BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OFFICE AND PROFESSIONAL WORKERS INTERNATIONAL UNION, LOCAL NO. 9. AFL-CIO, CLC

and

NINE NINETY-EIGHT CREDIT UNION

Case 1
No. 60690
A-5988
(Jennie Heth Grievance)

Appearances:

Mr. Gary Nuber, International Representative, OPEIU, 704 Hillcrest Avenue, Nekoosa, WI 54457, appearing on behalf of Local 9.

Kenehan & Sage, S.C., by **Attorney John Sage**, 8112 West Bluemound Road, Wauwatosa, WI 53213, appearing on behalf of 998 Credit Union.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, OPEIU Local No. 9 (hereinafter referred to as the Union) and 998 Credit Union (hereinafter referred to as the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute over the holiday benefits due to part-time employees under the labor agreement. A hearing was held on April 19, 2002, at the Union's offices in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The matter was submitted on oral arguments at the end of the hearing, whereupon the record was closed. Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Arbitration Award.

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 stipulated that the issues before the Arbitrator are:

1. Did the Employer violate the collective bargaining agreement when it failed to pay the Grievant holiday pay for holidays that fell on days she was not regularly scheduled to work? If so,

2. What is the appropriate remedy?

CONTRACT LANGUAGE

ARTICLE III - SENIORITY

. . .

Section 2. Regular part-time employees shall receive prorated vacation and holidays based on the relationship of hours worked per week to thirty-seven and one-half (37.5) hours.

. . .

ARTICLE VI - HOLIDAYS

Section 1. The following shall be paid holidays:

(A)

Day preceding New Year's Day	Thanksgiving Day
New Year's Day	Martin Luther King Day
Good Friday	Day preceding Christmas Day
Memorial Day	Christmas Day
Fourth of July	
Labor Day	

(B) Three (3) additional floating holidays to be taken at a time mutually agreeable to both the Employer and the employee.

Section 2. When any of the listed holidays fall on a Saturday and/or Sunday, the employees shall be paid holiday pay in addition to their weekly salaries or time off with pay on the Friday immediately preceding or the Monday following the holiday.

. . .

Section 4. If a holiday falls on a regular part-time employees regular scheduled work day, the employee shall be paid regular pay for a number of hours equal to their regular daily working schedule, not to exceed seven (7) hours.

. . .

BACKGROUND

The Employer is a Credit Union in Milwaukee. The Union is the exclusive bargaining representative for the Credit Union's office staff, including regular part-time employees. At the time this grievance arose, there was one regular part-time employee, Jennie Heth. Ms. Heth's regular work schedule was seven hours per day on Tuesday, Thursday and Friday of each week.

Article III, Section 2, of the 1997-2000 collective bargaining agreement provided that holidays and vacations for part-time employees would be pro-rated "based on the relationship of hours worked per week to thirty-seven and one-half (37.5) hours." Under this language, Ms. Heth received four hours of pay for each holiday. This meant that weeks in which a holiday fell on a day she normally would have worked, she received four hours of pay for the day rather than seven, and her weekly earnings were lower than usual.

In formulating its proposals for negotiations over the 2000-2003 collective bargaining agreement, the Union drafted a proposal intended to provide Ms. Heth with her normal salary for holidays falling on her regular work days. The Union's proposal was to add a new section to Article VI – Holidays: "If a holiday falls on a regular part-time employees regular scheduled work day, the employee shall be paid regular pay for a number of hours equal to their regular daily working schedule, not to exceed seven (7) hours." The Employer's bargaining committee accepted the Union's proposal on this issue, and the new language was incorporated into the 2000-2003 collective bargaining agreement. Neither bargaining team made any explicit proposal to remove the existing pro-ration language from Article III, and that article was carried forward unchanged in the new agreement.

July 4, 2001, fell on a day that was not a regular work day for the Grievant. She was not paid for the holiday, and filed the instant grievance. In the grievance, she requested four hours of pay, citing the language of Article III. The Employer denied the grievance, citing the new language of Article VI as controlling holiday benefits for part-time employees. The dispute was not resolved in the lower steps of the grievance procedure and was referred to arbitration. At the hearing on April 19, 2002, in addition to the facts recited above, the following testimony was taken:

Tony Vanderbloemen, OPEIU Local 9 Business Manager

Tony Vanderbloemen testified that he is the Business Manager of Local 9 and was the Union's sole representative in negotiations over the 2000-2003 collective bargaining agreement. According to Vanderbloemen, the proposed change in the part-time holiday language was in response to a request by the Steward, who explained to him that under the existing language of Article III, the Grievant was losing money whenever a holiday fell on one of her work days. Vanderbloemen testified that he held two negotiating sessions with the Employer, and that he explained this rationale for the proposal. He stated that he never proposed or discussed deleting the existing language of Article III, which had been in place for many years, because his aim was to improve the benefit, not to reduce it. At the hearing, Vanderbloemen produced a chart showing that over a five year period (1999-2003), the old language would have generated 40 hours of holiday pay per year, the Union's view of the language would generate between 49 and 55 hours of holiday pay per year, and the Employer's view of the language would reduce the holiday pay to between 21 and 35 hours per year.

On cross-examination, Vanderbloemen testified that he proposed to put the new language in Article VI – Holidays, instead of Article III – Seniority, simply because he thought that was the appropriate location for it. Asked why he had not proposed specific language on how non-work holidays would be treated, Vanderbloemen stated that he had, in the sense that the old language covered those situations, and the new language said "If a holiday falls on a regular part-time employees regular scheduled work day" which indicated that something else would happen on a non-work day. Vanderbloemen agreed that Article VI was more specifically aimed at holidays than was Article III, and he agreed that he had never told the Employer's bargaining team that Article III would continue to apply to part-time holidays. That specific question was never discussed. He also agreed that, if the Grievant's work schedule included Mondays, the Employer's view of the language would probably result in her receiving more holiday pay than the old language, because most holidays fall on a Monday. He noted, however, that the Grievant's work schedule was in place when the proposal was made, and did not include Mondays.

Dale Klingbeil, President, Nine Ninety-Eight Credit Union

Dale Klingbeil testified that he is the President of the Credit Union. He did not participate in negotiations, but reviewed the Union's proposals with his bargaining team. They explained to him that the holidays proposal was intended to replace the old holiday provision. Klingbeil said that his understanding of the old provision – Article III, Section 2 – was that all holidays were paid at pro-rata salary, whether worked or not.

Christopher Demske, Chairman of the Board, Nine Ninety-Eight Credit Union

Christopher Demske testified that he is the Chairman of the Board for the Credit Union and participated in contract negotiations with Local 9. Demske understood that the Union's proposal was intended to remedy the situation where the part-time employee received a smaller weekly check when a holiday fell on her normal workday. However, he also understood it to be a complete proposal, intended to replace the existing benefit. The issue was only discussed in the first negotiating session, and Demske's recollection was that Vanderbloemen said it would replace the pro-ration of pay for non-work days.

On cross-examination, Demske stated that before negotiations he studied the contract, and he understood how Article III, Section 2, worked. He explained that he believed the new language in Article VI would control holidays for part-timers and that he did not propose to change Article III because he thought the more specific provision would render it meaningless. Reviewing the chart prepared by Vanderbloemen, Demske agreed that under the Employer's interpretation, the Grievant would receive less holiday pay as a result of the new language during the term of the agreement. However, he noted that the chart was never presented during negotiations, so the Employer's team had no idea whether the Grievant would gain or lose from the new language. They viewed it simply as an equity proposal, because that was the way the Union presented it.

On re-direct, Demske observed that the language of Article III was still relevant to the vacation benefits for part-timer employees, and thus the provision could not be deleted from the contract. He opined that when new language changed a past practice, the new language would control over the practice. Thus, the language of Article III referring to pro-rated holiday benefits was rendered meaningless by the change in Article VI.

Gregory Scibek, Treasurer of the Nine Ninety-Eight Credit Union

Gregory Scibek testified that he is the Treasurer of the Credit Union and was a member of the Employer's bargaining team. The Union presented the proposed change in Article VI as a matter of equity for the Grievant, and the Employer agreed to make the change. Scibek said the bargaining team did not understand this to be an increase in benefits, or a supplement to the benefits in Article III. Instead, it was intended to replace Article III. He attributed the failure to delete the holiday language in Article III as a mistake. After three rounds of direct examination, Scibek testified that he told Vanderbloemen across the table the part-time employee would not receive pay for holidays outside her normal schedule.

Tony Vanderbloemen (recalled)

Recalled to the stand in rebuttal, Vanderbloemen denied that any member of the Employer's bargaining team ever said that the new language would replace the language of

Article III or that the Grievant would no longer be paid for holidays falling outside her normal work schedule. In fact, Vanderbloemen said he specifically told the Employer's team that the Grievant would continue to receive pay on non-work day holidays.

Christopher Demske (recalled)

Christopher Demske denied that Vanderbloemen ever told the Employer's bargaining team that the Grievant would continue to receive pay on non-work day holidays. On the contrary, Demske said Vanderbloemen was told that Article VI would control all holiday benefits for part-timers.

Gregory Scibek (recalled)

Gregory Scibek denied that Vanderbloemen ever told the Employer's bargaining team that the Grievant would continue to receive pay on non-work day holidays.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Union

The Union takes the position that there is nothing ambiguous about the contract and that the Grievant is plainly entitled to full pay for holidays falling on her normal work days and pro-rated pay for holidays falling on her normal off days. The Union argues that it proposed to improve the Grievant's existing holiday benefit, not to replace it with a completely different and lower benefit. The Employer's interpretation results in consistently lower holiday pay for the Grievant than the prior language. Certainly, the employee did not seek a reduction in her benefits and it makes no sense to think that the Union would have sought such a result.

There is no evidence at all that anyone sought to remove the pro-ration language in Article III or that its continuation in the contract was some sort of error or oversight. The Employer's complaint that its bargaining team did not realize that the new language was strictly an increase in the Grievant's holiday benefits is beside the point. The old language was clear, and everyone understood that it provided her with four hours of pay for all holidays. The additional language is clear, and everyone understood that it increased that benefit to seven hours of pay on holidays falling on her regular work days. Both provisions are in place in the current contract. Read in conjunction with one another, they plainly provide for pro-rata pay on non-work day holidays and regular pay on work day holidays. The Arbitrator is not free to

simply interpret away the language of Article III – under the normal principles of interpretation it must be given meaning and effect. The Union stresses that there is nothing unfair, unusual or absurd about this result. It is a routine improvement in benefits in a collective bargaining agreement.

The Union argues that the claims by members of the Employer's bargaining team that they were misled in negotiations raise issues of credibility that are difficult to resolve. The Union had a single spokesperson present, and he denies having misled anyone. However, the Union suggests that the resolution of this credibility issue may lie in looking to what the parties actually did, rather than what the Employer's bargainers claim they meant to do. The parties left the current language intact and added new language enhancing the benefit under certain circumstances. In short, they did precisely what the Union claims was done. For all of these reasons, the Arbitrator should grant the grievance, make the Grievant whole for any losses and order the Employer to abide by the contract in the future.

The Employer

The Employer takes the position that the Union seeks in arbitration to secure benefits beyond those which were negotiated at the bargaining table. The Union's bargainer came to the table with a complaint that the old system of paying pro-rata holidays was inequitable because it shorted the Grievant's paycheck in some weeks. The Union sought to restructure the benefit in the name of fairness, and the Employer's bargaining team agreed. They were not given to understand that the Union's goal was an overall increase in these benefits, or that the new language was intended to be less than a comprehensive statement of the holiday benefits for part-time employees. The fact that the old language was carried forward is somewhat inexplicable, but is rather clearly an error.

The Employer agrees that language cannot be ignored, but points out that the Arbitrator has the duty to resolve conflicts between contract provisions, and argues that these two provisions present just such a conflict. Article III says that pay is pro-rated in all circumstances. Article VI says that pay is at the normal rate on regular work days. The two cannot be readily reconciled, and at a minimum this presents an ambiguity that must be resolved by the Arbitrator. It is axiomatic that specific language governs over general language, and Article VI, as the more specific provision, must be given precedence. Article VI is also the newer language, and represents the most recent statement of the parties' intent as to holidays. The more specific and more recent language should be held to govern the benefit over the older, more general provision. Moreover, the principles of interpretation call for the proponent of a piece of language to bear the burden of any ambiguity, on the grounds that that party had it in its power to propose clear language. The Union was the proponent of the change here, and the instant dispute is the result of the Union's inartful drafting of its proposals. If the Union had meant to provide holiday pay for non-work day holidays, it had it within its power to be clear about that. It was not clear. Instead, it led the

Employer to believe that the new language was just what it appeared to be on its face -- a comprehensive statement of the holiday benefits for the Grievant. That is the interpretation placed on the language by the Employer, and the Arbitrator must conclude that the Union has not borne its burden of proving the Employer wrong. Accordingly, he should deny the grievance in its entirety.

DISCUSSION

The substance of the question before the Arbitrator is whether the contract gives part-time employees a two part holiday pay benefit – pro-rata pay for holidays outside the normal schedule and regular pay for holidays falling on regular work days – or a single benefit of regular pay for holidays on regular work days. Prior to the 2000 negotiations, the benefit was pro-rata pay for all holidays. This benefit was provided under Article III, Section 2. In that round of negotiations, language was added in Article VI providing for regular wages when holidays fell on a regular workday. The rationale for the new language was that the part-time employee lost money in weeks when a holiday fell on her regular work day, because she received only four hours wages for that day, rather than seven. The old language of Article III was left in place after the negotiations, leading to this dispute over the scope of the benefit. The Employer contends the new language was intended to replace the old benefit, while the Union argues that it was intended to supplement it.

The parties agree that, prior to the 2000 negotiations, Article III provided for pro-rated holiday and vacation benefits for part-timers, and that the pro-rated holiday benefit was applicable to all of the holidays listed in the contract, not merely those that fall on regular work days. Since this language continued unchanged in the 2000-2003 contract, the only way in which the Employer can prevail in this proceeding is if the addition of Article VI, Section 4, had the effect of negating the holiday language in Article III. The Employer argues that there are sound reasons for finding that it did. First, the two provisions are in conflict, and the newer and more specific language should be given primacy. Second, the bargaining history shows that the parties mutually understood that Article VI would cancel out Article III, Third, the Union as the author of the disputed language should bear the burden of the ambiguity.

The proposition that specific language governs over general language is well established in contract interpretation, but it does not help the Employer's cause. Certainly, if the question here was what benefit should be paid for holidays falling on a regular work day, Article VI would govern, since it specifically addresses that question. That is not the question. The question is what happens on holidays falling outside the regular schedule, and Article VI specifically does not apply to that situation. The Employer's thesis is that, because Article VI deals with holidays, and because it does not make any provision for holidays outside the regular work schedule, it follows that the parties intended that there would be no benefit for

those days. That argument is somewhat circular, in that it begins with the presumption that the parties intended Article VI to be the only statement about holidays in the contract. Yet the contract as written, ratified and signed, contains another statement about holiday benefits.

The principle of specific language controlling over general in the case of conflict does come into play here, but it serves to refute the Employer's claim that these two contract provisions stand in irreconcilable conflict with one another. One of the central principles of contract construction is that language is presumed to have meaning, and that an arbitrator should not read a contract so as to render language meaningless or to delete it from the contract, unless no other plausible interpretation is available. It is a completely plausible reading of this contract to say, as the Union does, that the parties overlaid the more generous, more specific benefit for work day holidays on the existing, more general pro-ration benefit, with the effect that the new language controls work day holidays and the old language controls non-work day holidays. This interpretation gives meaning to both provisions, and allows the more specific language of Article VI to control over the general language of Article III in the specific circumstance of a work day holiday. 1/

1/ For its part, the Union argues that the language used in Article VI specifically contemplates that there will be a different benefit for non-work day holidays: "If a holiday falls on a regular part-time employees regular scheduled work day. . ." The Union argues that use of the word "If" to start the provision indicates that it is meant to be an exception to a general rule, e.g. the pro-ration under Article III. While I agree that this wording is consistent with the Union's reading of the language, it is the existence of Article III, not the conditional language used in Article VI, that indicates the existence of another benefit. Absent Article III, the language of Article VI can just as easily be read to indicate that there is no benefit when the holiday falls outside the regular work schedule.

The Employer next asserts that the bargaining history shows that the new language was intended to provide the sole holiday benefit for part-timers. Members of the Employer's bargaining team testified that the Union presented this proposal as a matter of equity, not as an improvement in benefits, and that they were given to understand that it would replace the pro-ration of benefits under Article III. The Union's bargainer, Vanderbloemen, agreed that he presented the contract language as being justified by equitable considerations, but denied saying it would replace Article III and claimed that he told the Employer the pro-ration would continue for non-work days.

I have no doubt that the Employer's bargaining team subjectively believed that the new language would provide the only part-time holiday benefit. I have considerable doubt as to whether Vanderbloemen expressly represented across the table that it would replace Article III, just as I doubt that he expressly represented that Article III would remain in effect for holidays outside the normal work schedule. During the processing of the grievance, the Employer provided a comprehensive and detailed statement of its reasons for rejecting the grievance

(Joint Exhibit #2). The statement reviews the facts and the various principles of contract interpretation that the Employer relies on, and makes the argument for denying the grievance. It says nothing about an explicit agreement during bargaining that Article VI would replace Article III, even though one would expect that to be a central argument in support of denying the grievance. Moreover, if there is was a specific discussion to the effect that this new language would replace the holiday benefit in Article III, it becomes more difficult to understand why that language was not amended to reflect the discussion. It makes more sense to conclude that the Employer's team overlooked that change if there was never a specific discussion of how the new language would affect the existing language.

As for Vanderbloemen's testimony that he told the Employer's negotiators that Article III would continue to control non-work day holidays, this testimony was given on rebuttal after the members of the Employer's team had made the opposite claim. Again, if the issue was specifically discussed in bargaining, one would reasonably expect it to be prominently mentioned in the initial presentation.

Each party believed that it understood the impact of the new language, and each party genuinely believes that it is correct in its interpretation of the contract. 2/ Doubtless, each party believes that its position should have been clear to the other in bargaining. However, I cannot conclude on this record that there was any express discussion across the table of the continued viability of Article III. Even if I could make such a finding, bargaining history is relevant only for the purpose of giving meaning to ambiguous language. The parties understood the meaning of Article III. The parties also understood the meaning of Article VI, at least as to the situation it was aimed at, the work day holidays. There is no ambiguity in the language of the contract. Instead, the Employer seeks to have the Arbitrator use bargaining history to amend the contract. Amendment of a contract is possible in an arbitration, but only on the basis of overwhelming evidence of mutual agreement. As Arbitrator Harry Platt noted, in the context of considering a past practice that was alleged to have amended the contract, the evidence offered to support such a modification "must be unequivocal and the terms of modification must be definite, certain, and intentional." 3/

2/ My conclusion that Vanderbloemen genuinely intended that Article III would continue to apply to non-work day holidays is influenced by the fact that that is the only way in which his proposed change on work day holidays would not result in a reduction of benefits for the part-time worker. Given that her complaint was that she was losing pay when a holiday fell on her regular work day, a proposal to remedy the problem by reducing her annual holiday pay would have been an unusual response. Yet, that is the inevitable result if the Employer's theory is correct. It is not impossible that the Union intended such a result, but it is quite unlikely.

3/ GIBSON REFRIGERATOR CO., 17 LA 313, 318 (PLATT, 1951).

The final argument of the Employer is that the Union, as the party that drafted the language of Article VI, must bear the burden of the resulting ambiguity. This is an accurate statement of a general principle of interpretation, albeit a principle of last resort. However, as with the argument about specific vs. general language, the cited principle does not actually apply to this dispute. The language generating this grievance is not Article VI. Everyone agrees what that language means. The dispute here is whether Article III continues to have any meaning. To the extent that the Union is the proponent of Article III's continued viability, it satisfied its burden by showing that the language continued to exist in the new contract. The burden then falls on the Employer to explain why that clear language should be ignored. As stated above, I find that the Employer's negotiators had a good faith belief that that would be the outcome of the change in the contract. However, they took no steps to insure that outcome, and the contract as written does not allow me to interpret Article III as applying to vacations alone. It is explicitly applicable to holidays as well, and I therefore conclude that the part-time employee is entitled to pro-rated holiday pay for non-work day holidays.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Employer violated the collective bargaining agreement when it failed to pay the Grievant holiday pay for holidays that fell on days she was not regularly scheduled to work. The appropriate remedy is to made the Grievant whole for her losses by paying her pro-rated holiday pay for those holidays.

Dated at Racine, Wisconsin, this 7th day of August, 2002.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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