BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
GENERAL DRIVERS AND HELPERS UNION, LOCAL 662	:	Case 1 No. 48568 A-5019
and	:	
PROTEIN TECHNOLOGIES INTERNATIONAL	:	

Appearances:

Mr. Scott Soldon, Attorney at Law, appearing on behalf of the Union.

Ms. Phyllis Mayes, Labor Counsel, appearing on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company or Employer, respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing was held on June 24, 1993, in Red Wing, Minnesota. The hearing was not transcribed. Afterwards, the parties filed briefs, whereupon the record was closed July 28, 1993. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the Company violate the contract by refusing to pay the grievant for the time spent in follow-up medical appointments subsequent to a work-related injury? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1992-95 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 25
Maintenance of Standards

The employer agrees that all conditions of employment in the Employer's individual operation relating to wages, hours of work, overtime, differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer in applying the terms and conditions of this Agreement so long as the Employer gives written notice to the Union before correcting the error. Any disagreement between the Local Union and the Employer with respect to this matter shall be subject to the grievance procedure.

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ARTICLE 29
Perfect Attendance Bonus

Employees may earn one personal holiday for perfect attendance for each consecutive six month period actually worked.

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FACTS

Workers at the Company's Hager City, Wisconsin, facility manufacture a coating for Ralston Purina Pet Food that adds flavor and nutrition to the product. There are currently 43 production and maintenance employes who work in seven separate units at the plant. Steve Steiner supervises the 27 employes who work in the Spray Dryer, Sanitation and Nourish-Grinding units. Steve Hollins supervises the 11 employes who work in the Blending, Trucking and Warehouse units. Stan Brown supervises 5 maintenance employes.

For about 10 years preceding 1991 the Company had an unwritten plant-wide practice regarding the circumstances under which it paid employes for medical treatment for on-the-job injuries. That practice was that in order to stay on the clock and be paid, the employe's injury had to be work-related and require immediate medical attention. Employes were paid only for

the first doctor visit. Employes were not paid for follow-up medical appointments subsequent to a work-related injury. 1/ One example of this practice is that employe James Dougherty was not paid on three occasions in 1989 for time missed at doctor appointments for follow-up medical treatment for work-related injuries.

From 1991 to present, the practice described above continued to be applied to all bargaining unit employes except those who worked in the Blending unit. Thus, during this period all employes except Blending unit employes were not paid for follow-up medical appointments subsequent to a work-related injury.

From the time he was hired as a new supervisor about January, 1991, till June, 1992, Steve Hollins did something different from that described above for the Blending unit employes. Specifically, he paid employes in the Blending unit for time spent at medical appointments during their work hours for follow-up medical treatment for on-the-job injuries. Blending unit employes were paid for all such doctor visits, regardless of whether it was a first or follow-up visit. One employe in the Blending unit, James Dougherty, was paid on 22 separate occasions during this 18-month period for work time missed due to follow-up medical treatment of work-related injuries.

The reason employes in the Blending unit were treated differently from employes elsewhere in the plant insofar as the Company's aforementioned practice is concerned is that Hollins misunderstood the Company's practice. During that period Hollins thought he was applying the Company's practice correctly.

From January, 1991, to June, 1992, other Company officials were unaware that Hollins was treating Blending unit employes differently from employes elsewhere in the plant insofar as the Company's aforementioned practice is concerned. In May or June, 1992, Human Resources Administrator Kathy Krie learned of this inconsistency during a conversation with Dougherty. What happened was that Dougherty asked Krie to make him a follow-up doctor's appointment in connection with a work-related neck injury. Krie responded that he would not be paid for his time at the doctor, whereupon Dougherty responded that he was always paid for his follow-up doctor visits. Krie then spoke with Hollins and learned from him that he had, in fact, been paying Blending unit employes for all time spent at doctor appointments for follow-up medical treatment of work-related injuries. Krie informed Hollins that this was not the Company's practice and that he had erred by paying Blending unit employes for follow-up doctor visits related

1/ There were more aspects to the Company's practice than just noted. The other components have not been listed though because they are not specifically involved here.

to on-the-job injuries. Krie, Steiner and Hollins then met with Plant Manager Paul Windrath to discuss the situation. The outcome of their meeting was that the Company decided to prospectively correct Hollins' error in the Blending unit. To accomplish this goal the Company posted a notice at work on July 20, 1992, that essentially stated that henceforth employes would not be paid for time missed for follow-up doctor visits. With this notice the Company intended to return the Blending unit to the Company's practice that existed prior to 1991 and return to a uniform, plant-wide practice. Insofar as the record shows, the July 20 notice was not mailed to the Union.

During the last week of July, 1992, Dougherty told Hollins that he had scheduled a follow-up doctor appointment for August 4, 1992, during his work hours. Hollins then reviewed the July 20 notice with Dougherty and told him that since the doctor visit in question was not a first-time visit for a matter requiring immediate attention, but rather was a follow-up visit, he would not be paid for the time. Hollins also told Dougherty that if he went to the doctor as planned, he would be marked tardy for that date. Dougherty responded that he understood, but that he was going to the doctor on August 4 as planned.

On August 4, Dougherty went to the doctor appointment as planned. As a result, he was 2 1/2 hours late for work. He was not paid for the 2 1/2 hours he missed on that date. Additionally, he was recorded as being tardy on that date. The impact of being marked tardy is that he lost the clean attendance record he had until then. This made him ineligible for a perfect attendance bonus which consists of a paid day off.

Dougherty, who is the Union's steward, filed the instant grievance that same day. The grievance was not resolved and was ultimately appealed to arbitration.

The current labor agreement was signed July 6, 1992, and covers the period June 1, 1992, through May 31, 1995. Neither the Company's aforementioned practice nor Hollins' "practice" in the Blending unit was discussed in the negotiations which culminated in that labor agreement.

POSITIONS OF THE PARTIES

The Union contends that the Company violated the collective bargaining agreement when it refused to pay Dougherty for time spent at his doctor's office on August 4, 1992, for treatment for a worker's compensation injury. As background, it notes that Dougherty hurt his neck in 1991 while performing his job. On August 4, 1992, Dougherty received medical treatment in connection with that earlier injury. The Union believes that the Company's refusal to pay for time spent at his follow-up medical appointment

violated both implied and express provisions of the contract. First, the Union argues that there was a practice since December, 1990, of the Company paying Blending unit employes, including Dougherty, for time spent at medical appointments for follow-up treatment for on-the-job injuries. The Union asserts that the Company never challenged this practice prior to signing the current contract on July 6, 1992. The Union notes that two weeks after the current contract was signed, the Company posted a notice at work stating that follow-up medical appointments subsequent to job-related injuries scheduled during work hours would no longer be reimbursed. The Union argues that since there was a practice in the Blending unit of paying employes for follow-up treatments, and this practice was not discussed during the recently completed contract negotiations, that practice is binding during the remainder of the term of the contract. The Union therefore argues that the Company violated an implied provision of the agreement when it unilaterally changed an established past practice affecting a major condition of employment during the term of the contract. Second, the Union contends the Company violated the contractual maintenance of standards clause by lowering the wage terms of the contract below the standard in effect at the time of the signing of the contract. The Union asserts that even if the Company's previous reimbursement of Blending unit employes for medical appointments was an inadvertent bona fide mistake, the grievance should still be sustained. The Union notes that the contract requires the Company to give written notice to the Union before it corrects any error, and it asserts that never happened here. In its view, the Company never gave the Union any written notice before affecting the change. The Union therefore submits that the Company violated the maintenance of standards clause by failing to notify the Union in writing before correcting the alleged error. In order to remedy this contractual breach, the Union requests that the arbitrator rescind the July 20, 1992, notice and restore the practice that was in effect prior to that date (namely paying employes for time spent during work hours at medical appointments off the Company's premises for treatment of job-related injuries). The Union also asks the arbitrator to make Dougherty and any other affected employes whole for all losses sustained, including restoration of perfect attendance bonuses for which they are otherwise eligible.

The Company contends that it did not violate the contract when it refused to pay the grievant for time spent in follow-up medical appointments subsequent to a work-related injury. According to the Company, its long-standing practice was that employes were not paid for time spent on doctor visits during work time for follow-up medical appointments subsequent to a work-related injury. It acknowledges though that beginning in 1991 and running through June, 1992, the manager of the Blending unit deviated from the practice just noted. Specifically, he paid employes for all work-related doctor visits, regardless of whether immediate medical attention was required and regardless of whether

it was a first or follow-up visit. The Company characterizes the payment under these circumstances as a bona fide error that was limited to just a small portion of the plant, namely the Blending unit. It argues that what happened in the Blending unit for 18 months was an isolated misapplication of the Company's practice which should not be used to eradicate the practice which was properly applied to all other bargaining unit employes except Blending unit employes. Having thus characterized the "practice" in the Blending unit as a bona fide error, the Company believes it was not obligated by the maintenance of standards clause to continue that error ad infinitum. Instead, it is the Company's view that it was empowered to correct the error because there is nothing in the contract which prohibits it from making such a business decision. The Company asserts that once it learned of the Blending Manager's inadvertent mistake in applying the Company's practice, the only contractual obligation it had under the maintenance of standards clause was to notify the Union in writing before it corrected the error. The Company submits it did so. Specifically, it contends the posting dated July 20, 1992 was the written notice for the Union required by the maintenance of standards clause. It also notes that after the July 20, 1992 notice was posted, Hollins discussed it with the grievant prior to his August 4 medical appointment. As a result, the Company contends the grievant knew beforehand that he would not be paid for the time spent at his August 4 medical appointment. The Company asserts that the grievant's August 4 doctor visit was handled in accordance with the July 20 posting. In its view, no contractual violation occurred. It therefore requests that the grievance be denied.

DISCUSSION

At issue here is whether the Company has to pay employes for time spent in follow-up medical appointments subsequent to a work-related injury. The Union contends that it does while the Company disputes this assertion. In deciding this question the undersigned will first look to the contract language. If it does not resolve the matter, attention will be given to evidence outside the so-called four corners of the agreement.

A review of the labor agreement indicates it does not address whether employes are to be paid for time spent in follow-up medical appointments subsequent to a work-related injury. Thus, the parties have not included language in their present agreement covering this situation.

Given this contractual silence on the topic, attention is turned to the other evidence relied upon by the parties, namely an alleged past practice. Arbitrators oftentimes look to past practice to help them interpret the contract when there is no contract provision applicable. In those situations, unwritten

practices can supplement the written contract as an implied provision of that agreement and be binding on the parties. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract is silent on a specific topic. Arbitrators have historically cited a variety of guidelines or standards that a course of conduct must meet before it is found to be a binding past practice. Some of the variables which lead an arbitrator to accept or reject the existence of a past practice are: 1) knowledge of the practice, 2) it must have been mutually accepted by the parties, 3) it must have existed over a reasonably long period of time and been repeatedly followed, and 4) the underlying circumstances giving rise to the practice. 2/ In addition to the elements just noted, the undersigned adds that the practice must be between the parties and not simply individuals.

Here, the Company asserts, and the Union does not deny, that for about 10 years preceding 1991 there was an unwritten plant-wide practice regarding the circumstances whereby employes were paid for medical treatment of on-the-job injuries. 3/ The part of the practice pertinent here is that employes were paid for just the first doctor visit; they were not paid for follow-up medical appointments subsequent to a work-related injury. Accordingly, no dispute exists over the existence of this practice pre-1991.

Between 1991 and June, 1992, there was a deviation from the above-noted practice for some of the bargaining unit employes. The parties do not dispute what happened during that period but instead disagree as to its significance. What happened during this period was that the above-noted practice was continuously applied to all bargaining unit employes except Blending unit employes. Consequently, all bargaining unit employes except Blending unit employes were not paid for follow-up medical appointments subsequent to a work-related injury. During this same time period though Hollins did something different for the Blending unit employes. Specifically, the employes who Hollins supervised in the Blending unit were paid for follow-up medical appointments subsequent to a work-related injury. Prior to being denied payment in this case for follow-up medical treatment, the grievant was paid 22 times previously during this time period under similar circumstances.

Each side relies on the part of the above-noted history that supports their position. The Company relies on the practice which

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2/ Hill and Sinicroppi, Management Rights (BNA Books, 1986), at 24.

3/ In making this statement, the undersigned repeats the proviso noted in Footnote 1.

existed plant-wide prior to 1991 and was continuously applied thereafter to all bargaining unit employes except Blending unit employes, while the Union relies on what happened in the Blending unit from 1991 to June, 1992. Obviously the Company wants to enforce the former and the Union wants to enforce the latter.

Based on the rationale that follows, I find that what happened in the Blending unit from 1991 to June, 1992 is not a binding past practice entitled to contractual enforcement. First, Hollins acknowledged at the hearing that he erred when he paid employes in the Blending unit for follow-up medical treatment of on-the-job injuries. What happened was that he simply misunderstood the Company's practice. He mistakenly thought he was to pay employes for such follow-up treatments when that was not, in fact, the Company's practice pre-1991. Given Hollins' admission of error, the undersigned is hard-pressed to say otherwise. Consequently, what happened in the Blending unit for 18 months was, as argued by the Company, a mistake. Second, insofar as the record shows, the other six operating units at the plant did not deviate during this 18-month period from the practice that existed unit-wide before 1991. This means that Hollins' mistake did not affect the entire bargaining unit. Instead, his mistake was limited to just a single operating unit, namely the Blending unit. Consequently, a relatively small number of employes were affected by it. Third, during the 18-month period in question no other management official knew that Hollins was paying Blending unit employes for follow-up medical visits. That being the case, Hollins' personal "practice" was not known to other Company officials or approved by them. This is evident by the fact that once Hollins' supervisors learned what he had done in the Blending unit, they stopped it prospectively. The undersigned finds that since other Company officials did not know or approve of what Hollins did (i.e. pay Blending unit employes for follow-up medical appointments), his "practice" cannot be imputed to the Company even though he is a Company official. It follows from this decision then that the Company, as the term is used in the labor contract, lacked knowledge of Hollins' "practice" (element 1 above) and did not mutually accept it (element 2 above). Given the foregoing, it is held that what happened in the Blending unit for 18 months is not a binding past practice. Accordingly, I decline to enforce Hollins' "practice" in the Blending unit as an implied term of the agreement.

Having so found, the question remains whether there is any practice that should be enforced. As noted above, it has already been held that what happened in the Blending unit is not a binding past practice entitled to contractual enforcement. It logically follows from this decision that I need to look outside the Blending unit to the other units in the plant to see if a practice exists in those units. It does. It is noted in this regard that the Union does not dispute the existence of a plant-wide practice pre-1991 of employes not being paid for follow-up medical

appointments subsequent to a work-related injury. The Union further does not dispute that this same practice was continuously applied thereafter to all bargaining unit employes except Blending unit employes. Since the foregoing is undisputed, I find that this practice outside the Blending unit meets the previously identified criteria for a binding past practice. Accordingly, the practice of employes not being paid for follow-up medical appointments subsequent to a work-related injury is entitled to contractual enforcement.

Application of that practice here means that the grievant was not entitled to be paid for the 2 1/2 hours work time he missed on August 4, 1992 because he was at a follow-up medical appointment for treatment of a work-related injury. Since that is what happened, the Company treated the grievant in accordance with the applicable practice.

Attention is now turned to the Union's argument concerning the maintenance of standards clause. That clause provides that all conditions of employment shall be maintained at not less than the highest standards in effect at the time of the signing of the agreement. The Union contends that when the Company posted its July 20, 1992 notice, it violated that clause by essentially lowering the wage term of the contract below the standard in effect at the time of the signing of the contract.

Assuming for the sake of discussion that what happened in the Blending unit for 18 months was a "condition of employment" within the meaning of the maintenance of standards clause, that clause makes an exception for "inadvertent or bona fide errors made be the Employer in applying the terms and conditions of the Agreement . . ." It has previously been found that this is what happened here, namely that Hollins made a bona fide error when he paid employes in his unit for their follow-up medical treatment of work-related injuries. The maintenance of standards clause goes on to provide that when the Employer makes an inadvertent or bona fide error which it wants to correct, it can do so. What it has to do is give "written notice to the Union before correcting the error." Thus, the Employer can correct an error it has made concerning a "condition of employment", but it has to give the Union written notice before correcting same.

At issue here is whether the Company gave the Union "written notice" before it prospectively corrected Hollins' error in the Blending unit. The Company contends that it did while the Union disputes this assertion.

What happened initially was that the Company posted its July 20, 1992 notice at work. If this posting had been the only method used by the Company to publicize its correction of Hollins' error in the Blending unit, I would have found it insufficient to qualify as "written notice to the Union." However, the Company

did more than simply post the notice on the bulletin board. Specifically, Hollins explained the notice in detail. This happened when Hollins reviewed the contents of the July 20, 1992 notice with Dougherty before he (Dougherty) went to the doctor on

August 4, 1992. This explanation of the posting and its contents put Dougherty on notice that Hollins' previous "practice" in the Blending unit had been eliminated and that prospectively the Company was not going to pay employes for follow-up medical appointments. Given the foregoing, Dougherty knew what would happen if he went to the doctor as planned on August 4, 1992, namely that he would not be paid for it. Hollins' briefing not only put Dougherty on notice of the contents of the posting, but it also constituted notice to the Union because Dougherty was the Union steward.

The question nevertheless remains whether the Union received "written" notice of this correction. In my view, the Company could have satisfied the written notice requirement of the maintenance of standards clause by simply mailing a copy of the posting to the Union. Insofar as the record shows, the Company never did so (i.e. mail a copy of the posting to the Union). The Union contends that since the Company failed to mail a copy of the notice to the Union, the July 20, 1992 notice should be rescinded and Hollins' "practice" restored for the duration of the current contract. I disagree. In my view, neither proposed action is warranted here given the circumstances noted in the preceding paragraph. I believe it would elevate form over substance to conclude that the Union never received notice of the Company's corrective action since it was not mailed a copy of the July 20, 1992 posting. The fact of the matter is that the Union, via Dougherty, did receive notice that the Company was prospectively correcting Hollins' error in the Blending unit so that henceforth those employes would be covered by the practice that existed before the mistake was made.

Having found that notice was given to the Union, it follows that the Company complied with its obligation under the maintenance of standards clause when it prospectively corrected the error that had developed in the Blending unit. Accordingly, no contract violation has been found.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Company did not violate the contract by refusing to pay the grievant for time spent in follow-up medical appointments subsequent to a work-related injury. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 27th day of September, 1993.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator