BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LINCOLN COUNTY HIGHWAY EMPLOYEES
LOCAL 332, AFSCME, AFL-CIO

and

LINCOLN COUNTY (HIGHWAY DEPARTMENT)

Case 153
No. 54403
MA-9668

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. John Mulder, Administrative Coordinator, Lincoln County, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1995-97 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 the Union's grievance protesting a change in the accumulation rate of sick leave during the summer period. The undersigned was appointed and held a hearing on November 18, 1996 in Wausau, Wisconsin, where the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on December 30, 1996.

Stipulated Issues

1. Did the Employer violate the collective bargaining agreement when it changed the summer hours sick leave accrual from ten to eight hours per month?

2. If so, what is the appropriate remedy?

Relevant Contract Provisions

ARTICLE XIV
SICK LEAVE

A. Accumulation: Each employee shall earn one day of sick leave for each month of service and unused sick leave may accumulate to a maximum of ninety (90) days.

. . .

G. Retirement: When an employee retires under the provisions of the Wisconsin Retirement Plan, a maximum of sixty (60) days sick leave remaining in his account shall be converted to a monetary value at the daily rate then in effect (number of days, up to 60 days, times the daily rate), and such fund shall be used to pay the hospital and surgical insurance premiums for the plan then carried by the Employer for coverage for the employee and his spouse until such time that the account is depleted, or both are age 65, or both are deceased. The employee will have the option of receiving up to the sixty (60) days of unused accumulated sick leave in cash at retirement. The definition of "retirement" shall be eligibility for a WRS retirement benefit.

The employee shall be allowed, at his option, to contribute each month, fifty percent (50%) of the premium cost to enable the employee to continue under the insurance coverage for a longer period of time. When the employee chooses to contribute on his own each month, the payment shall be made, to the Employer, no later than the date as specified by the Employer as the date the employee's contribution is due. When an employee fails to pay his share by the specified date, he shall lose his option, by default, and the Employer shall then continue to pay the full amount of the premium until such time as the fund is depleted, or both are age 65, or both are deceased.

. . .

ARTICLE XX
WORK WEEK AND OVERTIME

A. Work Week: The regular work week for full-time

employees shall be forty (40) hours per week, Monday through Friday.

B. Work Day: The regular work day shall be eight (8) hours per day, Monday through Friday, as follows: 7:00 a.m. to 12:00 noon, and 12:30 p.m. to 3:30 p.m.

C. Breaks: Employees shall be allowed a ten (10) minute break at approximately 9:00 a.m. each day.

D. Sending Employees Home: The Highway Commissioner shall have discretion to send employees home after then have worked eight (8) hours on a regular working day.

E. Overtime: Employees shall receive time and one-half (1 1/2) for all hours worked outside of the regular work week and work day.

. . .

ARTICLE XXI
SPECIAL WORK WEEK

A. Work Week: Notwithstanding the provisions of Article XXI, preceding, and upon one (1) week notice to the Union, the County shall begin a ten hour day, four day work week during the period commencing on the last Monday of April and terminating on the first Thursday of October of each year. During this period the regular work week shall be ten (10) hours per day, forty (40) hours per week, Monday through Thursday.

B. Work Day: The work day shall be 6:30 a.m. to 4:30 p.m., Monday through Thursday, except for employees operating the asphalt plant, who shall work 6:00 a.m. to 4:00 p.m., Monday through Thursday. Employees are entitled to a ten (10) minute break at approximately 9:00 a.m. each day, and to a fifteen (15) minute lunch, without loss of pay.

C. Sending Employees Home: The Highway Commissioner shall have discretion to send employees home after they have worked ten (10) hours on a regular working day.

D. Overtime: Employees shall receive time and one-half (1 1/2) for all hours worked outside of the regular work week and work day.

. . .

ADDENDUM TO LABOR AGREEMENT
BETWEEN LINCOLN COUNTY
AND LINCOLN COUNTY HIGHWAY EMPLOYEES UNION, LOCAL 332
(1986)

It is hereby agreed that the following shall constitute an Addendum to the labor Agreement between Lincoln County and Lincoln County Highway Employees Union, Local 322, AFSCME, AFL-CIO, for the purpose of outlining the terms and conditions of changes in the operations of Lincoln County Highway Department during those times when the employee's work schedule is comprised of a four day work week of ten hours each day as follows:

1. ARTICLE XXI - WORK WEEK AND OVERTIME shall read as follows:

   a. Work Week: the regular work week for full-time employees shall be forty (40) hours per week, Monday through Thursday.

   b. Work Day: The work day shall be ten (10) hours per day, Monday through Thursday, as follows: 6:30 a.m. to 12:00 noon, and 12:15 p.m. to 4:30 p.m. The work day for employees when operating the asphalt plant shall be ten (10) hours per day, Monday through Thursday, as follows: 6:00 a.m. to 12:00 noon, and 12:15 p.m. to 4:00 p.m.

   c. Breaks: Employees shall be allowed one (1) break of fifteen (15) minutes at approximately 9:30 a.m. each day.

   d. Sending Employees Home: The Highway Commissioner shall have discretion to send employees home after they have worked ten (10) hours on a regular working day.

e. Overtime: Employees shall receive time and one-half (1 1/2) for all hours worked outside of the regular work week and regular work day.

2. ARTICLE XIII - HOLIDAYS shall remain in accordance with the language contained in the Labor Agreement except for the following changes:

> "When a holiday falls on a Sunday, it shall be celebrated on the following Monday and the employee shall receive his normal wages for ten (10) hours of work for the holiday."
>
> "When a holiday falls on Friday, the preceding Thursday shall be declared a holiday."

3. ARTICLE XIV - VACATIONS shall remain in accordance with the language of the existing Labor Agreement; however one (1) week shall be considered forty (40) hours and computed on an hourly basis.

4. ARTICLE XV - SICK LEAVE shall remain in accordance with the existing Agreement language; however, sick leave shall be granted at the rate of ten (10) hours for those work days when an employee is absent from work on sick leave. No sick leave shall be paid for days when employees are not required to work. Sick leave shall be computed on an hourly basis during the period of time that this Addendum is in effect.

. . .

Discussion

The facts are not significantly disputed. Among them, the following were immediately

stipulated:

1. The maximum difference in hours accumulation is eight hours.

2. The number of hours worked in a week is the same (40) as between winter and summer hours.

3. There is no difference or change in the amount of vacation accrued as between winter and summer hours.

4. The summer hours are in effect approximately from May to August. The start and ending dates vary according to the weather.

Oscar Wangen testified that in his 36 years with the Highway Department, the length of a sick leave day accumulated has always equalled the length of a work day. Wangen stated without contradiction that when he began work, the working hours were five nine-hour days plus a five-hour Saturday each week, for a total of 50. Wangen testified that at that time, sick leave accumulation was at the rate of nine hours. He stated that when the Department dropped to a 45 hour week, without Saturday work but still with nine hour working days, the sick leave accumulation continued to be at a nine-hour day. Wangen testified that at the time of the negotiations which led to the ten-hour summer day, ten years ago, no one brought up the question of how many hours would be accumulated. Subsequently, an employe got sick and at that time, Wangen stated, the parties agreed that sick leave would be drawn down at the rate of ten hours per summer day. But, Wangen stated, the Union's understanding was that ten hours would be the accumulation rate right away, and that this was put into effect by the County. It is undisputed that the County continued to accumulate sick leave for the Highway Department employes at the rate of ten hours per month during the summer months until about July, 1996, when the personnel office changed the accumulation rate to eight hours per month.

County Board member Gene Schmit testified that he has been on the County Board for 36 years, and on the Personnel Committee for about 25 years, and has always been involved in bargaining with the Union. Schmit testified that in the discussions which led first to an addendum to the Agreement governing summer hours, and later to inclusion within the contract itself of provisions for those hours, the County was never told that the Union expected a ten-hour summer work day to result in ten hours of sick leave accumulation per summer month, nor did the County agree to such a provision. Schmit pointed out that the County did explicitly agree to a 10 cent per hour pay increase for those hours, and to a half hour lunch; subsequently, the wage increase was converted into a 3 cent per hour year-round wage increase. Schmit testified that his interpretation of the reference to "90 days" in Article XIV-A had always been that these were eight hour days, and that this matched the 720 hour total accumulation possible under the agreement. Schmit also

testified that while the County Personnel Committee agreed to the ten hour rate for sick leave draw-down, it was never told that there was a ten hour accumulation rate, and only discovered this recently.

The Union contends that the contract language governing this benefit is ambiguous, because the "day" referenced in Article XIV could conceivably provide for 24 hours of sick leave per month, or the length of the work day per month, and in that event could mean either the regular eight hour work day or the special ten hour work day during the summer construction season. The Union notes that the word "day" is often interpreted, in different contexts, both as 24 hours and as a shorter period. The Union argues that when faced with ambiguous contract language, arbitrators have customarily looked to the past practice of the parties for guidance as to the contract's meaning, and that here the past practice is uncontradicted and clear. The Union argues that Schmit's testimony that accumulation by the Department of ten hours per month sick leave credit for all employes was a "mistake" stretches credulity, because the error would have had to be made on so many occasions and on an organizational level. The Union further argues that the history of sick leave in the Highway Department has been that it has always been provided consistent with the number of hours in the work day, citing Wangen's uncontradicted testimony that this practice was in effect even before employes regularly worked an eight hour day. The Union also notes that in the case of this particular past practice, it was the County's record keeping which established the past practice, and therefore the testimony by Schmit that the County Board did not know of the practice does not mean that the County as an institution was not well aware of it.

The County contends that the best indication of the parties' intent is the contract itself, read as a whole, along with the bargaining history and the past practice. The County argues that Article XIV, paragraph A specifies a maximum of 90 days' accumulation for unused sick leave, and that Schmit's interpretation that this meant 720 hours was not refuted by the Union. The County argues that its exhibits 1 - 4, bargaining notes from 1984 and 1987, support Schmit's testimony that there was never any discussion concerning an increased accumulation of sick leave during the summer months, contrasting this to testimony from Schmit and Wangen to the effect that there was discussion of how much an employe would be paid if absent on sick leave during the alternative schedule. The County notes that Wangen testified that he "assumed" that they would earn additional sick leave, but there is no evidence of any discussion on that point. The County contends that the 1986 side letter has been replaced with language in the contract, but that even if it were still in effect it refers to sick leave in identical terms to those used in its paragraph 3, concerning vacation. The County notes that it is stipulated that there was no increase in the amount of vacation that employes earn during the summer time, contending that this demonstrates that there should not have been any increase in the sick leave accumulation either. The County further notes that other changes, representing a price the County was willing to pay to obtain the alternative schedule, are explicit in the bargaining notes of 1987, particularly the 3 cent per hour negotiated wage increase.

With respect to the past practice prior to the eight hour day, the County argues that Wangen left unsaid that in the period when the employes worked nine hours per day, five days a week, they received nine hours of sick leave per month for working 45 hours per week -- and that this is the same rate of accumulation per hour worked as working a 40 hour week and accumulating 8 hours of sick leave per month. Finally, the County contends that the County Board never knew about and did not accept an increased rate of accumulation of sick leave, until it was informed of this in July of 1996, whereupon it changed the practice. The County contends that for the County Board to be bound by the past practice, it must know of the past practice. The County requests that the grievance be denied.

I find that while the Agreement is ambiguous as to the meaning of "day" in the circumstances disputed here, the evidence of past practice is so clear and so consistent that the County must be deemed bound by it under the current agreement. While the Union's theory that "day" in Article XIV-A could mean as much as 24 hours is a stretch, the fact remains that that clause provides for one "day" for each "month of service". Under the Union's theory, some months of service effectively involve longer days than others; and this theory cannot be ruled out under this language.

At the same time, the amount that might reasonably be paid out at retirement would become somewhat difficult to calculate under the Union's theory. Yet nowhere in Article XIV does the number "720 hours" appear, though that number was the basis of Schmit's logic as to why the Union's argument lacked merit. Adding to the confusion is the fact that the 1986 addendum which first introduced the ten hour day contains, in its item 4, a sentence which might arguably govern this issue. That sentence is "sick leave shall be computed on an hourly basis during the period of time that this addendum is in effect." The sentence arguably conflicts with the first sentence of item 4 (that "sick leave shall remain in accordance with the existing agreement language"), but if it refers only to the usage of ten hours per day when sick leave is drawn down, it would be an unnecessary duplication of the second phrase in the first sentence of that item, which clearly states that already. At the same time, the record is devoid of any testimony indicating why this language was not incorporated in its entirety when the addendum was incorporated into the parties' regular contract. Thus it is impossible to say on the face of this language whether the Agreement does or does not provide for a modification of the definition of "day" for sick leave accumulation purposes during the summer months.

While both parties have referred to bargaining history in their arguments, it is more accurate to say that there is literally no bargaining history on this point: both witnesses agreed that the accumulation rate, as distinct from the use rate of sick leave, was never discussed in the negotiations.

There is a certain logic to the Employer's position. There is no clear reason given by the Union why the employes should earn sick leave at a higher rate during the summer for working the same number of hours, especially since it is clear that they are free to draw down sick leave in terms of ten hour days during the summer even though the hours making up those days may have

been earned months or years earlier. Under these circumstances, it is logical that the Agreement would provide, as it explicitly does, for payment of a day's sick leave at the ten hour rate during the summer. It is not so clear why the parties would have added, in effect, an extra eight hours of sick leave per year to an employe benefit under these circumstances.

Yet add it they did. In the face of the Agreement's facial ambiguity and the silence of collective bargaining history, the parties' past practice speaks loudly here. The testimony by Wangen, unrebutted by the County, that the employes had accumulated sick leave based on a nine hour day, during the years when nine hour days were the norm, supports the Union's position that it could be assumed to be a part of both parties' underlying expectations that a change in the work day would change the accumulation rate. But of greater weight is the fact that, whether the County Board was ever apprised of it or not, this is one practice which could not have been entered into without management's active compliance. Employes, for obvious reasons, do not keep their own sick leave records: someone in management does that. Here, someone (the record is not clear who) or perhaps a succession of "someones," consistently applied the higher rate of accumulation every year for ten years running, according to uncontradicted testimony. Unlike many past practices which come into dispute, therefore, in this case it was the County which was the creator and custodian of a formal record, and the active party in maintaining the practice. Under these circumstances, the County as an institution must be held to have had knowledge of the practice, even if the County Board members were never apprised of it. I conclude that this clear, consistent and mutually known past practice is therefore the best guide to interpretation of the contractual ambiguity.

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

AWARD

1. That the County violated the collective bargaining agreement by changing the sick leave accumulation rate during summer time from ten hours to eight hours per month.

2. That as remedy, the County shall, forthwith upon receipt of a copy of this award, credit to employes' sick leave accounts an amount of time equal to that amount which was lost as a result of the violation referred to above.

Dated at Madison, Wisconsin this 28th day of March, 1997.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator