BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL UNION 3938, WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

WAUKESHA WATER UTILITY

Case 8
No. 61438
MA-11940

(Vacation Bonus Period Grievance)

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, WI 53401, appearing on behalf of AFSCME Local 3938.

Davis & Kuelthau, S.C., by **Attorney Joel Aziere**, 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202, appearing on behalf of the Waukesha Water Utility.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 3938 (hereinafter referred to as the Union) and the Waukesha Water Utility (hereinafter referred to as either the Utility or the Employer) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen to serve as arbitrator of a dispute over the Utility's decision to change the available vacation bonus periods for Pat Waite. The undersigned was so designated. A hearing was held on April 30, 2003, at the Utility offices in Waukesha, 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 parties submitted the case on oral arguments at the close of the hearing. A stenographic record was made of the hearing and the arguments, and a transcript was received on May 16th, 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 matter was properly before the Arbitrator and that the issues presented by this grievance are:

1. Did the Utility violate the collective bargaining agreement and/or long established past practice when it established Pat Waite's vacation bonus period in January of 2002?

2. If so, what is the appropriate remedy?

CONTRACT LANGUAGE

ARTICLE II - MANAGEMENT RIGHTS

1. The Employer has all management rights it possesses by law except as modified by this Agreement.

2. Management rights are prerogatives and functions which encompass those aspects of Utility operations which do not require discussion with or concurrence by the Union or rights reserved to management which are not subject to collective bargaining.

3. Except as modified by this Agreement, it is agreed that the rights, functions and authority to manage all operations and functions of the Waukesha Water Utility are vested in management and include, but are not limited to, the following:

A. To prescribe and administer reasonable rules and regulations.

B. To manage, evaluate and otherwise supervise all employees.

C. To hire, promote, transfer, assign and retain employees.

D. To suspend, demote, dismiss or take other disciplinary action against employees for just cause.

E. To layoff employees.

F. To relieve employees of duties.

G. To determine the services to be provided, the duties to be performed, the number of positions and classifications and to reclassify employees.

H. To maintain the efficiency and economy of the Utility operations.

I. To subcontract work.

J. To take whatever action is necessary to comply with the law.

K. To determine the methods, means and personnel by which Utility operations are to be conducted.

L. To take whatever action may be necessary to carry out the objectives of the Utility in emergency situations.

M. To exercise discretion in the operation of the Utility, the budget, organization, assignment of personnel and the technology of work performance.

N. All other rights of management which are not enumerated above.

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ARTICLE XXVI - VACATIONS

1. Non-Peak Periods. To encourage vacationing during off peak periods, extra vacation days will be granted to employees who take time off between annually specific bonus periods. Vacation pay is provided at the employee's current base rate. Each week of vacation taken during the bonus period entitles an employee to one (1) extra vacation day (the week must be taken in full or broken up by day within the period). The bonus days must also be taken during the bonus period of the affected employee.

2. Vacation Schedule. Employees are entitled to vacation on the anniversary date of employment according to the following schedule:

Years Employed	Weeks Granted
each 1 - 8	2 @ 5 days
each 9 – 15	3 @ 5 days
each 16 - 22	4 @ 5 days
each 23 - 29	5 @ 5 days
each 30 and over	6 @ 5 days

. . .

6. Supervisory Approval. Department supervisors are to approve vacation schedules and changes to assure minimum acceptable staffing is available so the departments remain operational on normal business days. Employees are permitted to schedule vacation time in days or half-days with department supervisor approval.

Department supervisors shall use seniority to determine scheduling priority when more than one (1) employee chooses the same vacation period between January 1st and March 15th of the current year.

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BACKGROUND

There is very little dispute about the facts giving rise to this grievance. The Utility provides water to the citizens in Waukesha, Wisconsin, and the Union is the exclusive bargaining representative for the Utility's non-supervisory employees. Pat Waite has worked for the Utility since 1990 and handles the Utility's customer billing. In addition to preparing the information to generate billings, she is responsible for other tasks such as entering new account information, pre-calculation, recording meter changes and inventories, and the like. The preparation of billing information generally occupies the latter portion of each month, and the other duties are performed when she is not working on billings.

For over 25 years, the Utility has had a system of vacation bonus periods. In an effort to encourage employees to take vacations at times other than peak demand for their services, employees are allowed to earn one extra day of vacation for each five days taken in specified non-peak periods. The bonus vacation day or days must also be taken within the non-peak periods. Employees are entitled to use their vacation at other times, but they do not earn the bonus days. This system was incorporated to the collective bargaining agreement with the Union when the initial contract was bargained in the early 1990s. The language has been carried forward unchanged since then, and appears in the current contract as subsection 1 of Article XXVI.

Prior to 2002, Waite's specified bonus period consisted of 105 consecutive days — the months of June, July, August, and the first 13 days of September. This is the same bonus period as the outside crews have. In 2002, the Utility changed her bonus period to the first 15 calendar days of March, April, May, June, August, September and November. While still adding up to 105 days, this eliminated the longer contiguous period she had previously enjoyed, and in many months includes only 1 full work week. In 2002, only 11 full work weeks fell within the half month bonus period schedule. She filed the instant grievance, challenging the modification of her bonus period schedule.

At the arbitration hearing, in addition to the facts recited above, Waite testified that the new bonus period was not as useful a block of time as the former period, and that it denied her the flexibility to take several weeks off at a time when she could be earning bonus vacation days. She noted that her bonus period was the only one among represented employees that did not include entire calendar months. Waite testified that she is a member of the Union's bargaining team, and that the Utility has never made any proposal to change the vacation bonus provisions of the contract. While she agreed that her billing work was concentrated in the last two weeks of each month, she said that she was equally busy in the first two weeks of each month with her other duties. She also noted that she had a trained backup who could do the billing work if she was gone.

Peggy Steeno testified on behalf of the Utility. Steeno has been the Administrative Services Manager since 1999, and she supervises Pat Waite. She was the person who decided to change the designated bonus period for Waite's position. After observing the administrative operations of the Utility for several years, Steeno decided it made no sense to designate the summer months as a non-peak time for Waite, since the peak demands for her position recurred monthly — specifically, the need to get the billings out by the last work day of each month — and were no different in the summer. Steeno said that Waite was working productively at all times during the month, but that the work in the first half was not time sensitive, while the billing work was time sensitive.

Steeno reviewed the history of the vacation bonus system, and said that there have been numerous adjustments of bonus periods over the years, though she conceded many of them had been minor. She did not know how many of the changes had been discussed with the Union. Steeno also reviewed the history of the bonus system language in Article XXVI. She noted that the system itself pre-dated the Union's certification, and that the Union had proposed the original language for this provision. That proposal said the bonus periods would be "annually specified" and was agreed to by management. However, in the drafting of the agreement, the Utility's former attorney made an error and wrote the term as "annually specific." That term has been carried forward unchanged.

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

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the Grievant is the victim of disparate treatment, in that she is the only represented employee at the Utility who does not have a bonus period which includes months of contiguous time. The result of the change is to make the bonus period useless for any extended vacation she might wish to take. In many months, the 15-day period encompasses only a single full work week. Clearly, the Grievant is disadvantaged relative to other employees.

The Utility's change in the bonus period is inconsistent with the practice it has applied to bonus periods in the past, in that it denies this employee the right to use consecutive weeks of vacation during the bonus period. It is undisputed that all other represented employees, and the Grievant herself before this change, have been allowed access to consecutive weeks of bonus time. This is an employee benefit, and the Utility is not free to simply diminish the benefit on a whim. It is well established that practices concerning employee benefits must be honored, unless changed through mutual agreement. The Union warns that accepting the Utility's theory of the case would allow it to designate every Tuesday and Thursday as the bonus periods, and thereby completely deny this negotiated benefit to an employee. That would be an absurd and unjust result, but it is not far removed from the result in this case. Just as that attempt to undermine the established benefit would have to be rejected by an arbitrator, so too must this less onerous example.

The Position of the Utility

The Utility takes the position that the contract vests in management the right to decide what constitutes a peak period for an employee and that the Arbitrator cannot usurp that right. Here, the evidence is clear that management acted reasonably in designating a bonus period for the billing operation that avoided the monthly peaks of the job. While that may be inconvenient for the Grievant, the contract language itself ties the bonus period to the demands of the specific job, not to the desires of the specific employee. Since the difference in the benefit is the direct result of a difference in her job, there can be no argument that the Grievant has in some way been subjected to disparate treatment.

Nor can the Union prove any type of binding past practice. The fact is that changes have been made in the designated peak periods many times, both before and since the certification of the Union. To the extent that there is a practice, it is that the peak periods of a job can be reviewed and changes can be made to the bonus period. The original tentative agreement on this Article said that the bonus periods would annually specified, and that clearly means that they can be changed each year if need be. The typographical error that led to using the term "annually specific" does not change the intent of the parties, and does not affect the Utility's history of making changes in the bonus periods when it felt that changes were justified.

The contract language plainly allows the Utility to identify the non-peak periods for each job, and to designate those as bonus periods. Inasmuch as management's decision that the Grievant's job had monthly peaks is reasonable, and since there is no evidence of any mutual agreement to restrict management's rights in this area, the grievance must be denied.

DISCUSSION

This is a contract interpretation case, and the outcome of any such case hinges on the language used in the collective bargaining agreement. Section 1 of Article XXVI defines the bonus vacation benefit:

> 1. Non-Peak Periods. To encourage vacationing during off peak periods, extra vacation days will be granted to employees who take time off between annually specific bonus periods. Vacation pay is provided at the employee's current base rate. Each week of vacation taken during the bonus period entitles an employee to one (1) extra vacation day (the week must be taken in full or broken up by day within the period). The bonus days must also be taken during the bonus period of the affected employee.

The dispute here is over what is meant by "annually specific bonus periods." The Utility reads this provision to mean that it can annually change the bonus periods to match its judgment of what are non-peak periods. The Union takes the position that the periods cannot be unilaterally changed, and that even if there is some ability to change the periods, the change must preserve the overall value of the benefit to the employee.

A fair reading of this language leaves little doubt that the bonus period is more than just a specified grouping of 105 calendar days in the course of the year. By definition, bonus periods are off peak periods. What constitutes a peak period necessarily requires a judgment as to the demands of the employee's position. The initial question is who makes that judgment and by what standards.

Contrary to the Union's interpretation, I conclude that the judgment as to what is and is not a peak period rests with management, and is not something that must be bargained during the term of the contract. This conclusion rests on the nature of the decision — which in some respects goes to the heart of management's function — and the reservation to management in Article II of the rights to "determine the services to be provided, the duties to be performed" . . . "maintain the efficiency and economy of the Utility operations" and to "exercise discretion in the . . . assignment of personnel." The decision as to what is and is not a peak period implicates the exercise of each of these rights, and absent clear language or well established practice to the contrary, I cannot conclude that Article XXVI compels the Utility to share that decision with the Union.

The Union does assert that a past practice exists, in that the Grievant has had the same bonus period for a dozen years and because, before this, no bargaining unit employee has ever had a bonus period that did not guarantee contiguous months. With respect to the Grievant's previous bonus period, this cannot be said to be a binding past practice of the parties. It is more properly characterized as a "present way" of doing things. The distinction was explained by Arbitrator Harry Shulman over 50 years ago:

> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases, there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. *Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion*. . . FORD MOTOR COMPANY, 19 LA 237, at 241-42 (SHULMAN, 1952), emphasis added.

Here, there is not just "the absence of a contractual provision to the contrary," there is language that makes it clear that changes may be made. The designation of bonus periods is not static. By the terms of Article XXVI, they are "annually specific." Even making allowances for the awkward phrasing, which apparently is the result of a typographical error in the early days of this bargaining relationship, the language can only be read to mean that the bonus periods are determined on a yearly basis. This necessarily means that there can be changes in them. 1/

1/ The Utility presented evidence of past changes in the bonus periods. Most of these were minor, such as the addition of new positions to the schedules, and many predated the certification of the Union. These examples would not be sufficient to show agreement by the Union that the Utility could make unilateral changes in bonus periods, but they do demonstrate the Utility's belief that it had that right.

The decision as to what is an off peak period is management's and it may be revisited each year. Management's discretion in making and reviewing this decision is not completely unfettered. As with any exercise of management rights, it may not be arbitrary or capricious. In the face of a challenge to the decision, it falls to management to provide objective evidence that the workload of the a position is subject to variations, and that the times it designates legitimately represent the periods of lower demand for the position's services.

The Union suggests that management's decision as to a bonus period for the Grievant may be arbitrary, in that it subjects her to disparate treatment. Disparate treatment is a concept most commonly used in analyzing acts of discipline under a just cause standard, but it can also be evidence of arbitrariness. That is, if one employee is treated differently and less favorably than other similarly situated employees, there can be a reasonable question about the grounds for the decision. However, by definition, disparate treatment, requires more than just different treatment of employees. It requires that the employees be similarly situated. That is, the difference in treatment must be based on something other than a difference in the work records, skills or other job related attributes of the workers or their jobs. In this case, the Grievant is the only bargaining unit employee whose non-peak periods have been designated as portions of months, but she is also the only bargaining unit employee whose primary responsible is in billing, which is a monthly activity. The Grievant concedes that the billing work is concentrated in the last two weeks of the month, and that is a reasonable basis on which management could determine that those are peak periods for her job. 2/

2/ This distinction between the cycle of activity in the Grievant's job and the jobs of others also answers the Union's assertion of a practice of granting bonus periods containing contiguous months. Assuming that the administration of this Article gives rise to a binding practice, it bears remembering that while a practice can supplement or clarify ambiguous language, it cannot read the language out of the contract. If there is a practice here, it is more plausibly seen as a practice of granting the longest contiguous bonus periods possible, so long as those bonus periods are consistent with Article XXVI's clear requirement that they mirror the non-peak periods for the job. For most of the Utility's jobs, a bonus period of the June through mid-September is the longest contiguous period consistent with the seasonal demands of the positions. Given the peculiar demands of the Grievant's billing position, the Utility could rationally judge the first 15 days of the month as the longest contiguous bonus period available.

The Utility's decision to designate the first 15 days in seven calendar months as the Grievant's bonus period does impair her enjoyment of the benefit, compared with her former schedule. It may be that the Utility's decision could have more reasonably been structured in a way that insured the Grievant access to consecutive work weeks as her bonus period, while still encouraging her to use vacation outside of the peak periods of bill preparation activity. However, the standard applicable to the decision is not whether it is the most reasonable balance between her interests and the Utility's. The standard is whether the decision was arbitrary or capricious. As discussed above, there is a reasonable basis for the difference in the bonus period for the Grievant and those of other unit employees, and the bonus periods selected reflect that difference.

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

AWARD

1. The Utility did not violate the collective bargaining agreement and/or long established past practice when it established Pat Waite's vacation bonus period in January of 2002;

2. The grievance is denied.

Dated at Racine, Wisconsin, this 10th day of June, 2003.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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