In the Matter of the Arbitration
Between:

EMPLOYER

-and-

UNION

OPINION
AND
AWARD

RE: Sick leave pay
job related injury

The undersigned, Barry C. Brown, was mutually selected by the parties under the auspices of the American Arbitration UNION to render an Opinion and Award in its case number 54 39 93. Hearing was held at the district offices in SOMEPLACE, Michigan on January 21, 1994. The parties exchanged post-hearing briefs on February 24, 1994 and thereafter the record was closed.

ISSUE:

Did the employer violate the collective bargaining agreement when it charged the grievant's time off due to a work injury against her sick leave days?

PERTINENT CONTRACT PROVISIONS:

ARTICLE II Board Rights

2.1 It is expressly agreed that all rights which ordinarily vest in and have been exercised by the Board of Education, except those which are clearly and expressly relinquished herein by the Board, shall continue to vest exclusively in and be exercised exclusively by the Board without prior negotiations with the UNION either as to the taking of action under such rights with respect to the consequence of such action during the term of this Agreement. Such rights shall include, by way of illustration and not by way of limitation, the right to:

A. Manage and control the school's business, the equipment, and the operations, and to direct the working forces and affairs of the employer.

E. Adopt rules and regulations.

I. Determine the financial policies, including all accounting procedures, and all matters pertaining to public relations.

2.2 The exercise of the foregoing powers, rights, authority, duties and responsibilities of the Board, the adoption of policies, rules, regulations and practices of furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the specific and express terms of this Agreement and then only to the extent such specific and express terms thereof are in conformance with the Constitution and laws of the State of Michigan and the Constitution and laws of the United States. Nothing contained herein shall be considered to deny or restrict the Board of its rights, responsibilities, and authority under the Michigan General School Laws or any other national, state, county, district, or local laws or regulations as they pertain to education.

With cause, the Board shall have the right in its discretion to require an employee to submit a physical or mental examination at Board expense by a licensed physician approved by the Board.

ARTICLE VII Sick Leave, Bereavement, Personal Business

7.1 Members of the bargaining unit shall be credited with their accumulated illness days. UNION members absent from duties on account of personal illness shall

be allowed full pay for a total of one working day per month worked (full 12 month employees will earn twelve (12) working days in one (1) fiscal year). Employees using sick days prior to their accrual shall not have their pay reduced unless they cannot accumulate that number of days in the remainder of the year, or they are to be separated from the District. Administrative office employees shall call in sick days prior to 7:30 a.m. Day school and pre-school employees shall call in prior to 7:00 a.m. The maximum accumulated sick leave shall be 120 days. An individual's personal sick days may be taken by an employee for the following reasons and subject to the following conditions:

A. Personal Illness or Disability - The employee may use all or any portion of his/her leave to recover from his/her own illness or disability.

7.3 Absence due to injury or illness incurred in the course of the employee's employment shall not be charged against the employee's sick leave days, provided that the Board shall pay to such employee the difference between his/her salary and benefits received under the Michigan Worker's Compensation Act for the first **six** (6) months.

ARTICLE XV Grievance Procedure

15.1 A grievance shall be an alleged violation, misinterpretation or misapplication of the terms and conditions of this Agreement.

Representatives for grievance processing shall be selected as follows:

A. The UNION shall designate representatives to handle grievances.

B. The Board designates the supervisor of employees and age superintendent or his/her designated representative to act at Level Three as hereinafter described.

A. The Arbitrator shall have no power to:

1. Amend, modify, or otherwise change any provision of this Agreement.

2. Establish, amend, or modify, any wage schedule or fringe benefit provided under this Agreement.

ARTICLE XVIII Negotiations

18.1 The parties acknowledge that during the

> negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Board and the UNION, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

STATEMENT OF FACTS:

The employer, SOMEPLACE Intermediate School District, is a Michigan agency which serves the special education and vocational education needs of the K-12 school districts in the area of two counties. The 24 aides, secretaries and other support staff employed by the district are in a bargaining unit represented by the UNION. The grievant, Judith PEARS, was hired in 1979 and in the 1992-93 school year she was assigned as a teacher's aide in the Day school. On Friday, November 6, 1992, the grievant was injured on the job when a school bus lift came down on her foot. The grievant was absent on November 6, 9, 10, 11 and 12. She returned to work on Friday, November 13, 1992 and her time off was charged to sick leave days.

On December 15, 1992 the following grievance was filed:

> "1. Date grievance occurred: 11/16/92 2. Statement of Grievance: Article VII Section 7.3. 3. Relief sought: Employee made whole. The UNION is seeking the restoration of

> 5 sick days taken away as a result of on the job injury."

This grievance was denied 1-19-93 by the grievant's supervisor and it was appealed to the Superintendent. On February 12, 1993 the grievance was denied as follows:

> "Disposition of Superintendent or Designee. This office has reviewed the alleged grievance and finds that the Board has not violated the Agreement. First, 7.3 is not applicable to the present situation. Secondly, even if applicable, the Board has the option of implementation as was clarified by the parties at the negotiation table. For this and other reasons not specifically set forth herein, the grievance is denied."

The UNION demanded arbitration on February 24, 1993. On March 24, 1993 this arbitrator was informed of his selection by the parties. No procedural issues were raised at the arbitration hearing conducted on January 21, 1994.

There was no dispute that the injury to the grievant's foot had been incurred in the course of employment on 11-6-92. However, the employer had maintained that an employee's eligibility for employer payment for an injury absence only occurred if the employee was eligible for and received worker compensation benefits. The employer pointed to the proviso in Article VII Section 7.3 of the collective bargaining agreement. The district asserted that the mutual intent of the parties had been expressed in the pre-contract bargaining sessions and it was clear that Section 7.3 applied only when an employee drew worker compensation benefits.

The UNION Director testified that in 1992 she was the chief

spokesperson for the UNION and this local bargaining unit. She recalled that Section 7.3 had been discussed and the district had sought a cap on the time period for which they would have to pay some absence pay for an employee injured on the job. She said that on September 9, 1992 the UNION had eventually agreed to a six month limit on the duration of employer payments. She asserted that there had been no discussion about the first few days of absence due to a job injury or illness. She indicated that her understanding was that all time off due to on the job injuries was to be covered by Section 7.3. She said she started as the unit bargaining representative in June 1992 and she had little past experience with the district's sick leave pay practices but she had heard that an employee who missed work after receiving a required inoculation had been paid by the district.

Other UNION bargaining team members corroborated what had been said by the UNION Director. However, the only cases they could cite in which the employer had paid for sick leave was for reactions to the TB and/or hepatitis inoculations. These witnesses acknowledged that there had been several prior instances in which short term absences due to work injuries had been charged to the individual employee's sick leave days.

The UNION witnesses also said that the administration had always maintained that Worker Compensation benefits would cover 80% of an employee's regular pay and then 20% would be charged to an employee's sick leave days after a week of absence due to a work injury. These witnesses could not explain how the employer was

able to prorate payments in this way because that method of allocating absence pay was not in the support staff labor agreement.

Some members of the UNION's bargaining team recalled that prior to negotiations in November 1992 the employer's newly added chief bargainer had brought up Section 7.3 as it related to "retroactivity". He had said that he wanted to clarify about how worker's compensation tied into employee absence payments. The employer's bargainer had asked how the UNION interpreted this section and he had expressed his view that there was no employer duty to pay during the first week. He added that the district could elect to pay in some circumstances. They said that this had been an informal, off-the-record discussion of a section already "T.A. ed". and they did not respond to his interpretation. They discussed his comments in their caucus, they recalled, but they couldn't figure out why he brought this up. Later they found out about the grievant's injury the week before.

The grievant stated that she had been absent for three days years earlier because she had had an adverse reaction to a hepatitis B vaccination which had been required by the district and the district had paid for those absences. She also recalled that the employer has always paid for her time to get her TB vaccinations. She said that in 1992 all five days she had been absent had been charged against her accrued sick days.

The employer's chief bargainer in 1992 had a different recollection of his pre-negotiations discussions with the officers

of the UNION. He said that on November 12, 1992 he had specifically asked them what did the language of Section 7.3 meant to them. He recalled that the UNION team then went into a caucus and when they returned they said that the word "provided" was meant to be synonymous with the word "if". The UNION team mentioned that in their memories there had been only one worker's compensation claim filed by a unit member and when that unusual event occurred the employee had gotten regular pay by workers compensation payment and deductions from accumulated sick leave days. The employer's witness acknowledged that he had told the UNION's officers that he felt that the district had the alternative of making payment too. However, he was fully aware of the district's past procedures, he said, and that practice was consistent with what had been said by the UNION's representatives. He confirmed that the district does prorate continued salary payments on an 80%-20% basis when worker's compensation "kicks in". He noted this does not occur until an employee's eighth day of absence due to a work-related illness or injury.

The employer's chief bargainer stated further that he brought up Section 7.3 on November 12, 1992 because he had been reviewing the sections which had been "T.A.'ed" and he found the language of that section to be ambiguous. He wanted to be sure both sides understood it the same way or it might have to be further clarified. He was then satisfied, he said, when the UNION's representatives had expressed the same interpretation that the

administration had been using for years. He also stated that the practice of proration was also covered by the terms ". . the difference. . ." in Section 7.3 which allows such calculations by the administration.

The district's bookkeeper provided records of employee's job injuries and absences since 1979. She showed that there had been only one long term absence in this support staff unit and that employee was paid on an 80%-20% ratio for the full two weeks of her absence. In four other cases (including the grievant's case here) the employees sick leave bank had been charged. The district showed a similar experience for the teacher's bargaining unit. This witness said that she could not find evidence of a single case in which an employee had suffered a short term absence due to an on the job injury and this time off had not been charged to the individual's sick bank.

A former president of this unit testified that in 1985 she had been injured on the job and she was then absent for fifteen days. She said that she was paid for the full time of her absence but 20% of her pay was charged back to her sick leave bank. She had argued with the bookkeeper that her labor agreement did not provide for proration and that language was in the teacher's contract. The bookkeeper had insisted that ". . . This is the way it is done". She was president of the unit at the time, she said, but she decided that she had gotten full pay and she would not file a grievance. Later she served on a bargaining team, she said, and the UNION had not sought to change the terms of Section 7.3

as it was being applied by the administration.

THE UNION'S POSITION:

The UNION contended that the school district had a contractual obligation to not charge absence due to injury incurred in the course of employment against the employee's sick leave days. The UNION argued that Section 7.3 clearly prohibits charges against employees sick leave days for absence due to work-related disabilities. This language is clear and unambiguous, it was asserted, and the employer's interpretation would contradict the plain meaning of the contract's terms. The UNION also maintained that the employer has unilaterally adopted a phrase from the teacher's contract in administering the collective bargaining agreement for the support staff. The UNION stated that it had never agreed with the proration set forth in Article XXII (F) of the teacher's collective bargaining agreement and the district had no authority to establish such a limitation on an express benefit due to the employees in a different bargaining unit. The UNION also stated that the district did not show that a past practice had been established with regard to deducting sick leave days for on-the-job injuries. There was no clear practice nor mutual acceptance shown, it was stated, and the prorata language was shown to cover only those cases in which an employee actually had drawn worker compensation benefits. The UNION also indicated that the governing contract language in the teacher's contract had been the same as the support staff prior to 1987 but the prorate

language was added thereafter. The UNION asserted that there was no basis in the support staff agreement to deny an employee employer payment of absence pay in the event of an on-the-job injury or illness. For all of these reasons the union asked that the grievance be granted and that the district be ordered to make the grievant whole by reinstating five sick leave days to her personal bank.

THE EMPLOYER'S POSITION:

The ISD argued that Section 7.3 of the collective bargaining agreement is applicable only when and if an employee injured on the job is absent from work long enough to qualify for the payment of benefits under the workers' compensation statutes. The district asserted that the meaning of Section 7.3 is ambiguous but the parties' intent can be established by their pre-contract negotiations and by the application of this provision over the last several years. The employer maintained that in 1992 its chief negotiator had expressly discussed the meaning of this section with the union's bargaining representatives and at that time these officers had agreed with the administration's interpretation. Further, the district stated that over the years it had never made payments to employees under the provisions of Section 7.3 except as a deduction from the individual employee's sick leave accumulation. The employer noted that in 1985 the UNION president had first challenged this policy and then she had acquiesced to the employer's interpretation. For all of these reasons the employer

asks that this grievance be denied.

DISCUSSION:

The UNION has maintained that the terms of Section 7.3 are clear and unambiguous and therefore the arbitrator must apply this plain language of the contract without regard to parole evidence concerning past practice or bargaining history. However, the arbitrator cannot determine the outcome of the grievance before him by a simple reading of the governing contract clause. It is not clear how the phrase which follows the word "provided" was meant to affect the right set forth in the opening words of the sentence. The employer has stated that payment of workers' compensation benefits is a condition precedent to the employer's liability for absence pay. Both sides have offered plausible interpretations of the disputed language. For all of these reasons it is determined that the contract terms are not clear and the arbitrator must employ the standard criteria for interpreting ambiguous contract language.

The disputed contract clause starts with a clear statement of entitlement in the first words of a long, compound sentence. One could conclude that the employee's accrued sick leave days will not be charged when the employer is absent due to a work-related disability if the sentence ended at the word "days" and there was no proviso. However, the sentence goes on to explain under what circumstances the employer's obligation to pay arises.

Many labor contracts provide that an employee's absence due to

a work-related injury or illness will be paid by the employer. However, there is no statutory requirement that this be done. The state law establishes a "waiting period" of sorts so that time off work of a week or less is not time compensated by statutory benefits. An employer may also negotiate a waiting period before employer liability for absence payments in the case of short-term work-related absences. (Monsanto Industrial Chemicals, 85 LA 113 (Grinstead, 1985)). Here the employees in the unit are often scheduled to work less than an eight hour day and/or for less than a twelve month year. Thus, standard 40 hour, 52 week type sick pay provisions may not be applicable in this different work setting. When Article VII is read as a whole there is no express prohibition against an employee electing to use personal sick days when absent due to a work related disability. Further, it may be concluded that employer payment is limited to co-payment with workers' compensation benefits.

There were some differences in the witnesses description of the parties discussion of Section 7.3 on November 12, 1992. There is agreement that the conversation took place just before the regular bargaining sessions started when the employer's chief bargainer had inquired about the union's interpretation of Section 7.3. The union's witnesses recall that they did discuss his inquiry and his comments in their caucus but they deny giving him an interpretation that agreed with management's position. This factual dispute must be resolved by the arbitrator.

It was shown that in work related disabilities and absences

the district had deducted time from employee's sick leave days prior to 1992 and that fact was known to the union's representatives. It was also established that no further discussions had taken place about Section 7.3 in November 1992 and so neither side had felt that any clarification or any other action was necessary. All of this supports the testimony given by the district's spokesperson. If the union's bargainers had said that they believed that there can never be any deductions from an employee's sick leave days when that employee is injured on the job, then the parties would have had further discussions on this issue.

The employer has asserted that there has been a well established past practice which has demonstrated the parties' intent when they adopted Section 7.3. The district alleged that the parties have previously implemented this disputed contract language in the same way that is now challenged by the UNION. The UNION has responded that the claimed practice was not supported by repeated and readily ascertainable incidents over a reasonable period of time. The arbitrator agrees that the district's methods of handling teacher sick leave claims does not establish a precedent for this unit. Further, the arbitrator agrees that post grievance cases should be excluded.

However, in the period from 1985 through 1992 there were four instances shown in which a unit employee was injured on the job, absent for a short time period and paid for the time off. In none of these cases did the employer pay for an employee's absence

during the first week of absence. In one teacher case the employer successfully challenged the employee's claim that his disability was work related. In the support unit cases only one Worker's Compensation claim was ever submitted. The fact remains that each employees short-term absence pay was handled in the same way as was the grievant's case here. The employer has shown a consistent, repeated and long term practice. The union showed no exceptions to the practice in the only known cases of this sort over a seven year period. (Dillon Stores Co., 84 LA 84 (Woolf, 1984)).

One of the prior cases is of greater importance in that it establishes the UNION's knowledge of this practice and its acquiescence to the employer's interpretation of Section 7.3. In 1985 the local union president was absent fifteen days due to an on the job injury. She questioned the administration when her accumulated sick leave days had been charged for some of the time she had been paid absence pay. Then she was told about the practice now challenged by the UNION and she decided not to file a grievance. This incident and the interpretation of the bargaining team members in 1992 shows that the union leadership knew of the employer's practices regarding sick leave days and job related absences. Yet the union did not file grievances nor seek changes in the contract language over the years.

It is noted that in 1985 the employer applied the 80%-20% ratio to the then local UNION president. This was done two years before the employer's existing practice had been codified into contract language in the teacher's labor agreement. The

support groups contract language (Section 7.3) is still very vague about how "the difference" between salary and benefits shall be paid. An employer is always entitled to work out bookkeeping procedures and personnel policies to fill in the gaps and to implement the broad and general terms of a labor agreement. In this agreement management is specifically authorized to determine all financial policies and accounting procedures. (Art II, *Sec.* 2.1 (E) & (I)). Thus, the employer's method of allocating absence pay when workers' compensation benefits are paid was a practical application of a confusing and ambiguous contract provision (Compare: School District of City of Beloit, 82 LA 177 (Greco, 1984)).

In summary, the disputed contract provision is ambiguous. It is particularly unclear in light of the employer's unchallenged implementation of it for many years. The parties' bargaining history and the established practice support the employer's interpretation. An employee's entitlement to sick leave days is a right created by the contract. Where the governing language is vague or confusing the parties' practices will serve to clarify its terms. Here the receipt of worker compensation benefits is a condition precedent to the employer's duty to pay under Section 7.3. The proscription in that section against a charge against an employee's sick leave days applies only when an employee's injury or illness is covered by worker compensation benefit payments and only to the extent of these payments. For these reasons this grievance must be denied.

AWARD:

Grievance denied.

Dated: March 25, 1994

BARRY C. BRO ARBITRATOR