BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN STATE BUILDING TRADES, AFL-CIO

and

STATE OF WISCONSIN, UNIVERSITY OF WISCONSIN-MILWAUKEE, DIVISION OF ADMINISTRATIVE AFFAIRS

Case 472
No. 57016
SA-68

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. Frederick J. Bau, Senior Labor Relations Specialist, State of Wisconsin, Department of Employee Relations, 345 West Washington Avenue, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, University of Wisconsin-Milwaukee.

ARBITRATION AWARD

Wisconsin State Building Trades, AFL-CIO and State of Wisconsin, University of Wisconsin-Milwaukee are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on September 29, 1998, requested the Commission to appoint either a Commissioner or a member of its staff to serve as arbitrator. The Commission appointed Paul A. Hahn as arbitrator on December 3, 1998. Hearing in this matter was held on February 9, 1999 at the University of Wisconsin-Milwaukee, Student Union, Milwaukee, Wisconsin. The hearing was transcribed and the parties filed post hearing briefs which were received by the Arbitrator on April 2, 1999. The record was closed on April 2, 1999.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the collective bargaining agreement when it issued its policy concerning leave without pay on June 6, 1997? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

Recognition and Union Security

Section 1. Bargaining Units.

The Employer recognizes the Union as the exclusive collective bargaining agent for all Craft employes as listed below:

Asbestos Worker	Painter
Bricklayer and Mason	Plasterer
Carpenter	Plumber
Electrician	Sheet Metal Worker
Elevator Constructor	Steamfitter
Glazier	Terrazzo and Tile Setter
Lead Craftsworker	Welder

"Craft employe" means a skilled journeyman craftworker, including his/her apprentices and helpers, but shall not include employes not in direct line of progression in the craft.

Employes excluded from this collective bargaining unit are all office, blue collar, technical, security and public safety, clerical, professional, confidential, project, limited term, management, and supervisory employes. All employes are in the classified service of the State of Wisconsin as listed in the certification by the Wisconsin Employment Relations Commission as set forth in this Section.

. . .

ARTICLE III

Management Rights

It is understood and agreed by the parties that management possesses the sole right to operate its agencies so as to carry out the statutory mandate and goals assigned to the agencies and that all management rights repose in management; however, such rights must be exercised consistently with the other provisions of this Agreement.

Management rights include:

A. To utilize personnel, methods, and means in the most appropriate and efficient manner possible as determined by management.

B. To manage and direct the employes of the various agencies.

C. To transfer, assign or retain employes in positions within the agency.

D. To suspend, demote, discharge or take other appropriate disciplinary action against employes for just cause.

E. To determine the size and composition of the work force and to lay off employes in the event of lack of work or funds or under conditions where management believes that continuation of such work would be inefficient or nonproductive.

F. To determine the mission of the agency and the methods and means necessary to fulfill that mission including the contracting out for or the transfer, alteration, curtailment or discontinuance of any goals or services. However, the provisions of this Article shall not be used for the purpose of undermining the Union or discriminating against any of its members.

It is agreed by the parties that none of the management rights noted above or any other management rights shall be subjects of bargaining during the term of this Agreement. Additionally, it is recognized by the parties that the Employer is prohibited from bargaining on the policies, practices and procedures of the civil service merit system relating to:

A. Original appointments and promotions specifically including recruitment, examinations, certifications, appointments, and policies with respect to probationary periods.

B. The job evaluation system specifically including position classification, position qualification standards, establishment and abolition of classifications, assignment and reassignment of classifications to salary ranges, and allocation and reallocation of positions to classifications, and the determination of an incumbent's status resulting from position reallocation.

ARTICLE IV

Grievance Procedure

Section 1 – Definition

A grievance is defined as, and limited to, a written complaint involving an alleged violation of a specific provision of this Agreement.

. . .

Section 2 – Grievance Steps

. . .

Step four: . . .

. . .The arbitrator shall not have jurisdiction or authority to add to, amend, modify, nullify, or ignore in any way the provisions of this Agreement and shall not make any award which in effect would grant the Union or the Employer any matters which were not obtained in the negotiation process. The arbitrator shall render a decision within thirty (30) calendar days following the hearing or within thirty (30) calendar days of receipt of the briefs submitted by the parties.

The decision of the arbitrator will be final and binding on both parties to this Agreement.

. . .

ARTICLE VII

Wages and Employe Benefits

. . .

Section 9 – Paid Annual Leave of Absence

. . .

E. In scheduling vacation (annual leave), choice of time and amounts shall be governed by seniority as defined in Article V. The parties recognize that the Employer has the right to determine the number of employes within each classification and work unit that may be on vacation at any given time; however, vacations shall be granted at times and in amounts most desired by employes whenever operations permit. Scheduled vacations may be changed with the approval of management, providing no other employe's vacation selection is adversely affected. Once vacation periods have been scheduled, Employer initiated changes in employe vacation schedules shall be made only to meet unanticipated staff shortages or emergencies. In the event the Employer finds it necessary to cancel a scheduled vacation, the affected employe may reschedule his/her vacation during the remainder of the calendar year or extend the scheduling of his/her vacation into the first six (6) months of the ensuing calendar year as they desire, providing it does not affect other employes' vacation period. Employes shall be permitted to carry over five (5) days of earned annual leave credit to the first six (6) months of the ensuing calendar year upon notification to the Employer.

. . .

Section 11 – Leaves of Absence Without Pay

. . .

C. Employes shall have the option to request the use of leave of absence without pay, at the amounts listed for the following full years of service. An employe is eligible for a category at the start of the first year listed:

Full Years of Service	**Leave Without Pay Amount**
1- 5	80 hours (10 days)
6-15	120 hours (15 days)
16 and over	160 hours (20 days)

Such leave without pay shall be without loss of seniority, vacation, sick leave accruals or Legal Holiday eligibility.

The scheduling and use of this leave without pay shall be in accordance with Article VII, Section 9E, except that this leave shall only be scheduled in blocks of at least five (5) consecutive work day increments, unless otherwise agreed to by the Employer.

. . .

STATEMENT OF THE CASE

This grievance arbitration involves the University of Wisconsin-Milwaukee (Employer) and the Wisconsin State Building Trades Negotiating Committee and its Appropriate Affiliated Building Trades Councils, (Union) representing the employees set forth in Article II, Recognition. (Jt. 1) The Union alleges a contractual violation by the University for the issuance of a Memorandum dated June 6, 1997 from Gary Kressin, Operations Manager of Physical Plant Services for the Employer which stated:

> Effective June 23, 1997, all personnel will be required to use up their annual vacation time before Leave Without Pay will be granted. In addition, any leave without pay must be used in eight hour blocks of time. (Jt. 3)

For approximately 25 years prior to this grievance arbitration, collective bargaining agreements between the Employer and Union have provided employees with a benefit called leave of absence without pay, referred to by the parties as "AWOP." This leave is set forth in Article VII, Wages and Benefits under Section 11 – Leaves of Absence Without Pay. Under subsection (C) of that section, employees are allowed to schedule and use leave without pay in accordance with Article VII, Section 9(E), which is the contractual provision that covers the scheduling of vacation or annual paid leave. (Jt. 1) Under the scheduling of vacation, subsection (E) of Section 9, the employees schedule vacation based on seniority. The labor agreement provides that the Employer has the right to determine the number of employees within each classification that may be on vacation at any given time and provides that vacation shall be granted at times and in amounts most desired by employees whenever operations permit. (Jt. 1) Until the memorandum from Operations Manager Kressin, employees took AWOP in amounts of time as they wished, which could mean as little as one-tenth of an hour. Employees also combined AWOP with paid vacation.

During the contract negotiations for the collective bargaining agreement which covers this grievance arbitration (October 11, 1997 – June 30, 1999), the parties added to subsection (C) of Section 11, Leaves of Absence Without Pay, the restriction that AWOP could only be scheduled in at least five (5) consecutive work day increments, unless otherwise agreed to by the Employer.

On August 7, 1997, Grievant filed a grievance, alleging a violation of Article VII, sections 9 and 11, when his request for AWOP was denied on July 16, 1997 because he had not used all of his allowed annual vacation time pursuant to the June 6, 1997 policy. (Jt. 2 and 3) The grievance was denied by Employer representative Shannon E. Bradbury, Labor Relations Manager on August 27, 1997. The Employer's response stated that Grievant had been put on notice that pursuant to Kressin's policy of June 6, 1997, craft employees (Grievant) would have to use up annual leave (vacation) before AWOP could be used under Article VII, Section 11(C). (Jt. 2)

The parties processed the grievance through the contractual grievance procedure and were unable to resolve the grievance. No issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on February 9, 1999 in the City of Milwaukee at the University of Wisconsin-Milwaukee.

POSITIONS OF THE PARTIES

Union

It is the position of the Union that the Employer violated the collective bargaining agreement and ignored past practice when it issued its policy requiring employees to use vacation before they could schedule AWOP. The Union argues that the collective bargaining agreement does not require that employees, and specifically the Grievant, must exhaust their vacation time prior to using AWOP. The Union points out that the only restrictions on the use of AWOP are one, that it must be scheduled in blocks of at least five consecutive work days unless otherwise agreed to by the Employer, and two, the Employer has the right to determine the number of employees within each classification and work unit that may be on vacation at any given time. The Union pleads the legal position of *expressio unius est alterius* in that when the contractual provision contains certain restrictions on the use of AWOP, restrictions not stated are excluded. The Union argues the Employer could not unilaterally add the restriction set forth in the June 6, 1997 memo that employees would be required to use up vacation before AWOP would be granted.

The Union next claims that it has been the Employer's and Union's past practice for at least 25 years, based on the testimony of the witnesses, that AWOP could be scheduled in the same manner as vacation and was granted unless operations did not permit the time off. The Union argues that there is no dispute as to this past practice as Operations Manager Kressin admitted such on the record. (Tr-38) The testimony also established, submits the Union, that in the past AWOP was often used by employees in conjunction with their vacation time in order to maintain enough paid hours per paycheck to guarantee receipt of certain contractual benefits. In response to the Employer's argument that it implemented the new policy because it found increasingly hard to schedule employees who were using AWOP, the Union states that the Employer has always had the right to deny AWOP requests if operations did not permit such time off because of staffing deficiencies or an abundance of work.

Arbitration case law, the Union submits, does not allow the management rights clause to be used by the Employer to unilaterally change a past practice. The Union argues that the Employer has not proved any significant reason as to why it needed to change contract language and eliminate the past practice relating to scheduling of AWOP.

The Union states that the parties have gone through numerous contract negotiations, including the negotiations for the current collective bargaining agreement, and the Employer has never attempted to add language that employees had to use all of their vacation before they

could use AWOP. The Union points out that the only language that was added during the negotiations for the current contract was to require employees to use AWOP in at least five consecutive workday increments; the Union thought this modification was to take care of what the Employer perceived as abuse of AWOP.

The Union also argues that employees, including Tom Pytlik and Mary Rick, were not required to use all their vacation before they were granted AWOP after the June 6, 1997 policy was in effect. (U. 6 and 7) The Union states its position that the sole impetus for the June 1997 policy was the Employer's dissatisfaction with Grievant's use of AWOP. The Employer provided no evidence that there was widespread abuse among employees with respect to the use of AWOP which necessitated the unilateral issuance of its June 6, 1997 policy. The Union argues that the Employer ignored the collective bargaining agreement and the longstanding past practice of the parties by unilaterally implementing a change in AWOP. The Union requests that the Arbitrator declare the June 6, 1997 memorandum to be void and require the Employer to continue to grant AWOP in the same manner as it has for the past 25 years.

Employer Position

The Employer maintains that it retains residual management rights to develop policies on matters not specifically limited by the parties' collective bargaining agreement. The management rights clause, the Employer argues, gives it the right to develop reasonable policies to enable it to run the business of the Employer. Citing arbitration case law, the Employer takes the position that the only limitations on the Employer are those set forth in the collective bargaining agreement. The Employer reasons that under this collective bargaining agreement (Jt. 1) nothing in the contract language prevents it from adopting a policy requiring employees to exhaust their vacation before using AWOP. The Employer submits that because of the number of hours employees have for vacation and AWOP under the collective bargaining agreement it is reasonable to allow the Employer some "small limitation" on the use of the amount of time off in support of legitimate operational needs.

The Employer argues that Grievant was abusing the use of vacation and leave without pay by working just enough hours to keep receiving paid benefits. The Employer notes that with only four electricians (Tr. 42) in Physical Plant Services, Grievant's absence from the work place was detrimental to the Employer. The Employer submitted records to establish a case that the Grievant and craft employee Rick worked few full pay periods in 1997 and 1998. (E. 9, 10, 11 and 12) This, the Employer submits, demonstrates an operational need to modify the use of AWOP. The Employer believes that the record supports its action in altering an admitted past practice of AWOP which the Employer claims had become abusive. The Employer, citing arbitration case law, submits that when a past practice becomes abusive action may be taken by the Employer to correct that abuse. The Employer argues, reviewing its exhibits of Grievant's time off, that tenth of an hour use of AWOP is "outrageous."

The Employer agrees with the testimony of Union witness Purdy that AWOP language was added to the collective bargaining agreement between the parties many years ago because there was no provision for vacation time. (Tr. 12) But, argues the Employer, in recent years AWOP has become a "tool" for employees to abuse the Employer by working just enough hours to pay for benefits as required by their "craft" labor agreement. The Employer offers that the AWOP use exceptions granted to employees Pytlik and Rick were for special circumstances and pleads that those employees were using AWOP pursuant to its original intent as prescheduled leave not as unanticipated absenteeism. (Tr. 41 and 55)

In conclusion, the Employer argues that it had an operational need to halt what it regarded as an abusive practice of the use of AWOP. The Employer argues that it retains the management right to utilize personnel, methods and means in a most appropriate and efficient manner possible and that it retains all rights it has not given away. Finally the Employer submits that nothing in the contract prohibits the adoption of the June 6, 1997 policy and that since the Employer has not violated the labor agreement the grievance should be denied.

DISCUSSION

This contract language case is not confused by any significant disagreement over the facts. Witnesses for both parties testified that for approximately twenty five years employees have been allowed to use AWOP as they wished provided that said use did not cause operational problems. (Tr. 12 and 37) The issue in this case was clearly presented by the parties and stated another way is whether the Employer has the right to alter the way AWOP is scheduled.

I find that the contract language is clear and unambiguous that AWOP is to be scheduled in the same manner as vacation. (Jt. 1) The vacation scheduling language I also find to be clear and unambiguous. Employees schedule vacation pursuant to seniority and at times most favorable to them; the sole limitation to this scheduling is that the Employer has the right to deny vacation if operational needs require the employee to be present. Therefore, AWOP is scheduled the same as vacation except with one additional restriction that it must be taken in blocks of five consecutive days. This restriction was added during the negotiations for the current labor agreement (Jt. 1) covering the grievance before the arbitrator. (Tr. 7) The Employer had tried during these contract negotiations to eliminate AWOP entirely but was unsuccessful except for the restriction of five consecutive days. (Tr. 9) Where the language is clear and unambiguous, I do not need to consider past practice or negotiation notes but, in this case, past practice supports the employees' right to schedule AWOP as they wish except for seniority and the Employer's work needs.

This past practice and the contract language presented a significant hurdle for the Employer to overcome when it issued its memorandum of June 6, 1997, disallowing the use of AWOP unless and until the employee had used all of their paid vacation. The

argues it met this burden by proving that the Grievant and one of the other craft employees in this bargaining unit had abused the use of AWOP giving the Employer the right to establish the policy. And the Employer reasons, it had the right under its Management Rights clause to modify the use of AWOP because there is nothing in the language of the parties' labor agreement to prevent it from doing so. The Employer specifically relies on the accepted legal theory that management reserves to it all rights except those specifically modified or given away by contract language.

The Employer in its opening statement stated that it tried to eliminate AWOP in its entirety in the recent state-wide negotiations for the contract because of abuse problems. (Tr. 9) The Employer did not offer any evidence of those state-wide problems so, I consider this arbitration limited to this specific Employer and it is clear that the policy at issue only relates to the employees covered by the labor agreement at UW-Milwaukee. (Tr. 13, 43 and 44) (Jt. 3) The Employer introduced four exhibits to establish its case for abuse of the use of AWOP. The exhibits were the time records of the Grievant and employee Rick (Pfaff) for 1997 and 1998. It is clear that these records do establish that these two employees worked very few forty hour or full work weeks during those two years; they used a variety of contractual leaves, including AWOP, to modify their work schedules. (E. 9, 10 11 and 12) The Grievant also admitted that he does electrician work on the side. (Tr. 26) However, as admitted to by Operations Manager Kressin, and according to the exhibits themselves, all the time off requested, in the aforementioned exhibits, was approved and allowed. (Tr. 43 and 44) It stands to reason that when one out of four electricians employed by the Employer takes as much time off as the Grievant, it probably does cause operational problems, but I am left to wonder why the Employer did not exercise its clear contractual right to deny the leave requests if the leaves were adversely affecting the Employer's operation. If there was abuse, it was acquiesced in by the Employer.

The Employer cites several cases to support its contractual right to issue the policy. These cases state the arbitration standard, cited by the Employer in its post-hearing brief, that the reserved rights of management are upheld unless expressly prohibited or expressly limited by the language of the labor agreement. However the facts of these cases I find do not support the Employer in this case. CLEVELAND NEWSPAPER is a case that dealt with elimination of work. In ruling for the company, the arbitrator found that there was no prohibition in the contract to prevent the company from eliminating work in the composing room. The arbitrator in that case was not, as I am in this case, dealing with specific contract terms on how AWOP is to be scheduled which state the only restrictions the Employer in this case can use to limit AWOP. 1/ In METAL SPECIALTY CO., the arbitrator was not dealing with a contract term at all but with a past practice regarding the use of vending machines and breaks. In that case, the company proved abuse of the practice by employees because they were taking more and longer breaks. The arbitrator found that the company did not accept this abusive practice and therefore lacking mutuality there was not a past practice in effect. 2/ In the case before me, I am dealing with a clear contract term and a past practice accepted by both parties. In

VACAVILLE UNIFIED SCHOOL DISTRICT, the arbitrator had to answer the issue of whether taking off to go skiing was a bonifide use of personal necessity leave provided under the agreement. In that case, the contract term was ambiguous as the contract did not define what was the accepted definition of personal necessity. Both parties accepted the testimony of a note taker at their contract negotiations that the leave was not to be used for recreation. Negotiation notes have long been accepted by arbitrators to determine the meaning of ambiguous contract language and the arbitrator found for the school district. 3/ Again, in this case, I am considering specific contract terms, the scheduling of AWOP, that I have found to be clear and unambiguous.

1/ CLEVELAND NEWSPAPER PUBLISHERS ASSOCIATION, 51 LA 1174 (DWORKIN, 1969).

2/ METAL SPECIALTY CO., 39 LA 1265 (VOLZ, 1962).

3/ VACAVILLE UNIFIED SCHOOL DISTRICT, 71 LA 1026 (BRISCO, 1978).

In my opinion, the cases cited by the Union in this matter, as applied to the facts in this case, provide substantial support for the Union position that the June memorandum (Jt. 3) was an unlawful, unilateral modification of the parties' labor agreement. In WEYERHAEUSER CO., the contract language provided that employees' work schedules would not be changed for the sole purpose of avoiding overtime. A practice had been in existence for twenty years that provided employees with a paid lunch which in effect gave the employees thirty minutes of overtime per day. The company unilaterally eliminated the paid lunch, eliminating two and one-half hours of overtime per week. The company argued that under its broad management rights clause it was not prevented from changing this practice as no limitation on its rights dealt with the practice. Further, it had not changed the practice solely to limit overtime. The arbitrator found that the practice was of long length and consistency and that the company had never tried to change it during contract negotiations. The practice was an accepted part of the working conditions of the employees and became a reasonable economic expectation. In ruling against the company in that case, the arbitrator said the issue should be addressed in contract negotiations. 4/ In the case before me, the Employer is trying to modify the use of a contractual benefit of long duration and practice without a clear sign of abuse. While the practice in WEYERHAEUSER may have modified the contract term allowing the elimination of overtime as long as it was not for that purpose alone, in this case, the practice for use of AWOP supports the contract AWOP scheduling language that the Employer is trying to modify.

4/ WEYERHAEUSER CO. 95 LA 834 (ALLEN, 1990).

BROWN AND WILLIAMSON and BOISE CASCADE support the Union's argument that if the labor agreement lists certain restrictions for the use of AWOP then those that are not listed are excluded. 5/ Here the contract language for the scheduling of vacations, which clearly and by the admission of the parties is the language for the scheduling of AWOP, lists restrictions of seniority, blocks of five consecutive days and if the operations of the Employer permit. Otherwise, scheduling is at times most desired by the employees. What the Employer in this case is trying to do is add another restriction that AWOP can only be used after all vacation is used. There can be little issue that the Employer in this case is trying to unilaterally add a provision to the contract.

5/ BROWN AND WILLIAMSON TOBACCO CO. 92 LA 722 (NICHOLAS, 1989) and BOISE CASCADE CORP., 111 LA 231 (SNOW, 1998).

A case I find close on point is INLAND EMPLOYEES FEDERAL CREDIT UNION. In that case, the employees had three personal days the scheduling of which, as with vacations, required two day's notice. The company denied an employee, who gave the required notice, funeral leave for a Friday/Saturday based on the fact that these were busy days. The only restriction on use of the personal leave in the contract was that it had to cause minimum operational interference. The arbitrator in ruling against the company found that there was no "busy day" restriction in the labor agreement and refused to add such a restriction. The arbitrator held that when agreeing to add the personal days to the contract, it was incumbent on the company to anticipate that there was the possibility of busy days. 6/ While the Employer in this case may not have originally anticipated that employees would schedule AWOP in tenths of hours it allowed the practice, and, more importantly, the Employer had a contract provision that specifically allowed it to deny those tenths of an hour usage if it affected the Employer's operation; it simply never exercised that right.

6/ INLAND EMPLOYEES FEDERAL CREDIT UNION, 98 LA 728 (STALLWORTH, 1992).

If in this case we were merely dealing with a past practice, the Employer might have a stronger case, but we are concerned with contract provisions that specifically govern the scheduling of AWOP. The Employer would have me add a provision to the labor agreement by agreeing that the June 1997 policy was permissible. But, as discussed above, this alleged policy is more that just a work rule policy; it in fact becomes a term of the agreement because

it modifies terms of the agreement by adding another contractual restriction for the use of

AWOP. If there were no terms of the agreement concerned with scheduling of AWOP, it might be different but that is not the case here. Arbitration case law, as well as the parties' labor agreement, does not allow me to add terms to the parties' agreement. I note that the parties negotiated a provision that effective with the current contract AWOP must be taken in blocks of five consecutive days. This should eliminate much of the problem of short term use of this benefit and enhance the Employer's legitimate ability to schedule and perform work. Further restrictions on the use of AWOP should be addressed at the bargaining table.

Based upon the foregoing and the record as a whole, I enter the following

AWARD

The Employer violated the collective bargaining agreement when it issued its policy on June 6, 1997, restricting use of leave without pay. Therefore the grievance is sustained. The Employer is directed to continue to schedule leave without pay pursuant to the language of Article VII, Section 9(E) and Article VII, Section 11(C).

Dated at Madison, Wisconsin this 27th day of April, 1999.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

rb

5849