BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between GENERAL TEAMSTERS UNION LOCAL 662 and HUDSON SCHOOL DISTRICT	Case 22 No. 54084 MA-9544

Appearances:

Ms. Christel Jorgenson, Business Agent, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen L. Weld, appearing on behalf of the District.

ARBITRATION AWARD

Hudson School District and General Teamsters Union Local 662 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 District agreed, that the Wisconsin Employment Relations Commission appoint Thomas L. Yaeger, a member of its staff, pursuant to that request. Hearing in the matter was held on August 29, 1996, in Hudson, Wisconsin. The parties filed post-hearing briefs on September 27, 1996.

ISSUE:

The parties stipulated to the following statement of the issue:

> What is the appropriate vacation payout for departing employes whose hire date falls within the period of July, 1975 and June, 1991?

PERTINENT CONTRACTUAL LANGUAGE:

> Full time employees shall be eligible for paid vacation time on the July 1 following their commencement of work and shall start to earn vacation time on their date of hire. The amount of paid vacation to

be received on July 1 is determined by multiplying the number of full months the employee has worked for the District during the first fiscal year of employment times five working days divided by 12. The result is rounded to the nearest full day to determine the number of days of vacation for which the employee is eligible in his/her first full fiscal year of employment. An employee on or before the 15th day of any month shall be given credit for working the full month. An employee who is hired after the 15th day of any month shall receive no credit for that month.

Vacation time may not be carried over to the following year except that up to one week may be carried over into July of the next fiscal year. Any vacation requested for June or July but not allowed, may be carried over into the remainder of the next fiscal year. Employees will not receive pay in lieu of vacation. The District Administrator or his/her designee may reject vacation requests based on the operational requirements of the District.

Example 1. If employment with the District commenced on October 12, effective July 1 of the following year, eligible pro rata vacation would be as follows:

> 9 full months of employment x 5 divided by 12 =
> 3+ rounded to 4 days of vacation

In the next year, the employee would be entitled to five days of vacation and in the year after that, the employee would be entitled to ten days of vacation.

Example 2. If employment with the District commenced on January 18, effective on the following July 1, eligible pro rata vacation would be as follows:

> 5 full months of employment x 5 divided by 12 =
> 2+ rounded to 3 days of vacation

In the next year, the employee would be entitled to five days of vacation. In the year after that, the employee would be entitled to ten days of vacation.

In subsequent years, vacation time with pay shall be granted by the District on a fiscal year basis based on the following schedule:

A. One or more than one (1) year but less than two (2) full years of service - five (5) days.

B. More than two (2) years of service but less than six (6) full years of service - ten (10) days

C. More than six (6) years of service - fifteen (15) days

D. More than fifteen (15) years of service - twenty (20) days

If a holiday falls during an employee's vacation period, the employee shall be entitled to an additional day of vacation for each such holiday.

In the event an employee leaves the District, the employee shall receive, on a prorated basis, vacation earned between the most recent July 1 and the date of separation.

BACKGROUND:

The parties negotiated their initial collective bargaining agreement for the period July 1, 1991 through June 30, 1994. Article 20 - Vacations established an "accrual" system for earning and using vacation. Under that system, employes earn vacation one fiscal year to be used in the following year. Therefore, employes who are hired after July 1, 1991, are entitled to a payout for vacation earned in the year prior to termination, but not used in the year of termination, as well as vacation earned during the year of termination.

When bargaining the first contract (1991-94), the parties did not resolve the question of what type of vacation system had been followed by the District for employes hired prior to July 1, 1991. Essentially the parties agreed that regardless of whatever system had been in place in the past, the accrual system would be in place for new hires. The parties also agreed that employes hired prior to the first day of the initial collective bargaining agreement (July 1, 1991) would be able to take vacation in 1991-92, the first year of the contract. However, the parties in reaching that agreement side stepped the question of whether employes hired before July 1, 1991, earned and then accrued vacation for use in the following fiscal year, or whether they were credited with vacation in the current fiscal year in anticipation of them working the entire fiscal year.

Subsequently, during the 1996-97 school year, some custodial employes hired prior to July 1, 1991, left the District's employment. That raised the issue of how they were to be compensated for vacation time: would it be based on the accrual system or the system where vacation was credited prior to being earned? On March 13, 1996, the Union filed a class action

grievance leading to this arbitration proceeding.

POSITION OF THE UNION:

The Union asserts that the employes hired between July, 1975 and June, 1991, have earned vacation in one year and used it the next year (accrual system). Therefore, any employe who terminates his/her employment is entitled to a payout for vacation earned in the year prior to termination, but not used in the year of termination, as well as vacation earned during the year of termination. Consequently, employes hired prior to July 1, 1991, are entitled to the same vacation payout provided to employes hired after July 1, 1991.

The Union argues that the employe in question earned 20 days' vacation during the 1995-96 school year, and, therefore, at the time of termination did not owe the school district any payback for the 1996-97 school year and is eligible for a payout for vacation earned between July 1, 1996 and December 21, 1996, in accordance with the 1991-94 and 1994-96 contracts.

The Union also discredits the testimony of Payroll Clerk Peggy Wolff because no records of when vacation was taken had previously been kept, and because the other records do not reflect what actually happened. The Union also maintains that Wolff was not a member of the custodial group. Rather, she was a clerical employe. Therefore, she could not testify as to what actually took place within the custodial group because each department may have followed a different policy.

Furthermore, the Union relies on the testimony of their three witnesses, Blyton, Norvold and Scobey. They stated that vacation always had to be earned before it could be used. The Union also refutes the use of Daniel Steel's records because he stated that he was able to borrow the vacation time he used in his year of hire. Therefore, Mr. Steel's records prove nothing.

In addition, the Union maintains that Johannsen's records actually prove that an accrual system was used starting in 1974, and not the "use as you earn" system. Johannsen did not use any vacation during his year of hire. The second year he was granted three days, which he took during the 1975-76 school year; the three days of vacation were accrued from the 1974-75 school year (he started working February 12, 1975). The following year (1976-77) he used 7.5 days of vacation which he accrued during the 1975-76 school year.

POSITION OF THE DISTRICT:

On the other hand, the District argues that since 1975, the District had followed a "use as you earn" system of vacation that permits the employes to earn vacation and use it immediately. Therefore, an employe can only receive payout for the vacation days not used and may actually owe the Employer money if vacation had been taken before it had been earned. Therefore, those

employes hired prior to July 1, 1991, are entitled to only the vacation earned in the year of termination.

Payroll Clerk Peggy Wolff, who keeps records of vacation time earned and used, testified that employes earned and used vacation in the year of hire, and thereafter continued to use vacation as it was earned. In support of their position, the District offers the vacation records of Daniel Steel. Steel began working for the District on March 6, 1989. During his first year (year of hire), he was entitled to take one day of vacation. Steel took his vacation ten days after he was hired, during the 1988-89 school year. He did not have to wait until the 1989-90 school year to take his vacation, which would be the standard procedure if the accrual system had been in place, as the Union contends.

The District also argues that the meet and confer agreements, at least since 1986-87, stated that employes have earned and used vacation in the year of hire. The 1986-87 agreement also states that, "if an employee terminates and has taken vacation time in excess of the number of days to which he/she is entitled under this policy, the excess allowance will be deducted from the employee's final paychecks." This vacation payback could only have been in place if the employes earned and used vacation in the same year, and they used more days than they had earned at the time of their termination. If employes have always earned vacation one year and used it the next, there would be no payback requirement. Therefore, the language in the 1986-87 agreement confirms that employes were under the "use as you earn" system.

Furthermore, the District used Norvold's records and testimony as proof that during the 1979-80 school year, the District had a "use as you earn" system in place. Norvold started on October 15, 1979. Under the contract he was entitled to three days of vacation. The next year, 1980-81, he was entitled to six days of vacation between June 1 and August 30, 1980. He took six days of vacation in July, 1980. If an accrual system had been in place during 1979-80, Norvold would not have been allowed to take six days of vacation in July, 1980. He would not have been able to use any of those six days until the following school year, 1981-82. Furthermore, the three days for the school year 1979-80 would not have been able to have been taken until the 1980-81 school year.

Similarly, Scobey was hired on May 1, 1980. Two months after being hired, he took three days of vacation. He did not have to wait until the following year to take his vacation.

The District also asserts that Walt Johannsen's records establish the "use as you earn" system had been in place since as far back as 1975-76. For example, during the 1977-78 school year Johannsen used 12 days of vacation. According to the contract, he would only have been entitled to 12 days after three years, which would have been February 12, 1978. However, the District allowed him to take the 12 days of vacation during the 1977-78 school year. He did not have to wait until the end of the three full years of employment. He earned and used the 12 days during the third full year. If an accrual system had been followed, it would not have permitted the number of days of vacation that Johannsen took.

For these reasons the District believes the evidence establishes that an accrual system was

used by the District prior to the 1991-94 collective bargaining agreement. Therefore, it concludes the Arbitrator should deny the grievance.

DISCUSSION:

The sole question raised by the instant grievance is what type of system for earning and using vacation was followed by the District prior to the 1991-94 collective bargaining agreement. Before that contract, the District and its custodial employes had reached agreements regarding vacation earned and used under a meet and confer arrangement, not pursuant to the collective bargaining relationship that resulted in the 1991-94 contract between the District and the Union. During the negotiations leading to the 1991-94 collectively bargained contract, the parties voluntarily left unresolved the question of what methodology had been used in determining vacation eligibility for employes hired prior to July 1, 1991.

The bargaining history leading to the 1991-94 contract, by implication, does provide some evidence of what system of earning vacation had been followed by the District in prior years. The language (or history) of Article 20 - Vacations provided that employes hired prior to the first day of the initial collective bargaining agreement (1991-94) would be able to take vacation in the first year of that agreement (1991-92 fiscal year). Had the District been using an accrual system to determine an employe's vacation eligibility there would have been no need to reach or discuss that agreement because the contract would have been merely a continuation of the then-existing accrual system. Employes would have earned an accrued vacation during the 1990-91 fiscal year that would have been available for use in the 1991-92 fiscal year (after July 1, 1991). Clearly, the only reason to discuss that matter would be because the District had been following an "earn and use" vacation system, where the vacation taken in fiscal year 1990-91 was earned, or anticipated to be earned, in that year, and converting to an accrual system would mean those employes (except for any carryover) would not have had any vacation to use in the 1991-92 fiscal year. They would merely have been accruing vacation in the 1991-92 fiscal year to be taken in fiscal year 1992-93, the second year of the new collective bargaining agreement.

Also, supporting the District's contention that prior to July 1, 1991, it had followed an "earn and use" vacation system is the language contained in the meet and confer agreements from 1986-87 through 1990-91 (Joint Exhibit #6). The 1989-90 agreement provided:

> 8. Vacations with pay will be as follows:
>
> 1) The vacation year is the twelve month period from July 1st to June 30th.
> 2) The length of vacation for each employee during the vacation year is determined as follows:
>
> a. Initial Vacation: For his/her

initial vacation, each new employee shall receive vacation time in accordance with the following table:

Hired	Year of Hire	Next Year
July	5 days	10 days
August	5 days	10 days
September	4 days	10 days
October	4 days	10 days
November	3 days	10 days
December	3 days	10 days
January	2 days	10 days
February	2 days	10 days
March	1 day	10 days
April	1 day	10 days
May	0 days	10 days
June	0 days	10 days

b. Subsequent Vacation: The years of experience within the Hudson School District will determine the length of vacations. In the years following an employee's vacation allowance shall be determined by his/her continuous service, projected to June 30th of the current vacation year, as follows:

Length of District Service as of June 30th	Length of Paid Vacation
Less than 6 years	2 weeks
6 years or more	3 weeks
15 years or more	4 weeks

3) The School may designate in any year a common vacation period for all or certain groups of employees to meet the requirements of school conditions. Otherwise, employees may indicate their choice of vacation period and, insofar as it is practical, the School will grant the request of the employee. In the final analysis it will be the Administrator's responsibility to approve the scheduling of vacations.

4) Vacation time may not be accumulated from one year to the next, nor will employees receive payment in lieu of vacation time not taken. Vacation time must be used before August 1st.

5) Employees who terminate shall receive the pro rata amount of annual vacation pay to which they would normally be entitled, except that employees who retire shall receive the full amount of annual vacation pay to which they would normally be entitled if they were on the payroll on June 30th of the current vacation year. If an employee terminates and has taken vacation time in excess of the number of days to which he/she is entitled under this policy, the excess allowance will be deducted from the employee's final paychecks.

6) The vacation pay allowance for each employee will be based on his/her monthly pay rate in effect at the time the vacation is taken.

The language of those agreements pertaining to "Initial Vacations" and "Subsequent Vacation" supports the conclusion that the District was not following an accrual system. The narrative contained in the section dealing with "Subsequent Vacation" provided:

> . . ., an employee's vacation allowance shall be determined by his/her continuous service, projected to June 30th of the current vacation year, . . . (emphasis added)

This clearly provides that vacation was awarded in anticipation of an employe working the entire year, and is not consistent with an accrual methodology for calculating vacation earned. That also explains why the language required the employe to pay back, with a deduction from the final pay check upon termination, resignation, or retirement any vacation taken, but not earned. He/she could take vacation assuming he/she worked the entire fiscal year. Thus, if he/she terminated before the end of the fiscal year, he/she would have used vacation not earned. There would be no need for such language if the District were using an accrual system, because the employe would only be eligible to take vacation already earned and accrued in the prior fiscal year.

Finally, the evidence of actual employe vacation usage also supports the conclusion the

District did not use an accrual system between 1975 and 1991. While that evidence is not exhaustive, it is consistent with the language of the above-described meet and confer agreements.

Thus, the most reasonable construction of the language of those meet and confer agreements is that employes were credited, at the beginning of each fiscal year, with those days

of vacation they would earn were they to work that entire fiscal year. They were then allowed to use those vacation days in the same fiscal year. Clearly, that procedure is not consistent with an accrual methodology of determining vacation eligibility.

AWARD

For the above reasons, the undersigned has concluded that the District, for employes hired prior to July 1, 1991, was not using an accrual system for determining the amount of vacation earned and available for use by an employe in any fiscal year. Therefore, vacation payout for employes who were hired between July, 1975 and June, 1991, and subsequently depart employment with the District, are to be calculated pursuant to the old system, and not the accrual system applicable to employes hired on or after July 1, 1991. Thus, those employes hired prior to July 1, 1991, are, upon their departure, entitled to receive the prorated vacation earned and accrued since the beginning of the fiscal year of their departure (July 1); and if the employe departs during the month of July, that vacation which they were allowed to carry over for use in July pursuant to Article 20; and any prior year vacation requested for June or July but not allowed.

The parties stipulated the undersigned was to retain jurisdiction for ninety (90) days following issuance of this Award in order to resolve any questions arising out of this decision. Therefore, if the parties need my services between the date of this Award and October 21, 1997, they should so advise me. Otherwise, effective October 22, 1997, I will relinquish my jurisdiction.

Dated at Madison, Wisconsin, this 23rd day of July, 1997.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

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