BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 67, AFSCME, AFL-CIO	Case 391 No. 47457 MA-7274
and	
THE CITY OF RACINE	

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401-0624, appeared on behalf of the Union.

Mr. William R. Halsey, Long & Halsey Associates, Inc., 8338 Corporate Drive, Suite 500, Racine, Wisconsin 53406, appeared on behalf of the City.

ARBITRATION AWARD

On May 22, 1992, Local 67, of the American Federation of State, County and Municipal Employes filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint a member of its staff to hear and decide a grievance pending between that Union and the City of Racine. On August 27, 1992, following jurisdictional concurrence from the City, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on October 29, 1992, in Racine, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were filed and exchanged by December 22, 1992. This arbitration involves the right of certain workers to leave their work site during their morning coffee break.

BACKGROUND AND FACTS

Local 67 of AFSCME is the exclusive collective bargaining representative of certain employes of the City of Racine, namely those employed in the City's Public Works, Streets, Solid Waste, Bridges and Buildings, Parks and Recreation Departments. The Employer and Union have a long-standing relationship and have been signatories to a series of collective bargaining agreements going back many years. One of the provisions of the parties' labor agreement provides for a coffee break. In the 1990-91 collective bargaining agreement, Article XIII, "Miscellaneous Provisions", Paragraph "A", provided the following:

> A. Coffee Break. A coffee break of fifteen (15) minutes will be allowed per day during a period falling in the first four (4) hours of an employee's working shift. The coffee break shall be computed from the time of cessation of work to the resumption of work. Police Department employes shall not leave the Safety Building for this break, except for the Animal Control Officer when he is on the road for animal calls.

The parties stipulated that under the terms of that agreement, Parks employes were free to go to convenience stores during their morning break to make purchases.

During the negotiations leading to the 1992-1994 collective bargaining agreement, the Employer bargaining team, headed by Personnel Director James Kozina, was under direction to change certain aspects of the morning coffee break. Specifically, the management team was under some pressure from

the Mayor, members of the common council and some citizens to eliminate what was perceived to be coffee break abuses. According to Kozina, those concerns were directed at coffee breaks exceeding the fifteen-minute allocation, and the congregation of workers at restaurants and/or convenience stores. To that end, the Employer proposed to replace the last sentence in Paragraph "A" with the following:

> Police Department employes shall not leave the Safety Building for this break, and all other employes shall take any coffee breaks at the job site.

The proposal, in that form, was unacceptable to the Union.

The parties bargained over this subject during their October 2, 1991 bargaining session. Doug Dresen, who chaired the Union's negotiating team, testified as to the discussion over the subject of breaks. According to Dresen, the discussion was exclusively over breaks taken in restaurants. Specifically, Dresen testified that the parties never discussed breaks taken at convenience stores, or purchases made at convenience stores and/or gas stations. It is Dresen's testimony that the City never indicated to the Union that the intent of the proposal was to ban employes from making purchases in vending machines and/or at convenience stores and/or gas stations. The subject received a lot of discussion. The Union raised a concern about breaks taken in the Winter, and expressed a desire to maintain the ability to take those breaks out of the elements. Dresen testified that it was a common practice for employes to go to a convenience store during their break, make purchases and return to the work area. That practice had extended at least sixteen years. With that practice in mind, and the discussion focused solely on restaurants, it was Dresen's testimony that the Union was prepared to make certain changes requested by the City. It was Dresen's testimony that during negotiations, the parties agreed that employes were free to continue to use convenience stores to make purchases during their breaks.

Jim Kozina also testified as to the discussion that took place over this issue in negotiations. It was Kozina's testimony that the concern was not focused exclusively on restaurants, but rather extended to restaurants, convenience stores, and any other sites upon which employes would break, congregate, and overextend their breaks. Kozina acknowledges the practice referenced by Dresen. It was his testimony that the discussion was not limited to restaurants, but rather was all-encompassing. Kozina denies that there was any indication ever made that the Union would continue to be free to make purchases at convenience stores during break periods.

The negotiations led to compromise language, which is set forth below:

> A. Coffee Break. A coffee break of fifteen (15) minutes will be allowed per day during a period falling in the first four (4) hours of an employee's working shift. The coffee break shall be computed from the time of cessation of work to the resumption of work. Police Department employes shall not leave the Safety Building for this break, except for the Animal Control Officer when he is on the road for animal calls. Coffee breaks shall be taken on the job site by all bargaining unit members from the first full week of April through the last full week of October, unless the employee is working emergency overtime and/or hours outside of his regular work schedule. Employees permanently assigned to City facilities shall take their coffee break on the job site year round.

On April 6, 1992, the following interpretive memorandum was issued by the Department of Public Works:

CITY OF RACINE

DEPARTMENT OF PUBLIC WORKS

MEMORANDUM

TO: ALL STREET MAINTENANCE - SOLID WASTE AND BRIDGE PERSONNEL **FROM:** JOE GOLDEN **DATE:** APRIL 6, 1992

STARTING ON APRIL 6, 1992, NEW CONTRACT LANGUAGE ADDRESSING THE COFFEE BREAK BECOMES EFFECTIVE. THE NEW AGREEMENT BETWEEN THE CITY OF RACINE AND LOCAL 67 READS AS FOLLOWS:

COFFEE BREAK: "COFFEE BREAKS SHALL BE TAKEN ON THE JOB SITE BY ALL BARGAINING UNIT MEMBERS FROM THE FIRST FULL WEEK OF APRIL THROUGH THE LAST FULL WEEK OF OCTOBER, UNLESS THE EMPLOYEE IS WORKING EMERGENCY OVERTIME AND/OR HOURS OUTSIDE OF HIS/HER REGULAR WORK SCHEDULE. EMPLOYEE'S PERMANENTLY ASSIGNED TO CITY FACILITIES SHALL TAKE THEIR COFFEE BREAK ON THE JOB SITE YEAR ROUND.

THIS AGREEMENT MEANS YOU **MUST** TAKE YOUR COFFEE BREAKS ON THE JOB SITE THROUGH OCTOBER 30, 1992. MANAGEMENT RECOGNIZES THE NEED TO USE BATHROOM FACILITIES DURING THE COURSE OF THE DAY. WE EXPECT OUR EMPLOYEE'S TO USE THE **CLOSEST BATHROOM FACILITY AVAILABLE** TO THE JOB SITE. IF THIS HAPPENS TO BE A CONVENIENT (sic) STORE OR GAS STATION THAT SELLS FOOD, YOU MAY USE THE **BATHROOM FACILITIES ONLY! NO FOOD OR BEVERAGES CAN BE PURCHASED WHILE USING AN ESTABLISHMENT FOR A BATHROOM BREAK.** YOUR COOPERATION IN THIS MATTER IS APPRECIATED.

The Union takes issue with that portion of the Memorandum which denies employes the ability to make food purchases in convenience stores during their break. A grievance was filed, leading to this arbitration.

ISSUE

The parties stipulated the following issue:

> Does the City have the right, pursuant to Article XIII, Section "A", to prohibit an employe from leaving the work site during the morning coffee break to make purchases, even if items purchased are consumed back on the work site during the contractually-provided break?

POSITIONS OF THE PARTIES

It is the view of the Union that in making its proposed changes, the City never indicated, nor does the language exhibit, any restrictions relative to where a food purchase may be made, so long as it is consumed on the job site. In the view of the Union, this case boils down to one simple concept, intent. It is the view of the Union that it was never the intent of the parties to restrict the food purchase rights of bargaining unit members. The Union cites the testimony of Doug Dresen, to the effect that the City told the Union that its intent was to limit restaurant usage. Dresen went on to indicate that the City never told the Union that there was any other motive for its proposal. Never did the City suggest that members of the Union would not be allowed to make purchases at locations other than restaurants and return to their work site to consume same.

Dresen went on to testify that some members of the Union work at City facilities containing vending machines. In some cases, these vending machines may be 50 yards from a worker's job site. There is no intent to restrict these workers from making vending machine purchases at break time, nor could the City take such a position. How, therefore, can it be construed by the City as permissible to restrict purchases to a worker on an outside crew who, for example, walks across the street at break time to purchase a cup of coffee at McDonald's? Dresen further testified the City had, on an annual basis, informed the workers that if they purchased product at gas stations or convenience stores for break consumption, to not congregate at these locations. Workers were told to make their purchase and get back to the job site. This practice, coupled with the narrow scope of negotiations, supports the position of the Union.

The Union notes that, when questioned about an employe who may be trimming trees, Kozina indicated a tree limb could become a worker's job site, effectively meaning the worker should take his break in a tree. This interpretation, argues the Union, is absurd. When confronted with an interpretation of the labor agreement leading to a harsh, absurd, or nonsensical result, an alternative, rational interpretation should be sustained. The Union argues that it is equally absurd for the City to contend that a worker is not permitted to make a food purchase away from his work site and return to the work site to consume the purchase provided the contractual time period for a break is not exceeded. The Union agrues that the grievance should be sustained.

In the view of the Employer, this dispute is decided by the clear and unambiguous language adopted by the parties. The Employer points to the testimony of Kozina, who indicated that the reasoning behind the City's bargaining position was not limited to employes visiting restaurants. If employes are permitted to go to stores and/or restaurants to make purchases the public perception giving rise to this proposal and language would be unchanged.

The City argues the language to be clear and unambiguous. The contract dictates that employes "shall" take their breaks at the job site during certain periods of the year. The Union's interpretation that employes may leave the job is both illogical and if upheld, renders the contract change meaningless. It is the task of this arbitrator, argues the Employer, to enforce clear contract language.

The Union in this matter is arguing that the parties really intended to only prohibit employes from going into restaurants and did not intend to address convenience stores. If the parties had in fact meant that, they would have drafted that specific language. The Employer concludes that the grievance

violates the language agreed to by the parties and seeks to have that grievance denied.

DISCUSSION

It is clear to me that bargaining unit employes have historically enjoyed very flexible coffee breaks. Historically, employes have been free to go to restaurants and convenience stores to sit and eat and drink, and/or to make purchases and return to the work site. It appears to me that prior to the imposition of the rule that is the subject of this grievance, employes had driven their trucks to convenience stores, made purchases and sat in their trucks in the convenience store parking lots to consume their food and drink. It further appears to me that the problem as perceived by the Employer was the congregation of employes in public places which was politically unpalatable. It also appears that the Employer believed that the fifteen minutes was being stretched beyond the contractually-defined period. The City came forward with a perceived need to change the status quo. The Union was receptive in part. From the testimony of Kozina and Dresen, it seems clear that the discussions focused on restaurants. It is unclear whether restaurants were the exclusive subject of their discussion or not. The testimony of Kozina and Dresen cannot be reconciled with respect to the understanding of the parties relative to employes' right to leave the work site to make purchases in convenience stores that would be brought back to the work site and consumed.

The language to be interpreted is new to the parties. The Union points to the historic practice, which I agree forms the framework against which this language was bargained. However, it is precisely this practice that the Employer was concerned about and which led to the formulation and negotiation of the subject of coffee breaks.

I do not believe that "work site" has been arbitrarily defined. It has been limited to the actual physical site in order to accomplish the purpose of eliminating the congregation of workers and the extension of breaks that led to the proposals in the first place. The fact that the Employer has drawn distinctions between outside and inside work sites does not render this rule flawed or arbitrary. It is reasonable to treat a vending machine that is housed within a garage as on that work site. It is equally reasonable to treat a vending machine housed within a convenience store which itself is adjacent to a street whose curbs are being replaced as not on that work site. The problem, as raised by the Employer, was with the appearance fostered by the congregation of workers at publicly-visible non-work sites. The problem does not arise for an employe who works in a building which happens to house a vending machine. There is no parallel.

I believe the language is clear, and I find no need to turn to collateral evidence, such as bargaining table conduct, to resolve this dispute. A trip to a convenience store could be made by one or all members of a crew. It could take one or fifteen minutes. An infinite variety of combinations and permutations exist. I do not believe this rather flexible scenario is contemplated by the terse, pointed, and specific clause governing the coffee breaks. All employes are required to take breaks on-site; no contractual exceptions are provided. An employe who leaves his work site to make a purchase and then returns to the site to consume his purchase has taken a part of his break off-site. The contract requires the break to be taken on-site.

In my view, the Employer's construction of the words is consistent with the common use of those terms. The parties agree that there exists an exception to go to the restroom where that is necessary. It seems to me with that understanding an absurd result has been avoided. The Union's example of an employe required to take his break in a tree, I think, stretches the

construction given to this term by the Employer. It is true the Employer has advised employes they are not free to make purchases while using the bathroom facilities. On its face, this appears to be a somewhat patronizing and overly-restrictive construction of the language. However, it is not difficult to envision how a bathroom purchase exception could easily swallow the rule. Under the circumstances giving rise to the language in question, I do not believe the bathroom purchase restriction is an unreasonable interpretation of the language.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 2nd day of February, 1993.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator