BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LODGE NO. 155	:	Case 38 No. 48189 A-4992
and	:	
KRC (HEWITT), INC.	:	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman S.C. by Mr. Frederick Perillo, on behalf of the Union.

DiRenzo and Bomier, Attorneys at Law, by Mr. Howard T. Healy, on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the Employer respectively are signatories to a collective bargaining agreement providing for final and binding arbitration. The Wisconsin Employment Relations Commission designated the undersigned, a member of its staff, to hear the above-captioned matter pursuant to a request for arbitration by the parties. Hearing was held on March 4, 1993, in Neenah, Wisconsin. No stenographic transcript was made. The parties completed their briefing schedule on April 27, 1993. Based on the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE

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

The Employer proposed the following:

> Did the Employer violated the contract when it issued the safety glasses policy on April 14, 1992?
>
> If so, what is the appropriate remedy?

The Union proposed the following:

> Did the Employer violated the collective bargaining agreement and past practice by unilaterally changing the policy of providing safety glasses at no cost to the employes?
>
> If so, what is the appropriate remedy?

Accordingly, the undersigned frames the issue as follows:

> Did the Employer violate the collective bargaining agreement and/or past practice when it issued the safety glass policy on April 14, 1992?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 16
General Conditions

Section 5.

. . .

(3) Effective 5/1/91 the Company shall pay up to $35 during the first year of the contract toward the cost of an eye examination. Effective 5/1/92 the $35 shall be increased to $40. Effective 5/1/93 the $40 shall be increased to $45.

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Section 10. General Working Conditions. The Company agrees to provide safe and sanitary working conditions in its plants including clear aisles, and safety protection around open pits in the building.

OTHER RELEVANT DOCUMENTS

ASSIGNMENT, ASSUMPTION AND CONSENT AGREEMENT

THIS ASSIGNMENT, ASSUMPTION AND CONSENT AGREEMENT, hereafter "the Agreement", is dated this 24th day of July, 1991, by and among LODGE NO. 1855, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, hereafter referred to as the "Union," J.W. HEWITT MACHINE CO., INC., hereafter referred to as the "Company", and Purchaser of the assets of certain assets of the J.W. Hewitt Machine Co., Inc., hereafter referred to as "Purchaser".

W I T N E S S E T H

WHEREAS, the Union and the Company are parties to a collective bargaining agreement dated May 1, 1991 and effective through April 30, 1994, hereafter referred to as the "Collective Bargaining Agreement";

WHEREAS, the Company and Purchaser are discussing the possibility of Purchaser's acquisition of certain assets of the Company;

WHEREAS, the Company, Purchaser and the Union recognize the mutual benefit to all parties of representation of the production and maintenance employees by the Union, Purchaser's assumption of the Collective Bargaining Agreement, and the continuous uninterrupted operation of the production facilities in question;

WHEREAS, in the event that the Company and Purchaser consummate their asset purchase and sale transaction, Purchaser desires to recognize the Union as the sole and exclusive collective bargaining agency for all production and maintanence employees of the Company as described in the "Recognition" clause of the

Collective Bargaining Agreement, and Purchaser desires further to assume the Company's Collective Bargaining Agreement;

WHEREAS, the Union similarly desires that Purchaser assume the Collective Bargaining Agreement under the terms and conditions set forth herein; and

WHEREAS, the Company desires to assign its rights and interests under and in the Collective Bargaining Agreement to Purchaser, and the Union desires such assignment under the terms and conditions set forth herein,

NOW, THEREFORE, in the event that the Company and Purchaser consummate their contemplated asset purchase and sale transaction, on or before August 31, 1991 in consideration of the mutual promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Company, the Union, and Purchaser agree, as follows:

1. The Company does hereby assign all of its rights and interests under and in the Collective Bargaining Agreement to Purchaser.

2. Purchaser does hereby recognize the Union as the sole and exclusive collective bargaining agency for all production and maintenance employees of the Company as described in the "Recognition" clause of the Collective Bargaining Agreement; hereby assumes all of the Company's rights and interests under and in the Collective Bargaining Agreement; and does further agree to abide by the terms and conditions of the Collective Bargaining Agreement.

3. The Union desires, agrees, and consents to the Company's assignment and Purchaser's assumption of the Collective Bargaining Agreement and does further agree to abide by the terms and conditions of the Collective Bargaining Agreement.

4. The Union, the Company, and Purchaser hereby agree that whatever rights and obligations they have or may have, under law, contract or otherwise, to bargain further over the effects of the proposed asset purchase and sale transaction between the Company and Purchaser, have been fully satisfied by the execution of this Agreement and that any and all such rights and obligations are otherwise expressly waived.

5. Notwithstanding any of the foregoing, this Agreement shall be conditioned and effective only upon the consummation of the asset purchase and sale transaction contemplated by the Company and Purchaser.

6. The Company, the Union, and Purchaser understand and agree that, in the event that the asset purchase and sale transaction between the Company and

Purchaser is consummated, Purchaser shall agree to initially employ all current employees covered by the Collective Bargaining Agreement and to maintain the wages, hours, terms, and conditions of employment as provided within the Collective Bargaining Agreement for the term of the current Collective Bargaining Agreement.

7. Employees initially employed by Purchaser shall retain their seniority date which they had as an employee of Company for purposes of seniority and benefit calculation; such employees shall also not be considered a probationary employees as provided in Article VII of the Collective Bargaining Agreement.

8. The Union and Purchaser understand and agree that the Union and Purchaser shall not be liable or responsible for any and all grievances, arbitrations, negotiations, claims, actions, charges, unfair labor practices, or suits of any nature, whether occurring prior to or after the consummation of the asset purchase and sale transaction between the Company and Purchaser, which refer to or relate in any respect to any matter or action arising before said consummation, with respect to the wages, hours, terms, and conditions of employment of any bargaining unit employee covered by the Collective Bargaining Agreement as modified herein.

9. The Union and Company understand and agree that the Company shall be liable or responsible for any and all grievances, arbitrations, negotiations, claims, actions, charges, unfair labor practices, or suits of any nature, whether occurring prior to or after the consummation of the asset purchase and sale transaction between the Company and Purchaser which refer or relate in any respect to any matter or action arising before said consummation, with respect to the wages, hours, terms and conditions of employment of any bargaining unit employee covered by the Collective Bargaining Agreement.

10. If accrued vacation, sick pay, personal holidays and/or other fringe benefit payments are owed by Company to employees of Company at the time Company terminates employees and Purchaser hires employees, neither Company nor Purchaser shall be obligated to make such benefit payments to employees payable as a result of Company's termination of such employees. Purchaser agrees to assume responsibility to pay employees terminated by Company any accrued vacation, sick pay, personal holidays or any other benefit payments payable to such employees as provided in the Collective Bargaining Agreement. Employees terminated by Company and hired by Purchaser shall be paid benefits as provided in the Collective Bargaining Agreement but shall not receive any additional benefits as a result of their termination by Company and hiring by Purchaser.

11. Purchaser agrees to maintain the current Profit Sharing Plan for the term of the current Collective Bargaining Agreement except as required by law or regulation. For the 1991 Plan Year, Purchaser agrees to pay to the Profit Sharing Plan an amount equal to ten percent (10%) of qualifying salaries of bargaining unit employees from 1/1/91 to the date of closing.

12. All parties hereto recognize that the substance of this Agreement is of a highly confidential nature. Each party executing this Agreement agrees to maintain the substance of this Agreement and the fact of negotiations concerning the proposed asset purchase and sale transaction in the strictest confidence until a definitive agreement for the purchase and sale of the Company's assets to Purchaser is entered into or until negotiations are terminated, and the Union has been notified in writing by Purchaser that disclosure is appropriate.

IN WITNESS WHEREOF, this Agreement has been executed by the parties on the date and year first above written.

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Safety Glasses

Purpose:

POLICY:

A. The Company will provide non-prescription safety glasses for all full-time probationary employees and all employees not requiring prescription eyewear.

B. For full-time employees who have completed their probationary period and who require corrective lenses, the Company will make arrangements for obtaining safety lenses and/or safety frames when the employee submits to the Company a prescription from a licensed eye doctor or optometrist indicating that a change is necessary, or that the employee requires glasses for the first time. The employee will obtain glasses from an optometrist or optical service company designated by the Company.

At present, the designated providers are Valley Optical at 464 South Commercial or Dr. D.M. Andersen at 1416 South Commercial, both in Neenah. Should there be a change in provider, a notice will be posted accordingly.

Should anyone prefer to use another provider, the employee will be required to pay such provider for services and then submit his detailed bill to management for competitive

pricing of covered services.

C. Progressive lenses, scratch guarding, and/or special tinting (unless specifically prescribed by the doctor in writing) are not included in the company's share of the cost. The doctor's written prescription, showing the need for any tinting, must be presented to management for approval before obtaining glasses.

D. Once an employee has been furnished a new lens or a new pair of lenses, and/or complete new frames, any further replacement of either or both lenses, or of complete frames, within the following 12 months period will be at the employee's expense, except for breakage occurring at work for the Company, in which case the broken item(s) must be presented to the employee's supervisor with adequate substantiation that the damage occurred in the normal course of work and was not due to employee negligence. (Occupations requiring additional eye protection - such as welding, cutting, brazing, etc. - do not justify replacement due to pitting of the lenses, and it is considered employee negligence for failure to wear the additional eye protection provided.) Eyeglasses damaged, shattered and/or broken willfully, or through negligence, must be replaced at the employee's expense.

E. The Company will not provide contact lenses to any employee under any circumstances other than as provided for under our health insurance coverages.

F. Within 12 months following start of employment with the Company, and providing the probationary period has been completed, the Company will reimburse the employee for up to $30 toward the cost of a routine eye examination performed by a licensed eye doctor or optometrist. Subsequent eye examinations will be supported by the Company as provided under the collective bargaining agreement.

G. Time lost during working hours for eye exams and/or eye glass fittings will not be paid for by the Company.

H. None of the provisions hereunder shall be construed to apply to part-time employees, occasional employees, dependents of employees, retired or terminated employees. Under no circumstances will any of these provisions apply to eyeglasses that do not meet the basic tests

of safety glasses.

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14 APRIL 92

NOTICE

TO ALL UNION EMPLOYEES

It has been brought to my attention that the section of the contract relating to annual eye examinations (Article XVI section 5(3) is not being applied consistently.

Effective 14 April 1992 the Company will pay up to
$35 (effective 5/1/91)
$40 (effective 5/1/92)
$45 (effective 5/1/93)
towards the cost of an annual eye examination.

The contract does not provide for the company to pay any portion of the cost of eyeglasses, however in the interests of safety we will respect the Vision Care policy as issued by previous management (copy attached).
We will pay a maximum of $40.00 annually towards the cost of prescription safety glasses. This amount will cover the cost of basic frames and lenses supplied through VALLEY OPTICAL 464 S. Commercial St Neenah or Dr. STEINER 996 S. Green Bay Rd Neenah.
For employees who require bifocal lenses the amount allowed will not exceed $72.00.
Employees using any other supplier will be required to prepay their optician and will be reimbursed up to the amounts stated above upon submitting proof of payment.

B.J. Glenister

BACKGROUND

The underlying facts in this case are relatively simple, and involve few credibility issues. The current collective bargaining agreement was negotiated between the Union and a predecessor employer, J.W. Hewitt Machine Co., in 1991. The prior agreement had expired in March of 1991 and negotiations for a new agreement continued until June. The current agreement was executed on July 3, 1991, retroactive to May of 1991. The duration of said agreement extended from 1991 to 1994.

In late July or early August of 1991, the predecessor company completed negotiations to sell certain of its assets to the Employer. The Employer is a completely separate corporation from the predecessor company. When the Union became aware that the predecessor was selling a major portion of the business, all three parties, the Union, the predecessor, and the current Employer negotiated and executed an Assignment, Assumption and Consent Agreement, hereinafter referred to as the Assumption Agreement. Under the express terms of the Assumption Agreement, the Employer recognized the Union as the exclusive bargaining representative of the employes covered by the collective bargaining agreement, agreed to assume all of the predecessor's rights and interests under and in the collective bargaining agreement, and agreed to abide by the terms and conditions in the agreement. The Employer also agreed to initially employ all current employes covered by the collective bargaining agreement and to

maintain the wages, hours, terms, and conditions of employment as provided within the collective bargaining agreement for the term of the current collective bargaining agreement.

No party to the Assumption Agreement raised the subject of safety glasses during these negotiations. There is no evidence that any party specifically raised or that the parties discussed past practices that were currently in effect under the predecessor's and Union's operating arrangements. Neither the predecessor or the current Employer ever advised the Union that past practices in general, or that any specific practice would be discontinued. There was no repudiation of any of the past practices at that time.

One item which was not specifically included in the collective bargaining agreement, but which was discussed by all three parties, was the then-existing profit-sharing plan and the terms and conditions under which it would continue to exist. The Union wanted the Employer to guarantee that the profit-sharing plan would remain in force and that the past practice of paying ten percent (10%) of qualifying salaries as a contribution would continue. The Union was only able to secure an agreement that ten percent (10%) of salaries accrued to the date of closing would be paid as a profit-sharing contribution with no agreement as to contributions after the closing date. The Employer has not paid for contributions after the closing date.

The Employer has continued to run the old business in substantially the same form as the predecessor.

At the time of the negotiations for the 1991 collective bargaining agreement, a past practice existed concerning safety glasses. The practice was written as a policy of the predecessor company but was of the free-standing variety in that there is no specific reference to safety glasses in the agreement. The predecessor's safety glasses policy had existed for decades. It was, however, not codified in writing until 1989. The policy provided for full payment of the cost of safety lenses and frames including bifocals, trifocals, and other special requirements (but not scratch guarding unless employed in the weld shop or tinting unless prescribed). There was no monetary cap on the cost of the safety glasses. Furthermore, the employe had the choice of providers: If he or she accepted the preferred provider, the company was billed directly by the provider. Otherwise, the employe paid for the cost at another provider and was reimbursed in full by the predecessor company.

During the 1991 negotiations, the Union proposed a comprehensive vision care plan to provide family coverage for employes and their dependents for all vision care services including the full payment for eye examinations. According to the Union, it withdrew this proposal during the course of bargaining because the predecessor pointed out that employes with corrective lenses already received a free pair of glasses every year pursuant to the safety glasses policy, and assured the Union that the policy would remain unchanged. Two Union bargaining representatives, Joseph Wilfling and James Lyons, testified to this effect. The predecessor denied making any such representation. Attorney Howard Healy testified that he did not make that representation and that there was no discussion during negotiations about the existing safety glasses policy.

Upon assumption of the business and collective bargaining agreement by the Employer, it continued to pay for safety glasses under the predecessor's past practice until April 14, 1992. Brian Glenister, the Employer's General Manager and Vice-President, assumed responsibility for the day-to-day operations in early 1992. Upon assuming daily responsibility, he reviewed the safety glasses policy and posted a Notice on April 14, 1992. The Employer put a monetary cap on the cost of ordinary and bifocal lenses, and did not pay for

such extras as designer frames. Glenister indicated that the Employer changed its policy because the KRC group has a fairly rigid guideline for the amount it is willing to spend on safety glasses. The notice of changed policy is consistent but slightly more lenient than this guideline.

POSITIONS OF THE PARTIES

Union

The Union stresses that the safety glasses policy as codified in 1989 clearly constituted a beneficial past practice of the kind routinely enforced by arbitrators and that employes were given assurances during the 1991 contract negotiations that the practice would be maintained, Healy's denial being disregarded as incredible. Even if assurances were not given, the Employer failed to notify the Union that the practice was being discontinued. According to the Union, where a practice has not been disavowed during negotiations (when the other side has the opportunity to write the practice into the agreement), it automatically continues for the life of the next agreement.

Although there was a change in the identity of the employer, the new Employer explicitly assumed all of the obligations inherent in the agreement and did not disavow any practices. It is the Union's view that the Employer's defenses are irrelevant. The existence of the profit-sharing plan does not imply the non-existence of past practices; and the ERISA benefit plan is not a "past practice" as the term is commonly understood. The Union disputes any Employer contention that by abandoning its proposal for a comprehensive vision care benefit, the Union eliminated the safety glasses policy. It cannot be inferred that by dropping its request for family vision coverage, the Union was relinquishing safety glasses for the employe.

In support of its argument that the safety glasses policy is an unwritten past practice, the Union maintains that it is a binding but unwritten contractual commitment. Such a free-standing past practice, i.e., one that is not tied to any language in the agreement, is enforceable during the term of the agreement. Such a practice does not disappear during negotiations simply because the negotiators do not mention it. Their silence at the bargaining table is presumed to constitute assent to existing conditions, whether they thought of this or not. To end such a practice, explicit repudiation must take place during negotiations or the practice remains a binding part of the agreement for its term.

The Union submits that the assumption of the collective bargaining agreement by the current Employer included assumption of all existing past practices, including the safety glasses practice. When a party assumes a collective bargaining agreement, it assumes not only the written expressions, but also the practices that are equally a part of the collective bargaining agreement, although not expressed in it. Any assertions that the practice is not binding because the new employer failed to acquaint itself with the existence of the practice are irrelevant. The current Employer, as the purchaser, assumed the agreement "as is" with no qualifications expressed.

The Union stresses that the vast majority of arbitrators agree that a purchaser who assumes a contract assumes the entire agreement, including the past practices. It also points out that whatever strength the Employer's arguments would have had is further blunted by its own compliance with the practice for nine months after it assumed the agreement, noting that the current Employer followed the practice and complied with it on no less than 18 occasions.

In responding to Employer assertions that the inclusion of the profit-

sharing plan in the assumption agreement implies exclusion of all other practices, the Union points out that the profit-sharing plan is a free-standing agreement in writing. Unlike any past practice which derives its vitality solely form its existence as an unwritten term of a collective bargaining agreement between an employer and a union, the profit-sharing plan is enforceable by law independent of the collective bargaining agreement. Thus, the Company's contention that the Union was trying to preserve the existence of a plan that would automatically wink out of existence on July 25, 1991 unless codified in the assumption agreement is therefore devoid of legal or factual substance. The Union stresses that neither the assumption agreement nor the collective bargaining agreement in question contain a "zipper" clause limiting the assumption agreement to only those issue specifically included in the agreement. The Union points to the fact that the new Employer has not eliminated other unwritten past practices which currently exist. This it submits, along with the Employer's continuation of the safety glasses policy for nine months, is proof positive that no party believed that the inclusion of the profit-sharing plan in the assumption agreement eliminated past practices generally.

The Union requests that the Employer be ordered to rescind the April 14, 1992, memorandum on the changed safety glasses policy, to reinstate the past practice, and to reimburse employes for all differential costs for safety glasses incurred from April 14, 1992, until the date the old practice is reinstated.

Employer

The Employer relies primarily upon the principle that to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. To expressly state certain exceptions indicates that there are no other exceptions. This principle applies to the instant case where the successor employer had an obligation to bargain with the Union but was not obligated to accept the contract. The Employer notes that the Union obtained the Employer's agreement to continue the wages, hours and conditions of employment in the contract. In addition, it submits, the Union was able to reach an agreement with respect to one non-contract item, the profit-sharing plan.

There were no other non-contract terms and conditions of employment contained in the Assumption Agreement and no language which required the new Employer to maintain past practices regarding any non-contract terms and conditions of employment.

The Employer asserts that the collective bargaining agreement does not contain a "maintenance of standards" clause, and argues that the Employer did not agree to maintain standards or other conditions of employment, such as the safety glasses policy, which existed at the time the assets were purchased.

The Employer avers that the Union waived any right to include the safety glasses past practice as a condition of employment when it failed to expressly include it in the Assumption Agreement. Citing an experienced bargaining committee and competent legal counsel on the Union side of the table during the negotiation process over the Assumption Agreement, the Employer submits that it stretches the limits of credibility to suggest that the Union did not understand the negotiation process and failed to recognize the consequences of failing to raise an issue that was known to them during negotiations. According to the Employer, the Union knew or should have known that, except in unusual circumstances, labor law agreements need to be in writing to be enforced. Based upon the extensive discussions over the profit-sharing plan, the Employer argues that the Union understood the difference between

contractual and non-contractual terms and conditions of employment and waived inclusion of the safety glasses policy in the Assumption Agreement.

The Employer urges the undersigned to find that, absent inclusion in the Assumption Agreement, the Employer had no obligation to maintain the safety glasses policy or to be bound by any past practice of the predecessor. According to the Employer, the Union assumed the risk that the safety glasses policy would continue or that it would cease.

The Employer relies upon the parol evidence rule to discourage the arbitrator from concluding that the predecessor employer promised that the safety glasses policy would continue. It denies any such representation nevertheless.

Noting that at least one arbitrator has rejected the Union's arguments regarding the enforceability of past practice items, the Employer stresses that it was not the duty of the Employer to bring the matter to the attention of the Union. It maintains that the Union recognized that the safety glasses policy was not contained in the assumption agreement but took no steps to protect itself.

In conclusion, the Employer stresses that the April 14, 1992 memorandum is reasonable and not inconsistent with any provision in the contract. The Assumption Agreement did not require the Employer to maintain past practices of its predecessor. KRC rejected the past practice related to the profit-sharing plan. The Assumption Agreement contained language dealing with at least one non-contract fringe benefit, but no other non-fringe benefits. It requests that the grievance be denied.

DISCUSSION

It is undisputed that the predecessor's safety glasses policy is an unwritten past practice of long standing. It is also evident that at no time prior to the sale of the company or the signing of the Assumption Agreement did the predecessor employer ever repudiate this particular past practice. The essential question, in the view of the undersigned, is whether or not the current Employer assumed this unwritten past practice along with all of the expressly written terms and conditions set forth in the collective bargaining agreement. The Employer submits that it did not assume any of the unwritten past practices except for the profit-sharing plan which the parties specifically addressed in the Assumption Agreement.

The Employer points to its actions in this respect as evidence of the parties' intent to exonerate the new Employer from being bound by any of the other past practices. The action of specifically incorporating the profit-sharing arrangement in the Assumption Agreement can be viewed in an entirely different manner, however. Because the current Employer did not intend to maintain the past practice as it existed, it notified the Union that it was repudiating the current arrangement and the parties then bargained over what would be the on-going obligation of the new Employer with respect to profit-sharing and incorporated their ultimate agreement on this issue in the Assumption Agreement. When viewed in this light, the inclusion of a different profit-sharing arrangement could be construed as evidence that the new Employer did not repudiate all of the other unwritten past practices accompanying the collective bargaining agreement but accepted them as part and parcel of the obligations which it was agreeing to assume when it assumed the predecessor's collective bargaining agreement.

The latter construction is also supported somewhat in that the current employer continued the safety glasses practice of its predecessor for some nine

months after it took over plant operations. If it had really intended to limit its obligations to only those terms and conditions of employment expressly written in the collective bargaining agreement, it would have notified employes immediately upon taking control of the business operation that it would no longer honor any of the unwritten past practices.

The Employer expressly committed itself in item 2. of the Assumption Agreement to agree to abide by the terms and conditions of the collective bargaining agreement. The Employer further agreed in item 6. to maintain the wages, hours, terms, and conditions of employment as provided within the collective bargaining agreement for the term of the current collective bargaining agreement. This language is broad enough to bind the current Employer to the implied terms and conditions of employment encompassed in longstanding past practices as well as those explicitly set forth in the written agreement. Had the Employer wished to avoid assumption of the past practices it could have expressly so provided in the Assumption Agreement. See American Petrofina Company of America, 65 LA 947 (Stephens, 1975), where the arbitrator found that wording of the contract of sale whereby the successor employer agreed "to use its best efforts to offer employment to the persons it desires to employ at substantially similar levels of wages, working conditions, employee benefits and practices then applicable to them" did not extend a past practice of the predecessor to provide scholarships to children of employes to the successor employer.

Where a longstanding past practice regarding a definitely ascertainable economic benefit exists and the successor agreed to assume the predecessor's collective bargaining agreement, arbitrators have not been reluctant to find that the successor is obligated to honor the past practice. See Elesco Smelting Corporation, 56 LA 1257 (Sembower, 1971), where the arbitrator held the successor employer to be obligated to pay Thanksgiving and Christmas bonuses which were longstanding past practices never referenced specifically in the collective bargaining agreements with the predecessor. Arbitrator John Sembower, concluded new management of the employer was aware of the existence of the established past practice at the time of its acquisition of the company, because the plant manager whose service bridged the transition from old to new managements knew of the existence of the past practice and, in fact routinely paid it. Sembower held that if the new management proposed to eliminate the past practice, it was incumbent upon it to raise the matter in negotiations, which it failed to do. See also, Genstar Stone Products Company, 81 LA 1181 (Le Winter, 1983) where the successor could not discontinue a uniform allowance past practice of ten years duration although no mention of uniforms is made in the parties' collective bargaining agreement. Genstar is significant in one other respect. In that case, as in the case before the undersigned, no maintenance of standards clause nor any zipper clause exists. Moreover, because there was no zipper clause, the arbitrator in that case concluded it was reasonable to assume that the parties dealt with the concept that the uniform benefit existed. He further concluded that if the parties dealt with the concept, the demands and the agreements reached presumed the continuation of the benefit.

Extending this rationale to the instant dispute, it is clear that the parties were aware of the existence of various past practices like the profit-sharing benefit which were not directly referenced in the agreement. With respect to the safety glasses policy, the current employer continued the practice for some nine months after the business had been purchased. This arbitrator does not question the underlying rationale for the Employer's desire to modify the safety glasses policy. Rather, she holds that the Employer is bound to honor the past practice until or unless it properly repudiates said practice or the parties negotiate otherwise.

Accordingly, it is my decision and

AWARD

1. The grievance is sustained.

2. The Employer violated the collective bargaining agreement when it unilaterally modified the past practice with respect to the safety glasses policy by issuing the memorandum of April 14, 1992.

3. The Employer is directed to reinstate the safety glasses policy which existed prior to April 14, 1992, and to reimburse employes for all differential costs for safety glasses incurred from April 14, 1992 until the dated upon which the previous safety glasses policy is reinstated.

Dated at Madison, Wisconsin this 19th day of May, 1993.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator

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