STATE OF WISCONSIN
BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

HALES CORNERS VILLAGE EMPLOYEES, LOCAL NO. 511, LABOR ASSOCIATION OF WISCONSIN

and

THE VILLAGE of HALES CORNERS

Daniel Nielsen, Arbitrator

Case 27, No. 45229, MA-6533
Hearing: 05/01/91
Briefs: 06/12/91
Award: 09/10/91

The Labor Association of Wisconsin, 2825 North Mayfair Road, Wauwatosa, WI 53222, by **Mr. Patrick Coraggio**, Labor Consultant, appearing on behalf of the Union.

Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, WI 53202-3101, by **Mr. Mark Vetter**, Attorney at Law appearing on behalf of the Village.

ARBITRATION AWARD

The Labor Association of Wisconsin (hereinafter referred to as either the Association or the Union) and the Village of Hales Corners (hereinafter referred to as either the Employer or the Village) jointly requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the appropriate level of pay for Maintenance Mechanic/Firefighter Lance Giese. The undersigned was so designated. A hearing was held on May 1, 1991 at the Village Hall in Hales Corners, at which time the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant. The parties submitted written arguments, which were exchanged through the undersigned on June 12, 1991, whereupon the record was closed. Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

I. ISSUE

The parties were unable to stipulate to the issue to be decided herein. The Village proposes the following issues:

> "1. Did the Village violate Section 23.03 in the Agreement when, during the negotiations with the Association regarding the performance of work on the ladder truck, it did not agree to a new wage rate for the Maintenance Mechanic / Fire Fighter when he performed work on that truck? If so, what is the appropriate remedy?"
>
> "2. Does the grievance arbitrator have the authority to establish an appropriate rate of pay under Section 23.03 if an agreement cannot be reached by the parties?"
>
> "3. Does the language in Article XXIII, Section 23.03, constitute a contract re-opener clause? If so, is the grievant entitled to final and binding interest arbitration if the negotiations reach an impasse?"

The Association proposed the following:

> "1. Does the language in Article XXIII, Section 23.03, mandate that the employer provide a wage increase to any employee who is assigned to work on, or with, a new major piece of equipment purchased by the Village which was not used prior to the execution of the contract?"
>
> "2. Does the grievance arbitrator have the authority to establish an appropriate rate of pay under Section 23.03 if an agreement cannot be reached by the parties?"
>
> "3. Does the language in Article XXIII, Section 23.03, constitute a contract re-opener clause? If so, is the grievant entitled to final and binding interest arbitration if the negotiations reach an impasse?"

The grievance filed herein states that the "... grievant alleges that the employer violated the expressed and implied terms of the Collective Bargaining Agreement by refusing to negotiate/arbitrate a wage increase consistent with the implied and expressed terms of the Collective Bargaining Agreement..." The only substantive difference between the two framings of the issue is that the Village seeks to limit the question to the appropriate pay rate when working on the new fire truck, while the Association asks for a general increase in Maintenance Mechanic wages. The somewhat broader statement by the Association is more reflective of the grievance as filed, and the undersigned therefore adopts it as the statement of the issue.

III. RELEVANT CONTRACT LANGUAGE

ARTICLE V - GRIEVANCE PROCEDURE

> Section 5.01 - Definition: Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below. The Association may file a grievance regarding matters which affect a group (two or more) or all of the employees in the bargaining unit. Association grievances shall be filed at Step Two.

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Step Four - Final and Binding Arbitration
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E. The decision of the arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to the interpretation of the contract in the area where the alleged breach occurred. The arbitrator shall not modify, add to or delete from the expressed terms of the Agreement.

ARTICLE XXIII - MISCELLANEOUS

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Section 23.03: When new types of major equipment are utilized which were not used by the Village prior to the execution of this Agreement, the parties agree to negotiate the wage rates to be paid Employees assigned to such equipment and these operations. If it is impractical to negotiate wage rates prior to implementation, such rates shall be negotiated within sixty (60) days of implementation with retroactive pay where applicable.
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III. BACKGROUND FACTS

There is virtually no dispute over the facts in this case. The Village is a municipal employer providing general governmental services to the people of Hales Corners, in southeastern Wisconsin. One of the services provided is fire suppression through the Village Fire Department. The Village employees the grievant, Lance Giese, as a Maintenance Mechanic/Fire Fighter to provide general maintenance for the equipment in the Department of Public Works, Police Department and Fire Department.

During 1990 the Village purchased a ladder truck, called a Quint Fire Apparatus. This was first ladder truck owned by the Village. Based upon its belief that the ladder truck fell into the category of "new types of major equipment are utilized which were not used by the Village prior to the execution of this Agreement", the Association demanded negotiations over the Maintenance Mechanic's wages under the provisions of Section 23.03.

The parties met twice to negotiate over the wage issue. At the initial meeting on July 25, 1990, the Association took the position that the Quint apparatus introduced a hydraulics over electronics system for the first time, as well as proximity switches which were not used on any other piece of Village equipment. This, the Association argued, should yield a $2.00 per hour increase in pay. The Village took the position that the Quint apparatus was not a significantly different piece of equipment than had been used in the past, and that the Mechanic would only be expected to do normal maintenance, with major repairs being contracted to outside vendors. Thus the Village argued, there should be no increase in the Mechanic's wages.

The second bargaining session was held on August 20th. At this meeting, the Village notified the Association that the Mechanic would not be responsible for any structural repair or maintenance on the ladder portion of the vehicle. This left only the proximity switches in issue, and the Village took the position that simply adding a new magnetic switch would not justify any change in the Mechanic's wages.

The Association responded in a letter, reducing its hourly wage demand by 25¢. It also informed the Village of its view that the language of Article 23.03 required bargaining in good faith, and that the Village's refusal to make any wage offer could lead to submission of the dispute to an arbitrator. The

Village informed the Association by return correspondence that it did not believe that the language of Section 23.03 required the making of a specific wage proposal, nor did it provide for arbitration of the dispute in the event of an impasse. Instead, the Village stated its position that it was merely obligated to bargain in good faith.

The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

IV. THE POSITIONS OF THE PARTIES

A. The Position of the Association

The Association takes the position that the contract dictates a wage increase in cases where major new types of equipment are introduced:

> Section 23.03: When new types of major equipment are utilized which were not used by the Village prior to the execution of this Agreement, the parties agree to negotiate the wage rates to be paid Employees assigned to such equipment and these operations. If it is impractical to negotiate wage rates prior to implementation, such rates shall be negotiated within sixty (60) days of implementation with retroactive pay where applicable."

Granting that the language is ambiguous, the Association argues that the structure of Section 23.03 strongly indicates that the parties contemplated raising employee wages, and that the issue left open for negotiation was how much the increase should be. Certainly the addition of major new responsibilities could not lead to a decrease in compensation.

Section 23.03 has remained in the agreement unchanged since the initial contract was negotiated in 1977. The grievant was able to reach and speak with the retired AFSCME Business Agent, Irv Horak, who negotiated this language. Horak indicated that the language was intended to re-open the contract to allow for a negotiated wage increase. Even though the hearsay nature of this evidence might affect is weight, the Association argues that it is unrebutted in the record and is the best evidence of the mutual intent of the parties at the time they language was bargained. Since determining mutual intent is the primary goal of arbitration, Horak's unrebutted testimony is entitled to weight in resolving this case.

Ideally, the language of Section 23.03 would have detailed exactly the standards to be used in determining wage increases, and the procedures for advancing to arbitration in the event of an impasse. Unfortunately, the drafters did not go into such detail. The Section's reference to "retroactive pay" is a strong indicator that a wage increase was anticipated by the bargainers when they settled on this language. The obvious intent of this provision is to re-open the contract. An impasse in negotiations over a re-opener, the association notes, entitles the parties to take advantage of interest arbitration under Section 111.70, Stats. The Association urges the arbitrator to use his expertise in negotiations and public sector labor law to evaluate the language and order the parties to proceed to interest arbitration, either before him as a grievance arbitrator or through the statutory process.

While the contract is silent about the grievance arbitrator's right to establish a wage rate where parties reach an impasse, the Association argues that such recourse must be reasonably inferred. If, as the Village claims, their only duty is to talk to the Association, the language of Section 23.03 is reduced to a nullity. Clear principles of interpretation dictate that any

reading of a contract which reduces a clause to a nullity must be avoided, since parties are presumed to have intended all parts of their agreement to have effect.

Finally, the Association maintains that the Village's decisions to admit that the Quint was a major new piece of equipment, and then to contract out repairs and routine structural maintenance on the ladder assembly of the Quint apparatus is an admission of their liability for increased wages under Section 23.03. Having first asserted that the Quint was not a major new piece of equipment, the Village then changed its position for tactical reasons, hoping to persuade the Association or the arbitrator that its only duty was to "negotiate" rather than provide an actual increase. The Association urges the arbitrator to look upon these changes in position with suspicion in deciding the case.

For all of the foregoing reasons, the Association urges that the grievance be granted and arbitral resolution of the wage impasse undertaken or ordered.

B. The Position of the Village

The Village takes the position that its sole duty under Section 23.03 is to negotiate in good faith with the Association. The term "negotiate" is not defined in the agreement, but in labor relations parlance, "to negotiate" is synonymous with "to bargain". It is axiomatic that the duty to bargain in labor relations does not include the duty to make a concession or agree to a proposal. In this case, the Village negotiated with the Association, exchanging views and entertaining proposals on the change in duties, if any, occasioned by acquisition of the Quint apparatus.

The only evidence submitted by the grievant in support of his claim that Section 23.03 somehow obligates the Village to concede to the Association is the hearsay version of bargaining history attributed to Irv Horak. The Village vigorously asserts that the evidence is not entitled to any weight. First, the Village notes that Horak was contacted by phone three days before the hearing. No explanation was offered for not contacting Horak in time to have him attend the hearing. Furthermore, the claim that Horak, without notes and after 14 years, could clearly remember that the parties in one of his many negotiations intended Section 23.03 to result in added compensation is, the Village argues, a trip through Fantasy Land.

The Association and, allegedly, Horak ignore the second sentence of Section 23.03, which provides:

> "If it is impractical to negotiate wage rates prior to implementation, such rates shall be negotiated within sixty (60) days of implementation with retroactive pay where applicable" (Emphasis added)

If Section 23.03 assumed a pay increase in every instance, the words "where applicable" would be meaningless. Since the parties specifically used this phrase, it must be assumed that there would instances in which retroactive pay would not "be applicable" i.e. where no pay adjustment would be made.

Turning to the Association's request for a wage determination by the grievance arbitrator, the Village maintains that the arbitrator in this case is bound by the limitations of the arbitration clause. The contract restricts the arbitrator to interpreting the contract, and forbids additions to or modifications of the express terms of the contract. Since there is no express authorization for the grievance arbitrator to decide wage issues, the remedy

sought by the Association is inappropriate.

Even if the arbitrator had the right to establish a wage rate for the Mechanic, the Village argues that no increase is merited. The Village has repeatedly told the grievant that he has no duties related to repair of the ladder assembly. This includes the proximity switches, valves or ram assemblies, turntable and hydraulic jacks. All of the new duties cited by the grievant in requesting a pay increase have been contracted to outside firms. His refusal to accept these simple facts does not justify an increase in his pay.

Contrary to the Association's claim that Section 23.03 is re-opener clause justifying recourse to interest arbitration, the Village asserts that it simply allows for mid-term bargaining. Statutory interest arbitration is available for (1) reopened negotiations under a specific reopener clause, (2) negotiations over a successor collective bargaining agreement for a new term, or (3) negotiations over an initial collective bargaining agreement. It is "inapplicable to deadlocks which may arise in other negotiations which may occur during the term of a collective bargaining agreement." Dane County Handicapped Children's Education Board, Dec. No. 17400 (WERC 11/79). The dispute over Mechanic's wages is precisely a dispute arising in other negotiations during the term of a collective bargaining agreement. Thus there can be no recourse to interest arbitration under Section 111.70.

V. DISCUSSION

The threshold issue in this case is whether the language of Article XXIII, §23.03 obligates the parties to negotiate to an agreement on wages when a new piece of equipment is introduced, or whether it merely requires that the process of negotiation will take place. If the language is intended to guarantee a particular result, i.e. a wage increase, the additional issue of how bargaining impasses are to be resolved is presented.

The language of Section 23.03 provides for bargaining over wages when new equipment is obtained by the Village:

> When new types of major equipment are utilized which were not used by the Village prior to the execution of this Agreement, the parties agree to negotiate the wage rates to be paid Employees assigned to such equipment and these operations. If it is impractical to negotiate wage rates prior to implementation, such rates shall be negotiated within sixty (60) days of implementation with retroactive pay where applicable.

The Association asserts that the only reasonable reading of the language must assume an understanding by the parties that wages would be increased, and that it follows from this that the parties must also have intended some method by which impasses would be resolved. The undersigned cannot agree.

The Association states that a reading of §23.03 which imposes only an obligation to bargain would render the clause meaningless. This argument is circular. Only if one supposes that the clause guarantees an increase, is it true that language guaranteeing simply an opportunity to negotiate to agreement or impasse undercuts the guarantee. One must first presume the existence of the guarantee. If the clause is read as dictating a process rather than a result, there is no nullity created by refusing to infer a third party impasse resolution mechanism. The

language still has meaning, since it offers a framework for bargaining and, as noted below, a good faith bargaining process will often lead to some positive result. 1/

The Association urges that the guarantee of an increase must be presupposed, because the only evidence of intent -- the statements of Irv Horak -- shows that §23.03 was intended to provide an increase in wages in return for an increase in responsibility. Horak's statement were reported by the grievant, who spoke to him at his home in Portland, Oregon by telephone three days before the hearing. The grievant read Horak the language of §23.03 and got a response from him as to what the parties intended by the language. The undersigned admitted the testimony over the strong objections of counsel for the Village, with the admonition that hearsay testimony of this type was entitled to very little weight. The reasons for this are obvious from the circumstances of this case. Granting the accuracy of the grievant's version of the conversation, Horak was expressing an opinion about the meaning of language he negotiated in one of many contracts he handled, after 14 years had elapsed, without the aid of notes. Even if he had a clear present recollection of the negotiations, there was no opportunity to inquire about the limits of the language. Most pertinent to this case would be the question of whether a wage increase was guaranteed even where the new maintenance work required by the Quint apparatus was being almost entirely contracted out.

Were Horak's statements the only evidence in the record, the Association would prevail since the statements are entitled to some slight weight. The undersigned finds that the Horak statements are so unreliable as evidence, however, that they must yield to any more reliable evidence of a contrary intent. Such evidence is found in the language of Section 23.03 itself.

The contract calls for negotiation where circumstances change during the contract term. "Negotiation" is a term that has a commonly understood meaning in the labor relations field. It is a process of exchanging information, views and proposals. Normally this exchange will lead one or both parties to modify their positions, but this is not always the case. The federal and state laws governing labor relations recognize that the duty to bargain does not encompass an obligation to make concessions or agree to specific proposals. Had the parties intended to predetermine the outcome of such talks, as urged by the Association, they would presumably have made that intent clear in the language they used.

The conclusion that §23.03 does not presuppose a wage increase is buttressed by the last clause of the section:

> "...If it is impractical to negotiate wage rates prior to implementation, such rates shall be negotiated within sixty (60) days of implementation with retroactive pay where applicable."

As noted by the Village, the phrase "..with retroactive pay where applicable" rather plainly contemplates that there will be instances in which new equipment is introduced but no adjustment in pay is agreed upon. If the contract mandates an increase, retroactive pay would be "applicable" in every instance, and the phrase would be meaningless. Parties are presumed to have intended that the language used in their contracts have meaning, and the undersigned is not free to ignore the implications of the second half of §23.03. Thus the words used in the contract contradict the interpretation placed on the language

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1/ In the instant case, the bargaining process lead to a clear definition of the mechanic's duties relative to the new equipment and should have relieved some of his concerns about the impact of the Quint apparatus on his working conditions.

by Horak and urged by the Association.

Section 23.03 cannot reasonably be read as requiring the Village to agree to a wage increase. The use of the term "negotiation" to describe the parties' obligation, and the reference in the second sentence to increases being paid "where applicable" indicate that the parties contemplated both impasse and mutual agreement on no wage change as possible outcomes of the process.

There remains the question of whether the contract requires determination of the wage issue by either a grievance arbitrator or an interest arbitrator in the event of an impasse. In order to determine that the parties intended a third party resolution of their wage dispute, the term "negotiation" must be given a different meaning than is customarily applied to it in labor relations. The undersigned finds no proof of any such intent in the record or the contract language. As discussed above, the lack of a mechanism for resolving a bargaining impasse does not render Section 23.03 meaningless. It has independent significance in that it dictates a procedure and gives recourse to the grievance machinery in the event of a refusal to engage in good faith bargaining. Beyond that, however, the contract is silent. As the party bearing the burden of proof, the Association is obliged to offer some evidence that the Village and its predecessor Union, AFSCME, agreed to proceed to arbitration if negotiations reached an impasse. Even assuming that this is a permissible reading of the language, there must be some basis in the record for assigning that meaning to §23.03. In the absence of such evidence, the undersigned may not add an interest arbitration or wage re-opener clause to the contract under the guise of interpretation.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

1. The language in Article XXIII, Section 23.03, does not mandate that the employer provide a wage increase to any employee who is assigned to work on, or with, a new major piece of equipment purchased by the Village which was not used prior to the execution of the contract;

2. The grievance arbitrator does not have the authority to establish an appropriate rate of pay under Section 23.03 if an agreement cannot be reached by the parties;

3. The language in Article XXIII, Section 23.03, does not constitute a contract re-opener clause.

4. Accordingly, the grievance filed herein is denied.

Signed and dated this 10th day of September, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator