BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 587, DISTRICT COUNCIL 48, AFSCME, AFL-CIO	:	Case 439 No. 48039 MA-7487
and	:	
MILWAUKEE AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT	:	

Appearances:

Podell, Ugent & Cross, S.C., by Ms. Nola J. Hitchcock Cross, appearing on behalf of the Union.

Mr. William J. Roden, Attorney, Milwaukee Area Technical College, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve a grievance filed by Michael Connors on behalf of all employes, protesting the removal of the employe bookstore discount.

The undersigned was appointed and held a hearing on April 22, 1993 in Milwaukee, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on May 21, 1993.

STIPULATED ISSUES:

1. Did MATC violate the collective bargaining agreement when it unilaterally discontinued the employe bookstore discount?

2. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

PREAMBLE

This Agreement covering wages, hours, and working conditions made and entered into at

Milwaukee, Wisconsin, between the Milwaukee Area District Board of Vocational, Technical, and Adult Education (hereafter referred to as

the "Board") and Local 587, AFSCME, AFL-CIO, AFL-CIO, an affiliate of Milwaukee District Council No. 48 (hereafter referred to as the "Union") and their successors.

WITNESSETH: That

Whereas, it is the desire and intent of the parties to seek peaceful adjustment of differences that may arise between them and,

Whereas, the purpose of this Agreement is to promote harmony and efficiency in the working relationships between the parties so that the employee, the college, and the public may be benefited,

Now, therefore, it is agreed that the following provisions shall cover this Agreement.

. . .

Article III -- Management Rights

The Board retains and reserves the sole right to manage its affairs in accordance with all applicable laws and legal requirements, except as limited by the specific provisions of this Agreement. Included in this responsibility, but not limited thereto, is the right to:

. . .

K. Maintain efficiency of operations by determining the method, the means, and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

I. Make reasonable work rules.

The above rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union.

DISCUSSION:

The facts are essentially undisputed. Since time immemorial (at least longer that the 30 years' memory of the most senior

official of either party involved in this matter) MATC has maintained a policy of providing all material sold at its in-house bookstores at a discount of ten percent for personal purchases made by full-time employes. This discount was applied equally at all four bookstores maintained by the college, and accumulated approximately $12,000
per year in recent years in savings to employes generally. The institution has approximately 1,200 full-time employes, but the fact that employe I.D.s do not segregate part-time and full-time employes, coupled with less-than-stringent enforcement of the discount's availability, meant that some employes not technically eligible for the discount received it anyway. The bookstore's former Director, Linda Hausladen, testified that she saw employes purchasing items routinely, including some books but mostly gift items, candy, pantyhose, and aspirin and such items. Office supplies and other materials purchased for departments the employes worked in were not eligible for the discount.

The bookstore has generally been a profitable operation for the District, unlike some other operations such as the District's internal child care facility. Financial Vice-President Herbert Flaig testified that the bookstore profits have historically been used to cover red ink in the child care department. In late 1991, MATC's President held a meeting with approximately 70 faculty and staff to discuss general concerns that they might have. A number of issues were raised, among them the proposition that bookstore prices were too high. In the wake of this discussion, Hausladen was asked by Dr. Bryant, the former Director of Operations, for some information as to the figures and some suggestions. Hausladen made several suggestions as to possible changes in bookstore pricing policies, among them the idea that ending the employe discount would generate sufficient additional revenue to pay for the incremental cost of raising the "buy back" rate paid students for used books from 50 to 60 percent. Hausladen reasoned that this would benefit both the students and the bookstore, because students frequently take the cash and buy other items right away. While not all of Hausladen's recommendations were adopted, approximately six months later this one was, and by memo to all staff and faculty dated July 21, 1992, Bryant informed the employes that effective August 1st the discount would be discontinued. The memo also stated that the funds thus raised would be used to improve students' return on their investment in text books when they were resold to the bookstore. The grievance in this matter was filed on August 7, 1992, protesting that this action violated Article III of the collective bargaining agreement.

The District introduced documentary evidence to the effect that the bookstore profit had declined from approximately $246,000 in 1990 to $56,000 in 1991 before recovering for 1992 to $167,000.

The District similarly provided documentary evidence to the effect that in each case this represented a relatively slim profit margin compared to other bookstores of similar size operated at colleges across the country. Hausladen testified that other proposals of hers, to raise the price on school and office supplies and the percentage charged departments for internal requisitions, were not implemented. She stated that these were not accepted because higher management felt that it would be a matter of "robbing Peter to pay Paul" to raise the price charged one section of the college by another section.

Former Union President Renie Robison testified that when she was hired, in October 1966, she was told while she was filling out the forms that there was a ten percent employe discount in the bookstore, and that she had used it since. Flaig testified that he had not been told about the discount when he was hired. Robison admitted that the bookstore was not a significant factor in accepting this employment.

The Union argues that the Employer's act of eliminating the discount, regardless of its motive of assisting students, violated the Agreement because it eliminated a customarily recognized benefit to employes without collective bargaining. The Union argues that arbitrators have traditionally made a distinction between employe benefits and basic management functions when determining whether an employer was permitted to change a past practice, and that the employe discount is an implied provision of the parties' collective bargaining agreement. The Union contends that the contract Preamble, its requirement for "reasonable" work rules, and its prohibition against "discrediting or weakening the union" are applicable to this discount and support the proposition that the discount is implied into the parties' contract. The Union argues that the implied covenant of good faith and fair dealing is violated by a unilateral action of this type, and contends that the discount is not a mere "gratuity", contending that employes rely on the discount for an expansive variety and amount of purchases on a day-to-day basis. Finally, the Union contends that the District has no special justification for removing the discount because this standard for determining the propriety of a management action does not relate to general economic justifications, referring instead to situations where the original reason for the custom no longer exists. The Union requests that the discount be ordered restored and that employes be ordered reimbursed for their average proportionate share of the amount of the discount.

The Employer contends that the matter is not properly before the Arbitrator, because the Employer's pre-hearing brief argued that the Arbitrator did not have jurisdiction to render a decision on the merits of the matter. The Employer's fundamental

contention is that this matter does not relate to any article of the collective bargaining agreement, and does not involve a benefit of employment. The District argues that insignificant matters such as a savings of about ten dollars per employe per year do not rise to the level of a possible contract violation even when the contract is ambiguous. The District further argues that Article III allows it to "maintain the efficiency of the operation . . . and to take whatever actions are reasonable and necessary", which gives it discretion to change such practices. The District further argues that in its attempt to attract and retain an adequate student population, measures which would increase enrollment or enhance services to existing student populations are in the best interest of all the parties. The Employer also contends that any financial benefit the employes received was de minimus, and that its non-implementation of other recommendations of the bookstore manager is irrelevant. The Employer requests that the grievance be denied.

Initially I must note that the parties have stipulated to the issues before me, notwithstanding the Employer's contention that the matter is not properly before me. To the extent that that argument is interwoven with the Employer's argument on the merits of the matter, this will be discussed below.

It is clear that until it was eliminated, the bookstore discount was a matter of little significance to either party. Unremarked in the collective bargaining agreement, there is no evidence that the matter had ever been discussed in collective bargaining, or that it was considered as anything more than a "frill" by anyone involved. The Employer's calculation that even if only full-time employes had taken advantage of it, the value of the discount would have averaged out to approximately ten dollars per employe per year is not seriously disputed. Thus the only collective bargaining agreement clause squarely to address the issue is the Management Rights clause, which in its Section K allows the Employer to "maintain efficiency of operations . . ." and

in its Section L allows the Employer to "make reasonable work rules". The Union argues that this change violates the requirement for reasonable work rules, but I do not find that this type of item constitutes a "rule" governing the nature of an employe's work or work requirements, as "rules" are generally understood; Item K, namely in its reference to "method" and "means" by which such operations are conducted, does refer to general management decisions which affect an operation such as the bookstore. Of the other sections argued by the Union, the Preamble of the Agreement makes no reference to anything related to this matter, and there is no evidence that the Union was discredited or weakened by the Employer's action or that this was any part of the Employer's purpose. In fact, the action was taken with respect to employes in management and other bargaining units, as well as the unit involved here. At the same time, it is clear that the Employer had an economic and management reason for eliminating the discount, and that the matter was not arbitrarily put into effect, but involved discussions at several levels and a calculation of the best interests of the students.

It might be that none of these factors would save the Employer's action from arbitral reversal, were the discount in question cognizable as a clear benefit to employes of the kind sometimes not mentioned in collective bargaining agreements, but considered in the context of negotiations by all parties and reflected in their calculations year in and year out. There is no credible evidence that this is the case with the bookstore discount. First, the amount involved is minimal to any individual employe, though as the Employer points out the aggregate is sufficient to generate a noticeably improved buy back percentage for students. Second, there is nothing in the record to demonstrate that either party ever paid the matter any attention until this dispute arose. And third, the nature of the discount (available to all full-time employes, and not policed to keep it from part-time employes) suggests that the matter has not been regarded as a significant benefit on a per-employe basis for many years.

All of these conditions support the Employer's contention that the bookstore discount falls within the general definition of a "gratuity", as that has been arbitrally determined in the past, and not a benefit of employment as generally understood. Whether the word "gratuity" is used (as by Arbitrator Cornsweet in Fawick Airflex Co., 11 LA 666 at 668-669) or as a "minor" condition of employment (as used by a series of arbitrators over many years), the principle is the same. That principle is that in certain situations where a binding past practice might be found to exist, based on general conditions customarily applied, including that it be clearly known to the parties and of long standing, a binding past practice may yet not be found if the matter is too small to

justify such treatment. The matter need not involve a large amount of money or equivalent value for employes on average, if one or

some employes obtain a major and reasonably expected benefit from it; but here, there is no evidence in the record to indicate that any one employe had much more of a "stake" in the bookstore discount than the ten-dollar-per-year average. I conclude that the Union has not established that this matter was a "major" condition of employment within the line of cases noted above, and that it did in fact serve as a "gratuity" or equivalent based on all of the facts in the record. Management therefore acted within its rights under Article III, Section K in discontinuing this minor feature of MATC employment and putting the savings to the benefit of students.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That MATC did not violate the collective bargaining agreement by unilaterally discontinuing the employe bookstore discount.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 29th day of July, 1993.

By Christopher Honeyman /s/