BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL NO. 7889 of the UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, CLC and the UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, CLC

and

NORDBERG, INC.
Clintonville, Wisconsin

Case 6
No. 53340
A-5422

Appearances:

Mr. Richard Luetschwager, International Representative, United Paperworkers International Union, 1008 Brown Street, Wausau, Wisconsin 54403, for Local No. 7889 of the United Paperworkers International Union, AFL-CIO, CLC and the United Paperworkers International Union, AFL-CIO, CLC, referred to below as the Union.

Mr. Dennis W. Rader, Godfrey & Kahn, S.C., Attorneys at Law, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, for Nordberg, Inc., Clintonville, Wisconsin, referred to below as the Company.

ARBITRATION AWARD

The Union and the Company 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 Union requested, and the Company agreed, that the Wisconsin Employment Relations Commission assign an Arbitrator to resolve a dispute reflected in grievances filed by James Tomsovic and Dale Lohrentz. The Commission assigned Coleen A. Burns to serve as Arbitrator. Hearing on the matter was set for July 10, 1996. Due to the unavailability of Arbitrator Burns, the Commission, with the agreement of the parties, assigned Richard B. McLaughlin to replace her. Hearing was conducted on July 10, 1996, in Clintonville, Wisconsin. A transcript of that hearing was taken and provided to the Commission on July 16, 1996. The parties filed briefs by September 9, 1996.

ISSUES:

The parties were unable to stipulate the issues for decision. I have determined the record

poses the following issues:

> Did the Company institute the vacation pay calculation in a timely manner as proposed?
>
> If not, what should the remedy be?

RELEVANT CONTRACT LANGUAGE

ARTICLE XVI (VACATIONS)

> Section 1. Eligibility.
> (a) The following schedule will be used to determine vacation time for employees covered by this contract, according to the length of service and number of hours worked in the preceding calendar year (subject to exceptions for only one year of service).
>
> (b) Definition of terms as applicable to this Article:
>
> (1) Calendar year - means the period from January 1 to December 31.
>
> . . .
>
> Section 2. Vacation Pay.
> (a) Effective January 1, 1996, the vacation pay rate will be calculated based on the prior year's gross wages (less any profit sharing) divided by the number of weeks in that year. This rate will be paid if it is higher than the employee's current rate of pay at the time of his/her vacation.
>
> . . .

BACKGROUND:

Tomsovic filed Grievance 95-4 on October 3, 1995. 1/ The grievance states the "COMPLAINT" thus:

> Having received check for pay period ending 9/24/95 I received 32 hours vacation pay computed at my base hourly rate. I feel that this

1/ References to dates are to 1995, unless otherwise noted.

> is incorrect and it should be computed on the basis of my 1994 avg hourly wage for the newest union company agreement entered into 9/15/95. There were no stipulations that this new method would incur on any other date other than the date of said agreement.

Lohrentz filed Grievance 95-6 on October 13. His grievance states the "COMPLAINT" thus:

> Did not receive correct pay for vacation on Sept 28 & 29 according to new contract agreement.

James Grzeca, the Company's Operations Manager, answered each grievance thus:

> Grievance denied. During negotiations, it was discussed how the calculation would be made on Jan. 1. The parties involved in negotiations agree that this change would be effective on Jan. 1, 1996.

The facts underlying the grievance are not in dispute. The "newest" or "new" agreement referred to on the grievances is in effect from September 16, 1995 through September 15, 1998.

The Union ratified this agreement at a meeting conducted on Friday, September 15. The Union's bargaining committee put before its membership a document entitled "MODIFICATIONS TO THE PREVIOUS CONTRACT AS AGREED TO BY THE BARGAINING COMMITTEE AND THE COMPANY." This document, referred to below as the Modifications List, was prepared by the Company, consisted of nine pages and summarized the changes to Article XVI, Section 2(a), thus:

> Page 23. New
> Section 2. Vacation Pay.
> (a) The vacation pay rate will be calculated based on the prior year's average weekly pay for each employee. It will be adjusted for weeks off for layoff, Worker's Comp, A & S, and family leave. Depending on the vacation pay rate, it may also be adjusted for up to ten unpaid excused days.

The Union also distributed to its membership a work sheet which set forth the language of the revised Article XVI, Section 2(a), and detailed the implementation of that language thus:

> W-2 earnings minus A & S (5 or more paid days) minus profit sharing
> 52 minus full weeks for family leave, U.C., W.C., A & S
>
> equals average weekly pay
>
> IF this weekly rate / 40 is less than the hourly rate on Jan. 1, then the records will be reviewed and unpaid excused days will be subtracted from the denominator in the equation and a new rate will be calculated.
>
> The calculated vacation pay rate will be used for the entire calendar year.

Example	A	
W-2 Earnings	$35,398	
Profit Sharing	-$ 950	
A & S	-$ 900	3 weeks
Annual pay		$33,548
divided by		49
= Weekly Pay	$684.65	
divided by		40
= Hourly Rate	$ 17.12	
Compare to		$ 13.90 Jan 1.
$13.50 x 1960 =		$26,460
$20.25 x 350 =		$ 7,088
Total		$33,548

Neither of these documents stated the date that the changes to Article XVI, Section 2(a) would become effective. None of the employes at this meeting questioned when the provision would become effective, and none of the Union's bargaining team stated when the changes would become effective.

The initial vote taken by the Union on the proposed changes to the labor agreement did not produce a ratification of the proposed agreement. Tomsovic, Lohrentz and certain other Union

members left the meeting after this vote. The Union's Chief Spokesman, Donald Schaeuble, however, phoned Grzeca to advise him of the vote. After they had discussed certain

revisions to the rejected tentative agreement, the Union took another vote and a 1995-98 agreement was ratified. On November 9, 1995, Company and Union representatives signed the 1995-98 labor agreement.

Tomsovic and Lohrentz did not learn of the ratified agreement until the Monday following the September 15 meeting. Both took vacation between the time the agreement was ratified and its execution on November 9. The Company's refusal to calculate their vacation pay effective September 15 prompted the grievances set forth above.

The Collective Bargaining Preceding the September 15 Meeting

Article XVI, Section 2(a) of the 1992-95 labor agreement reads thus:

> Vacation pay shall be figured on the employee's straight time hourly wage rate in effect at the time of his/her vacation. A second or third shift employee's straight time hourly wage rate includes the shift premium.

The Union made the initial proposal to modify this language. That initial proposal reads thus:

> The Union requests that all vacation pay be based on 40 hours or 2% of the employees (sic) wages which ever is greater.

After some give and take, the proposal reached the form stated in the Modification List.

It is undisputed that the parties discussed the effective date of the changes in the vacation language. Donald DeWinter, Rick Utke and Robert Briske all served on the Union's negotiating committee. The testimony of each witness varies on the depth of the discussions concerning the effective date of the changes to Article XVI, Section 2(a). DeWinter and Utke agreed that the January 1, 1996 date was discussed during bargaining. Each of them acknowledged that there was, during bargaining, no Union objection to a January 1, 1996 implementation date. Each also acknowledged that the Union did not demand, during bargaining, a September 15 implementation date.

Grzeca and Linda Arndt, the Company's Human Resource Administrator, testified in depth concerning those discussions. Arndt served on the Company's negotiating team, and signed the

1995-98 agreement for the Company. She is the person responsible for the

implementation of the revised benefit. She asked when she should put the new benefit into effect. She noted that Schaeuble and DeWinter affirmed that the date for implementation would be January 1, 1996.

Schaeuble confirmed that the January 1, 1996 implementation date was discussed by the parties during bargaining. The implementation date reflected that the revised benefit would be based on the W-2 form for the prior year.

Grzeca testified that at no time in these discussions did the parties discuss using a W-2 form from any year prior to 1996.

Events Following the Filing of the Grievances

After Arndt learned of the filing of the Tomsovic grievance, she brought the matter to Grzeca. Grzeca filed his answer to the grievance on October 4, but was concerned about the misunderstanding he perceived to underlie the grievance. He contacted DeWinter and Schaeuble and one other Union representative to determine if they shared Tomsovic's view of the effective date for the changes to Article XVI, Section 2(a). Each of these representatives confirmed that they understood the effective date for the changes to be January 1, 1996. Schaeuble, DeWinter, Briske and Utke all signed the 1995-98 agreement on November 9.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION:

After a review of the evidence and arbitral precedent, the Union contends that the issue posed by the grievance turns on five essential points. First, the Union notes that the "exact date that the vacation pay benefit would go into effect was never discussed at the September 15, 1995, ratification meeting." Second, the Union urges that arbitral precedent and common practice establish that where an effective date for a benefit is not expressly stated, bargaining parties typically understand that the "effective date of the benefit is upon ratification." This understanding is in fact the past practice of the parties to this agreement. Third, the Union notes that the filing of the grievance preceded the execution of the labor agreement, thus establishing that the Company was aware of a dispute over the effective date of the vacation benefit. The Union draws from the third point to establish the fourth. That point is that the parties' mutual intent in negotiating the provision cannot be established through the terms of the labor agreement alone. Rather, the intent of the parties must account for the presence of the dispute raised prior to the execution of the labor agreement. Finally, the Union argues that the Company is the author of the Modifications List. It follows from this, according to the Union, that the Company "is the responsible party of that document."

The Union concludes that "the withholding of the vacation pay benefit from the grievant was improper and should be reversed." From this it necessarily follows, according to the Union, that the Grievant should be made "whole for the lost vacation pay." This remedy should, the Union urges, be extended to all other members of the Local who experienced a similar loss.

THE COMPANY'S POSITION:

After a review of the evidence, the Company argues that the executed labor agreement clearly and unambiguously denies the Grievants' claims. Nor can the Modifications List be used to alter the agreement's unambiguous terms. The filing of grievances prior to the execution of the labor agreement cannot, the Company argues, obscure that "the Agreement was signed by both parties," or that the Company's draft of the items modified during negotiations was no more than a courtesy.

The parties have, in the past, addressed items of dispute which arose prior to an agreement's execution. This practice is significant to this case, since the effective date for vacation pay changes cannot be considered such a dispute. The Company's Human Resource Administrator must calculate and pay this benefit, was on the negotiating team and insisted that a clear understanding be reached on how to implement the benefit. Her understanding was confirmed by Grzeca's, DeWinter's and Briske's testimony. The Grievants' challenge to the understanding reached during negotiations is based not on any communication between the negotiating parties, but on the Grievants' personal opinions. From this, the Company concludes that the dispute posed "is not really with management, but is with (the) Union." That vacation is calculated on a calendar year basis further underscores how poorly the grievances are rooted in fact.

Even if the contract could be considered ambiguous, the Company contends that bargaining history establishes that the Union and the Company mutually intended that the vacation benefit was to be effective in January, not September. The Company argues that the earlier date cannot even be rooted in communications between the Union bargaining team and its membership at the ratification meeting. The Company then argues that even if the absence of the effective date from the Modifications List is considered a mutual mistake, the remedy appropriate to that mistake, under arbitral precedent, would be the inclusion of the date in that document. Reformation of the contract cannot, according to the Company, be awarded to the Grievants since the reformation they seek is to a position never agreed to in bargaining.

The Company concludes that "this grievance (should) be denied in all respects."

DISCUSSION:

I have adopted the Union's statement of the issue as that appropriate to this record. That

statement leaves the underlying source of the "vacation pay calculation" ambiguous by questioning whether the calculation was timely "as proposed." This highlights the Union's contention that the Modifications List fails to state a date for vacation pay implementation and that standard practice requires that undated obligations be implemented upon ratification.

This ambiguity may be necessary to the Union's position, but the source which governs the timeliness of the vacation pay calculation cannot be considered in doubt. That source is Article XVI, Section 2(a). Article X, Section (7) underscores this point:

> (7) The powers of the arbitrator shall include the authority to render a final and binding decision with respect to any dispute brought before the arbitrator, including the right to modify or reduce or rescind any disciplinary action taken by the COMPANY but excluding the right to amend, modify or alter the terms of this Agreement.

Article X, Section (7) focuses arbitral review on the contract, and Article XVI, Section 2(a) states that the vacation pay calculation shall be "timely" implemented "(e)ffective January 1, 1996."

There is no ambiguity in the language of Article XVI, Section 2(a), and thus no call for arbitral interpretation of it. Nor is there any ambiguity in the application of Article XVI, Section 2(a) to the facts of either grievance. Both concern vacation days taken well before the effective date of the governing language. The grievances have, then, no support in the labor agreement and must be denied.

This conclusion states the inevitable conclusion to the grievances, but it is appropriate to tie it more closely to the arguments of the parties.

The Union forcefully points out that the Modifications List contains no effective date, and that common practice dictates that undated items are implemented on ratification. This position explains the concern of the Grievants and other workers, who interpreted the Modifications List to offer more than the executed labor agreement grants. The fundamental difficulty with these points is that the Modifications List is not the Labor Agreement. An arbitrator's interpretive authority, under Article X, extends only to the labor agreement.

The Modifications List could be taken to indicate the labor agreement does not accurately codify what the Union ratified. The evidence will not, however, support this. Neither Grievant, nor any other unit member present for any vote on September 15, questioned the implementation date of Article XVI. Nor did the Union's bargaining committee inform the voting membership that such an implementation date was contemplated during negotiations. To have meaning, any inaccuracy the grievances point to must be rooted in the bargaining process.

The evidence establishes, however, that there was no ambiguity within the bargaining process on this point. DeWinter, Briske, Utke and Schaeuble signed the Labor Agreement on November 9. Their signatures confirmed, and their testimony affirms, that the express reference to an implementation date in Article XVI, Section 2(a) was no mistake. Grzeca and Arndt confirmed this for the Company both by signing the agreement on November 9 and by their testimony at hearing.

The evidence thus establishes that the absence of an implementation date in the Modifications List was no more than an unintended oversight. There is an element in the testimony of the Grievants which implies that the Union's reworking of the initially rejected Modifications List was somehow improper. Lohrentz' testimony, however, establishes that the initial rejection of a tentative agreement is not necessarily an unusual event. That the negotiating team would rework the Modifications List to produce a ratifiable agreement is an indication not of deception, but of diligence by those negotiators. That some members chose to leave the ratification meeting reflects, on this record, no more than their personal choice. Even if there is a contractual basis for arbitral examination of the ratification vote, there is no tenable basis to conclude that either Union or Company negotiators sought to deceive the voting membership.

The grievances acknowledge the propriety of the ratification by seeking to enforce the "new" contract which resulted from it. Even if the evidence regarding the discussion of the new benefit during bargaining is disregarded, the grievances afford no insight into why the parties would negotiate, on a calendar based system of vacation accrual, a mid-year implementation date.

There is, then, no basis to support a conclusion that the parties ever agreed to an implementation date other than that stated in Article XVI, Section 2(a).

Collective bargaining derives its strength from the organization of employes. For unions, this can offer strength in numbers. For employers, this can offer a stability not achievable through dealing with individual employes. When the process lives up to its promise, the result is a collective bargaining agreement which codifies the rights and responsibilities of individuals. To be given meaning, that agreement must be rooted in the mutual intent of the bargaining representatives of each party. Those representatives have the difficult role of balancing competing individual interests in a fashion which can benefit all. If an individual employe or manager can impose their individual will on a labor agreement, the balancing performed by bargaining representatives is lost. The agreement can then offer neither party the stability the entire process rests on.

Tomsovic acknowledged that his grievance was based on his personal reading of the labor agreement. Lohrentz and other employes agreed with his view. This view was, however, communicated neither to Union nor to Company representatives while collective bargaining on

the point was possible. To grant either grievance would give individuals the power to overturn results achieved through collective bargaining. This might grant the Grievants a greater benefit, but would undermine the bargaining process by which such benefits are secured and enforced.

AWARD

The Company did institute the vacation pay calculation in a timely manner as proposed.

The Tomsovic and Lohrentz grievances are, therefore, denied.

Dated at Madison, Wisconsin, this 29th day of January, 1997.

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

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