

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48,
AFSCME, AFL-CIO and LOCAL 366

Complainants,

vs.

MILWAUKEE METROPOLITAN
SEWERAGE DISTRICT

Respondent.

Case 320

No. 47102 MP-2461

Decision No. 27249-A

Appearances:

Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway, Milwaukee, WI 53202 by Mr. Alvin Ugent, appearing on behalf of the Complainant, Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 366.

Mr. Harold B. Jackson, and Mr. Donald L. Schriefer, attorneys on the legal staff of the Milwaukee Metropolitan School District, 260 West Seeboth Street, Milwaukee, WI 53204-1446, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: Milwaukee District Council 48, AFSCME, AFL-CIO and its affiliated Local 366 (hereinafter referred to as the Complainant or the Union) filed a complaint of prohibited practices on February 27, 1992 with the Wisconsin Employment Relations Commission (hereinafter referred to as the Commission) alleging that the Milwaukee Metropolitan School District (hereinafter referred to as the Respondent or the District) had violated Sections 111.70 (3) (a) 1, 4, 5 and 7 of the Municipal Employment Relations Act (MERA) by unilaterally changing the hours of operation of a ferry boat used by Union represented employees. The Commission appointed Daniel Nielsen, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07, Wis. Stats. The District denied committing prohibited practices. A hearing was held on May 11, 1992, at which time the parties reached an agreement to hold the matter in abeyance pending further negotiations. A settlement was not forthcoming, and the hearing was reconvened on November 30, 1992 in

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Wauwautosa, Wisconsin at which time the parties were afforded full opportunity to present such evidence and arguments as were relevant. A transcript was made, and was received on December 12, 1992. The parties submitted briefs which were exchanged through the Examiner. On June 13, 1993, the Examiner was notified that the parties had waived reply briefs whereupon the record was closed. The Examiner, having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated Local 366, hereinafter collectively referred to as either the Complainant or the Union, is a labor organization, maintaining its principal offices at 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208.

2. The Milwaukee Metropolitan Sewerage District, hereinafter referred to as either the Respondent or the District, is municipal employer providing sewage treatment services to the people of the Milwaukee metropolitan area in southeastern Wisconsin, and maintaining its principal offices at 260 West Seeboth Street, Milwaukee, Wisconsin 53201-3049.

3. The District operates a sewage treatment plant on Jones Island in Milwaukee. Among the employees working at the Island are those represented by the Union. Access to Jones Island may be obtained by road from the south. Employees coming from the north may park in a lighted and fenced parking lot at National Avenue and take a ferry boat across the Kinnickinnic River to Jones Island. This saves employees approximately 4 miles of driving (eight miles round trip) versus accessing the Island by car. It is also more convenient for employees who use public transportation from the north. The ferry boat service has been available to employees since the 1920's on a seven day a week basis.

4. In 1974, the District informed its employees that it was curtailing ferry boat service by cutting hours of operation from 6:00 a.m. to 11:30 p.m. seven days a week to 6:00 a.m. to 5:00 p.m. five days a week. It also took the position that the service would be eliminated entirely as soon as there were sufficient parking spaces available on Jones Island. The Union grieved the decision. In November of 1975, arbitrator George Fleischli issued an Award, finding that maintaining the National Avenue parking lot and the ferry boat service were benefits that could not be unilaterally reduced during the term of the contract. Arbitrator Fleischli found that:

"The Employer has violated the collective bargaining agreement by curtailing the hours of operation of the ferry boat service between its National Avenue parking lot and Jones Island on November 7, 1974 and will further violate the agreement if it terminates said operation during the term of the agreement..."

He ordered the parties to bargain a remedy.

5. After the Fleischli Award, the District made a number of other efforts to curtail or eliminate ferry service, including attempts to bargain elimination in contract negotiations. The primary reasons for these efforts were the District's view that the service was expensive, and its concern that the Boat Operators spent a great proportion of their work time simply sitting on the boat waiting for someone to show up for service. The Union did not agree to any such curtailment of service, and the language underlying the Fleischli Award has remained unchanged in the contract through the term of the May 1, 1989-April 30, 1992 collective bargaining agreement.

6. In 1990, the Union and the District entered into a settlement of two prohibited practice cases. Part of the settlement was a change in ferry boat operations during six months of the year. The District wished to have the boat operators work on a skimming boat during some hours of the day, rather than remaining on the ferry during times when demand for service was infrequent. In return for other considerations, the Union agreed that the ferry boat operators could be assigned to a skimming boat for a portion of each day from April 15th until October 15th. Normal transportation services would be available from 5:30 a.m. until 7:30 a.m., 12:00 p.m. until 4:30 p.m., and dusk until 11:00 p.m. The District agreed to provide transportation or pay mileage for employees who needed to leave the Island or were required to report to the Island during times when the ferry was out of operation. These changes were made part of a settlement agreement in May of 1990. The agreement did not change the status of ferry boat services during the period from October 15th through April 15th of each year. During those times, the ferry would continue to be manned from 5:30 a.m. until 11:00 p.m.

7. On December 12, 1991, representatives of the District met with William Mollenhauer, staff representative for Council 48, and members of the Union bargaining committee. The purpose of the meeting was to discuss the elimination of certain bargaining unit positions as a result of budget cuts. At that meeting, the District presented the Union with notice that it intended to assign custodial duties to the boat operators during the winter months:

With the proposed reduction in plant custodial personnel, it has been proposed that boat operations be reduced and the operators be assigned custodial duties. With that in mind, it is proposed that hours of boat operations be revised effective with Pay Period 1, 1992 (December 29, 1991). The new boat operational hour would be:

MONDAY THROUGH FRIDAY

5:30 a.m. to 7:30 a.m.

1:30 p.m. to 4:30 p.m.

9:00 p.m. to 11:00 p.m.

SATURDAYS, SUNDAYS AND HOLIDAYS

5:30 a.m. to 7:00 a.m.
1:30 p.m. to 3:00 p.m.
9:00 p.m. to 11:00 p.m.

Whenever the boat is out of service, the Boat Operator would be assigned:

- a. Custodial duties.
- b. Skimmer duties.
- c. Grass cutting and other yard maintenance duties.
- d. Snow removal and ice control duties.
- e. Other plant operational or maintenance duties within the scope of a plant maintenance worker's job duties.
- f. Boat Operators will carry a pager and if available, could provide transportation services outside of the operational hours.

The operational times listed in the memo included the peak times of usage for the boat, including the shift changes. The Union objected to the change in operational hours, as well as the assignment of additional duties to the Boat Operator.

8. On December 12, 1992, a memo from Mark Gallaway, Utility Maintenance Supervisor, was posted indicating the change in operational hours for the ferry:

Starting on December 29, 1991, the ferry boat will have different scheduled hours.
The new hours are as follows:

Monday through Friday:

5:30 a.m. to 7:30 a.m. In service
7:31 a.m. to 1:29 p.m. Out of service
1:30 p.m. to 4:30 p.m. In service
4:31 p.m. to 8:59 p.m. Out of service
9:00 p.m. to 11:00 p.m. In Service

Saturdays, Sundays and Holidays

5:30 a.m. to 7:00 a.m. In service
7:01 a.m. to 1:29 p.m. Out of service
1:30 p.m. to 3:00 p.m. In service
3:01 p.m. to 8:59 p.m. Out of service
9:00 p.m. to 11:00 p.m. In Service

Please make a note of these times, and dates when new hours will start and end. If the need for a boat operator comes up during "out of service" time, the operator will carry a pager, and can be called in the event of an emergency. Any concerns on this subject please feel free to contact me as 3871.

Thank you for your cooperation in this matter

There was no bargaining with the Union over the change in Boat Operator duties or the introduction of a pager system for summoning the Operator to the ferry before this memo was issued.

9. The Union objected to the change in operational hours for the ferry, submitting a grievance, filing the instant prohibited practice complaint, and discussing the topic in contract negotiations. Among the objections raised was the fact that employees used the ferry during lunch time to go to a restaurant off the Island, and run errands. The Vice-President of the Union, Salvatore Serio informed the District during a bargaining session that he had on one occasion been denied the opportunity to use the ferry during lunch time. In response to this particular objection, the District revised the hours of operation on February 28, 1992 to extend the operational hours to include the period from noon to 1:30 p.m. on weekdays. Since workers do not have a duty free lunch period on weekends, the Saturday, Sunday and Holiday hours were not affected by this change.

10. Since the change in December of 1991, the Boat Operators have been assigned primarily to sweeping duties during the winter months when they are not on the ferry. These duties are performed in an area of the Island within a five to ten minute walk from the ferry boat. An employee needing to use the ferry must call a supervisor, who will page the Boat Operator. If the person requesting service knows that he will need the boat a certain time, he can arrange for the service in advance, in which case the Boat Operator will be waiting on the boat. If the person needing service does not give advance notice, the Operator will be paged and will report to the boat. Persons needing the boat for transportation from the National Avenue parking lot must call over to the Island on a pay phone and wait for the Operator to report to the boat, and bring it across.

11. The number of requests for using the ferry during the hours that the Boat Operators are assigned to custodial tasks is relatively small. Gallaway estimated that the District might receive a maximum of five requests per week for the service from all sources, including bargaining unit personnel, management employees and employees represented by other Unions.

12. The contract covering May 1, 1989 through April 30, 1992 was unchanged in any material respect from the contract interpreted by Arbitrator George Fleishcli in 1975, as discussed in Finding of Fact No. 4, supra.

13. The availability of ferry boat service is an existing benefit to employees, which cannot be unilaterally terminated or modified during the contract term, per the Fleischli Award discussed in Finding of Fact No. 4, supra.

14. The assignment of custodial duties to the Boat Operator during non-shift change and lunch hours during the winter months does not deny ferry boat service to unit employees, but may cause a delay of up to ten minutes in securing transportation across the river.

15. The delay of up to ten minutes in securing transportation across the river during non-peak hours has a de minimis impact on the benefits and working conditions of bargaining unit employees, and represents a change in the administrative means of delivery the benefit of ferry service, rather than a reduction in the benefit itself.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The availability of ferry boat service for bargaining unit employees is a benefit guaranteed by the collective bargaining agreement between the parties for the period from May 1, 1989 through April 30, 1992 and by the Fleischli Award interpreting the relevant portions of the agreement.

2. The Milwaukee Metropolitan Sewerage District did not violate Sections 111.70 (3) (a) 1, 4, 5 and 7 of MERA by introducing the use of a pager for summoning the Boat Operator to the ferry during the hours of 7:01 a.m. through 1:29 p.m. and 3:01 p.m. and 8:59 p.m. from December 29, 1991 through February 28, 1992, and the hours of 7:01 a.m. through 11:59 p.m. and 3:01 p.m. and 8:59 p.m. from February 28, 1992 through April 15, 1992, nor when they repeated the use of the pager system beginning on October 15, 1992.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that the instant complaint be, and the same hereby is, dismissed in its entirety. 1/

Dated at Racine, Wisconsin this 23rd day of August, 1993:

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/

1/ Any party may file a petition for review with the Commission by following the procedures set forth in section 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or orders of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification in mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of new testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of an exceptional delay in receipt of a copy of any findings or order it may extend the time for another 20 days for filing a petition with the commission.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

Daniel Nielsen, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER DISMISSING COMPLAINT

Background:

There is relatively little dispute over the facts of this case. The District operates a plant on Jones Island in Milwaukee. The Island is accessible by road on the south. It is accessible on the north via a ferry boat which runs across the Kinnickinnic River between the island and a parking lot the District owns on National Avenue. The ferry operates on the first and second shifts on a seven day a week basis. The ferry service has been available to employees since the 1920's.

During the period from April 15th to October 15th each year, the ferry is only operated on a limited basis. The ferry operates from 5:30 a.m. to 7:30 a.m., 12:00 p.m. to 4:30 p.m., and from dusk until 11:00 p.m. When the ferry is not operating during these warm weather months, the boat operators are assigned to a skimming boat. This arrangement is the result of an agreement between the Union and the District. Until December of 1991, the boat operators remained on the ferry throughout the first and second shifts during the non-skimming cold weather months from October through April.

On December 12, 1991, the District notified the Union of its determination that the boat operators had a great deal of idle time between shift changes, and that it intended to assign the operators other duties during non-peak times which would require them to leave the boat. The notice also informed the Union that the operators would carry pagers when they were off the boat, so that if someone needed to use the ferry, they could respond to the request. The Union made no immediate response to this memo.

On December 29, 1991, the District put in place the new system. Effective with that date, operators were physically present on the ferry boat only during the following hours:

Monday through Friday

5:30 a.m. to 7:30 a.m.
1:30 p.m. to 4:30 p.m.
9:00 p.m. to 11:00 p.m.

Saturdays, Sundays and Holidays

5:30 a.m. to 7:00 a.m.
1:30 p.m. to 3:00 p.m.
9:00 p.m. to 11:00 p.m.

The Union objected to the lack of service during lunchtime, because bargaining unit employees used the ferry to go off the Island at lunch. In response to this objection, the District expanded the service effective February 28, 1992 so that the boat operator was present from 12:00 noon until 4:30 p.m. during weekdays. 2/

The operators were assigned to work at custodial tasks, primarily sweeping, during the times when they were off the ferry boat. If someone wished to use the ferry when the operator was off the boat, they would contact a supervisor, who would page the operator. The operators are required to interrupt their other activities in the event of a page, and report to the boat. Operators work in the area of the ferry, and it takes a maximum of ten minutes for them to respond to a page and get to the boat. Bargaining unit members would typically need to use the ferry in mid-shift if they had a medical emergency, or if they were working a split shift.

The Union filed this complaint in February of 1992, alleging that the change in the ferry boat operator's availability was a drastic change in working conditions and a violation of a 1975 Award by Arbitrator George Fleischli which found the ferry service a benefit which could not be curtailed unilaterally.

The Arguments of The Parties:

The Union argues that the District has been providing ferry services to its employees for nearly seventy years. The service is a valuable benefit to employees, as it saves them driving time needed to access Jones Island by road, and allows them to run errands or eat off the premises at lunchtime. The benefit has existed throughout every contract between these parties, and the District has previously been frustrated in bargaining and in litigation in its attempts to curtail the service. There is absolutely no justification for the unilateral change effected by the District here, since the operation of the ferry is purely a convenience to employees and has no bearing whatsoever on the operation of the sewage treatment plant. Thus there can be no compelling managerial interest in making ferry service less available to employees. For these reasons, the Union asks that the District be found guilty of having made a unilateral change in benefits and working conditions in violation of the agreement and the Fleischli Award, that an order be entered directing the restoration of ferry service as it was prior to December of 1991 and that a notice be posted acknowledging the violation of Section 111.70.

The District argues that it did not change the operating hours of the ferry boat service to

2/ The Union has initiated separate litigation over the assignment of custodial work to the Boat Operators, and the change in their working conditions is not the subject of this decision. The dispute in this case is limited to the impact of this change on the availability of ferry service to other employees.

Jones Island. Ferry service remains available to the employees on the first and second shifts, just as it has in the past. The only change has been that the operator is assigned to custodial duties during the frequent periods of down time between shift changes when ferry service is not requested.

The location of this work is very close to the ferry's docking site, and the operator can respond to a request for service within minutes. Union and District witnesses agreed that the ferry operators respond promptly to their pagers. Furthermore, the supervisor of the boat operators indicated that usage of the ferry between shift changes was a rare event, occurring perhaps five times in a busy week. This includes non-Union employees, so the impact on Local 366 members has been minimal at most.

The District also denies that it has violated the November 1975 Award by George Fleischli regarding ferry service. The Fleischli Award found that the District violated the contract in 1974 when it completely eliminated ferry service for five and a half hours each day. As noted above, this case does not involve any curtailment of ferry hours or ferry service. For that reason, the Fleischli Award is irrelevant to this dispute.

Discussion:

Neither party disputes the fact that ferry boat service is a benefit guaranteed to bargaining unit employees by the contract, and may not be unilaterally withdrawn or modified. This point was established beyond argument by Arbitrator Fleischli's 1975 Award. The argument here centers of the exact contours of the benefit, whether a change in the method of providing the benefit constitutes a reduction in the benefit.

The original notice changing the system for the ferry suggested that ferry service would no longer be available to employees during the hours when the Boat Operator was assigned to custodial duties. It informed employees that the ferry would be "out of service" during these hours, and could be summoned in the event of an emergency. However, the practice has been to send the ferry whenever service is requested during these hours, without regard to whether there is an emergency. Testimony at the hearing revealed only one instance in which a bargaining unit employee requesting ferry service during the winter months was denied service. That incident involved Union Vice-President Salvatore Serio, and resulted in the restoration of normal service during the lunch hours as of February 28, 1992. Since the basic benefit of transportation across the river when needed continues, the real issue in this case is whether the requirement that employees telephone for the service and wait from three to ten minutes more for the service from 7:30 a.m. to noon and from 4:30 p.m. to 9:00 p.m. is a substantial enough impact to constitute either a violation of the Fleischli Award or of the contract.^{3/}

There was a collective bargaining agreement in effect at the time this complaint was filed, providing for arbitration of grievances. The complaint alleges a violation of the duty to bargain, the duty to comply with the contract and the duty to comply with an arbitration award. The District has raised no objection to the Commission's assertion of jurisdiction over the entire complaint, and has made no request for deferral to arbitration.

The Fleischli Award dealt with a District attempt to eliminate ferry service after 5:00 p.m. as a first step to entirely eliminating the ferry. The arbitrator did not discuss the details of boat operations, because such considerations were irrelevant to the issue before him. He found the availability of ferry service to be a valuable benefit of long standing, that could not be eliminated unilaterally during the term of the contract. That is a far cry from saying that a change in the process by which boat service is summoned constitutes a violation of the contract. The ferry service is a benefit established by past practice, rather than any express term of the contract. Such implicit terms guarantee the continuation of the core benefit, but do not freeze in place the administrative arrangements by which the benefit is provided. An employer is allowed to make changes on the periphery of such benefits, even if the changes impose some inconvenience on employees. 4/ The need for paging the Boat Operator rather than having him standing by at all times produces some minor delays for the relatively small number of people who use the ferry between shift changes, but cannot be said to deny bargaining unit employees the core benefit recognized in the Fleischli Award.

Whether or not the Fleischli Award recognized the immediate availability of the ferry as a binding benefit, the Union argues that it has substantial value to employees and is guaranteed by the contract. While I agree that a change in Boat Operator duties which rendered him unavailable for, or which required lengthy delays in, providing ferry service to employees could rise to the level of a contract violation. Likewise, had the District applied its memo in such a fashion as to refuse ferry service during non-peak hours except in emergency situations, the reduction in benefit would be substantial enough to constitute a violation of the contract. Finally a change to a pager system during the peak hours of operation, even if feasible, would probably represent a large enough inconvenience to a large enough group of workers to constitute a serious diminution of the benefit. However, the change here involves a very brief delay in ferry service and affects a handful of employees. As such, it has a de minimis impact on the benefits available to bargaining unit workers.

The switch to using a pager to summon the Boat Operator during non-peak hours in the winter months does not render the benefit of ferry boat service unavailable, and thus does not violate the Fleischli Award. This change has a de minimis impact on bargaining unit employees, and cannot be said to violate some implicit term of the collective bargaining agreement. For these reasons, I have dismissed the complaint.

4/ See the discussion at page 447 of Elkouri and Elkouri, HOW ARBITRATION WORKS, (BNA, 4th Ed., 1985) and cases cited in footnote 55.

Dated at Racine, Wisconsin this 23rd day of August, 1993:

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel Nielsen /s/
Daniel Nielsen, Examiner