BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF CHIPPEWA FALLS STREET DEPARTMENT, WASTE TREATMENT DEPARTMENT, WATER DEPARTMENT AND CITY HALL BARGAINING UNION EMPLOYEES, AFL-CIO, CHIPPEWA FALLS, WISCONSIN

and

CITY OF CHIPPEWA FALLS, WISCONSIN

Case 113
No. 52614
MA-9042

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 1937, Eau Claire, Wisconsin 54702-1937, appearing for City of Chippewa Falls Street Department, Waste Treatment Department, Water Department and City Hall Bargaining Union Employees, AFL-CIO, Chippewa Falls, Wisconsin, referred to below as the Union.

Mr. Stevens L. Riley, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P. O. Box 1030, Eau Claire, Wisconsin 54702-1030, for City of Chippewa Falls, Wisconsin, referred to below as the City.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Dan Boos, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on August 17, 1995, in Chippewa Falls, Wisconsin. The hearing was not transcribed, and the parties filed briefs by September 11, 1995.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the City violate Article 27 by refusing to exempt the Grievant from a general work rule limiting annual vacation carry-over to seven days?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 6 - VACATIONS

Section 1. Employees shall be eligible for annual paid vacation as follows:

Five (5) days after 1 year of service;
Ten (10) days after 2 years of service;
Fifteen (15) days after 6 years of service;
Sixteen (16) days after 7 years of service;
Seventeen (17) days after 9 years of service;
Eighteen (18) days after 11 years of service;
Nineteen (19) days after 13 years of service;
Twenty (20) days after 14 years of service;
Twenty-one (21) days after 15 years of service;
Twenty-two (22) days after 17 years of service;
Twenty-three (23) days after 19 years of service;
Twenty-five (25) days after 25 years of service.

Section 2. Employees may take their vacations at any time of the year upon mutual agreement with the superintendent. No more than two (2) employees shall be allowed to take vacation at the same time, except with the approval of the department head. If the department head does not give approval, and more than two (2) employees sign up for the same week, seniority shall prevail. Departments with three (3) or less employees shall only be required to release one (1) employee for vacation, except with the permission of the department head. When taking vacation, employees shall take no less than one-half (1/2) day vacation at a time.

Section 3. All vacation shall be paid at the rate and classification the employee carries at the time vacation is taken.

. . .

ARTICLE 11 - WORKER'S COMPENSATION

Section 1. All employees shall be covered by Worker's Compensation insurance and if injured on the job and claim is paid by said insurance, said employee shall present their worker's compensation check to the City Clerk's office immediately after it is received and shall be issued, at regular pay intervals, a pay check for the difference between the employee's Worker's Compensation check and the employee's normal earnings for that period.

. . .

Section 3. All working time lost due to injuries incurred on the job shall be considered as time worked for that day.

. . .

ARTICLE 14 - TERMINATION OF SERVICE

Any employee who is entitled to a vacation at the time of terminating his/her services with the City, or upon being laid off by the City, shall be paid for his/her vacation at the time of severing his/her status; and if said employee has earned any prorata credit for his/her subsequent vacation, such vacation credit shall be paid in a proportionate ratio. Employees shall give two (2) weeks notice of their intent to terminate employment with the City. The City shall give two (2) weeks notice of their intent to lay off employees. If an employee fails to give two (2) weeks notice of his/her intent to terminate employment with the City, the City shall deduct from the employee's accrued sick leave or vacation, all additional costs it paid during the two week period to fill the vacancy.

. . .

ARTICLE 27 - MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, subject only to the provisions of this contract and applicable law. The rights include, but are not limited to the following:

1. To establish all operations of City government;

2. To establish reasonable work rules;

. . .

BACKGROUND

The Grievant is classified by the City as a Working Foreman. He was hired by the City on June 8, 1981. During the summer months, he typically operates a road grader. It is undisputed that he is an excellent employe.

On April 19, 1995, the Grievant filed a grievance challenging the City's denial of "vacation carry-over." The grievance sought the following remedy:

> Allow employee to carry over 14 days accrued vacation past anniversary date. Make employee whole.

Glen Zwiefelhofer, the City's Street Superintendent, responded to the grievance in a memo dated April 20, 1995, which states:

> The City Policy Manual G-3 page 2 allows a maximum carryover of (7) vacation days into their new anniversary year. Based on this policy I am denying your grievance . . .

The cited policy reads thus:

> Vacation credits will be added to the vacation record of each employee on their respective anniversary date equal to the number of days agreed to by contract or resolution. Due to the fact that this is a departure from the practice of some departments adding the vacation credits to be earned during the year on January 1, employees currently employed will be allowed to overdraw or carry a "credit or minus balance" of vacation days from January 1 to their anniversary date. In addition, each employee will be allowed to carryover a maximum of seven (7) vacation days into their new

> "anniversary year" in accord with action taken by the Council and Committee #2 in August of 1989. It is expected that all employees hired after September 1, 1989 will have their vacation credits and usage strictly administered on an anniversary date basis.

The Grievant acknowledged he was aware of this policy.

On March 16, 1994, the Grievant was assigned to cut brush along a river bank. While working his way back to his truck he fell. He fell on his outstretched hand, jamming his shoulder into his neck. The pain he suffered made it apparent he had injured his shoulder, and he returned to the shop. During his lunch hour, he was examined by a physician and then returned to work. He used no sick leave, and continued to work during the summer and fall.

The pain in his shoulder did not, however, go away. In August of 1994, he consulted a specialist, who diagnosed the problem as a pinched nerve and treated it with cortisone. In October of 1994, the Grievant went through physical therapy, to no avail. Throughout this period of time, he continued to work. His pain, however, endured, disrupting his sleep and forcing him to sleep in a recliner.

In November of 1994, the Grievant again consulted a specialist. This time, the specialist performed an MRI and discovered the Grievant had torn his rotator cuff. The specialist ordered the Grievant off work and scheduled him for surgery. The surgery was performed on December 16, 1994. The Grievant was unable to return to work until June 19, 1995. The tear proved sufficiently bad that the specialist was unable to "scope" it.

It is undisputed that while the Grievant was off on Worker's Compensation, he reported to work when asked by Zwiefelhofer to assist in training a new employe and with the set up of a new piece of equipment. It is also undisputed that Zwiefelhofer asked the Grievant to stay on the job until the grading season had been completed. The parties stipulated that at the time the Grievant went onto Worker's Compensation, he had fourteen accrued, but unused days of vacation.

The Grievant noted that he tries to save vacation for use during deer hunting season and over the Christmas and New Year's holidays. He uses this time for family activities and for maintaining two apartments he owns.

Joseph Rohrman is the City's Comptroller. He testified that vacation carry-over policy was implemented in 1989. The policy converted the City from a calendar year, "use it or lose it" vacation system to an anniversary year system. The seven day carry-over provision was included in the policy to ease the transition to an anniversary year system for those employes with birth dates early in the calendar year. He noted that the City, on the Grievant's anniversary date, granted him his accrued vacation under the contract and seven days of vacation carry-over. The

City did not offer to buy back the vacation it would not permit him to carry over into the next anniversary year.

Rohrman noted that the City has not experienced much turn over in its work force, and thus has a more senior work force with a considerable bank of vacation. The 1995 average among Street Department employes, for example, was 18.09 vacation days. The "use it or lose it policy" extends to all employes and is based on the potential difficulty of staffing City work if employes could indefinitely bank vacation leave, then use it on demand.

It is undisputed that this grievance poses the first time an employe has lost vacation due to an extended Worker's Compensation leave.

Further facts will be stated in the DISCUSSION section below.

THE UNION'S POSITION

The Union states the issue for decision thus:

> Did the City violate the collective bargaining agreement by not allowing the Grievant to carry-over 14 days of earned vacation past his anniversary date?
>
> If so, what is the appropriate remedy?

The Union acknowledges that the City maintains a policy which limits vacation carry-over to no more than seven days. This grievance, the Union notes, questions "whether circumstances may arise which make the strict enforcement of this policy unreasonable."

After a review of the evidence, the Union notes it "agrees in general with" the City's legitimate business reason in restricting vacation carry over to avoid staffing problems. The Union asserts that its grievance does not challenge the work rule itself, but the "strict application" of the rule on the facts posed. Noting that this is the first time in which an employe on Worker's Compensation lost vacation, the Union concludes that allowing the Grievant to carry over vacation could not conceivably "open the flood gates on vacation carry-over." That the City did not consider granting the carry-over on a non-precedent setting basis shows, the Union asserts, that the City's application of the policy is unreasonable.

The Union argues that four fundamental reasons make the City's application of the carry-over policy unreasonable. First, the City requested that the Grievant postpone going onto

Worker's Compensation until after the grading season, thus placing "some responsibility" on the City for the delay in the Grievant's discovery of the extent of his injury. Second, upholding the City's view undermines contract language requiring that "benefits accrue while employees are on Worker's Compensation." Third, the policy unreasonably places an employe who quits at

an advantage to an incumbent employe regarding the payment of vacation benefits. Fourth, the City's actions work a forfeiture on an employe who "did nothing wrong except to become injured in the line of duty."

The Union states its remedial request thus:

> (T)he Union requests that the Arbitrator sustain the grievance and order the City to restore seven days of earned vacation to the Grievant's vacation account. In the alternative, the Union requests that the Arbitrator sustain the grievance, and order the City to pay the Grievant the equivalent of seven days of earned vacation.

THE CITY'S POSITION

The City states the issues for decision thus:

> Is the City's work rule limiting annual vacation carryover to 7 days unreasonable and therefore a violation of Article 27 of the parties' collective bargaining agreement?
>
> If so, what is the appropriate remedy?

The City, after a review of the evidence, asserts that the Union's case in chief "consisted solely of an attempt to demonstrate that the grievant is an excellent employee." Noting that it "does not dispute" this conclusion, the City notes that whether or not the Grievant is the City's best grader operator is irrelevant to the issues posed by the grievance.

After an overview of arbitral authority, the City concludes that the reasonableness of the rule at issue must focus on its legitimate business interests and on whether the rule is unfair, on its face, to its employes. Regarding the first point, the City notes that its relatively senior work force has accrued a considerable amount of vacation, and that scheduling this vacation poses a considerable administrative burden. That burden cannot be considered to be fully addressed by the existence of contractual provisions limiting the number of employes who may take vacation at one time, since City denial of vacation requests can adversely impact employe morale. Beyond this, the City contends that the grievance potentially affects not only the Grievant but also "all 160 City employees, most of whom have accumulated substantial vacation benefits."

From this, the City argues that it is reasonable for the City to strictly apply its policy. This

assures a minimum amount of disruption to City work schedules and maximum flexibility

in granting employe vacation requests. To assess each vacation carry-over request based on the quality of a worker's performance would, the City argues, expose the City to unnecessary litigation and "weaken its ability to apply the rule to any other employee."

Beyond this, the City contends that the Grievant has not suffered any loss:

> He received his full pay and was able to spend time when he would otherwise have been working with his family and children -- the activities to which he normally devotes his vacation.

From this, the City concludes that the work rule addresses a legitimate City interest and is not unfair to the Grievant. It necessarily follows, according to the City, that the work rule should "be held to be reasonable and the grievance dismissed."

DISCUSSION

The issues adopted above as those appropriate to the grievance reflect a merging of the parties' conflicting statements. Although conflicting, the parties' statements of the issues do not reflect a significant difference. The City's statement clarifies that the source of the authority to review the carry-over limitation is the "reasonableness" standard established at Section 2 of Article 27. The Union states the issue more broadly, but this does not pose a significant substantive difference. Other agreement provisions, such as Article 14, can be considered in the application of the "reasonableness" standard. The merging of the two issues underscores that the narrow issue posed here is the reasonableness of the rule as applied to the Grievant.

As the City notes, arbitrators have offered various statements of the standard of review appropriate to the determination of the reasonableness of a work rule. At a minimum, it can be said that a work rule must be reasonable on its face and as applied. 1/ How an arbitrator views a rule primarily depends at the point in the rule's promulgation at which the review is undertaken. The facial validity of a work rule is the determinative point of view at the time the rule is published. When the rule is applied to a specific employe, the reasonableness of its application becomes the primary emphasis.

The Union acknowledges the facial validity of the work rule limiting vacation carry-over, but challenges its application to the Grievant. Thus, the legitimacy of the City's scheduling concerns need not be further discussed.

1/ See, generally, Hill & Sinicropi, Management Rights, (BNA, 1986) at Chapter 3.

That the City maintains a form of a "use it or lose it" vacation benefit forms the fundamental interpretive difficulty posed here. The application of that system to the Grievant, standing alone, cannot be the basis for finding the rule unreasonable. The City points out that the carry-over limitation, by the terms of its policy statement, is to be applied strictly, without regard to the equities of a particular request. The persuasive force of this argument must be granted. The City notes that the strict application of this system assures no case-by-case assessment of individual requests and thus assures the rule will be applied even-handedly, without discrimination. This has the added benefit, at least to the City, of reducing challenges to the exercise of management discretion. The Union persuasively points out that considering the equities of the Grievant's request cannot reasonably be seen to risk opening the floodgates of employe requests for added vacation carry-over, and can reasonably be seen to reward the Grievant's willingness to assist the City on a voluntary basis.

The difficulty with the Union's position is not that it lacks persuasive force. It is, no less than the City's, a reasonable view. Rather, the difficulty is that the City's attempt to defend its form of a "use it or lose it" vacation system is, as the Union acknowledges, reasonable. This exhausts the possibility for arbitral review. Whether I, or any other arbitrator, views this system as the most appropriate vacation policy is not an issue Article 27 places before an arbitrator.

Thus, if the application of the carry-over limitation to the Grievant is to be characterized as unreasonable, something more than a City failure to consider an individual employe carry-over request must be posed. Since the absence of discretion contemplated by the "use it or lose it" policy can be considered reasonable, finding the denial of the Grievant's carry-over unreasonable must be based on facts distinguishing the Grievant's case from any other employe request. Any exception carved out for the Grievant must not swallow the rule acknowledged as valid by both parties.

The evidence does not put the City in a sympathetic position, but cannot support a conclusion that the exception sought by the Union for the Grievant will not swallow the rule limiting vacation carry-over. The Grievant did not, regarding contractual benefits, lose anything. Throughout his leave he was in full pay status, due to the operation of Article 11. Article 11 thus served the purpose his vacation entitlement otherwise would have. That he did not have to use his vacation to fill in the pay gap Worker's Compensation would have created is no more a sign of an inequity than a sign of a strong safety net secured in collective bargaining. While the Union attempts to characterize the denial of the seven days of carry-over as a denial of the Article 6, Section 1 vacation benefit, granting the Union's position would afford the Grievant more time in full pay status than he would have earned had he not been injured. There is no persuasive evidence that the City buys back unused vacation from other employes. In sum, there is no factual basis to distinguish the Grievant's request, as a matter of contractual entitlement, from that of any other employe.

Before closing, it is necessary to tie this conclusion more closely to the Union's arguments.

The Union's contention that vacation must accrue during a Worker's Compensation leave is well-founded under Article 11, Section 3. It does not, however, follow from this that the City denied the Grievant accrued vacation. Article 11 made a vacation request superfluous. There is no evidence the City failed to award the Grievant his full vacation entitlement under Article 6, Section 1 on his anniversary date in 1995. Any vacation benefit the Grievant lost was the enjoyment he was denied due to the pain and damage traceable to his injury. That benefit, however significant, is not contractual. Article 6 addresses pay and off work status. The Grievant suffered no such loss. Article 11 maintained his full pay, off work status. Article 6 can do no more.

Article 14 grants a pay off for any "employe who is entitled to a vacation." The irony that a poor employe can receive such a pay off while a good employe, such as the Grievant, cannot is apparent. The fact remains, however, that the contractual price for this pay off is termination. The continuation of the employment relationship cannot be treated as worthless, nor can this irony be made a contractual entitlement.

The Union's contention that the Grievant suffered a forfeiture has been addressed above.

The strength of the Union's case lies in its contention that the "City is not faultless in this particular case." The Grievant voluntarily stayed on through the grading season and assisted the City during his leave. The City's unwillingness to consider this in addressing his carry-over request must be left to the City to explain. The difficulty with using the Grievant's volunteer efforts to assess the reasonableness of the City's application of the carry-over rule is that it has not been proven that the City's conduct caused the Grievant to lose vacation. If the City's actions had kept the extent of his injury from being discovered, or had somehow misled him into giving up vacation time or pay he otherwise would have realized, the Union's contention would be persuasive. The inflexibility of the "use it or lose it" policy cannot reasonably be viewed as a shield to otherwise improper City conduct. However, in this case, it appears that neither Zwiefelhofer nor the Grievant's physicians properly appreciated the extent of his injury until November of 1994. If the fact that the Grievant is a reliable employe becomes the basis for an exception to the carry-over policy, it is not apparent how that fact can be distinguished from any other employe request for carry-over. Absent a causal link between inappropriate City conduct and the Grievant's loss of carry-over, it is impossible to brand the application of the "use it or lose it" policy unreasonable.

The Union's contentions have their greatest persuasive force as a plea for recognition of the Grievant's good faith in staying on the job through the grading season and assisting the City on a volunteer basis. That plea has considerable persuasive force. There is, however, a difference between what the parties can do voluntarily and what an arbitrator can force an unwilling party to do. The difficulty with the Union's plea is that the contract does not generally empower an arbitrator "to do the right thing." The City is unwilling to risk an inflexible application of the "use it or lose it" policy by treating carry-over requests on a case-by-case basis. This would not seem conducive to encouraging employes to voluntarily assist the City, but cannot, under the contract,

be overturned. The Union's request for an exception, on the facts posed here, seeks the exercise of greater authority than the contract grants an arbitrator.

AWARD

The City did not violate Article 27 by refusing to exempt the Grievant from a general work rule limiting annual vacation carry-over to seven days.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 5th day of January, 1996.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator