BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
EAU CLAIRE CITY EMPLOYEES LOCAL 284, AFSCME, AFL-CIO	Case 190 No. 44089 MA-6164
and	
CITY OF EAU CLAIRE	

Appearances:
Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. Jeffrey P. Hansen, Assistant City Attorney, City of Eau Claire, appearing on behalf of the City.

ARBITRATION AWARD

Eau Claire City Employees Local 284, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Eau Claire, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Eau Claire, Wisconsin on July 17, 1990. The hearing was not transcribed and the parties submitted post-hearing briefs which were exchanged on September 25, 1990.

BACKGROUND

The City operates a water treatment plant which contains three inside parking bays. For as far back as anyone can remember, two operators have been allowed to park their personal vehicles in the bays when the area was not required for work purposes. Pursuant to a memo dated February 5, 1990, employes were informed that effective March 2, 1990, they could no longer park their personal vehicles in the inside bays. Thereafter, the instant grievance was filed.

ISSUE:

The parties were unable to agree on a statement of the issue. The Union stated the issue thus:

> Did the City violate the collective bargaining agreement when it unilaterally discontinued the past practice of providing indoor parking facilities for employes at the water treatment plant?
>
> If so, what is the remedy?

The City stated the issue as:

> Was the Employer within its contractual rights when it discontinued the practice of parking private vehicles indoors at the water treatment plant?

The undersigned views the issue as follows:

> Did the City violate the collective bargaining agreement by prohibiting employes from parking their personal vehicles in the bays inside the water treatment plant?
>
> If so, what remedy is appropriate?

PERTINENT CONTRACT PROVISIONS

Article 3 - UNION SECURITY AND MANAGEMENT RIGHTS

. . .

> Section 2. The rights, power, and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits, limited to mandatory subjects of bargaining, that the employees enjoyed prior to the adoption of this agreement and that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the

spirit, intent, or purpose of this agreement.

Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.

It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons, and determine the methods, means, and personnel by which the agency's operations are to be conducted. But this should not preclude employees from raising grievances about the impact that decisions on these matters have on wages, hours, and working conditions.

UNION'S POSITION

The Union contends that the City has violated Article 3, Section 2 of the agreement by unilaterally taking away the benefit of inside parking. It asserts that the employes' parking inside the water treatment plant is an established past practice. It submits that this practice has been clear, known and uncontested for many years. The Union claims that there were only 6 or 7 occasions over 32 years where the bays were used by the City so employes did not park there but these exceptions do not invalidate the past practice as these are insufficient evidence that the City definitely reclaimed the parking spaces. The Union maintains that parking inside the bays is more than a de minimis benefit in that the vehicles are protected from the weather, especially in winter and are safe from vandalism. It points out that the City has terminated this benefit without offering to bargain with the Union and the subject never came up during the last round of negotiations.

The Union argues that the City's justification for its unilateral change in the past practice is without merit. It claims that the City's assertion of dire financial necessity along with possible serious damage to the water supply is nonsense. It points out that since the City became self insured about three years ago, it has made no change in parking until this case and there is no evidence of any claim made against the City or any damage to the water supply. The Union notes that outside contractors have parked their machinery in the bays, welded in them and stored chemicals there. It maintains that any claim of serious liability, however remote, can be made by the City, but the claim of serious risk is ludicrous because the City parks its own truck in the third bay and there is a fire door between the bays and the main building.

The Union asserts that the City's proof that it enforced a no parking policy at other City facilities has no bearing on the instant case because the Union never had an established past practice of parking in those other facilities. It claims that employes tried to sneak in those facilities when they could, but the City ordered them to leave. Inasmuch as there was no established past practice of parking at those facilities, the Union admits it never grieved those cases and those cases have nothing to do with the water treatment plant where the past practice was clearly established. The Union asks that the City be found to have violated Article 3, Section 2 and be directed to resume the past practice.

CITY'S POSITION

The City contends that pursuant to the Management Rights clause giving it control over its facilities, it discontinued indoor parking by employes at the water plant because the risk created by the presence of private vehicles in a facility supplying water and having a value of between $5 and $10 million was too great. With respect to the past practice of the employes parking at City facilities, the City claims that the practice is that the City has traditionally regulated where and when employes have parked and determined when parking practices were to be discontinued. As examples of this practice, the City points to the discontinuance of parking inside City shops during snow plowing, in front of the Civic Center in an area sheltered by a parking ramp, in the wastewater treatment plant and the designation of parking areas at the new City shop building. The City also points to the occasions where employes could not park in the water treatment facility for periods of one or two days to one or two weeks when these were needed by the City. The City concludes that the only past practice that was established by the evidence is that the City has exercised its right to regulate the private parking of employes including the water plant and it asks that the grievance be dismissed.

DISCUSSION

Article 3, Section 2 of the parties' agreement provides, in part, that "the rights, power, and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits . . . employes enjoyed prior to the adoption of this agreement. . . ". Parking one's personal vehicle indoors and out of the elements is a benefit or privilege, especially considering Wisconsin in the dead of winter. The City's reliance on Article 3, Section 3, Management Rights does not give it the exclusive power to discontinue employes parking because Section 2 of Article 3 limits the exercise of the City's power. The City has argued that the liability risks it faces are so great that indoor parking of personal vehicles at the water treatment plant cannot be tolerated. The evidence with respect to said risk was not persuasive on this point. The fact that the City parks its own vehicle in one bay as well as outside contractors parking there occasionally indicates the risks are not as significant as portrayed by the City. Additionally, there may be methods that would minimize any risk such as keeping the fire door closed. Furthermore, there was no evidence that the City ever offered or attempted to discuss the risks with employes or the Union. It appears that the risks due to employes' parking at the water treatment plant are greatly exaggerated and do not justify the prohibition on parking.

The Union has presented overwhelming evidence that indoor parking has been permitted at the water treatment plant on a continuous basis for over 30 years. The City has argued that employes were directed to remove their vehicles for periods of up to two weeks when the City needed to use the bays. Each time thereafter employes continued the practice of parking their personal vehicles in the bays. The undersigned concludes that these occasional interruptions did not destroy the continuity of the practice. Certainly, the City knew about the practice of indoor parking and until February, 1990 permitted the practice. The evidence establishes that this practice was continuous over a long period of time and was known to the City. Thus, this practice must be found to constitute a past practice.

The City has asserted that the past practice cannot be narrowly applied to parking at the water treatment plant but the past practice must take into account or involve the City's practice with respect to all parking facilities or locations. This argument is not persuasive. If the shoe was on the other foot and the City had permitted parking at its other facilities but had consistently not permitted it at the water plant, it could not be required to provide parking at the water plant merely because it provided it elsewhere. Likewise, the City's practice elsewhere with respect to not permitting indoor parking cannot be applied to the water treatment plant where it has consistently and regularly permitted indoor parking there for employes' personal vehicles. Thus, the past practice applicable to the water treatment plant is a privilege or benefit long enjoyed by employes prior to the execution of the agreement and is protected by Article 3, Section 2. The evidence of potential or actual risk is not sufficient to require a change in the past practice. There was no evidence that the City discussed or repudiated this practice in negotiations that resulted in the present agreement, and thus, the City must continue the past practice.

Upon the basis of the above and foregoing, the record as a whole and the arguments of the parties, the undersigned makes and issues the following

AWARD

The City violated Article 3, Section 2 of the parties' collective bargaining agreement when it unilaterally discontinued the past practice of providing indoor parking facilities for employes at the water treatment plant. Therefore, the City shall immediately reinstate the practice of permitting employes to park their personal vehicles in the two bays at the water treatment plant.

Dated at Madison, Wisconsin this 25th day of October, 1990.

By _____
Lionel L. Crowley, Arbitrator

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