BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL UNION 1558 OF COUNCIL #40,
AFSCME, AFL-CIO

and

AMERICAN NATIONAL RED CROSS, BLOOD
SERVICES, BADGER-HAWKEYE REGION

Case 22
No. 52277
A-5339

Appearances:

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

Axley Brynelson, Attorneys at Law, by Mr. Michael J. Westcott, appearing on behalf of the Employer.

ARBITRATION AWARD

Local Union 1558 of Council #40, AFSCME, AFL-CIO and American National Red Cross, Blood Services, Badger-Hawkeye Region 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 Arbitrator Thomas L. Yaeger from its staff to resolve the Seely and Seidl grievances. Hearing in the matter was held on September 19, 1995, in Madison, Wisconsin. The parties filed post-hearing briefs by December 13, 1995.

ISSUES:

Seely Grievance:

> Did the Employer violate the 1994-97 collective bargaining agreement when it denied Larry Seely a personal holiday on January 6, 1995, and January 9, 1995?
>
> If so, what is the appropriate remedy?

Seidl Grievance:

Did Joint Exhibit No. 4, Fountain's January 10, 1995 memorandum violate the 1994-97 collective bargaining agreement? The parties stipulated that if the memorandum did not violate the collective bargaining agreement then Seidl's grievance is denied. If the policy did violate the collective bargaining agreement, then the grievance is sustained, and the remaining issue is what is the appropriate remedy.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 3 - MANAGEMENT

3.0 Except as may be expressly limited by this Agreement, the Employer has the sole right to plan, direct and control the working force, to schedule and assign work to employees, to determine the means, methods and schedules of operation for the continuance of its operations, to establish reasonable standards, to determine qualifications, and to maintain the efficiency of its employees. The Employer also has the sole right to require employees to observe its reasonable rules and reasonable regulations, to hire, lay off or relieve employees from duties and to maintain order and to suspend, demote, discipline and discharge employees for just cause. The Employer has the right to assign temporarily (sic) personnel to any other duties at such times as natural and man-made safety and welfare or the continuation beyond the duration of such disasters. The Employer shall determine what constitutes a natural and man-made disaster as expressed in this Article.

. . .

ARTICLE 21 - VACATIONS

21.0 Any full-time employee on the payroll of the Employer as of January 1 of each year shall be entitled to a vacation with pay. The vacation shall be taken during the twelve (12) month period following January 1 based upon the following schedule:

less than 1 year of service - 5/12 of one day per

month

1 to 4 years of continuous service - 10 days (75 hours pay)

4 to 6 years of continuous service - 15 days (112 1/2 hours pay)

over 6 years of continuous service - 20 days (150 hours pay)

21.1 The Employer shall, with due regard to seniority and consistent with its needs, determine how many employees may be on vacation at any given time. Vacations shall not be accumulated from one year to the next and are forfeited if not taken when earned subject to Section 21.5. Furthermore, vacations shall not be taken "back-to-back" in anniversary years without the Employer's written permission.

. . .

ARTICLE 23 - HOLIDAYS

23.0 All employees covered by this Agreement shall be entitled to the following holidays and shall receive a normal day's pay for such day:

New Year's Day
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

providing the employee works the last scheduled day before, the first scheduled day following the holiday and the holiday itself if scheduled, or is on authorized absence, in order to qualify for pay for that holiday. Should a holiday fall on a Saturday or Sunday, the previous Friday or the following Monday shall be celebrated as the holiday. Employees shall also receive "personal day holidays" as determined by their length of continuous service as of January 1 of each year as follows:

6 months to 2 years of continuous service - 4 days
2 years to 3 years of continuous service - 5 days
3 or more years of continuous service - 6 days

Personal day holidays are to be arranged between the employee and the Employer, but may not be taken while the employee is on-call. Personal day holidays which are not taken during the year shall be lost.

. . .

BACKGROUND:

The subject grievances arose in the Employer's Product Management Department. That Department receives hospital orders for blood and blood products and is responsible for filling those orders. The Department operates on a seven day per week, twenty-four hour per day schedule. Grievance CDM-95-01 arose when third shift employe Seely, on January 4, 1995, asked Fountain, Assistant Director of Product Management, to have January 6 and 9 off as personal holidays. Because the January work schedule had already been posted, these requested days off were considered to be requests for "short notice" personal days. Fountain had an undisputed practice of asking the reasons for the request to evaluate whether he should allow it on such short notice. He was told by Seely that it was for personal reasons. Fountain told Seely that because the schedule had been posted, he does not force employes to cover personal day requests. Further, he said he could not find anyone to work for Seely and that the only way he would grant the request was if Seely could find someone to replace himself. Seely did not find a replacement, was not granted the time off, and filed a grievance.

Prior to January 10, 1995, the Employer, in the Product Management Department, also had regularly permitted more than two employes to be off work on the same day on paid personal and vacation time, regardless of their work shifts. In contract negotiations leading up to the subject 1994-97 collective bargaining agreement, the Union made bargaining proposals relative to additional premium payments for the double shifting of employes. The parties were not able to come to any agreement on those proposals. Subsequent to those negotiations on January 10, 1995, Fountain distributed a memorandum to the Department staff on the subject of vacation requests. That memorandum is quoted below.

DATE: January 10, 1994 (sic)

TO: Product Management Staff

FROM: Mike Fountain

SUBJECT: Vacation Requests

A topic that was brought up during contract negotiations was that staff are sometimes forced to work too many double shifts. Due to the increasing regulatory pressures, this does not seem like an unreasonable concern. In an effort to reduce these shifts and control overtime costs simultaneously, the following guidelines will be followed for vacation requests for calendar year 95:

1. A maximum of two staff may take annual leave or personal days on the same day regardless of shift, regardless of job duty. (example: If two milkrunners had the day off, a second shift employee would not be able to take the same day off).

2. Any vacation request that requires another staff member to cover your shift must be turned in prior to typing and posting of the schedule. This allows the per-diem person to cover the shift alleviating the need for frequent double shift assignments. This person cannot be required and should not be expected to work shifts that are not on the schedule at the time of posting. (This will not affect requests for 1/2 days.)

3. Vacation requests that require coverage cannot be withdrawn once the schedule is posted.

It is strongly suggested that ALL staff use the vacation calendar posted in the department when choosing your leave requests. The total vacation days of all Product Management staff is 309 and since there are 253 work days in 1995, this should not be a problem fitting in requests. Senior staff are urged to turn in leave slips early in the year so that less senior staff can choose their vacation in a timely manner.

cc: David Greenfield
John Ridgley

Thereafter, on February 16, 1995, second shift employe Seidl put in for a week of vacation from May 15 - 19, 1995. A more senior Department employe had also requested to be on vacation the same week. Seidl assumed his request had been approved, but on May 1, he was told by Fountain his request was denied because another more senior employe, Miller, had put in to be

off work on a personal day on May 18, in the middle of Seidl's vacation week. Fountain told Seidl he would have to come back to work for one-half day on the 18th. Miller had made his request on April 27 so he could attend a grievance mediation session scheduled with the Company. Seidl offered to have Seely (third shift) work for him on the 18th and he would work for Seely on the 19th. Fountain told him there could be no shift swapping unless all the P.M. employes signed off. Seidl, after talking with Fountain and being told he would have to be at work on the 18th, left on vacation and traveled to North Carolina on Friday, May 12. He left North Carolina to return to work on Wednesday, May 17. When Seidl returned to work from North Carolina on the 18th, he found that Fountain had scheduled someone to work his one-half day shift. He told Fountain he was outraged by this, but he received no explanation or apology from Fountain. At hearing, Fountain testified that was a scheduling mistake that was made when he posted the overtime for the week in question before he received Miller's personal holiday request, and he forgot to take the employe off the schedule, but he never attempted to contact Seidl.

Vacation day requests are granted by the Employer on a seniority basis prior to May 1, and on a first come, first served basis after May 1. When Fountain and Seidl discussed the matter, Fountain told Seidl if he allowed him off it would be three employes off on the same day and he then would have to allow it in the future for everyone. Thus, he told Seidl the only way he could allow it for him would be if all Department employes agreed it was an exception and not precedential. No such agreement ever occurred. The Union grieved Fountain's decision to deny a portion of Seidl's vacation.

The Union contends Fountain's memorandum violated Article 21.1 of the contract and the attendant binding past practice of allowing more than two employes off work on scheduled leave on any given day. It believes that practice was longstanding and mutually accepted by both management and the Union. It further believes that there were no significant changes in the underlying operation that necessitated the change reflected in Fountain's memorandum. It points to no change in the level of staffing or distribution of staff among shifts. The Union argues the change was motivated by the Employer's frustration with the Union's complaints in negotiations about double shifting employes, and a desire to get back at the Union. Finally, the Union argues that there is nothing in the bargaining history leading to the current collective bargaining agreement that altered or terminated, as a part of the bargain, the then prevailing practice.

The Employer, on the other hand, argues that pursuant to Article 21.1 it has the right to determine the number of employes to be off work at any given time. It believes the only way the Union can establish that Fountain's January 10, 1995 memorandum violated the collective bargaining agreement is to show the policy reflected thereon does not give due regard to seniority or that it is not consistent with the Employer's needs. Regarding the issue of seniority, the Employer insists that the testimony of witnesses was that seniority is the determining factor in which two staff members will be permitted off. Also, the Employer contends that there is no record evidence that the policy was not consistent with its needs. Fountain's testimony established that the junior employe in the Department would be mandated to work double shifts, when there

was a manpower shortage, regardless of shift; and they were coming to work fatigued and with raccoon eyes. This situation presented safety and operational concerns for management. The Employer attempted to address those concerns during negotiations, but the Union rejected its proposed solution. It was only after negotiations concluded that the Employer exercised its rights under the contract.

The Employer also asserts a secondary reason existed for the promulgation of the memorandum. It was to minimize the amount of overtime due to increased pressure to keep costs down. The Employer had employed a per diem employe, and by spreading out vacations more evenly throughout the year, the Department could increase the coverage of the per diem employe for employes on leave. This would then reduce its overtime costs.

The Employer concludes the two-day limit was reasonable, when considering it only applied to whole day vacation and personal holidays off requests, not half days; and because other employes are likely to be off on sick leave, family and medical leave, bereavement leave, or for other unforeseeable reasons.

The Employer also argues that Article 21.1 only applies to vacation days, not personal days. Therefore, there is no contractual limitation upon the Employer's right to "schedule and assign work," as it pertains to personal days.

The Employer also insists that its past practice regarding how many employes could be off on any one day was that it was determined on a case-by-case basis. It does not follow that because it was handled on a case-by-case basis that management had lost its prerogative to change its policy. Thus, it believes it is not thereby precluded from adopting the policy reflected in Fountain's memorandum.

DISCUSSION:

The first grievance dealt with Fountain's decision to deny Seely's request for short notice personal days on January 6 and 9, 1995. The record evidence establishes that this request was received on January 4, 1995, prior to the January 10 Fountain memo. Clearly, this grievance is unaffected by the change in policy reflected in the January 10, 1995 memorandum. The Union President testified that there was no contractual provision requiring that the Employer grant any personal holiday request. He also testified that he was not aware, prior to January 1, 1995, that any employe's short notice personal holiday request had been denied, but he acknowledged he would not have been present when the employe request would be made to the supervisor.

Fountain, on the other hand, testified that most personal holiday requests are made prior to the work schedule being posted, whereas short notice requests are made after the work schedule has been posted. He also testified that he had denied more than one half of the short notice

requests before January 10, 1995. His decision to grant or deny short notice requests was based upon the reason the time off was being requested. If it was an emergency he would generally grant the request. If it was not an emergency, he would deny it unless the employe could find a replacement because he would not force an employe to work overtime to accommodate another employe's short notice request.

Fountain asked Seely why he needed the time off. Seely would only respond that it was personal. Clearly, Seely was not obliged to give Fountain the details of his request for personal holiday, but by not doing so he deprived Fountain of the reason to force an employe to work overtime to cover his absence. Seely was the only employe on the third shift. If he were allowed off, another employe would have to work it on short notice after the work schedule had been posted. Fountain did not preclude Seely from seeking a volunteer on his own, whether he told him he could or not. The undersigned is persuaded it was not unreasonable for Fountain to deny Seely's request for short notice personal holidays on January 6 and 9. Seely did not indicate it was of an emergency nature and no reason was given why he was not able to request the time off before the schedule had been posted.

Also, there is no evidence that there was an existing practice of always granting employe requests for short notice personal holidays. Further, and most importantly, Article 23.0 provides that "Personal day holidays are to be arranged between the employee and the Employer." Clearly, Seely did not arrange with Fountain to be off, and Fountain's denial was not precluded by this language. The use of the term "arranged" implies mutual agreement between the Employer and employe. If that were not so, the language would only need state that the employe must advise the Employer when he/she was taking a personal day holiday off. Thus, there is nothing in Article 23.0 that can reasonably lead one to conclude the Employer has no ability to deny the request. Fountain's explanation as to the policy he had followed prior to this incident and also applied to this situation was, on its face, reasonable. Thus, his denial of Seely's request did not violate the 1994-97 collective bargaining agreement.

Turning to the Seidl grievance, it is clear that the parties discussed the issue of double shifting of employes, and that they never came to an agreement as to what to do about it. It is also clear that the Employer never advised the Union during those negotiations that any practices that may have developed regarding vacation scheduling would be terminated with the commencement of the new contract if they were not contractualized during the negotiations. Further, the Employer does not dispute that it was its practice to allow more than two employes to be off work for personal holiday or vacation on any given day. The Employer argues that Fountain's memo lays out the business reasons for the change, i.e., to reduce the number of double shifts and control overtime costs.

There is extensive language contained in Article 21 - Vacations on the general subject. Relative to this issue it provides "The Employer shall, with due regard to seniority and consistent with its needs, determine how many employees may be on vacation at any given time." The Employer acknowledges that prior to January 10, 1995, vacation requests were dealt with on a case-by-case basis. However, Fountain's memo removed the case-by-case review which took into account seniority and operational needs, and substituted in its place a maximum limit of two (2) employes on any date regardless of any other considerations. The Employer argues that its prior practice did not abrogate its right to change its policy.

There are, however, aspects of the new policy promulgated by Fountain which violate Article 21. Even if the Employer is correct in its assertion that its prior practice of allowing more than two employes off at a time did not preclude a change in its policy, the new policy generalizes to all situations, regardless of the specific facts existing at the time. The undersigned believes this violates the implicit requirements of Article 21.1. Making a determination of operational needs at any given time, arguably can be read to mean all the time until further notice. However, I do not believe that to be a reasonable construction of the language. Rather, the more reasonable construction is reflected in the Employer's prior policy of assessing each situation as it arises. This seems particularly so, when one considers that the Product Management Department operates on a seven day per week, twenty-four hour per day basis, utilizing multiple classifications of employes to perform the necessary tasks. Obviously, the operational needs for the first shift can be considerably different from the second and third shifts regarding the type and amount of work to be performed from day to day, as well as the number and classification of employes necessary and available to complete it. Common sense, and the record evidence of shift assignments, etc., indicate that the Employer's operational needs can vary from day to day, department to department. Indeed, this policy was only applied to the Employer's Product Management Department. The Fountain policy clearly made his job easier because he did not have to assess what his operational needs were going to be on any given day, but it also had the potential effect of depriving an employe of a contractual benefit without regard to operational needs, one contractual standard against which employe requests are to be measured. The undersigned is persuaded, after examining the facts and the language, that the Employer's case-by-case handling of employe vacation requests prior to January 10, 1995, was not a "practice," as argued by the Union, but rather the contractually mandated procedure. The Employer's stated objective of reducing double shifts and its overtime costs are clearly appropriate operational objectives, so long as they can be accomplished without denying employes their contractual rights. In this case the contractual right is to have a vacation request reviewed in light of the operational needs when the vacation is to be taken. Fountain's January 10, 1995 memo clearly violated that contractual procedure.

The Employer also argued that, as noted in the memorandum, the new policy would have the effect of spreading out vacation and allowing for more coverage by the per diem employe. The fact is, however, that the per diem employe was not available to work the second or third shifts. Obviously, therefore, this rationale does not support the decision to make the directive applicable "regardless of shift" or classification. Further, Fountain merely "looking into" expanding the coverage to the second and third shifts by the per diem employe did not resolve the contractual problem, and was insufficient to lead to a conclusion that this was a reasonable assessment of management's operational needs at the time. Also, requiring employes to turn in their vacation requests prior to the posting of the schedule limits the sole third shift employe to taking vacation only when he/she can give sufficient notice to beat the work schedule posting. However, that requirement would not similarly impact other employes because on other shifts there are more employees working and the opportunity exists that they could be off without being replaced. Thus, the policy denies the third shift employe contractual rights enjoyed by others, i.e., being able to submit vacation requests after the work schedule has been posted.

Finally, by co-mingling personal holiday and vacation days together, the policy has permitted personal holiday requests, which have to be mutually arranged, to interfere with vacation scheduling rights. There are not the contractual restrictions placed upon the Employer in reviewing personal holiday requests that exist for vacation requests. (See earlier discussion of Seely grievance.) In the instant case, the Employer permitted a more senior employe's personal holiday request to supersede a less senior employe's vacation week request. Nothing in the contract suggests that management has the contractual right to devise a policy that has that effect. The Employer acknowledges in its argument that there will be employes off for reasons other than vacation, even when there are two employes on vacation. Why Fountain chose to include personal holidays and not other days was never explained. This is even more troubling when one considers personal holidays include the short notice personal holidays as well. Consequently, the undersigned believes this aspect of the Fountain policy also contravenes contractual rights guaranteed employes in Article 21.

As noted earlier, the parties stipulated that if it is determined that the Fountain January 10, 1995 memo violated the collective bargaining agreement then the Seidl grievance is to be sustained and a remedy determined. In addition to the policy violating the contract, Fountain's handling of the Seidl grievance was egregious. In the first place, he had the authority to deny the personal holiday request for the 18th. His decision to grant the single day personal holiday request in the middle of Seidl's week long vacation was abusive. Additionally, to have someone already on the schedule who could have worked for Seidl and still blindly adhere to the policy and refuse the day to Seidl was equally abusive. Fountain's testimony that this was a scheduling error is unpersuasive. Why was it not corrected in light of the controversy that was created by denying Seidl the 18th off? Why wasn't the additional employe told not to report after Fountain had directed Seidl to also report for work on the 18th? Why didn't Fountain attempt to contact Seidl when he recognized the error and tell him he did not have to return on the 18th? The only explanation can be that Fountain was incapable of making an exception to his own policy, notwithstanding the hardship it had wrought on Seidl. I have only discussed this aspect of the case because I believe it is relevant to a determination of a remedy for the Employer's violation. Because of Fountain's conduct and the hardship it caused Seidl--he was deprived of one week of uninterrupted vacation--I am ordering the Employer to grant Seidl an additional week of vacation to be taken any time in the next twelve (12) months without regard to any limits on the number of employes who can be off on vacation at any time, and over and above any vacation he is entitled to by contract. If Seidl is no longer an employe, the Employer shall give him one week (five (5) days) pay at his rate of pay in effect during the period May 15 - 19, 1995.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The Employer did not violate the 1994-97 collective bargaining agreement when it denied

Larry Seely a short notice personal holiday on January 6, 1995, and January 9, 1995.

Joint Exhibit No. 4, Fountain's January 10, 1995 memorandum, violated the 1994-97 collective bargaining agreement. Therefore, the Seidl grievance is sustained, and the Employer shall grant him a week of vacation, in addition to any vacation he is currently, contractually entitled to, and permit it to be taken by him within twelve months of the date of this Award, without regard to any limits on the number of employes who can be off on vacation at any time. If Seidl is no longer employed, the Employer shall pay him five (5) days pay at his rate of pay in effect during the period May 15 - 19, 1995.

Dated at Madison, Wisconsin, this 30th day of July, 1997.

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