BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY	
and	Case 146 No. 41722 MA-5445
MARATHON COUNTY COURTHOUSE EMPLOYEES LOCALS 2492 D & E, AFSCME, AFL-CIO	

Appearances:
Mulcahy & Wherry, S.C., by Mr. Dean R. Dietrich, and Mr. Jeffrey T. Jones, on behalf of the County.
Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the County and the Union respectively, are signatories to various collective bargaining agreements covering certain of the County's employes which provide for final and binding arbitration. Pursuant to said agreements, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was appointed by the Commission. Hearing was held on April 19, and June 6, 1989, in Wausau, Wisconsin. The stenographic transcript was received on July 7, 1989. After the parties mutually requested an extension in the briefing schedule, the parties concluded their briefing schedule on September 27, 1989. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties were unable to stipulate to the issue at hearing.

The County proposed the following:

> Whether the County violated the labor agreements when it provided for reserved parking spaces for the employes working in the County Courthouse after construction of the new jail facility on county land? If so, what is the appropriate remedy?

The Union framed the issue as follows:

> Did the County violate the comprehensive labor agreements of Locals 2492-D and 2492-E, AFSCME, AFL-CIO, by its unilateral discontinuance of the long-standing past practice of the employe benefit of providing an adequate supply of cost-free automobile parking?

The parties agreed that the undersigned would frame the issue.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 2 - MANAGEMENT RIGHTS

> The County possesses the sole right to operate the departments of the County and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:
>
> A. To direct all operation of the respective departments;
>
> B. To establish reasonable work rules;
>
> . . .
>
> F. To maintain efficiency of department operations entrusted to it;
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> G. To take whatever action is necessary to comply with State and Federal laws;

H. To introduce new or improved methods or facilities;

. . .

J. To change existing methods or facilities;

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

. . .

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the rights of the County to continue to exercise these management rights.

ARTICLE 3 - GRIEVANCE PROCEDURE

. . .

B. Arbitration

. . .

5. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract in the area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

. . .

ARTICLE 29 (26) - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement constitutes the Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendments supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The parties further acknowledge that, during negotiations which resulted in the Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any items covered by the terms of this Agreement and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity is set forth in this Agreement. Waiver of any breach of this Agreement by either party shall not constitute a waiver of any future breach of this Agreement.

FACTS:

The basic facts are not in dispute with some singular exceptions. Prior to 1985, the County provided parking spaces near the courthouse without charge to professional and nonprofessional bargaining unit employes who worked within the courthouse. Employe parking arrangements were defined and determined by the County pursuant to county ordinances which were modified as the County saw fit. While there was no express guarantee of free parking and the County did not make any attempt to maintain a specific ratio of free parking spaces to employes, the County did increase the number of spaces available over a period of time as the number of employes working within the courthouse increased.

While there have always been more employes than parking spaces available, prior to 1985, employes testified that they never had problems or that it was infrequent or rare that upon arriving to work they were unable to find an unoccupied free parking space.

In 1985, the County decided to build a new jail and sheriff's department

facility adjoining the courthouse. The old jail was several blocks away from the courthouse. In preparation for the project, the County purchased land adjoining the courthouse. The project was an addition to the existing courthouse which encompassed most of the pre-existing parking areas.

On September 10, 1985, the County notified department heads that free employe parking would not be available beginning on October 1. The Union filed grievances alleging violation of a long-standing past practice of County-provided, cost-free parking. The grievance was settled by the County's decision to rent two nearby lots for employe parking free-of-charge during the construction.

By late 1985, the Union was aware that, with the construction of the new facility, the County's parking policy was open for discussion. As the new facility neared completion in 1987, the County began to consider and develop its revised parking requirements. It distributed a survey to courthouse employes inquiring as to whether employes would be interested in reserved parking spaces enforced by payment of parking fees. The County also conducted meetings with groups of employes on this issue.

In May of 1987, County Personnel Director Brad Karger issued a memorandum to all employes of the courthouse and jail detailing a new parking policy. (emphasis added) Under the new policy, fifty-two spaces would continue to be cost-free to employes on a first-come, first-serve basis while the remaining eighty-one spaces would be "paid reserved" to which employes would be eligible, based on seniority, for rent from the County for ten dollars per month. The County received more requests for reserved spaces than were available. It placed less senior employes on a waiting list.

Employes who opted not to rent or who were ineligible to rent because of their seniority status encountered problems securing the cost-free spaces even upon arriving 15 or 20 minutes early. They reported considerable problems. One employe estimated that there's now only a one in ten chance of finding a spot. Many reported that they can never find a free spot.

Of those who opted to rent, at least five reported that they felt compelled to rent to insure a space, but would not be leasing if free parking availability had remained the same as it had prior to the remodeling-addition of the courthouse/jail.

It is this change from a system of free parking to limited free and substantial paid reserve parking which the Union challenges. The new policy leaves only 52 of 133 spaces free.

While estimates vary between County and Union witnesses, prior to construction of the jail addition, there were approximately .6 parking spaces for each employe. After construction, there is .56 or .58 parking spaces for each employe; however, the ratio of free parking spaces to those seeking them, after reserve spaces are excluded, is now .33 for each employe, while "paid reserve parkers" have a ratio of one space for each employe.

POSITION OF THE PARTIES:

Union

The Union stresses that no contract, regardless of how extensive, can foresee every circumstance which may arise through the duration of the agreement. It maintains that parties often silently recognize that certain conditions of employment are part of the whole agreement although they may not be expressly stated. According to the Union, to prove a past practice exists, the benefit must be consistent, longstanding and mutually accepted by the parties. Free parking, it avers, complies with all three criteria. Citing two arbitral decisions, the Union argues that the City's unilateral change in establishing reserved parking violates the comprehensive agreements involved herein.

In response to County arguments that the management rights, decision of arbitrator, and zipper clauses in the agreements permit it to unilaterally depart from the parking benefit which has been enjoyed as a longstanding past practice, the Union argues that numerous arbitrators have recognized a past practice as a part of every agreement and to accept the County's claim would give employers a virtual carte blanche to depart from such benefits at whim. To interpret the language as the County asserts would effectively result in a stampede by the County to abrogate all other longstanding benefits not clearly enunciated in the agreements.

The Union stresses that mutuality with respect to the practice existed and that circumstances have not materially changed because the amount of parking has not materially changed.

In sum, the Union asserts that the record demonstrates the existence of a clear, consistent, longstanding past practice "ripened" into a contractually inferred and accepted condition of employment which the parties mutually

accepted and expected to continue. The County, it alleges, breached this compact and the labor contracts when it decided to discontinue the free parking arrangement.

County

The major thrust of the County's argument is that the County's implementation of the reserved parking policy following the construction of the courthouse addition was not in violation of any of the provisions of the applicable labor agreements.

It argues that a binding past practice does not exist claiming that the parties never mutually agreed to and accepted the practice but rather that the provision of cost-free parking was unilaterally and voluntarily implemented by the County.

Even assuming that a past practice existed, the addition of the jail and sheriff's department constitutes a changed circumstance, according to the County, which results in the practice no longer being viable or binding.

The County also contends that the alleged past practice must be deemed nullified by the existing contract language, namely the contracts' zipper clauses.

It also strongly asserts that the County's action in implementing the new reserved parking policy comported with its statutory authority and Article 2, the contracts' management rights clauses. According to the County, the management rights clause vests the County with sole and specific authority to determine parking arrangements on County-owned land.

DISCUSSION:

It is evident from the evidence adduced at hearing, that employes enjoyed the longstanding privilege of cost-free parking provided close to the Courthouse facility by the County. It is equally clear that contractually, the County retained for itself the right to change this arrangement to one consisting primarily of reserved parking through its management rights clause. In the absence of either specific language addressing cost-free parking or ambiguous language from which the provision of cost-free parking could be implied or inferred, it is concluded that Sections J and K, expressly reserve this management right for the County.

Even assuming that the County's provision of the cost-free parking rose to the level of a longstanding past practice on the County's part, because both Article 2 and Article 29(26) are set forth in the agreement, it appears that such a practice was unilateral and therefore subject to change.

Moreover, Article 29(26), the entire memorandum of agreement or "zipper clause" plainly states that "this Agreement constitutes the Agreement between the parties and no verbal statement shall supercede any of its provisions. Any amendments supplemental hereto shall not be binding upon either party unless executed in writing by the hereto . . ."

Without specific mention of cost-free parking as a contractual benefit or a maintenance of standards clause which retains such unwritten benefits, the zipper clause effectively bars the undersigned from concluding that the provision of cost-free parking is an unwritten longstanding past practice that has ripened into an implied contractual benefit contained in the parties' agreements.

In concluding that the County possesses the right to switch to the current reserved parking system, the undersigned declines to comment upon the substantive merits of the decision to convert from cost-free to a primarily reserved parking system, but merely holds that the County possessed the contractual right to take the action it determined to take.

Accordingly, based upon the above, it is my

AWARD

1. That the County did not violate the comprehensive labor agreements of Locals 2492-D and 2492-E by unilaterally discontinuing its practice of providing cost-free parking as it had in the past and establishing a parking system in which most of the employe parking was offered on a paid reserved basis.

2. That the grievances are denied and dismissed in their entirety.

Dated at Madison, Wisconsin this 22nd day of November, 1989.

By _____
Mary Jo Schiavoni, Arbitrator