BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION, LOCAL 662	Case 88 No. 50776
and	MA-8377
POLK COUNTY (GOLDEN AGE MANOR)	

Appearances:

Ms. Christel Jorgensen, Business Representative, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by Mr. Jeffrey P. Hansen, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-93 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 a grievance filed by the Union protesting the County's manner of crediting vacation to part-time employes.

The undersigned was appointed and held a hearing on August 12, 1994 in Balsam Lake, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on September 13, 1994.

Issues:

The Union proposes the following:

1. Did the Employer violate the collective bargaining agreement when he prorated vacation not based on seniority established by date of hire, but by seniority based on the year in which part-time employes worked 1,020 hours?

2. If so, what is the appropriate remedy?

The Employer proposes the following:

1. May the Employer continue his past practice of many years with respect to vacation allocation for regular part-time employes?

Relevant Contractual Provisions:

ARTICLE 5

SENIORITY

Section 1. Seniority shall accrue from the last date of hire. The employee's earned seniority shall not be diminished because of layoff for up to eighteen (18) months,, paid absence, or an authorized unpaid personal leave of absence of less than thirty (30) days.

. . .

ARTICLE 6

PROBATION

Section 1. All new employees shall serve a probationary period of six (6) months. During this initial probationary period, employees may be discharged by the Employer without just cause or without recourse to the Grievance Procedure. Probation may be extended for three (3) months by mutual agreement.

Section 2. During the initial period of probation, employees will not be allowed any fringe benefits granted by this Agreement, however, upon completion of probation employees will be allowed all of this Agreement's fringe benefits retroactive to the date of their employment. If leave of absence is taken during probation, probation shall be extended for the length of the leave taken. The six (6) month pay step increases shall be withheld until probation is ended, and the twelve (12) month and all succeeding pay step raises shall be postponed accordingly.

. . .

ARTICLE 18

WORK DAY, WORK WEEK, LUNCH PERIODS, REST PERIODS

. . .

Section 6. For purposes of qualification for benefits granted by this Agreement, a workday shall be any day an employee receives pay for that day and prorated to the extent of the employee's pay for that day in qualifying for benefits consistent with Article 12, Section 1. An employee will qualify for benefits when paid 1020 hours annually.

Discussion:

The facts are largely undisputed. In 1990, the Registered Nurses and Licensed Practical Nurses at Polk County's Golden Age Manor Nursing Home were certified as an independent labor organization, which acquired representative status with respect to this bargaining unit. The County and the Nurses (known

as NAGAM at the time) negotiated a first collective bargaining agreement, which was signed on August 22, 1991. In November of that year, the Association affiliated with Teamsters Local 662, and successor agreements have since been negotiated by the Union for 1992-93 and 1994-96.

During late 1993, a part-time employe, Registered Nurse Kathy Ryan, questioned her vacation credits. The Union investigated the matter and discovered that the management did not use the employes' original date of hire to calculate how much vacation an employe was entitled to, but rather the date on which an employe first met the 1,020 hour requirement established for benefit eligibility.

There is no dispute that the employes, when they originally formed an independent labor organization and subsequently when they affiliated with the Union, were concerned about the Employer's handling of seniority issues. There is also no dispute, however, that the context in which the discussions were conducted at the bargaining table related chiefly to job bidding. Both the Employer's and the Union's witnesses testified that the specific subject of the calculation date (for purposes of crediting vacation for employes who had started their employment with less than 1,020 hours and subsequently increased those hours above that figure) was never discussed at the bargaining table in any of the three rounds of negotiation. It is also undisputed that the Home has had a practice of calculating vacation eligibility only from the date an employe first reached 1,020 hours for at least eight and one-half years, since the current Home Administrator, Gary Taxdahl, began working there. Under a prior manager, at least some employes were credited with a vacation starting date regardless of the fact that they worked fewer than 1,020 hours. Taxdahl testified without contradiction that he has applied this practice consistently not only with this Union but also with the AFSCME Union, which represents a unit of approximately 100 employes of the Home compared to the approximately 18 employes in the Nurses unit. This practice in the AFSCME unit continued at least up to the negotiation of the 1994 collective bargaining agreement.

The Union contends that the Employer's interpretation of this benefit in essence establishes two seniority dates for part-time employes, at least as far as the vacation benefit is concerned. The Union contends that it never negotiated for such a split seniority date, and that the employes had no intention of agreeing to such terms as part of the settlement of the first or any subsequent contract. The Union points to the consistent language beginning with the Union's initial proposal from 1990, and continuing through the current collective bargaining agreement, which refers in all cases to seniority as being determined by date of hire. The sole qualifications to this clause are that probationary employes are excluded from receiving vacation while probationary, and that in Section 12.2, a 1,020 hour minimum qualification is incorporated for benefit eligibility. The Union points out that nowhere in this language does the 1,020 hour qualifier refer to any effect upon seniority for the purpose of determining at what level the employe will accrue vacation. The Union also notes that subsequent to the tentative agreement on a contract in 1991, according to Cardinal's uncontradicted testimony, Taxdahl raised 18 points for clarification or correction, none of which referred to vacation or seniority accrual. The Union also argues that in 1991, when the County submitted a proposal to the then NAGAM for a successor agreement which would have changed the definition of seniority, this resulted in the NAGAM affiliating with the Teamsters. The Union points out that the 1992-93 successor agreement was subsequently negotiated without changes in language regarding seniority, benefit eligibility, or vacation accrual. Furthermore, the Union notes, the 1992-93 agreement did establish a wage progression, which specified a change based on hours worked for employes who worked less than 1,020 hours. The Union argues from this that a specific exception to the date-of-hire seniority concept was therefore incorporated for a specific group

of employes for the specific purpose of pay progression, and that this supports the Union's contention that no other exceptions are implied. The Union contends finally that the language in this labor agreement has been clear and unambiguous with respect to seniority since the first agreement was signed, and the Employer should not be allowed to assume the continuation of prior practices that conflict with that language, citing several arbitration decisions to that effect. The Union argues that to find otherwise would in effect supply the Employer with a kind of negative maintenance of standards clause, and would create a forfeiture for a certain group of bargaining unit employes. The Union requests an award that all affected part-time employes be made whole, and that the Arbitrator retain jurisdiction until the retroactivity issue is resolved for those employes.

The County contends that the contract language applicable to vacations specifically is silent with respect to the year of accrual for vacation benefits, and that the only language supporting the Union's cause is Article 6, Section 2, which was not even argued by the Union. The Employer contends that the rights conferred by that section have to be read as relating to full-time employes, and that more restrictive sections of the contract which pertain to part-time employes constitute an exception to that language. The Employer contends that Article 5, Section 1 is silent with respect to vacations, and that this language simply deals with seniority provisions among the bargaining group. The Employer further argues that Article 18, Section 6, by using the words "qualify" and "when", supports the Employer's contention that the date of accrual is when enough hours are paid, not the date of hire. The Employer further argues that even though the Union prevailed, as the Union pointed out, in a 1992 decision by Arbitrator Coleen Burns under related contract language discussing wages for part-time employes, the arbitrator in that case "specifically stated that the seniority language of Article 5 was silent on the issue of whether date of hire applied to placement on the wage scale. The same conclusion must be reached in this case, accept that we are discussing vacation accrual rather than wage schedules." 1/ Finally, the County argues that while the contractual language conflicts, the past practice is clear, and is therefore entitled to be given weight. The Employer requests that the grievance be denied.

I agree with the Employer both that the contractual language, read as a whole, is ambiguous with respect to the date of vacation eligibility, and that the past practice must be considered as having weight upon the issue. Articles 5.1 and 6.2, if either were read by itself, would tend to indicate that employes receive benefits as of the date of hire, although retroactively following the completion of probation. The Union's reliance on the word "seniority" in Article 5.1, however, gives that term too broad a meaning. Seniority is a principle which may be applied to a number of purposes, but in and of itself it merely establishes a "pecking order" among employes in a group. Without some additional indication one way or the other, the phrase itself leaves ambiguous the question of whether fringe benefits go along with seniority. In this collective bargaining agreement, as is common, not all benefits accrue to all employes, though seniority in its basic meaning does accrue to all employes. This is, at bottom, the flaw in the Union's case: the clear fact that not all benefits flow to all employes, while seniority does flow to all employes, establishes a difference between the meaning of the word "seniority" in this agreement and the meaning the Union's argument would imply.

At the same time, the language of Article 18, Section 6 does not dispose of the issue either. While an employe may only "qualify" for benefits when

---

1/ Employer's brief at page 5.

paid 1,020 hours annually, this could on its face mean either that the employe may then receive benefits, or that the employe may then accrue a time-sensitive benefit such as vacation -- even though the employe may yet have to pass some further hurdle, such as the 1,020 hour requirement, before such a benefit can be received. On its face, therefore, Article 18, Section 6 does not clearly dispose of the issue either. Yet it will support the interpretation the Employer argues for, and neither Article 5, Section 1 nor Article 6, Section 2 is sufficiently clear to resolve that ambiguity.

Thus, other factors commonly considered in arbitration, including bargaining history and past practice, must be taken into account in order to resolve the contract's facial ambiguity. Bargaining history, as both parties admit, is unenlightening: both parties went through three rounds of bargaining without ever identifying this issue to each other as one of significance or difficulty. While it is fully believable that the Union intended to cement the seniority date as the benefit accrual date for those employes who subsequently reached 1,020 hours, therefore, this intent cannot be laid at the door of the Employer. Thus the bargaining history does not resolve the issue, for some demonstration that the intent of the negotiators was communicated is essential in order to establish mutuality, which is at the heart of determinations that bargaining history may be relied upon to determine ambiguous language.

That leaves past practice. In this respect, there appears to be some inconsistency also, particularly because Union co-chair Gerry Cardinal was granted benefits when he was first employed, even though for a time he worked less than 1,020 hours. But there is no dispute as to what happened once the current administrator, Gary Taxdahl, appeared on the scene. Taxdahl applied a rule of 1,020 hours of employment to employes hired subsequently as the first date upon which vacation would begin to accrue, several years before the independent labor organization was formed. He applied the same rule to the much larger AFSCME bargaining unit. There is nothing in the record to dispute Taxdahl's assertion that this was applied consistently thereafter, though it is not clear in the record whether the AFSCME union subsequently negotiated a different arrangement for the 1994 contract. I conclude that the past practice meets all of the tests customarily applied to determine whether or not a past practice may be used to determine the meaning of ambiguous language. While, again, it is possible that the Union never intended such a result, the Union did not negotiate a change. The practice is therefore in place, and the Employer is entitled to the benefit of it, until and unless a negotiated change takes place.

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

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 23rd day of November, 1994.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator