BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OCONOMOWOC CITY EMPLOYEES UNION LOCAL 1747, AFSCME, AFL-CIO	Case 49
and	No. 42115
	MA-5573
CITY OF OCONOMOWOC	

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ms. Lisa M. Leemon and Mr. Roger E. Walsh, Attorneys at Law, Lindner and Marsack, S.C., appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1987-1988 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance regarding the use of City vehicles. The undersigned was appointed and held a hearing on October 3, 1989, in Oconomowoc, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript of the hearing was made, both parties filed briefs, and the record was closed on November 7, 1989.

ISSUE:

The Union states the issue to be decided as the following:

> Is the City violating the contract and/or a past practice by denying employees the use of City vehicles for transportation in conjunction with meetings involving the processing of contractual grievances? If so, what is the appropriate remedy?

The City states the issue as the following:

> Did the City violate the collective bargaining agreement by denying employees who were employee Union officers and/or grievants the use of City vehicles for transportation in conjunction with meetings involved in the processing of contractual grievances? If so, what is the appropriate remedy?

CONTRACT PROVISIONS:

ARTICLE II - MANAGEMENT RIGHTS

> 2.01 - Rights. The Union recognizes that, except as hereinafter provided, the City has the right to manage and direct the work force. Such rights include, but are not limited to, the following:
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> . . .
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> e. To establish reasonable rules and regulations, and to direct the job activities of employees;
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> . . .

ARTICLE XXII - GRIEVANCE PROCEDURE

> 22.01 - Definition and Procedure. Any difference of opinion or misunderstanding which may arise between the City and the Union, or any member of the Union, shall be handled as follows:
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> Step 1. The grievance shall be reduced to writing and presented by the aggrieved employee and the Union Grievance Committee to the Director of Public Works. A meeting between the above-named parties shall be held within ten (10) workdays of the presentation of the written grievance, and the Director of Public Works shall respond to the aggrieved employee and the Union

Grievance Committee in writing within ten (10 workdays of such meeting.

Step 2. If a satisfactory settlement is not reached as outlined in Step 1, the grievance may be appealed in writing by the Union to the City Administrator within fifteen (15) workdays of the receipt of the Step 1 answer. A meeting between the above-named parties shall be held within fifteen (15) workdays following such appeal, and the City Administrator shall respond to the aggrieved employee and the Union within ten (10) workdays of such meeting.

22.02 - Arbitration. In the event that any grievance has not been resolved in one of the two (2) preceding steps, the grievance may be appealed by the Union to arbitration by written notice thereof to the City Administrator. Upon receipt of the appeal, the City Administrator and the Union representative shall meet and attempt to agree upon a neutral arbitrator. If within the ten (10) days after the first meeting the parties have not been able to agree upon a neutral arbitrator, either party may request the Wisconsin Employment Relations Commission to: (1) appoint an arbitrator, or (2) submit a panel of arbitrators from which the parties will alternately strike names until one arbitrator remains. The arbitrator so selected shall hear the dispute and shall render a written decision which shall be final and binding upon the parties. Costs of arbitration shall be divided equally between the Union and the City. In rendering his decision, the Arbitrator shall have no authority to add to, subtract from, or modify the provisions of this Agreement.

22.03. The term "workday" shall not include Saturdays, Sundays or holidays.

BACKGROUND:

This grievance arose during a meeting at City Hall on February 2, 1989, between Union president Tony Kluz another City employee, Randy Lactsch, and the City Administrator/Treasurer, Richard Mercier. The three of them were in Mercier's office discussing another grievance in accordance with Step 2 of the grievance procedure. Mercier left his office to get a copy of something and, while out of his office, happened to look into the parking lot and saw a City truck parked outside City Hall. Upon returning to the meeting, he asked Kluz and Lactsch how they got to City Hall, and Kluz told him they used a City vehicle. Mercier told them that they could not use City vehicles anymore for meetings regarding grievances.

The Union filed a grievance, which was denied by the City and ultimately processed to arbitration. The parties stipulated that the grievance was timely and properly before the Arbitrator. The parties also stipulated that the grievance procedure in the 1987-1988 labor contract has not changed since 1980. The contracts between 1969 and 1979 had an additional step, with the aggrieved employee presenting his grievance to his immediate supervisor at Step 1, to the Director of Public Works at Step 2, and to the Mayor or City Council at Step 3. The successor labor agreement to the 1987-1988 contract, which was pending in interest arbitration at the time of this hearing, changed Step 1 back to the aggrieved employee going first to the supervisor, rather than to the DPW Director. The issue of what kind of transportation employees are to use to participate in grievance meetings has never been written into the parties' contracts, and the parties stipulated that this has never been an issue in contract negotiations.

The bargaining unit is composed of about 19 employees in three departments -- waste water, parks and public works (or DPW). The DPW shop is at 630 South Worthington Street, where nine employees report to the shop and some are assigned to different jobs throughout the City. The waste water treatment plant is at 900 South Worthington, where six employees report there each morning and two of them work in the street crew part of the time. The parks department has a building on Forest Street, where about five employees report but mostly work outside all over the City in its 10 or 12 parks. Each department has its own fleet of vehicles. Each shop also has a supervisor under a director. The directors work at City Hall at 174 East Wisconsin Avenue, except for the Parks Director who works at the recreation department center on West Wisconsin Avenue. The distance between City Hall and the shops is about one-half to three-quarters of a mile, with the distance across the City varying (roughly) from about three to four miles.

According to Kluz and Earl Sauer, a City employee for 20 years who also held many different positions as a Union officer, about six to ten grievances a year have been filed, with most of them resolved in the early steps of the

grievance proceedings in the meetings called for by the contracts. These grievance meetings, such as those with the DPW Director or the City Administrator, are always held at City Hall during the work day. The meetings are scheduled from two days to a week ahead of time, with the time and dates determined by the person at City Hall who will be conducting the meeting. The employees and Union stewards or officials are notified of the time, and they in turn notify their supervisors that they need to attend grievance meetings.

The employees have always used City vehicles to go to City Hall to attend the grievance meetings. When they notify their supervisors of the meeting or ask permission to leave, a supervisor might tell them which City vehicle to take for the meeting. Sauer explained that when a supervisor knows that someone will be attending a grievance meeting, the supervisor might arrange work assignments so that the employee will be working in or around the shop. If an employee who needs to be at a meeting is working out on the street, someone else involved in the meeting would pick up the employee in a City vehicle. There have been occasions in the past where more than one City vehicle was used to come to City Hall for a grievance meeting.

Mercier began working for the City as Treasurer in 1969 and was not involved with grievances until 1977 when he became City Administrator/Treasurer. He was the person handling Step 2 grievances from 1980 on, and would contact the Union president or notify the DPW Director that the Step 2 level meeting was to take place. Mercier had never seen City vehicles being used for this purpose before February of 1989, and his supervisors never told him about the practice. When he first saw the City vehicle outside City Hall during the February 1989 meeting, "a light bulb went on," he stated, but his renunciation of the practice was not connected to the grievance being discussed at the time. Mercier testified, "I had no knowledge that vehicles were used for Union business, none whatever." When he later talked to the directors and supervisors, they told him they were aware of this practice and that it had been going on for a long time.

THE PARTIES' POSITIONS:

The Union:

The Union contends that the City is violating the contract by refusing to allow employees the use of City vehicles to go to and from grievance meetings conducted during the work day. While the contract does not address the issue of transportation, its silence does not give the City the right to change this condition of employment. The Union submits that the providing of transportation
for employees is a longstanding practice, which is neither a gratuity nor an unintended benefit, and that this practice has weight equal to a written contract provision.

The Union notes that various supervisors and department heads were aware of the practice of providing vehicles for meetings and participated in it by assigning particular vehicles for employees to use or by arranging the work location of employees so that such transportation would be available. The Union states that Mercier is but one City official involved in grievance processing, and whether or not he knew of the practice is not determinative of whether a binding practice exists. The practice existed for more than 20 years and was exercised on a regular basis, with six to ten grievances processed each year.

Moreover, the Union asserts that the City has not provided any evidence that the underlying circumstances that gave rise to this practice have changed. While most employees come to work in their own cars, they are not required to do so and would not have access to their own vehicles if working for the City somewhere other than where they park. The Union points out that transportation with City vehicles is provided to employees when they are engaged in day to day City business, and the processing of grievances is also City business.

The use of City vehicles is not an insignificant benefit, the Union claims, as it allows employees to dispense with Union business in a prompt and timely manner. To require employees to walk or find alternate transportation would be more time consuming and less efficient, the Union asserts.

Therefore, the Union submits that the City's unilateral abolition of this practice violates the contract and asks that the Arbitrator order the City to cease and desist in such action or other relief, as appropriate.

The City:

The City argues that its denial of the use of City vehicles to attend grievance and arbitration meetings is not a violation of past practice, as a past practice did not exist. The City notes that there can be no acceptance of a practice where one of the parties has no knowledge of the practice. In this case, Mercier, the City Administrator for the past 12 years, had no knowledge of the practice in issue. Moreover, the City contends that Mercier is responsible for negotiating and interpreting the labor agreement, sets proposals for bargaining, and is the only source of approval or consent to a

practice before that practice will become binding on the City.

While acknowledging that supervisors and department directors knew that City vehicles were being used to attend grievance meetings, the City submits that those individuals did not have the authority to bind the City to a practice without prior consultation with the City Administration. To give effect to this practice, the City claims, would give supervisors and department directors the authority to create binding past practices and place them on the same level as negotiated contractual provisions, without the knowledge or approval of the City Administrator. The City cautions the Arbitrator to hold that an alleged practice carries the same weight as a negotiated contractual provision when the City Administrator had no knowledge of that practice.

Even assuming that a past practice did exist, the City submits that it cannot abrogate the City's clear contractual right to establish reasonable work rules as provided in Article II, Section 2.01(e). The City claims that Mercier's order that employees are not allowed the use of City vehicles to attend meetings at City Hall is such a rule established in accordance with that section of the contract. Past practice may be useful in interpreting ambiguous contract language or for filling contractual gaps, but it cannot be relied on in the face of clear contractual language. The City points out that Section 2.01(e) clearly gives it the right to establish reasonable work rules at any time during the life of the contract, and the City has exercised this right by prohibiting the use of City vehicles to attend meetings at City Hall.

Finally, the City contends that the rule established by Mercier is reasonable where the City was concerned that employees at the individual shops have access to City vehicles for performing work within the City. Two or more City vehicles could be used for a single meeting at City Hall, and those vehicles could be more efficiently used by employees driving to various assignments of work. Employees might have to drive to different departments to pick up others when a vehicle is unavailable, or return to the shop and exchange a needed vehicle with another available vehicle.

The denial of the use of City vehicles will not cause undue detriment to employees, the City states, while the rule will allow it to maximize efficiency and control the use of its vehicles. The City could arrange meetings to be held at more convenient times to allow employees to drive their own vehicles to City Hall and leave directly for home after a meeting. Such a _de minimis_ amount of driving personal vehicles would not affect employees' automobile insurance premiums. Furthermore, the contract requires that rules are to be reasonable, not necessarily the most reasonable or perfect solutions. The City argues that it has a legitimate reason for the rule -- control over its vehicles to use them efficiently.

Therefore, the City requests that the Arbitrator deny the grievance.

DISCUSSION:

Either party's framing of the issue is acceptable in this case, because the question presented is whether the practice of employees' use of City vehicles to attend meetings at City Hall has attained the status of a past practice and is as binding and effective as if it had been specifically written into the contract or become part of the essence of the parties' agreement.

It is generally accepted by arbitrators that, in the absence of written contractual language, a binding past practice -- one that cannot be unilaterally discontinued during the term of the contract -- must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The practice of using City vehicles to attend grievance meetings and arbitration hearings at City Hall goes back at least 20 years, meeting some of the necessary elements of a binding past practice. The question is whether Mercier's lack of knowledge of this practice precludes the Union from asserting that the practice has a binding effect.

The Arbitrator has no reason to doubt that the first time Mercier was aware of the practice at issue was in February of 1989, when, as he testified, he first noticed a City vehicle parked in the City Hall lot while meeting with the Union president and another employee in a Step 2 grievance meeting. Although Mercier had worked for the City for nearly 20 years and had been involved in grievance processing for 12 years, there was no reason that the matter would have necessarily come to his attention during that time. Mercier testified that the supervisors and directors of the departments involved were all aware of the practice and told him it had been going on for a long time. However, the matter was never brought up during contract negotiations.

The fact that one person in the City's management was unaware of the practice does not mean that knowledge may not be imputed to the City as a whole. Supervisors at the shops told employees which vehicles to use on occasion, and the directors who work at City Hall were well aware of the practice. The fact that the supervisors and directors never brought it to Mercier's attention or to the bargaining table may have meant that the supervisors and directors did not view the practice as a problem to be

addressed. It is not necessary that everyone in management must be aware of a practice in order to find mutual acceptance of the practice. For example, if the DPW Director had been unaware of the practice, but Mercier knew of it, the practice would still be binding. The City's management in general knew of the practice and acquiesced in it over a long period of time, through the terms of several collective bargaining agreements. The practice was exercised on a regular basis. The supervisors and directors act on behalf of the City, and their long-standing knowledge of the practice is sufficient to impute knowledge to the City as a whole.

The supervisors and directors have the apparent authority to assign particular vehicles to employees to attend grievance meetings and presumably the same authority to deny use of City vehicles. Contrary to the case cited by the City in its brief, Univac, 54 LA 48 (Volz, 1969), this is not a case of supervisors' exercising leniency toward employees to avoid disciplinary measures, but a case of supervisors and directors actively taking part in a practice established some time ago, long before Mercier became City Administrator. Therefore, I find that Mercier's lack of knowledge of the practice is not fatal to the Union's case, and a valid past practice has been established. 1/

The City argues that even if the Arbitrator should find that a past practice exists, that past practice cannot be used to abrogate the clear contractual right given to the City to establish reasonable work rules, as provided in the Management Rights clause, Article II, Section 2.01(e). However, this is not a matter of an arbitrator using past practice to guide her in interpreting ambiguous language because no language applies to the practice of the use of City vehicles to attend grievance meetings. Instead, this is a case where the past practice fills a gap or a matter not covered by the contract's literal terms. Thus, the Arbitrator does not view the past practice as a means to interpret Section 2.01(e). Rather, the past practice stands on its own merit, as part of the essence of the parties' whole agreement.

The City argues that it established a work rule which was reasonable by prohibiting employees from using City vehicles to attend meetings for the processing of grievances or arbitration hearings. The City asserts that the contract does not contemplate that it may establish work rules only if a past practice were not already in existence. The City looks at the rationale used by Arbitrator Barron in Louisiana Transit Co., Inc., 87-1 CCH ARB Para. 8302, where he states: "If the way things have been done in the past is deemed to be a past practice and, therefore, to constitute the contract provision dealing with an issue on which the Company could otherwise promulgate reasonable rules, the net effect would be to nullify the right of the Company to promulgate any rules at all." However, Arbitrator Barron gave an additional reason for not supporting a particular past practice -- that the particular past practice had become substantially detrimental to the company, and the company could change a past practice when circumstances compelled it to do so.

In this case, the past practice has not become substantially detrimental to the City. The City does not show that circumstances surrounding the use of City vehicles has changed in order to create a need to change the past practice. Nor is there evidence on the record that vehicles are not available or the employees' use of them to attend meetings at City Hall has prevented the City from getting its work done. Mercier stated at the hearing that taxpayers should not be subsidizing the Union to conduct its business. But both the City and the Union are parties to the contract, and both have agreed to this grievance procedure intended to resolve grievances without resorting to arbitration. The meetings at City Hall as part of the grievance procedure are Union and City business, not just Union business.

Clearly, the City has the right to establish reasonable rules. However, the renunciation of a past practice is not the same thing as the establishment of a reasonable work rule. To hold so would mean that any past practice could be unilaterally discontinued by characterizing the renunciation of the practice as the establishment of a rule. No past practice would have any effect under such a theory. Moreover, the unilateral abolition of past practices by the announcement of new work rules would have a destabilizing effect on labor relations, where past practices have come about as a matter of mutual understanding, convenience, necessity or accommodation.

Finally, it is not every past practice which will be given a binding effect. However, the City is not oppressed in this case by having to abide by the past practice of allowing employees to use City vehicles to attend meetings at City Hall during the term of the contract. There is no economic detriment to the City, and the City remains free to object to the practice in its next round of negotiations for a new contract. A timely repudiation of this past practice is better made during the negotiation of a successor agreement than during the term of the existing agreement. 2/

1/ For a similar case, see City of Appleton, 82-1 CCH ARB Para. 8107, (McGilligan, 1981).

2/ See Southern Gage Co., 80 LA 950, at 956, (Singer, Jr., 1983).

Therefore, I conclude that the Union has established that the past practice of allowing employees the use of City vehicles to attend grievance meetings or arbitration hearings is a valid past practice which is part of the essence of the parties' total agreement, and I will sustain the grievance. While the Union asks that employees adversely affected are to be made whole, any such relief would be _de minimis_, and I find that the better remedy is prospective only.

Accordingly, it is my decision and

AWARD

The grievance is sustained.

The City is ordered to cease and desist from denying employees the use of City vehicles for transportation in conjunction with meetings involving the processing of contractual grievances.

Dated at Madison, Wisconsin this 27th day of November, 1989.

Karen J. Mawhinney, Arbitrator