth above to employe Margaret Koos. Ms. Koos missed a substantial amount of work in calendar 1993 due to surgery. Both parties treat Ms. Koos' missed time as unavoidable, and not the product of anything under her control. The Company has applied the vacation provision in such manner that Ms. Koos' 1994 vacation is prorated. The Union has grieved this application contending that the language was intended to be prospective and that the first year in which vacation could be prorated was 1995, based on the 1994 work year.

Conrad Vogel is the Union Business Agent who negotiated the contract, including the language set forth above. Mr. Vogel testified as to other applications of similar provisions of this contract. The holiday clause, set forth below, contains language identical to the vacation section. It was Mr. Vogel's testimony that employe Tim Trottier missed substantial work time in 1993. Trottier was paid for a full New Year's Day holiday. Vogel testified as to the administration of the Company's profit-sharing plan. The plan took effect on January 1, 1993. Mr. Vogel testified that the first payment occurred in April of 1993, and was based on the first quarter of 1993. Mr. Vogel went on to testify as to the administration of the pay increase provision of the contract. According to Mr. Vogel, both the amount of money and the conditions to be satisfied to warrant payment of that money were changed in the December, 1993 bargain. Mr. Vogel testified that the first implementation of that clause occurred in February of 1994, and was based upon the January, 1994 attendance. Finally, Mr. Vogel testified that the changes in the health insurance provision, the Section 125 provision, and the alcohol and drug testing program were all new and each took effect in January of 1994.

Robert Block, Company President, negotiated this labor agreement on behalf of the Employer. Mr. Block testified as to the administration of the newly-created personal/bereavement days (pay increase). According to Mr. Block, those days were created in the December, 1993 bargain and were implemented in calendar 1994. That is, there was no need to work the full 1994 year to be entitled to the benefit.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

LPI PROFIT-BASED WAGE PLAN

Effective January 1, 1993

. . .

FORMULATION:

Bonus shall be based on the percentage of the net profits to net sales taken from the quarterly statements during the year and the Certified Public Accountant's year-end statement for the final payout.

. . .

DISTRIBUTION:

Partial payouts will be made quarterly, with a final full payout after the end of the year. . .

. . .

Pay Increase

Laminated Products, Inc. will pay each permanent employee $75.00 per month, provided the following conditions are met by that employee:

A) Three (3) tardies will be allowed per calendar year. No excuses for tardiness will be accepted.

B) The employee will be present each full scheduled work day. The only exceptions are as follows:
   1) Illness - with a written excuse from a physician (must be on an LPI Return to Work form).
   2) Three (3) personal/bereavement days will be granted each year to each permanent employee. Pay for each day will be forty dollars ($40.00). Unused days will be paid to individual employees at the end of each year.
      a) Personal/bereavement days will be granted only after the employee is employed a full calendar year.
   3) Necessary overtime: The employee may not refuse to work overtime, as follows:

. . .

The pay increase will be paid monthly on the first pay

period following the end of the month.

The Pay Increase will be increased by $25.00 as follows:

January 1, 1995 the Pay Increase will be $100.00 per month.
January 1, 1996 the Pay Increase will be $125.00 per month.
January 1, 1997 the Pay Increase will be $150.00 per month.

. . .

VACATIONS

. . .

If an employee does not average at least forty (40) hours a week in a calendar year, his vacation pay for the next year will be based on the average hours worked per week during the previous year. Example: An employee averages 30 hours a week in the previous year. If he would normally be entitled to 80 hours for the next year he would receive 30/40 of the 80 hours or 60 hours' vacation pay for the next year. Loss of time because of a work-related injury or layoffs will not be counted against this calculation.

. . .

HOLIDAYS

If an employee doesn't average at least forty (40) hours a week in a calendar year, his holiday pay for the next year will be based on the average hours worked per week of the previous year. Example: An employee averages 30 hours a week in the previous year. The next year he would receive 30/40 of the 8 hours or 6 hours holiday pay for each holiday the next year. Loss of time because of a work-related injury or layoffs will not be counted against this calculation.

POSITIONS OF THE PARTIES

It is the position of the Union that the Company has applied the vacation clause in a manner different than its administration of other benefits under the same or similar language. The purpose of this clause was to correct behavior. The Company's application is in effect a retroactive application which does not serve that purpose. The way the Company has applied this clause, it merely operates as a penalty. The Union contends that during the course of negotiations, the Company never said it would apply the language the way that it subsequently has.

It is the Company's position that this language is clear and unambiguous. 1994 vacation is based upon a 1993 work year. The Company contends that the Union never indicated it wanted the language not to be applicable in 1994. The Company contends that Ms. Koos was subject to required surgery, and off time. There is no way Ms. Koos could modify her behavior. The Company views this issue as one of fairness, and poses the question: How much vacation should an employe who does not work a full year be entitled to?

DISCUSSION

The language in question is new to this collective bargaining agreement. There is no indication as to when it was to take effect. I find it ambiguous in that regard. The Union's argument is more persuasive in this matter for a number of reasons. First and foremost, the holiday language is virtually identical, and Mr. Vogel's uncontradicted testimony, which I have credited, indicates that New Year's Day was paid in full to employes who missed significant work time in the preceding year. The clauses are substantively identical. Whatever the application, it should be common. The profit-sharing provision and the wage section were handled similarly. However, those clauses have language that differs significantly from the vacation/holiday language, and I regard those clauses as much clearer as to their effective dates.

The Company points to the three personal/bereavement days and the administration of that new benefit. I do not think the administration of that benefit sheds light on this dispute. Those days were granted "each year". On its face, that would include 1994. The clause goes on to indicate that an employe must be employed "a full calendar year", and I see no reason why that could not logically include prior years.

Language changes are generally applied prospectively. This is especially true of language which conditions benefits upon employe behavior. I regard the vacation and the holiday language as addressing employe behavior. Each of those clauses conditions the level of benefits granted on the employe's work performance. The Company's application does have a retroactive effect. The Company's application runs contrary to the general presumption. If the parties intended a retroactive application, it would have been helpful had some clear indication to that effect been made.

The record indicates that the proposals in question were Company proposals. The record indicates that the Company drafted the words. To the extent those words are ambiguous, a common rule of construction is that ambiguous language be construed against the drafter. In this case, that construction would run against the Company.

The Company contends that 1994 vacation is based on 1993 hours. This is hardly a frivolous contention. However, by December of 1993, that period of time in which these parties were in negotiations, Ms. Koos had "accrued" a certain amount of vacation under the contract that then existed and which was applicable during 1993. In essence, what the Company contends here is that Ms. Koos' vacation accrual/entitlement as of December 31, 1993, the last day of

the year, was altered and diminished by the parties' agreement which took effect the next day. I think this is a harsh result. It is a result not clearly provided for by the agreement. It is a result that is inconsistent with the Employer's application of the identical holiday language. For all these reasons, I believe the interpretation advanced by the Union is more appropriate.

AWARD

The grievance is sustained.

REMEDY

The Company is directed to apply the vacation language set forth above to hours worked in 1994 and vacation taken in 1995. The Company is not permitted to prorate 1994 vacation based upon 1993 hours worked under this provision of the contract.

Dated at Madison, Wisconsin this 24th day of October, 1994.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator