STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, Complainant, vs. SCHOOL DISTRICT OF BIRCHWOOD, Respondent.	Case 17 No. 50274 MP-2840 Decision No. 27954-A

Appearances:
Mr. Kenneth J. Berg, Executive Director, Northwest United Educators, 16 Wes
Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Richard J. Ricci,

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On December 22, 1993, Northwest United Educators filed a complaint of prohibited practice with the Wisconsin Employment Relations Commission wherein it alleged that the School District of Birchwood had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. by unilaterally altering a past practice as to a condition of employment not covered by the parties' collective bargaining agreement. On February 11, 1994, the School District of Birchwood filed its answer wherein it admitted certain allegations in the complaint and denied others and asserted certain affirmative defenses. The Commission appointed David E. Shaw, a member of its staff, to act as Examiner and make Findings of Fact, Conclusions of Law and Order in the matter. A hearing was held in the matter before the Examiner on March 1, 1994 in Birchwood, Wisconsin. A stenographic transcript of the hearing was prepared and the parties submitted post-hearing briefs by April 20, 1994. Having considered the evidence and the arguments of the parties, the Examiner makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The School District of Birchwood, hereinafter the Respondent, is a municipal employer with its offices located at 300 South Wilson Street, Birchwood, Wisconsin 54817. Since July 1, 1993, James Connell has been employed by the Respondent as District Administrator. For three years prior to July 1, 1993, the Respondent employed a District Administrator on a part-time (20%)

basis who worked one day per week. Since 1985 Bonita Basty has been employed by the Respondent as its Bookkeeper, and as such is responsible for doing the Respondent's payroll.

2. Northwest United Educators, hereinafter the Complainant, is a labor organization with its offices located at 16 West John Street, Rice Lake, Wisconsin 54868. Complainant is the certified collective bargaining representative for the bargaining unit consisting of all regular full-time and regular part-time secretaries, custodians, cooks, aides and bus drivers employed by the Respondent, but excluding supervisory, managerial, professional, and confidential and casual employes and all other employes of Respondent. Kenneth Berg is employed by Complainant as Executive Director and has been involved in the negotiations for the parties' last two collective bargaining agreements covering the employes in the bargaining unit set forth above.

3. Since 1984 Kathleen Tronstad has been employed by Respondent as a Cook II in the bargaining unit represented by Complainant. The first time Tronstad substituted for the Head Cook (Cook I) was in 1987 when she did it once. Tronstad substituted for the Head Cook once each in 1988 and 1989. Audrey Roppe had been previously employed by Respondent as Head Cook before she retired and during the years 1984 through 1990 she usually substituted for the then Head Cook Karen Hayes, when the latter was absent. Roppe would not substitute for the Head Cook unless she was paid the Head Cook rate. The present Head Cook for Respondent is Sandra Moore who began employment in the position in the fall of 1991. During 1991, Tronstad substituted for the Head Cook 21 hours in May of 1991 and seven hours in November of 1991. During 1992, Tronstad substituted for the Head Cook 154 1/4 hours and from January through May of 1993 substituted for the Head Cook 71 hours. Each time Tronstad had substituted for the Head Cook from 1987 through May of 1993 she was paid the Head Cook pay rate for those hours. Since December of 1989 Respondent's District Administrator had not signed the absence reports/substitute pay requests submitted by Tronstad. Except for the Head Cook position, and the period from January 18, 1989 until May 15, 1992 when Donna Manning received the higher pay when substituting for a higher-paid secretary, Liz Whittaker, employes in the bargaining unit have not received the higher pay rate when they substituted for an employe in a higher paid position. The Head Cook works eight hours per day and the Cook II works seven hours per day. When Tronstad substituted for the Head Cook she worked seven hours per day. The Head Cook uses the extra hour per day to fill out reports and do the ordering and the other paperwork required in the job. When the Head Cook was absent her substitute did not do any of the paperwork, but assumed the cooking duties of the Head Cook and showed the other substitute what to do. When both the Head Cook and the Cook II are present, they share food preparation and cooking duties.

4. Respondent and Complainant were parties to a 1991-1993 Collective Bargaining Agreement which contained a grievance procedure culminating in final and binding arbitration and which also contained the following provision:

ARTICLE XIV - ENTIRE MEMORANDUM OF AGREEMENT

> This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties, and supersedes all previous agreements and past practices between the parties. Any supplemental amendments to this agreement shall not be binding upon either party unless executed in writing by the parties hereto. Waiver of any breach of this agreement by either party shall not constitute a waiver of any future breach of this Agreement.

Said Agreement contained no provision regarding the compensation rate of an

employe substituting for an employe in a higher paid position. By its terms, said Agreement expired on June 30, 1993.

5. Beginning with September 16, 1993, and thereafter, Tronstad no longer was paid at the Head Cook's hourly rate when she substituted for the Head Cook when the latter was absent. By the following letter of October 4, 1993, Berg brought the matter regarding Tronstad and another employe 3/ to the attention of Respondent's District Administrator, James Connell:

> Dear Mr. Connell,
>
> I am of the understanding that in the past when employees in the Birchwood School District covered for an employee who was absent, they received wages in effect for the position covered.
>
> Recently, Kathy Tronstad filled in for the head cook and Delores Kraimer filled in for the custodian/maintenance position; however, neither was paid at the higher rate for the time involved. I believe this is contrary to the past practice in the District and hereby request that they both be paid the proper amount.
>
> Please let me know your intentions in this matter.
>
> Sincerely,
>
> NORTHWEST UNITED EDUCATORS
>
> Kenneth J. Berg /s/
> Kenneth J. Berg
> Executive Director

Connell responded to Berg's letter with the following letter of October 6, 1993:

> Dear Mr. Berg,
>
> The letter is in response to the letter you sent me, dated October 4, 1993. In that letter you requested that I let you know my intentions regarding the matter of support staff substitutes and their pay.
>
> I, as the current Superintendent, have never approved a similar request for pay. It is my understanding that they may have been approved in the past. This past practice, however; has not been consistent throughout the district. Specifically, when the office manager is gone, the office aid does not get a higher wage; when a bus driver is gone the substitute does not get a higher

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1/ The dispute as to the other employe, Delores Kraimer, was subsequently dropped by the Complainant upon further investigation into the matter.

wage; when I am gone the principal does not get a higher wage, etc.

There are a number of reasons for my decision not to allow Kathy Tronstad and Delores Kraimer to receive the higher amount in wage compensation. The primary reasons are based on the fact that the positions of Head Maintenance and Food Service Director carry with them a certain amount of long term responsibilities as a part of their job description. Specific examples include: inventory, ordering, menu selection, periodic maintenance checks, boiler work, etc. The substitutes do not have those long term responsibilities on the days that they are filling in.

Here are some other reasons for my refusing to approve the higher pay amount. I question why Kathy needed to sub for Sandy in the first place. If Sandy were gone the district would hire a substitute for Sandy, not Kathy. Sandy Moore was ill on September 16th. On that day she contacted Arlene Vieau to substitute for her. When I contacted Delores and asked her to come in early on September 13th, I gave no indication, nor did I expect, that she would be substituting for Rick Bohman on that day. I am not aware of any other district that follows this procedure. The master agreement with the support staff is mute on this issue. It is my understanding that in such a situation, the issue then becomes a management decision.

I should point out that the involved personnel did not follow established chain of command in their pursuit of this matter, as they did not contact their immediate supervisor first.

I feel that the district's ruling against the higher wage is sound and legal. I can understand the affected employees concern over this issue, however; given the inconsistencies, along with the other reasons, we feel that the proper amount of pay has been awarded. I trust that this letter clarifies the district's position on this issue.

Sincerely,

Jim Connell /s/
Jim Connell, Superintendent

Berg then responded to Connell's letter rejecting the employe's claims with the following letter of November 23, 1993 to Connell:

Dear Mr. Connell,

I have had the opportunity to pursue the question of past practice as it pertains to substitute pay for Kathy Tronstad. Based on the information enclosed, I am convinced that the District has clearly established a past practice of paying her a higher rate when she substitutes in a higher paid position.

> The only point in your letter of October 6 that I agree with is that the contract is silent on the issue. I do not believe the other points you made in denying her request are legitimate and suggest that you seek legal counsel and reconsider your position. I believe you will find a past practice can be and was established before you became the Administrator and that said practice need not be consistent District-wide.
>
> If this matter has not been dealt with to our satisfaction by December 10, the Union will seek redress by filing a prohibited practice with the WERC.
>
> Please call if you have any questions.
>
> Sincerely,
>
> NORTHWEST UNITED EDUCATORS
>
> Kenneth J. Berg /s/
> Kenneth J. Berg
> Executive Director

6. The Respondent has refused, since September of 1993, and continues to refuse, to pay Tronstad the Head Cook rate on days when the Head Cook is absent from work. On December 22, 1993, the Complainant filed a complaint of prohibited practice with the Commission alleging that by its refusal to pay Tronstad the Head Cook rate on days when the Head Cook is absent from work, Respondent has unilaterally changed a condition of employment and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats. On February 11, 1994, Respondent filed its answer with the Commission denying it had committed a prohibited practice, denying the existence of a binding practice, and asserting that even if the practice had existed, it was superseded by Article XIV - Entire Memorandum of Agreement, that the matter should be deferred to the contractual grievance arbitration process and that the Complainant had waived its right to bargain over the matter by virtue of Article V - Management Rights, in the parties' Collective Bargaining Agreement.

Based upon the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Upon the expiration of the parties' 1991-1993 Collective Bargaining Agreement on June 30, 1993, there was no grievance arbitration procedure available to which disputes arising thereafter regarding the parties' obligations under the Agreement could be deferred. Therefore, deferral of the instant dispute to said procedure is not appropriate.

2. Respondent School District of Birchwood, by its officers and agents, was not obligated to continue a practice regarding the compensation for Cook II's when they substitute for the Head Cook as part of the status quo, and therefore, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)4, Stats., when it unilaterally refused to continue such a practice during the contract hiatus period after the parties' 1991-1993 Agreement expired.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 2/

The instant complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 3rd day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

(Footnote 2/ appears on the next page.)

2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 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 order 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 is 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 additional 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 exceptional delay in the receipt of a copy of any

findings or order it may extend the time 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).

BIRCHWOOD SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant has alleged that the Respondent violated Sec. 111.70(3)(a)4, Stats., by unilaterally discontinuing during the contract hiatus period a practice of paying the Cook II at the Head Cook rate on days she substituted for the latter. Respondent filed an answer wherein it denied a binding practice existed, asserted that even if a practice was found to exist, Article XIV - Entire Memorandum of Agreement, superseded any such practice, and asserted as affirmative defenses that the matter should be resolved through the contractual grievance procedure and that the Complainant has waived its right to bargain over the matter by virtue of Article V - Management Rights in the parties' Agreement.

Complainant

Complainant alleges that the Respondent committed a prohibited practice by unilaterally changing a practice that had existed for six years without bargaining the change with the Complainant. Since the Collective Bargaining Agreement is silent on the issue, the contractual grievance procedure would not be the proper avenue to challenge the action.

As to the existence of the practice, the Complainant asserts that acknowledgement of a practice can be established by the parties' actions. Here, Tronstad turned in her requests for substitute pay at the higher rate to the Respondent's Bookkeeper and in every instance she received the higher rate of the Head Cook. Complainant asserts the fact that the Respondent's previous District Administrator did not sign all of those requests does not weaken its case. The fact that Tronstad was always paid the higher rate indicates Respondent's approval and acknowledgement of the practice. The practice does not have to be District-wide. Even if the practice was restricted to only the Cook classification, Respondent's actions are still a unilateral change in the terms and conditions of employment for one employe. However, Respondent's Bookkeeper testified that a Secretary, Donna Manning, had been paid a higher rate for substituting on several occasions. Complainant concludes that a practice of paying Tronstad the Head Cook's rate when she substituted for the latter was consistent over a six-year period until the Respondent unilaterally changed the practice when it denied Tronstad the higher payment beginning in September of 1993.

With regard to the Respondent's reliance on Article XIV - Entire Memorandum of Agreement, the Complainant asserts the impact of that provision was limited to the parties' first contract. The provision does not prevent the establishment of a past practice thereafter, as was done in this case. Article XIV has been in at least the last three contracts and likely was in the parties' first contract. The practice regarding Tronstad has spanned the negotiation of three contracts and the current negotiations on a fourth. The Respondent had ample opportunity during that time to pursue a change in the practice at the bargaining table.

Lastly, the Complainant disputes Respondent's assertion that since Tronstad only works seven hours a day instead of eight hours per day that the Head Cook normally works, she was not really doing the Head Cook's job on those days that the latter was absent. Tronstad testified that the Head Cook is responsible for the bookkeeping and record keeping and is given an extra hour

per day to do that work. Since Tronstad does not do that paperwork when she substitutes, she does not get the extra hour.

Respondent

As a threshold issue, the Respondent asserts that the issues raised in the complaint should be deferred to the grievance arbitration procedure in the parties' Collective Bargaining Agreement. Respondent cites several decisions by the Commission and its examiners as establishing a long-standing policy of deferring to grievance arbitration. The Respondent especially relies on the Commission's decision in Brown County 4/ as being dispositive in this case, citing the following from that decision:

> With regard to the appropriateness of the Examiner's disposition of the disputed claim (and the implicit denial of Respondent's Motion to that extent) we conclude that the Examiner erred in not deferring this particular claim of unlawful unilateral change to the parties' contractual grievance arbitration procedure.
>
> We so conclude because there is a high probability that a grievance arbitration would fully resolve the unlawful unilateral change claim and because the Respondents have, as noted above, objected to WERC exercise of prohibited practice jurisdiction of this essentially contractual issue. More specifically, the analysis and the remedies (if any) in a grievance arbitration of the dispute are quite likely to fully determine the Sec. 111.70(3)(a)4 issue and to satisfactorily remedy any unlawful unilateral change in overtime assignment procedure involved.

Respondent asserts that to not defer this dispute effectively erases the grievance procedure's contractual timelines. Issues of timeliness are within the arbitrator's jurisdiction to decide. To permit the Complainant to pick and choose when it will or will not use the arbitration process the parties bargained into their Agreement is contrary to both Wisconsin law and the federal case law of the National Labor Relations Board. 5/

As to past practice, Respondent contends there was no consistent District-wide practice to pay the higher rate when an employe substituted for another. While Tronstad was paid the higher Head Cook rate on many occasions, there were also many times when Roppe, a non-unit person, substituted for the Head Cook and also times when no one was paid the higher rate when the Head Cook was absent. The higher rate was not paid in the custodial and transportation areas, nor was it paid in the business office.

To be binding, a past practice must be

> (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Celanese Corp. of America, 24 LA 168 (Arbitrator Justin, 1954).

Webster's Dictionary defines "unequivocal" as "undisguised or unobscured;

3/ Decision No. 19314-B (WERC, 6/83).

4/ Citing, Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1977); United Technologies Corp., 115 LRRM 1049 (1984).

admitting of no doubt or misunderstanding; clear". The original claim by Complainant's representative, Berg, was not only with regard to Tronstad, but also included a claim on behalf of Delores Kraimer when substituting for the employe in the Custodian/Maintenance position. Berg later found that there was no such practice in the custodial area. By itself, that evidences doubt and misunderstanding as to practices in the District. Further, for the last several years, Respondent only had a 20% time District Administrator. During that time Tronstad scheduled herself as the substitute for the Head Cook and requested the higher rate. Tronstad received the higher rate of pay, but some of those times there was not signed authorization from the Administrator. Tronstad's being paid at the higher rate was therefore the result of an oversight due to an understaffed administration and not a practice accepted by both parties. The Complainant is attempting to take advantage of that situation as it related to the one position to establish a practice. Ford Motor Co., 19 LA 237 (Arbitrator Schulman, 1952) is cited as a case where a practice resulting from a similar situation was held not to be binding. The Respondent concludes that Complainant has failed to establish that the claimed practice was consistent or acknowledged by both parties. To the contrary, the evidence established that if there was a practice, it was not to pay the higher rate.

Even if the Complainant could establish that there was a practice of paying the higher rate when substituting for a higher paid employe, the parties' Agreement contains Article XIV - Entire Memorandum of Agreement. The language of that provision is clear and unambiguous that the contract represents the full agreement of the parties and that any past practices are not binding. Respondent cites arbitral precedent and federal law precedent 6/ for the proposition that such clauses are to be given effect and that their inclusion in the agreement forecloses incorporation of past practices into the agreement. Assuming arguendo, that Complainant had proved there was a past practice, to bind Respondent to that practice would clearly negate the language of Article XIV. It is a rule of contract construction that where contract language is clear and unambiguous, it must be given effect. Citing, Great Atlantic and Pacific Tea Co., 36 LA 391, 392 (1960). Further, an interpretation that would render meaningless a part of the contract is to be avoided. Citing, John Deere Tractor Co., 5 LA 632 (1946).

Next, the Respondent asserts that it would be unfair to require it to pay Tronstad the higher rate, since she does not perform all of the duties of the Head Cook when the latter is absent, e.g., ordering supplies, baking, supervising other employes. Roppe, having been the Head Cook, knew all of the duties of the position and was paid the higher rate when she substituted for the Head Cook.

Respondent concludes that the Complainant has failed to establish that there was a binding past practice of paying substitutes the higher rate, and even if it had, by virtue of Article XIV, Complainant waived its right to bargain over a change in past practice. Hence, Complainant has failed to establish that Respondent violated Sec. 111.70(3)(a)4, Stats.

DISCUSSION

Deferral

The Respondent asserts that this dispute should be deferred to the parties' contractual grievance and arbitration procedures. For the following reasons, it is concluded that deferral is not appropriate in this case. First, unlike the case in Brown County cited by Respondents, there was no final and binding grievance arbitration in effect at the time the instant dispute arose.

5/ Martinsville Nylon Employees v. NLRB, 140 LRRM 2876.

By its terms, the parties' Agreement expired on June 30, 1993, and at the time the dispute arose, and at the time of hearing, the parties were engaged in the process of negotiating a successor agreement. There is nothing in the record to indicate that the parties have agreed to extend the terms of the 1992-1993 Agreement beyond its expiration date. The Commission has held that there is no duty to proceed to grievance arbitration as to disputes arising during the contract hiatus. 7/ There is also no evidence that the Complainant has otherwise agreed to submit this dispute to grievance arbitration. The Commission has held that deferral is not appropriate in those circumstances. St. Croix Falls School District, Dec. No. 27215-D (WERC, 7/93). Further, the duty to maintain the status quo as to wages, hours and conditions of employment during a contract hiatus period is statutory and not contractual. While the provisions of the expired agreement may be relevant in determining the status quo, those provisions are not the basis of the employer's obligation to bargain over any changes in the status quo during a contract hiatus. 8/ Thus, deferral to grievance arbitration is not appropriate in this case.

6/ City of Greenfield, Dec. No. 14026-B (WERC, 11/77) at 5-6.

7/ See City of Greenfield, Ibid; Menasha Jt. School District, Dec. No. 16589-B (WERC, 9/81); School District of Tomorrow River, Dec. No. 21329-A (Crowley, 6/84).

Alleged (3)(a)4 Violation

Both parties concede that the expired agreement is silent as to the compensation an employe is to receive when substituting for an employe in a higher paid classification. The Complainant is asserting that with regard to the Cook classification, there is an existing past practice of paying the substituting employe the higher rate of the Head Cook when the latter is absent and that the Respondent is obligated to negotiate with the Complainant regarding a change in that practice. The Respondent asserts that the Complainant has failed to prove the existence of a binding past practice, and that even if it had done so, by virtue of Article XIV - Entire Memorandum of Agreement in the Agreement, such a practice would not be binding and Respondent had no obligation to maintain the practice.

As stated in the above discussion regarding deferral, the issue in this case is the scope of the Respondent's statutory duty to maintain the status quo during the contract hiatus period.

The Commission held in Mayville School District that:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment during a contractual hiatus is a per se violation of the employer's duty to bargain under the Municipal Employment Relations Act. Such unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because they undercut the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. In addition, such an employer unilateral change evidences a disregard for the role and status of the majority representative which is inherently inconsistent with good faith bargaining. 9/ (Footnotes omitted)

In order to resolve the issue, it is necessary to determine what the status quo was at the time the parties' Agreement expired. The Commission has held that the status quo is to be viewed as "a dynamic concept defined by the language of the expired agreement, the manner in which the language has been implemented, and any bargaining history related to the language." St. Croix Falls School District, supra. In viewing status quo as a dynamic concept, the Commission stated in its decision in Mayville School District that the status quo

> can allow or mandate change in employe wages, hours and conditions of employment. For instance, the status quo may dictate that additional compensation be paid to employes during a hiatus upon attainment of additional experience or education. 4/ Or the status quo may give the employer discretion to change work schedules during a hiatus. 5/
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> . . .

8/ Dec. No. 25144-D (WERC, 5/92) at p. 12; aff'd, Dec. No. 92 CV 341, 92 CV 342 (Cir. Ct. Dodge Co., 10/93).

4/ School District of Wisconsin Rapids, supra; Manitowoc Schools, Dec. No. 24205-B (WERC, 3/88), aff'd Dec. No. 88-CV-173 (Cir Ct Manitowoc 1/89).

5/ City of Brookfield, supra note 3; Washington County, Dec. No. 23770-D (WERC, 10/87).

. . .

(At 13)

In this case the expired agreement is silent as to the matter of compensation for employes substituting for higher paid employes. Complainant, however, asserts there is a past practice of paying the substitute the higher rate, that the practice is the status quo, and that therefore, Respondent is obligated to negotiate any changes in that practice with the Complainant. While the expired agreement is silent regarding the compensation for substitutes in such a situation, it is not silent as to the status of practices not set forth in the agreement or in writing. Article XIV - Entire Memorandum of Agreement states, in relevant part:

> This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties, and supersedes all previous agreements and past practices between the parties. Any supplemental amendments to this agreement shall not be binding upon either party unless executed in writing by the parties hereto.

. . .

Contrary to the Complainant's assertion that the above provision only applied to the parties' initial agreement, no such limitation is expressed in Article XIV. Article XIV continues to be in effect with each successor agreement and by its terms, supersedes any past practices not incorporated into the Agreement and places the parties on notice that if they desire to continue a practice, they must obtain the written agreement of the other party.

There is no written agreement in evidence regarding the alleged practice in this case. Thus, assuming the Complainant has established there was a past practice of paying Tronstad the Head Cook's rate when the latter was absent, pursuant to Article XIV, it could not have enforced such a practice during the term of the Agreement, and the Respondent would not have been obligated to continue it. That situation then, is the status quo once the parties' Agreement has expired. Therefore, the Respondent was free to end the unwritten practice without first bargaining the change with Complainant. That does not mean that Complainant could not propose to include the practice in the successor agreement. In that case, Respondent would be required to bargain in good faith over the matter, as compensation is, of course, "wages", but the status quo until the parties do so, is that such past practices regarding subjects about which the agreement is silent, are not binding.

For the foregoing reasons, the Examiner has found that Respondent's action did not constitute a violation of Sec. 111.70(3)(a)4, Stats.

Dated at Madison, Wisconsin this 3rd day of June, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/

David E. Shaw, Examiner