BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS LOCAL UNION NO. 563

and

CITY OF APPLETON

Case 372
No. 53317
MA-9307

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Scott D. Soldon, and Mr. Gerald E. Sprague, Business Representative, on behalf of Teamster Local Union No. 563.

Mr. Greg J. Carmen, City Attorney, and Mr. David Bill, Personnel Director, on behalf of the City of Appleton.

ARBITRATION AWARD

Teamsters Local Union No. 563, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Appleton, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on May 13, 1996 in Appleton, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by June 5, 1996. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed that the Arbitrator will frame the issues to be decided. The following are the issues presented:

> Did the City violate the parties' Collective Bargaining Agreement when it denied the Grievants' respective requests to be permitted to retain and use, or be paid for, vacation days or floating holidays that they were unable to use in 1994 due to their being off work on Worker's Compensation leave? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 8 - HOLIDAYS WITH PAY

A.

. . .All permanent employees shall receive three additional regularly scheduled work days off each calendar year to be designated as paid holidays. Between January 1 and April 1 of each year, employees may sign up for these holidays by seniority. After April 1, floating holidays which have not been signed for shall be taken on a first-come, first-served basis with not less than forty-eight (48) hours notice of same. Not more than two employees shall be permitted to select the same day.

Effective 1994, the day after Thanksgiving will be observed as a holiday and the number of floating holidays in the above paragraph will be reduced from three to two regularly scheduled work days off.

. . .

ARTICLE 16 - SPECIAL CONDITIONS

. . .

F. Any permanent employee receiving Worker's Compensation Benefits as a result of an on-the-job injury or accident, shall be paid forty (40) times ninety-five percent (95%) of the employee's prevailing straight time hourly rate for each week of such disability but not to exceed thirty (30) weeks. The City's liability under this provision shall be limited to the difference between the forty (40) hours at ninety-five percent (95%) straight time pay and any weekly benefit the employee receives from Worker's Compensation. In order to remain eligible for such payment, the employee shall be required to inform his Supervisor of his status not less than once per week and shall further be required to report to his Supervisor to sign his time card bi-weekly unless physically unable to do so except that this requirement is waived for the period of the attending physician's prognosis.

. . .

ARTICLE 17 - VACATIONS

Vacation with pay shall be granted to permanent employees as follows:

A. After 1 year of service, 1 week of vacation - (5 working days)

. . .

E. After 20 years of service, 5 weeks of vacation - (25 working days)

F. Vacations shall be taken in the calendar year in which they are earned except that employees who become eligible for an additional week of vacation in November or December pursuant to "J" below, shall be allowed to carry over all or part of that week to the following calendar year. Such vacation must be used by March 31 of that following year or it will be forfeited.

. . .

H. When a holiday falls during an employee's scheduled vacation, the employee shall receive an extra day with pay concurrent with the paid vacation.

. . .

J. Permanent employees will be eligible for their first paid vacation as of the first anniversary of their date of hire. After qualifying for their first vacation, employees will be eligible for future vacations as of January 1 of each calendar year.

If an employee qualifies for a 1, 2, 3 or 4 week vacation as of January 1 and completes the service necessary for an additional week of vacation later in that calendar year, such

employee shall receive the additional week of vacation after their anniversary date and shall thereafter be eligible for such increased vacation as of January 1 of each succeeding calendar year.

BACKGROUND

The instant grievances involve two employes of the City's Department of Public Works, James Vanden Boogart and Richard Willes. The essential facts of the case are not in dispute. Both Grievants are long-time employes of the City and both were injured on the job in the latter part of 1994. Willes was injured and went off work on October 25, 1994, and was off on Worker's Compensation until he returned on January 5, 1995. Willes had pre-scheduled the week of Thanksgiving as vacation and two days in that week, Thursday and Friday, were holidays. Due to his being off work, Willes was unable to use four and one-half vacation days and two floating holidays. 1/ Vanden Boogart was unable to use one day of vacation due to being injured on the job December 19, 1994 and being off for the balance of that year on Worker's Compensation.

When the Grievants returned to work, they requested to be paid for the vacation time that they had been unable to use during the calendar year 1994 or to have that time reinstated so that they could use it. 2/ The City denied the Grievants' requests and the instant grievances were filed in response. The parties attempted to resolve the disputes through the grievance procedure, but were unsuccessful and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Agreement and past practice require a conclusion that the Grievants did not forfeit their vacation or personal holiday benefits while they were on Worker's Compensation leave, and that they are entitled to either carryover those benefits or receive vacation or personal holiday pay. The Union asserts that Article XVII of the Agreement grants paid vacation time to permanent employes who have completed specified terms of service. Article XVII, Section G, provides that when a holiday falls during an employe's scheduled vacation, the employe shall receive an extra day with pay, concurrent with the paid vacation. Article XVII does not address the relationship between Worker's Compensation leave and vacation

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1/ While the City stipulates that Willes did not use two floating holidays it reserves the right to argue that floating holidays are not at issue in this grievance.

2/ There is some dispute as to whether Willes had originally grieved the two floating holidays that he lost.

or personal holiday benefits. While Section F of that provision provides that employes are to take vacation in the calendar year in which it is earned, there is no language that requires or even implies that employes forfeit vacation leave and pay while they are on Worker's Compensation leave.

According to the Union, the City's claim that employes forfeit their vacation benefits while on Worker's Compensation leave cannot withstand analysis. Forfeitures are not favored in law, equity or arbitral policy. If an agreement is susceptible to two constructions, one which would result in a forfeiture, and one which would not, arbitrators are inclined to adopt the former. Citing, Elkouri and Elkouri, How Arbitration Works (4th Ed., 1985) at p. 356. Absent indication of the "unmistakable intention of the parties", an agreement will not be construed to forfeit employe rights under the agreement. There is no explicit statement, or even an implication, in the parties' Agreement that an employe forfeits vacation and holiday entitlements while on Worker's Compensation leave. Moreover, Article XVII, Section G, which provides for an extra day of pay when a paid holiday falls during an employe's vacation, indicates that there is no forfeiture of a contractual benefit when it occurs simultaneously with another contractual benefit. Second, the Union asserts that in the absence of a governing provision or language in Article XVII, the Agreement must be read as a whole in order to construe the parties' intent. Under the Agreement, an employe on Worker's Compensation leave retains his status as an employe and continues to benefit from his contractual rights, e.g., employes do not lose seniority and they continue to receive health insurance and other important benefits. Thus, the Agreement cannot reasonably be read to strip employes of their vacation or holiday entitlements while they are on Worker's Compensation leave. The City's position allows employes who experience on-the-job injuries earlier in the year or who incur less severe injuries, which enables them to return to work before the end of the calendar year, to receive their vacation or holiday time, while employes injured later in the year or injured more severely and who cannot return to work before the end of the year, lose their vacation or holiday time. That is an absurd and completely arbitrary result.

The Union also asserts that past practice emphasizes the City's arbitrary interpretation of Article XVII. The evidence indicates that the City allows vacation or holiday carryover when it calls in employes to work during Christmas or New Year's week while they are on vacation. Thus, the practice reveals that Article XVII does not deny vacation or holiday carryover in all circumstances, but the City would deny carryover except when it serves its own purposes.

The Union also disputes that allowing the Grievants to receive vacation pay during their Worker's Compensation leave would result in a "windfall" for them. Assuming arguendo, that the Agreement could be construed to bar vacation carryover, employes are entitled to receive vacation or holiday pay in lieu of the time off, if their vacation or holiday occurs while they are on Worker's Compensation leave. Regardless of possible pyramiding, employes are entitled to receive benefits simultaneously when two benefits arise under different provisions and are separate and distinct, even though it might be possible that an employe in such circumstances would receive more than a working employe. Citing, Elkouri and Elkouri, (4th Ed.), at p. 342. Under this

Agreement, Worker's Compensation benefits and vacation or holiday benefits are clearly separate benefits; vacation being a negotiated benefit based on prior service and holiday pay likewise being a negotiated benefit, while Worker's Compensation is not negotiated and is protection against being incapacitated from working. Where benefits are clearly separate and distinct, neither serve as a substitute for the other, and their simultaneous receipt does not result in a windfall. The Union cites a number of arbitration awards where the arbitrators have distinguished between vacation benefits and Worker's Compensation and concluded that because they were not related under the agreement and the agreement did not expressly or impliedly deny their simultaneous receipt, the employes were entitled to both. The Union concludes that simultaneous payment of Worker's Compensation and vacation or holiday pay does not result in a windfall, but merely insures that employes receive their full negotiated benefits under the Agreement. Further, since the Agreement does not expressly or impliedly deny or limit the employes' right to receive both benefits simultaneously, and those benefits are not related under the Agreement, the employes are entitled to either carryover their vacation entitlement or to receive vacation and holiday pay due them while out on Worker's Compensation leave.

City

The City takes the position that Article XVII, Section F of the Agreement is clear and unambiguous, stating, in relevant part, "Vacations shall be taken in the calendar year in which they are earned." The City has consistently applied that provision as requiring that unused vacation at the end of an employment year is forfeited, i.e., employes must use their accrued vacation by the end of the year or lose it. The City asserts that when the language of a provision is plain on its face and subject to only one interpretation, "the sole function of the [interpreter] is to enforce it according to its terms." Citing, Sutherland, Statutory Construction, paragraph 46.01 (5th Ed.); and State ex. rel. Nekoosa Papers, Inc. v. Board of Review, Town of Saratoga, 114 Wis. 2nd, 14 (1983). Thus, under the rules of construction that the plain meaning of the language be given effect, vacation days must be used by the end of the year in which they are earned or they are lost. The Grievants are attempting to modify the plain terms of the Agreement by asserting there is a different practice, however, the credible evidence of a differing practice involves a situation that is clearly distinguishable from the instant situation. The City has permitted employes to reschedule vacation days in the new year when the City cancelled vacation days in the year they were earned and ordered the employes in to work. There was no cancellation by the City in these instances; the vacation days being lost by operation of the Worker's Compensation law.

The City also asserts that awarding the Grievants replacement days for the vacation they "lost" during their Worker's Compensation leave would amount to a windfall and is contrary to good public policy. The Grievants conceded that they received 95 percent of their base pay during their period of Worker's Compensation leave. While there was no specific testimony regarding the tax implications of Worker's Compensation "wages", neither Grievant denied that they paid less income tax on that species of "income". Thus, it is appropriate to draw the inference that the Grievants received close to, the same or more, compensation during their leave periods. To award

them new vacation days for those lost during the leave period would amount to "double-dipping" and constitute unjust enrichment.

DISCUSSION

The City asserts that the wording of Article 17, Section F, of the agreement is clear and unambiguous that vacation not used by the end of any calendar year is forfeited by the employe. There are several problems with that argument. First and foremost, the language upon which the City relies states only that "Vacations shall be taken in the calendar year in which they are earned except. . ." 3/ That wording is silent as to what happens if the vacation time is not taken within the specified period. Unlike the express wording in the second sentence of Section F relating to the vacation allowed to be carried over via the exception, 4/ the forfeiture for which the City argues is not expressly stated. Thus, such a forfeiture must be necessarily implied, if it is to be found.

The testimony at hearing established that the express exception in Section F to the requirement that vacation be used in the year in which it was earned, is not the only exception to that requirement that the parties have recognized. The Union's steward in the Streets Division and the Grievant Willes both testified, as did the City's Personnel Director, that there has been a practice of permitting employes to carry over vacation into the next year where the City has asked employes to come into work who are off, or are scheduled to be off, on vacation at the end of the year. 5/ Thus, the parties have recognized that, to the extent vacation must be used or it is lost, there is an exception beyond that expressly stated in Section F. There is, therefore, no clear implication that vacation not used is forfeited in every circumstance except that expressly provided for in Section F. That being the case, it cannot be said that Article 17, Section F, of the Agreement clearly requires or necessarily implies the strict forfeiture for which the City argues. It must then be determined whether the situation in this case falls within the exceptions the parties have recognized.

The parties have recognized in Section F that employes who become eligible in November or December for an additional week of vacation would be hard put to schedule and use the additional vacation by the end of that year, and have expressly provided for an exception to the requirement that the vacation be used in the year in which it is earned. Similarly, the practice discussed above indicates their recognition that employes who are asked or required to work rather than take their scheduled vacation, such that they will be unable to use it before the end of the year, should not lose that vacation time. In this case, Willes had four and one-half days of vacation and two floating holidays on the books and was scheduled to use three days of vacation during the week of Thanksgiving when he went off of work on October 25 due to an on-the-job

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3/ The stated exception is not applicable in this case.

4/ "Such vacation must be used by March 31 of that following year or it will be forfeited."

5/ The testimony of the Union's witnesses and the Personnel Director differed somewhat on points not relevant in this case and also on whether it also covers floating holidays.

injury, and was off for the remainder of 1994. Grievant Vanden Boogart had one day of vacation remaining (unscheduled) when he was injured on the job and went off work December 19th for the remainder of 1994. Both of these situations would appear to be within the scope of the parties' intent not to penalize employes who are unable to use all of their vacation within the year in which it is earned directly due to work-related circumstances. Such an interpretation would avoid a forfeiture and would be consistent with the intent evidenced by the parties' practice. As the Union has noted, in construing contracts, if an agreement is susceptible of two constructions, one of which would result in a forfeiture and one of which would not, arbitrators are inclined to adopt the latter interpretation. 6/

With regard to the assertion that permitting the Grievants to carryover their vacation would result in a "windfall" for them, the argument assumes that being injured and off work and receiving Worker's Compensation benefits is tantamount to being on paid vacation because they are not working and still are receiving full, or close to full, pay. The undersigned is unwilling to make such an assumption. Further, as the Arbitrator finds no authority in the Agreement for payment of wages in lieu of vacation time, no monetary payment has been awarded, so there is no double payment. It is therefore concluded that the City violated Article 17, Vacations, of the parties' Agreement, when it refused to permit the Grievant to carryover the vacation time they were unable to use in 1994 due to being off work on Worker's Compensation.

There remains the issue of Willes' two floating holidays. Article 8, Holidays With Pay, of the Agreement is silent as to whether floating holidays must be used by the end of each calendar year or lost. It appears from the testimony that the general practice has been that floating holidays have not been carried over into the next calendar year. The Union's witnesses testified that there is an exception where the employe has scheduled time off at the end of the year and then is called into work i.e., that the practice discussed above also applies to holidays. The Union Steward testified that the practice involved scheduled "time off" and could not say if it specifically included floating holidays. Grievant Willes testified he had been called in at the end of the year to plow snow when he had scheduled a block of "time off" that included both vacation and floating holidays and he was permitted to carryover that day. However, Willes could not say whether he had been on vacation or on a floating holiday on the day he was called in to work. Conversely, the City's Personnel Director testified that the practice has only involved vacation time, and has not included floating holidays. The testimony is deemed to be insufficient to support a finding of a mutually-intended exception to the general practice of not permitting carryover of floating holidays. That being the case, the Union has not demonstrated that the City violated Article 8 of the Agreement when it did not permit Willes to carryover his remaining floating holidays from 1994.

6/ Elkouri and Elkouri, How Arbitration Works, (3rd Ed.) at page 312.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievances are sustained with regard to the City's refusal to permit the Grievants to carry over the vacation days they were unable to use in 1994 due to being off work on Worker's Compensation leave into the following year. The grievances are denied with regard to the City's refusal to permit the carry over of floating holidays in these circumstances. Therefore, the City is directed to immediately credit the Grievants with the vacation time they had remaining in 1994 at the time they went on Worker's Compensation leave. 7/

Dated at Madison, Wisconsin, this 2nd day of October, 1996.

By David E. Shaw /s/
David E. Shaw, Arbitrator

7/ Although the Arbitrator has not found that the Agreement authorizes the payment of wages in lieu of vacation time off, the parties may mutually agree to such an alternative as a remedy.