BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ST. MARY'S HOSPITAL OF SUPERIOR EMPLOYEES UNION LOCAL 1760, AFSCME, AFL-CIO

and

ST. MARY'S/DULUTH CLINIC HEALTH SYSTEM

Case 5
No. 58085
A-5805

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1701 East Seventh Street, Superior, Wisconsin 54880, appearing on behalf of the Union.

Fryberger, Buchanan, Smith & Frederick, P.A., by **Attorney Joseph J. Mihalek,** 700 Lonsdale Building, 302 West Superior Street, Duluth, Minnesota 55802-1863, appearing on behalf of the Employer.

ARBITRATION AWARD

St. Mary's Hospital of Superior Employees Union, Local 1760, AFSCME, AFL-CIO, hereinafter the Union, with the concurrence of St. Mary's/Duluth Clinic Health System, hereinafter the Employer, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as Arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' collective bargaining agreement, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated, and on January 25, 2000, a hearing was held in Superior, Wisconsin. The hearing was not transcribed. On March 15, 2000, and upon receipt of the last of the parties' written briefs, the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to a statement of the issues.

The Union would state the issues as follows:

1. Did the Employer violate the terms of the Collective Bargaining Agreement (Article 9.01) when it denied the Grievants, who have attained twenty-five (25) years of seniority, the full five (5) weeks of earned vacation?

2. And if so, is the appropriate remedy for the Employer to grant the full five (5) weeks of vacation to these Grievants?

The Employer would state the issues as follows:

1. Whether the grievance should be dismissed as untimely because the Grievants acquiesced for at least eight years in the practice they now challenge and because they failed to file a grievance within the time limits set forth in the collective bargaining agreement?

2. Whether the respondent breached its collective bargaining agreement by calculating an employee's length of service for purposes of vacation eligibility by dividing the total hours the employee has worked during periods of part-time employment by 2080 hours (the number of hours per year that define full-time employment under the agreement), as the respondent has consistently done for at least eight years?

The Arbitrator frames the issues for determination as follows:

1. Were the grievances timely?

2. If so, did the Employer violate the terms of the Agreement when it denied Grievants a fifth week of vacation?

3. If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited, in relevant part:

ARTICLE 9 – VACATION SCHEDULE

9.01 All employees covered by this Agreement may schedule earned vacation time anytime during the year subject to provisions in this article. All full-time employees shall be granted vacations with pay each year based on their cumulative length of continuous service according to the following schedule:

Length of Service	Length of Vacation
1 year, but less than 5 years	2 weeks
5 years, but less than 10 years	3 weeks
10 years, but less than 25 years	4 weeks
25 years and over	5 weeks

Vacation pay shall be at the employee's regular hourly rate.

9.02 Part-time employees shall be granted vacations with pay each year. The number of days shall be determined by the employee's cumulative length of service, prorated for total hours worked, as they relate to 2080 hours per year.

. . .

ARTICLE 12 - DEFINITIONS

12.01 Regular Part-time Employees: Regular part-time employees are employees who work under eighty (80) hours per pay period on a regular and continuous basis.

Employees regularly scheduled between a minimum of 32 hours/pay period but less than 80 hours/pay period will be eligible for part-time employee benefits specifically listed.

. . .

12.04 Full-Time Employees: Full-time employees are employees of the Hospital who work eighty (80) hours per pay period on a regular and continuous basis. Full-time employees shall receive fringe benefits as specified in this agreement.

. . .

ARTICLE 15 – GRIEVANCE PROCEDURE

. . .

15.02 Step One: Should any employee covered by this Agreement feel a grievable situation exists, the employee shall present the grievance orally to his/her immediate supervisor within ten (10) calendar days of the time when the employee knew or could have reasonably known of the event(s) giving rise to the grievance. The supervisor shall respond to the grievant within five (5) calendar days from the date the grievance was presented to the supervisor.

. . .

BACKGROUND

Grievants Patricia Westland and James Grasky, hereinafter referred to as Grievant Westland and Grievant Grasky, or collectively referred to as Grievants, through their respective grievances seek a fifth week of vacation based upon their more than twenty-five years of employment with the Employer. At the time of hearing, the Grievants were employed on a full-time basis. During part of their more than twenty-five years of employment, Grievants were each employed on a part-time basis.

Grievant Westland was hired on June 26, 1974, as a part-time employee. On April 4, 1979, she became a full-time employee. The record is not clear how many total hours Westland worked during her approximate five-year period of part-time employment. 1/ Since that time, Westland has at all times held a full-time position with the Employer.

1/ The Employer's brief states that between June 26, 1974 and April 4, 1979, Westland worked "a total of only 2980 hours, or the equivalent of 1.43 years." It is undisputed that Westland worked less than full-time during this time period. However, the evidence presented and my hearing notes do not indicate a total numerical amount. Nevertheless, and for purposes of this decision, the total number of hours during Westland's period of part-time employment is not dispositive.

Grievant Grasky was hired on September 13, 1974, as a full-time employee. In 1992 and 1993, and again for a time in 1995, Grasky was periodically employed on a part-time basis. The record is not clear how many total hours Grasky worked during his periods of part-

time employment, nor the specific dates of when Grasky was employed on a part-time basis. 2/ Except for those periods of part-time employment referred to above, Grasky has at all other times held a full-time position with the Employer.

2/ Grasky did not testify. The Employer's "Payroll Master Sheet" includes some handwritten notations regarding Grasky's employment status, but these were not clear. For purposes of this decision, these facts are not dispositive.

On July 19, 1999, Grievant Westland filed a grievance alleging that the Employer violated Section 9.01 of the Agreement when it refused to extend a fifth week of vacation to her after twenty-five years of continuous service. The grievance also states that someone in the Employer's Payroll Department informed Westland that the Employer had converted to hours worked and not years of service, and that Westland did not have enough hours to accrue vacation at a five-week rate.

On October 21, 1999, Grievant Grasky filed a grievance alleging a similar violation as that alleged by Westland. Grasky's grievance states that after receipt of his October 15, 1999 check, Grasky noticed that he "should have accrued an additional 8 plus hours of vacation based upon 5 weeks after 25 years of service." The grievance also states that on October 19, 1999, Grasky contacted the HR/Payroll Department and was informed that "vacations are based solely on hours worked and not the length of service for full-time employees."

On November 2, 1999, the Employer wrote a letter to Grasky acknowledging receipt of his grievance and agreeing to refer it, along with Westland's grievance, to arbitration.

Additional background information is set forth in the parties' positions and in the discussion portion of this decision below.

POSITIONS OF THE PARTIES

The Union

With regard to timeliness, Westland noticed that she was not credited with a fifth week of vacation upon examining her paycheck stub following her twenty-fifth anniversary date. She brought the issue to the Employer's Payroll Department and was told that she had not worked enough cumulative hours to have five weeks of vacation. Westland then reviewed Section 9.01 and filed a grievance on July 19, 1999. Therefore, the grievance is timely.

Alternatively, timeliness is irrelevant. The Union never knew that the Employer had a lifetime-hours calculation for determining vacation. Given the Union's vigilance in opposing

changes made to the vacation language, if the Union knew that an employee was being denied their proper vacation, then it would have promptly filed a grievance. If the Union did not learn of a contract violation, it cannot file a grievance. Such were the circumstances here.

With regard to the merits, Section 9.01 is clear and unambiguous: an employee who has obtained twenty-five years of service with the Employer shall receive five (5) weeks of vacation. Twenty-five years of service equals five weeks of vacation. Further, the language contained in the prior collective bargaining agreements between the parties has remained unchanged for the last twenty-five years. The language is clear and unequivocal and it should not be given meaning other than that expressed.

The Employer has attempted from time to time to secure a change in the vacation language as illustrated by the Employer's proposal in 1989:

ARTICLE 9: VACATION ALLOWANCE

Language clarification only by replacing the word "year" with appropriate number hours paid.

Length of Service	Length of Vacation
1040 hrs. to 2079 hrs.	Prorated
2081 hrs. to 8319 hrs.	2 weeks
8320 hrs. to 20,799 hrs.	3 weeks
20,800 hrs. to 35,359	4 weeks
35,360+ hrs	5 weeks

Union witnesses testified that the Union never agreed to any change in the vacation language. The Employer now characterizes this 1989 proposal as a clarification of the method already in use by the parties. However, the Employer's proposed clarification is really a change, and the Union has firmly resisted any change in the vacation language. The Employer is trying to secure through arbitration what it cannot secure at the bargaining table.

The current Agreement does not provide for any other method of calculating accrual rates for either full-time or part-time employees. It makes no provision for calculating vacation based upon the number of hours worked. The Arbitrator should apply the arbitral principle that to include one thing is to exclude another.

There is no past practice regarding the calculation of vacation eligibility based upon the number of "lifetime hours" worked by an employee. All of the Union's witnesses testified that they had never heard nor had any knowledge of the Employer's method of lifetime-hours-based calculation until these grievances were denied. The Employer's witness, Mary Schnell, may have had an internal bookkeeping method using an employee's lifetime hours to determine

their vacation eligibility, but all of the Union's witnesses testified that this was never shared with the Union. Schnell testified that she did not recall ever sharing this methodology with the members of the Union. In terms of having an effect, Schnell's method never had an impact.

Moreover, the Employer has not met the essential criteria of mutuality necessary to show the existence of a past practice.

With regard to the Employer's handbook or policies, they are superceded by the Agreement. When a conflict arises between the Agreement and such handbooks or policies, the Agreement controls.

The Employer

The grievances must be dismissed as untimely. Section 15.02 of the Agreement states that grievances must be brought within ten days of the date on which the "grievable" situation arises. In this case, Westland failed to present her grievance within ten days after she knew or reasonably could have known of the Employer's policy regarding calculation of length of continuous service for employees. Even where there is no time limit set forth in the agreement, a requirement for filing a grievance within a reasonable time may be inferred.

Historically, and since the collective bargaining agreement was substantively modified on July 1, 1981, the Employer has calculated employees' length of continuous service, and thus their vacation eligibility, based upon their total hours worked. The Employer's practice has been consistent with the 1981 contract language change. Prior to July 1, 1981, the parties' contract language relating to vacation read:

> All regular full time employees covered by the terms of the Agreement shall receive vacations with pay according to the following schedule:
>
> > A. After twelve (12) months of continuous permanent employment – two (2) weeks vacation with pay.
> > B. After forty-eight (48) months of continuous permanent employment – three (3) weeks vacation with pay.
> > C. After one hundred twenty (120) months of continuous permanent employment – four (4) weeks vacation with pay. (Emphasis added).

On July 1, 1981, the above contract language was significantly and substantially modified. Instead of vacation levels being based upon months of continuous permanent employment, the parties replaced that with the concept of length of continuous service. This change demonstrated the parties' intent that vacation entitlement was to be based not upon the

number of months of employment, but rather upon the length (not years or months) of continuous service. Also adopted at that time in 1981 was Section 9.02 which specifies that vacation pay is pro-rated for part-time employees based upon the rule that 2080 hours is considered to be one year of service.

The significance of abandoning the phrase "months of continuous permanent employment" while at the same time introducing the principle of pro-rated vacation for part-time employees based upon a 2080-hour year cannot be overstated. The parties recognized that using months or years of employment does not accurately reflect an employee's cumulative service. This is because part-time and full-time employees who have worked the same number of months or years will have provided substantially different levels of continuous service. For example, a full-time employee, after twenty-five years of full-time work, will have provided twenty-five years of service; a part-time employee, however, after twenty-five years of working ¼ time, will have provided only 6.25 years of service during the same twenty-five calendar years. These two employees should not be entitled to the same level of vacation benefits in future years because of the great disparity in their length of service in the past. The contract language demonstrates that the parties intended to treat a year of part-time work as worth less than a year of full-time work. This is because the part-time employee's vacation was to be pro-rated based upon the number of hours worked in relation to 2080. Simply put, a ¼ employee (two hours per day) earns two hours of cumulative service while a full-time employee earns eight hours of cumulative service for one day's work. Where there are both part-time and full-time employees, it would be inequitable to calculate cumulative length of service based upon calendar days rather than hours worked.

In this case, Westland worked part-time for a total of 2980 hours, or the equivalent of 1.43 years, between June 26, 1974 and April 4, 1979. Thus, on June 26, 1999, her cumulative length of continuous service totaled 21.66 years. Because of her nearly five years of part-time work, Westland's cumulative length of continuous service (21.66) is less than the number of calendar years during which she had permanent employment (25).

The parties agreed that vacation entitlement for part-time employees was to be pro-rated based upon the portion of the 2080-hour year that they worked. The same principle applies to determining their length of continuous service. The parties abandoned "months of permanent employment" and adopted "cumulative length of continuous service." This change in language and procedure was clearly communicated to all employees through employee handbooks. The handbooks state that "[a] year of service is defined as 2080 hours." Since 1981, the handbook has stated that "the number of hours [of vacation] earned shall be determined by the employee's cumulative length of continuous service pro-rated for total hours of work as pertaining to 2080 hours per year."

Under Westland's proffered interpretation of Section 9.02, she would have been entitled to five weeks of vacation in 1991 since that is when she completed her seventeenth year of employment and, according to Westland, since the contract at that time provided five

weeks of vacation for those employed seventeen years. Under that interpretation, she also would have received five weeks of vacation in 1992 and 1993 and until the contract changed in December of 1994, whereupon twenty-five years of continuous service was required before reaching the five-week vacation level. However, under the Employer's interpretation of the Agreement, which is consistent with the Employer's handbooks, Westland's cumulative length of continuous service based on hours worked in relation to a 2080-hour year did not reach seventeen years until November, 1993. Accordingly, she received only four weeks worth of vacation in 1992 and 1993. (The Employer's Payroll Master Sheet for Westland shows that in November of 1993, Westland became eligible for her pro-rated percentage of five weeks of vacation (185.54 hours) to be taken in 1994. In December 1994, the 1994-1996 contract was signed which increased from seventeen to twenty-five the cumulative length of service required to qualify for five weeks of vacation. In 1995, Westland received 178.38 hours based upon what she earned in 1994 under the 1994-1996 contract. In 1996, Westland reverted back to the new maximum of 160 hours, or four weeks. Westland did not file a grievance at that time.

The Employer's interpretation of the Agreement in 1992 and 1993 was identical to its interpretation in 1999. Westland "knew or could have reasonably known of the event(s) giving rise to the grievance" in 1992 when she was first denied a fifth week of vacation. Her unexplained failure to bring a grievance within the current Agreement's prescribed ten-day period bars her claim.

Even without the ten-day limitation, by Grievants' acquiescence of at least eighteen years, Grievants allowed the Employer's vacation policy to become a binding past practice and an implied term of the Agreement. Custom can, under some circumstances, form an implied term of a contract; where an employer has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the contract was entered into upon the assumption that the customary action would continue to be taken, such a customary action may be an implied term, citing Elkouri and Elkouri, How Arbitration Works, (5th ed., 1997) at 631, and SCHOOL DISTRICT OF WAUKESHA, DEC. NO. 27835-A (BURNS, 1994). The arbitrator's source of law includes the practices of the industry and is equally a part of the contract, citing STEELWORKERS V. WARRIOR & GULF NAVIGATION CO., 80 S.CT. 1347, 1351-52 (1960). A past practice is binding where it is (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties, citing SCHOOL DISTRICT OF WAUKESHA above.

All of the factors enumerated in the WAUKESHA matter apply to the instant arbitration. Since at least 1990, the Employer has consistently and unequivocally used the same formula to calculate eligibility. The Arbitrator should note Employer Exhibits 6, 7 and 8, i.e., communications related to computer programs that calculate and monitor usage of employees' vacation benefits, which all demonstrate that the Employer's practices have been consistently applied since at least the earliest of these documents, August 29, 1990. Moreover, Mary Schnell testified about the consistent application of the Employer's interpretation of the contract since the change in contract language in 1981. The Employer clearly enunciated its

vacation policy in its handbooks and that policy was, thus, readily ascertainable. For over ten years, Grievants acquiesced in, and apparently accepted, the Employer's policy. Further, the Employer has consistently interpreted Section 9.02. For example, employee Audrey Kidd was hired on December 14, 1970. Although she had worked seventeen calendar years by December 14, 1987, and because of some part-time work, she did not qualify for the full five weeks of vacation (200 hours) until 1990. In 1989, she "blended" into the five weeks because she became eligible for five weeks of vacation during the year. Thus, Kidd's vacation hours for 1989 were 187. If the contract had required calculation of vacation time based upon calendar years worked, Kidd would have been eligible for 200 hours of vacation in 1988. No one grieved the Employer's interpretation as to Kidd in 1988. In the meantime, and over the past ten years, the Employer's practice with regard to Grievants has become a binding part of the Agreement.

Turning to the merits, the Agreement is ambiguous because it does not explicitly state how an employee's length of continuous service is calculated where the employee has in the past worked on a part-time basis. This ambiguity is easily resolved, however, by reference to the Employer's handbooks and past practice. The Union's argument that the Agreement controls over the language of the handbooks does not have merit. The handbooks state that "in the event of conflict, the applicable union agreement will supercede this Employee Handbook." (Emphasis added). However, the handbook's language is consistent, and not in conflict, with the Agreement's language. When the Agreement is read as a whole and in its proper context, the Employer's calculation of Westland's cumulative length of continuous service is correct.

Section 9.01 is ambiguous because the phrase "cumulative length of service" is subject to possible conflicting interpretations. One interpretation is the number of calendar years or months someone has worked. Another interpretation is the number of lifetime hours (per year equivalents based upon a 2080-hour year) an employee has worked. If the former was intended, the parties could easily have stated that vacation entitlement was based upon the number of calendar years of service or calendar months of continuous employment. Indeed, the prior contract provided that vacation was to be based upon an employee's number of months of permanent employment. That language was abandoned and demonstrates the parties' intent that entitlement was to be based not on calendar months, but rather on the number of hours worked. This intent is also evident from the parties' adoption of the new term (Section 9.02) at the same time the parties adopted the principle of determining vacation entitlement for part-time employees based upon their number of hours worked in a 2080-hour year.

An agreement is ambiguous if plausible contentions may be made for conflicting interpretations thereof, citing Elkouri, at 470, and PEACE V. NORTHWESTERN NATIONAL INSUR. CO., 228 WIS.2D 106 (1999). Westland's proposed interpretation would mean that an employee could work on a part-time basis for twenty-five years, change to a full-time status, and instantly become eligible for five weeks of vacation. The Employer's interpretation is

consistent with the Agreement and is more plausible than Westland's interpretation because it is consistent with other terms of the Agreement. The Agreement is, therefore, ambiguous on its face.

Section 9.01 may not be interpreted in a vacuum, but must be read together with Sections 9.02 and 12.04. This is because the meaning of each contract provision must be determined in relation to the contract as a whole. Section 9.02 provides that part-time employees' vacations are calculated by pro-rating their cumulative length of continuous service by their total hours worked, in proportion to 2080 hours per year. Section 12.04 provides that a full-time employee is one who works 80 hours per pay period (2080 hours per year). Thus, the Agreement implies, at least, that vacation time for an employee like Westland who works on a part-time basis for some period and on a full-time basis for a period should be calculated based upon hours of service. If Westland's vacation is not calculated based upon lifetime hours, she will, in effect, be credited for years of service she has not actually worked. Such an interpretation would negate and conflict with Section 9.02. Even if Section 9.01 appears unambiguous in isolation, Sections 9.02 and 12.04 render the Agreement ambiguous.

In this case, the Employer has submitted evidence, i.e., handbooks and past practice, resolving the ambiguity in favor of its position. An issue concerning the ambiguity of contract language can always be resolved by consideration of extrinsic parole evidence, citing Elkouri, at 61, n. 1, and PORTAGE COUNTY, WERC MA-10327 (CROWLEY, 1998), and WINNEBAGO COUNTY, WERC MA-10022 (MCLAUGHLIN, 1998). Extrinsic evidence relevant to resolution of an ambiguity includes an employer's written policies and past practices, citing CITY OF CHIPPEWA FALLS STREET DEPT., WERC MA-9042 (MCLAUGHLIN, 1996) (written policies), and PORTAGE COUNTY, WERC MA-10327 (CROWLEY, 1998) (past practices).

Grievants' proposed interpretation is unreasonable and implausible. If adopted, it would result in a part-time employee who works ¼ time for twenty-five years, and then became a full-time employee, to get the same amount of vacation as an employee who works full-time for twenty-five years. The parties did not intend to count ¼ time as a "year" of service, but Grievants' proposed interpretation would do so.

The contract, by pro-rating vacation for part-time employees, established the parties' intent to treat full-time employees differently than part-time employees with respect to earned vacation. Just as vacation is earned in a given year based upon the number of hours worked in relation to 2080 hours (full-time employment), vacation is earned in a career based upon cumulative length of service (based upon 2080 hours as a year).

The Employer's current handbook provides, in relevant part that "[i]n general, full-time employees earn vacation time *according to the number of hours worked*; [p]art-time employees will receive pro-rated vacation time based on hours worked; *[a] year of service is defined as 2080 hours*." (Emphasis added). The Employer's prior handbooks contained identical language. At the hearing, Employer witness Mary Schnell testified that the Employer has

followed the vacation policy expressed in the handbook since 1990. Thus, although the Agreement is ambiguous on its face, the ambiguity must be resolved in favor of the Employer because of the handbook language and because of the Employer's longstanding, unchallenged practice, citing CITY OF CHIPPEWA FALLS, WERC MA-9042 (MCLAUGHLIN, 1998), and PORTAGE COUNTY, WERC MA-10327 (CROWLEY, 1998).

Ostensibly, in support of their argument, Grievants have submitted copies of prior collective bargaining agreement provisions regarding vacation eligibility substantially similar to that of the Agreement, along with summaries of negotiations regarding other provisions of the Agreement. This evidence is insufficient to meet Grievants' burden of proof because it actually supports the Employer's interpretation of the Agreement. If the contract language relied upon by a grievant is ambiguous and each party has submitted equally convincing external evidence, the grievant has not sustained the burden of proof, citing Elkouri, at 472. Even if Westland and the Union had submitted extrinsic evidence supporting their position that was "equally convincing" to that submitted by the Employer, their grievance fails, citing Elkouri at 472. The Union's evidence is markedly less convincing than, for example, the handbooks, which explicitly support the Employer's position.

The parties waived reply briefs at the hearing.

DISCUSSION

The issue regarding timeliness is whether Section 15.02 of the Agreement precludes the Grievants from advancing their grievances to arbitration. The "event giving rise to the grievance" in this case, and within the meaning of Section 15.02, is the Employer's act of crediting the Grievants with less vacation time for the current year than what Grievants claim they are entitled to under the Agreement. The Employer's determination of the Grievants' vacation amounts for the current year is a new and separate grievable event. Hence, the Employer's determinations for prior years are irrelevant with respect to whether these grievances are timely. For the same reason, it is irrelevant what the Grievants knew or could have reasonably known of similar grievable events in prior years. Instead, the question is what the Grievants knew or could have reasonably known about the current year's vacation allotments.

Section 15.02 states that an employee "shall" present a grievance within ten days of the grievable event. This is mandatory language. Therefore, a grievance must be filed within ten days of the grievable event in order for it to be timely.

In this case, Grievant Westland filed her grievance on July 19, 1999. Westland testified that on July 9, 1999, she received her regular biweekly Friday paycheck for the pay period June 20, 1999, through July 4, 1999. This was the first check paid to Westland following her twenty-fifth anniversary date of employment on June 26, 1999. The unrebutted

evidence is that her receipt of this check was the first opportunity for Westland to notice that her vacation had not increased to five weeks following her twenty-fifth anniversary due to the manner in which employees were notified about increased vacation amounts, i.e., through information contained on their paycheck stubs. Thus, Westland's notice on July 9, 1999, is "the event giving rise to" her grievance. Since Westland filed her grievance within ten days of July 9, 1999, Westland's grievance is timely under Section 15.02 of the Agreement.

Grievant Grasky filed his grievance on October 21, 1999. As previously stated, Grasky did not testify. Based upon the Employer's biweekly pay system and its payments to employees on the Fridays following each pay period, Grasky would have received a paycheck on October 1, 1999, for the pay period September 12, 1999, through September 26, 1999. This would have been the first check that Grasky received following his twenty-fifth anniversary date of employment on September 13, 1999. In the absence of proof otherwise, this would have been Grasky's first opportunity to notice on his paycheck stub that his vacation allotment was amiss. Thus, Grasky's notice on October 1, 1999, is "the event giving rise to" his grievance. The amount of time from this event to the time that Grasky filed his grievance is twenty-one days. Since Grasky filed his grievance more than ten days from when he first had notice, his grievance is untimely under Section 15.02 of the Agreement.

Turning to the merits, I agree with the Employer that Section 9.01, regarding vacation eligibility for full-time employees, and Section 9.02, regarding vacation eligibility for part-time employees, must be read together. However, I disagree that Sections 9.01 and 9.02 are ambiguous.

Section 9.01 refers to "length of service" in terms of years. It states that "[a]ll full-time employees shall be granted vacations with pay each year based on their cumulative length of continuous service according to the following schedule: . . ." The "schedule" is then listed immediately below this language. The left-hand column is entitled "Length of Service" and enumerates varying amounts of years. The right-hand column is headed "Length of Vacation" and enumerates varying amounts of vacation. Section 9.01 does not define "length of service," but based upon the referenced schedule and columns of "years" and "weeks," the inference is that the number of years of service equates to the corresponding number of weeks of vacation. For example, if you are a full-time employee with one year, but less than five years of employment, then your "Length of Service" of "1 year, but less than 5 years" corresponds to a "Length of Vacation" of "2 weeks." Similarly, if you are a full-time employee with twenty-five years of employment, then your "Length of Service" of "25 years and over" corresponds to a "Length of Vacation" of "5 weeks." This methodology is clear.

In this case, Grievant Westland is a full-time employee. The method for determining her vacation allotment for the current year is to follow the enumerated schedule in Section 9.01. Since Westland has twenty-five years of employment service, she is entitled to five weeks of vacation following her twenty-fifth anniversary date of employment on June 26, 1999.

Section 9.02 states that a part-time employee's "number of [vacation] days shall be determined by the employee's cumulative length of continuous service, prorated for total hours worked, as they relate to 2,080 hours per year." Although Section 9.02 does not refer to a schedule, the use of the schedule contained in Section 9.01 is implied. Without the schedule in Section 9.01, there would be nothing with which to apply the prorated amount from Section 9.02. The prorated amount in Section 9.02 would be meaningless which is not a preferred construction. A part-time employee may know his proration, but without the schedule in Section 9.01 that employee would not know how many days off he/she gets. There would be nothing in which to plug that proration. It is clear that "length of service" in Section 9.02 is understood and determined in the same way as "length of service" in Section 9.01, i.e., in terms of years. If the parties had intended "length of service" in Section 9.02 to be understood in the context of lifetime hours, as opposed to years of employment, then they would have laid out a separate enumerated schedule with which to apply the prorated amount. They did not. The meaning of "length of service" in Section 9.02 is not ambiguous as that term is applied to the vacation allotment for part-time employees.

Even if consideration is given to the parties' prior agreements, the parties' bargaining history, and evidence of past practice, the Employer's argument is not persuasive.

With regard to prior agreements, the Employer points to the language of the 1979-1981 agreement which qualifies "service" for full-time employees in measures of "months." Further, the successive agreements omit "months" while at the same time providing the equivalent of Section 9.02. Thus, the Employer's argument goes, the parties intended to define "service" in terms of lifetime hours for part-time employees, and not in terms of years. Contrary to Employer's argument, the fact that "months" was dropped from Section 9.01 of the parties' 1979-1981 agreement does not evidence an intent to measure "service" as lifetime hours. The successor agreements following the 1979-1981 agreement all have a similar schedule in Section 9.01 that measure "Length of Service" in terms of "years." The intent of the parties following the 1979-1981 agreement, including this Agreement, consider "service" in terms of years. Second, the fact that the equivalent of Section 9.02 was created at the same time as the word "months" was dropped from 9.01, and following the 1979-1981 agreement, does not signal a new intent by the parties to measure "service" in terms of lifetime hours. Rather, it means that part-time employees need to look to the schedule in Section 9.01 in order to calculate their proration. The parties' intent on this point is evidenced in the 1979-1981 agreement's equivalent of Section 9.02:

> PART-TIME VACATION ALLOWANCE: Part-time employees who work no less than eight hundred and thirty-two (832) hours in a twelve month period shall receive vacation with pay on a pro-rated basis according to the following schedule:
> A. After a length of service of (1) year, a pro-rated vacation based on two (2) weeks

B. After a length of service of four (4) years, a pro-rated vacation based on three (3) weeks.

C. After a length of service of ten (10) years, a pro-rated vacation based on four (4) weeks.

Formula:

$$\frac{\text{Hours within the anniversary year}}{2{,}080} \times \text{Vacation benefit based on length of service} = \text{Earned vacation}$$

Length of service meaning the passing of time from the date of hire. (Emphasis added in italics).

In the above emphasized language, the parties intended that "length of service" is defined by "the passing of time from the date of hire," that is, the number of years employed. (Emphasis added.) Thus, the term "length of service" was understood by the parties in 1979-1981 to mean the same thing for part-time as for full-time employees. The fact that this definition is not seen in the parties' succeeding agreements does not imply that part-time "service" is no longer defined in the same way. This is because the above 1979-1981 method of determining vacation for part-time employees is essentially an abbreviated version of the present Section 9.02 in the Agreement. The parties' prior agreements support the Union's position that the parties intended the word "service" to be treated the same for part-time people as for full-time people, i.e., in terms of years.

With regard to the parties' bargaining history, the Employer attempted to change the meaning of "length of service" with its proposal in 1989:

Article 9: VACATION ALLOWANCE

Language clarification only by replacing the word "year" with appropriate number hours paid.

LENGTH OF SERVICE	LENGTH OF VACATION
1040 hrs. to 2079 hrs.	Prorated
2081 hrs to 8319 hrs.	2 weeks
8320 hrs. to 20, 799 hrs.	3 weeks
20,800 hrs. to 35,359 hrs.	4 weeks
35,360+ hrs.	5 weeks

In the 1989 proposal, the "Length of Service" is expressed in terms of lifetime hours. Had the Union accepted this proposal, then the Agreement would be clear and the parties' bargaining history would have supported the Employer's position that the parties treat "length of service" as lifetime hours and not years of employment. However, the Union did not accept this proposal. This indicates that the parties intended "Length of Service" to remain as years and not hours.

With regard to past practice, the record is somewhat mixed. Grievant Westland testified that she received three weeks of vacation after completing five years of employment in 1979 and that she received four weeks of vacation after ten years of employment in 1984. This is consistent with the Union's interpretation of both the Agreement and the 1981-1983 and the 1983-1986 prior contracts. Those earlier contracts provide in Section 9.01 that a full-time employee whose "Length of Service" is four years but less than ten years receives three weeks of vacation and that ten years but less than seventeen years receives four weeks of vacation. Under the Employer's interpretation, Westland's part-time status during 1974 to 1979 would have given her 1.43 years of equivalent full-time employment. However, the Employer's time sheets do not support its position. The Payroll Master Sheet for Westland shows that Westland went from five days of vacation in 1978, to "9 days" in 1979, to "15 days" in 1981, 1982, and 1983, and that she received "20 days" of vacation in 1984. Had the Employer's position of past practice been applied, Westland would have not hit the three and four week vacation levels under the prior contracts until 1980 and 1985, respectively. As it turns out, Westland reached the three and four week vacation levels at a time that is more consistent with the Union's interpretation. Therefore, the Employer's assertion and its witness Schnell's testimony that the Employer has consistently applied its interpretation since 1981 does not have merit.

On the other hand, Westland admitted that from 1991-1993 she did not receive a fifth week of vacation even though under the Union's interpretation she would have been entitled to it due to her seventeen years of employment. This would support the Employer's position that since at least 1990 it has enforced its policy that an employee does not earn a full year of service for vacation purposes until she has worked 2080 hours.

Nevertheless, the Employer's evidence is not sufficient to show that it has consistently applied this policy since 1990. The Employer's documents relating to computer programs, the earliest of which was dated 1990, are fill-in-the-blank questionnaires and communications from individuals who did not testify and who were employed by an outside data systems vendor. The Employer's Payroll Clerk from 1981 to 1999, Schnell, testified that the Employer had a computer system generally and that the computer "takes care of it all." However, the fact that there is a computer system for vacation allotments does not prove that employees knew about it. Schnell testified that up to about 1996, employees regularly received a sheet of paper informing them of their accrued vacation. However, there was no documentary evidence backing this up. Specifically, Schnell admitted that neither the Grievants nor another long-time employee named Audrey Kidd ever received any kind of a document from the Employer

totaling their employment lifetime hours worked. If employees had received a regular and updated summary of their total lifetime hours, the Employer's argument on a past practice would have been stronger.

With regard to the Employer's handbooks, the language is clear that "full-time employees earn vacation according to the number of hours worked" and that "[a] year of service is defined as 2,080 hours." However, that language is in conflict with Sections 9.01 and 9.02 of the Agreement and, as discussed above, those sections are not ambiguous. Further, the handbooks state that "in the event of a conflict, the applicable union agreement will supercede [the handbook]." Therefore, the Union and Grievant Westland are not bound by the Employer's handbooks on this issue and the Agreement prevails.

The Employer's argument in equity, i.e., that Grievants are seeking full-time credit for part-time service, is not persuasive. The record does not support that the parties intended that Westland, and others similarly situated, would have their part-time years of service converted to a full-time equivalent. To the extent that this award results in full-time credit for part-time service in the computation of vacation benefits, that is merely a function of the fact that Section 9.01 and 9.02 of the Agreement award vacations on the basis of continuous years of employment. See, e.g., CITY OF MAUSTON, WERC MA-5398 (HOULIHAN, 1989).

For all of these reasons, I make the following Award and Remedy.

AWARD

In response to the first issue for determination, Grievant Westland's grievance was timely, but Grievant Grasky's grievance was not. In response to the second and third issues for determination, the Employer violated the terms of the Agreement when it denied Westland a fifth week of vacation and, therefore, that grievance is sustained. The Grasky grievance is denied based upon its untimely filing.

REMEDY

St. Mary's/Duluth Clinic Health System shall immediately credit Patricia Westland with a fifth week of vacation.

Dated at Eau Claire, Wisconsin, this 7th day of July, 2000.

Stephen G. Bohrer /s/
Stephen G. Bohrer, Arbitrator

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