

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS GENERAL UNION LOCAL 662**

and

**MARSHFIELD ELECTRIC AND WATER DEPARTMENT**

Case 159

No. 64228

MA-12845

(Sick Leave Pay Out Grievance)

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**Appearances:**

**Ms. Andrea Hoeschen**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appearing on behalf of the Union.

**Mr. Steven Zach**, Boardman Law Firm, appearing on behalf of the Employer.

**ARBITRATION AWARD**

The Union and Employer noted above are parties to a 2002-2003 collective bargaining agreement that provides for final and binding arbitration of disputes. The parties jointly asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear the grievance regarding sick leave pay outs. A hearing was held on November 15, 2004, in Marshfield, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on December 23, 2004.

**ISSUE**

The parties ask:

Is the Utility violating the collective bargaining agreement by changing the sick leave pay out policy to allow only for lump sum pay outs to department employees? If so, what is the appropriate remedy?

## **BACKGROUND**

The grievance is over how employees are paid accrued sick leave when they leave the Employer. Article 12, Section 5 of the labor contracts states:

Employees hired prior to January 1, 1982, upon retirement, death, discharge, total disability, or voluntary quitting with adequate notice shall be paid their accumulated sick leave benefits at their then existing regular rate. Employees hired after January 1, 1982, must have at least five (5) years of seniority before they shall be eligible to be paid their accumulated sick leave benefits under the above provision.

Article 2, Section 2, states:

The employer agrees that all conditions of employment in its individual operation relating to wages, hours of work differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, except as otherwise negotiated.

The Utility had previously allowed employees to use their accrued sick leave in increments to stay on the Utility's health insurance plan or payroll, bridging a gap between their last day of work and their actual retirement date. The Utility changed its policy so that accrued sick time will be paid only in a lump sum to retirees. The Union filed a grievance over the change on March 23, 2004. Utility Manager Joseph Pacovsky, in denying the grievance, sent the following letter to Union Business Agent Bob Russell:

The craft and non-craft units grieve the fact that the Utility changed its policy pertaining to the manner in which accrued sick leave is paid out upon an employee's retirement. A meeting was held between both units and the Utility on April 6, 2004. The Utility believes that the change in its policy does not violate the terms of the labor agreements. Therefore, it denies the grievance.

To the extent the union is arguing violation of past practice, given that both units are currently in negotiations, the Utility disavows any practice related to this issue.

Both contracts provide that sick leave benefits shall be paid to employees "upon retirement." The policy recently adopted by the Utility calls for payment of sick leave benefits in a lump sum at the time of retirement. We believe this policy accomplishes exactly what is required of the Utility under the terms of the contract. (Article XII, Section 5). Furthermore, Article XXII, Section 3

provides that in calculating an employee's termination date, the Utility should take into consideration accrued vacation time and any paid holidays falling within the vacation period. There is no reference to using accrued sick leave in order to determine the last working date. This is consistent with the new policy's calculation of the last working date. Finally, the contracts contain a management rights provision which reserves to the employer all rights and functions of management. We believe this covers change in policy such as that at issue in this case.

The union believes that the maintenance of standards provision found in Article II, Section 2 applies. The Utility disagrees. Only those conditions of employment related to wages, hours of work differentials and general working conditions are subject to this provision. We do not believe the issue of whether to pay sick leave benefits as a lump sum or allow an employee to utilize them to change the last day of work constitute an issue that relates to wages, hours of work differentials or general working conditions.

Jeff Holbrook, the Union Steward for the craft unit, has been employed at the Utility for 17 years. He noted that employees get insurance paid between the ages of 62 to 65, and employees who plan to retire at age 62 have used their vacation and sick leave before they reach age 62. Holbrook knew of a couple of employees who left the job somewhere between 40 and 60 days before their true retirement date by using accrued benefits. Under the new policy, vacation can still be used prior to the birthday for retirement but sick leave is to be paid out in a lump sum. No one has sought to cash out the sick leave since the policy changed.

### **THE PARTIES' POSITIONS**

The Union asserts that the maintenance of standards clause precludes the Utility from changing a benefit without bargaining, even during a contract hiatus. There is no dispute that the provision of the benefit was a past practice. A Utility policy specifically allowed employees to use sick leave as a bridge between their last day of work and their official retirement date. A public sector employer has an obligation to maintain the *status quo* of wages, hours, and conditions of employment during a contract hiatus. An employer may notify the union of its intent to change a benefit that is solely a past practice. A maintenance of standards clause operates to give all existing employee benefits the protection of the contract, and maintaining the *status quo* includes maintaining those benefits protected by the maintenance of standards clause.

The Union contends that arbitrators have recognized that practices based on mutual agreement may be subject to change only by mutual agreement, and that a maintenance of standards clause insures that past practices that predate the contract are continued, except

where expressly modified. Thus, the employer cannot eliminate the benefit unilaterally and the change must be bargained. If an employer could unilaterally repudiate a benefit protected by a maintenance of standards clause during a hiatus in which it must maintain the *status quo*, then the maintenance of standards clause would be nullified. No one would ever contend that an employer can unilaterally modify benefits protected by a contractual wage provision, vacation provision or seniority provision, even during a contract hiatus. A maintenance of standards clause is entitled to no less respect, and the benefits it protects must be maintained unless a change is bargained.

### **The Employer**

The Employer submits that any past practice was disavowed during bargaining. The parties stipulated that they were involved in bargaining at the time of the policy change. An employer may disavow a past practice by advising the union during the course of bargaining that it no longer considers the practice to be in effect or recognized. Moreover, the policy is consistent with the labor agreement. Article 12, Section 5, provides that sick leave benefits shall be paid to employees upon retirement. The policy requires payment of sick leave benefits in a lump sum at the time of retirement. Article 23, Section 3, provides that in calculating an employee's termination date, the Employer must take into consideration accrued vacation time and any paid holidays falling within the vacation period. There is no reference to using accrued sick leave in order to determine the last working date. And the management rights provision reserves the ability to make such changes as are necessary to improve the efficiency of the operations.

The Employer asserts that the maintenance of standards clause does not apply if the subject matter at issue has been otherwise negotiated. This issue has been negotiated, and a general maintenance of standards clause cannot govern or control where another clause in the contract governs the matter. Furthermore, the maintenance of standards provision applies only to wages, hours of work differentials and general working conditions. The payment of accrued sick leave at retirement is none of those. A general working condition is limited to such matters as the physical conditions under which work is performed. A mere change in the time of sick leave accrual payments is a change in operations which is within management prerogatives as opposed to a change in conditions of employment.

### **DISCUSSION**

A general maintenance of standards clause, such as Article 2, Section 2, in this contract, does not govern or control where another clause in the contract specifically governs the matter, just as specific language takes precedence over the general language of a management rights clause. The language of Article 12, Section 5, specifically says that accumulated sick leave benefits shall be paid upon retirement. Under the new policy, the

Utility pays the benefit upon retirement and not before, as it had previously. There is nothing in that policy that violates the contract, and in fact, it follows it more accurately. Moreover, as the Utility points out, Article 23, Section 3, calculates that the employee's last working day is the termination date less all accrued vacation time and any paid holidays within the vacation period. It says nothing about the accrued sick leave.

The past practice of paying sick leave to bridge time between actual retirement and leaving employment early was effectively repudiated during bargaining. When one party disavows a past practice during bargaining, the mutual agreement on which the past practice rested is no longer there. Accordingly, the Union needed to obtain language to protect the past practice during bargaining. It did not. Although the Union believes that the past practice is protected by the maintenance of standards clause, it is not so. The maintenance of standards clause here protects wages, hours of work differentials and general working conditions. The payment of sick leave accumulation is not a wage or hours of work differentials or a general working condition. A general working condition pertains to working. The benefit at issue pertains to someone no longer working, to what happens upon retirement.

Further, there is no loss of benefits here because employees still get the accumulated sick leave paid out, upon retirement, as the contract says. Although some employees have been able to leave their employment a few days or weeks earlier than their actual retirement date by running out their sick leave, they will continue to get their sick leave paid upon retirement. There is no contract violation.

### **AWARD**

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 15<sup>th</sup> day of March, 2005.

Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator