

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 LOCAL 986, AFSCME, AFL-CIO : Case 276
 : No. 49581
 and : MA-7995
 :
 MANITOWOC COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Gerald Uglund, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Union.
Mr. Robert J. Zeman, Corporation Counsel, Manitowoc County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above are parties to a 1993 collective bargaining agreement. The Union requested, with the County's concurrence, that the Wisconsin Employment Relations Commission appoint an arbitrator to hear a grievance regarding the use of highway shops. The undersigned scheduled a hearing for October 12, 1993, but the parties decided to submit a complete stipulation of facts and exhibits to the arbitrator rather than hold a hearing in the matter. The stipulations and exhibits were received on November 3, 1993, and the parties completed filing their briefs by December 9, 1993.

ISSUE:

The issue is:

Did the Employer violate the collective bargaining agreement which applies by closing the Highway Department shops to employee use for working on employee vehicles and personal projects outside of working hours? If so, what is the remedy?

STIPULATED FACTS:

The parties submitted the following facts:

1. The employees of the Manitowoc County Highway Department have, for forty-five (45) years or more, been allowed to use the Main Shop in Manitowoc, the carpenter's shop in Manitowoc, and the outlying shops, to service their family vehicles and work on personal craft projects. Said employees have frequently utilized those shops for those purposes until April 13, 1993.
2. No other county employees had access to the County Shops for the purpose described in paragraph one.
3. Equipment and tools which had not been locked away were available for employee use.
4. No employee has, during any relevant period of time, reported being injured as a result of having been

in or having worked in the Highway Department shops outside of work hours.

5. On April 13, 1993 the Employer posted a notice (Exhibit "C") that the shops were to be closed to employee private use effective immediately.

6. On April 13, 1993 a grievance was filed by the Union alleging a violation of the Collective Bargaining Agreement.

7. The Collective Bargaining Agreement was bargained repeatedly under the circumstance that private shop use by employees was permitted.

8. During contract bargaining there has been no refutation of employee private use of the shops.

9. That the language of Article 3, paragraph 4 of the contract regarding past practices and amenities has remained unchanged for at least the past two contracts, and for many years prior to that.

10. That five (5) mechanics employed by the Highway Department keep personal tools, which are their personal property, and which are too numerous and bulky to transport to and from the work place, at the Main Shop premises. These employees value their individual tools at ten to fifteen thousand dollars (\$10,000.00 to \$15,000.00) on a replacement cost basis. The present policy denies these mechanics access to those tools outside normal work hours, unless the tools they need are taken home when they leave work.

11. It is less expensive for a person to buy and install parts and/or fluids to a vehicle than it is to have the same work performed commercially.

12. The County Highway shops have woodworking and other equipment that is not generally available in home workshops.

13. Employees working on personal projects were sometimes present when the premises otherwise were vacant. The mainshop has heat sensors. On Christmas eve 1992, employees working on a personal project discovered a pump failure in the furnace at the County Highway Shop. Had these employees not been present, damage may have occurred to the premises before employees returned to work after the holiday.

14. Employees were allowed to use water supplied by the County to wash their personal vehicles, drain oil from employees vehicles was commingled with drain oil from County vehicles.

15. No releases or hold harmless agreements were requested from any employee using the County Shops for the purposes described in paragraph 1.

16. The Union grievance is timely in all respects.

17. Between September 17th and 23rd, 1993 the Employer allowed Mishicot High School Students to use the Mishicot Shop outside work hours, without the supervision of any managerial or other employee of the Department and without fee, to build a homecoming float.

CONTRACT LANGUAGE:

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

. . .

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and practices in effect for a minimum period of twelve months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement.

. . .

ARTICLE 29 - ENTIRE MEMORANDUM OF AGREEMENT

A. This Agreement constitutes the entire agreement between Manitowoc County and Manitowoc County Highway Department Employees, Local 986, AFSCME, AFL-CIO. None of the terms and conditions of this Agreement shall be changed unilaterally. Changes may be made by mutual agreement of the parties in writing.

. . .

THE PARTIES' POSITIONS:

The County argues that the County was within its rights in terminating its prior policy on employee use of buildings and equipment, because this policy was not a binding past practice as that term is used in labor relations. Employees' use of County buildings and equipment during their non-working hours has nothing to do with their wages, hours or working conditions. The County has no obligation to bargain with employees over what they do in their spare time.

The County asserts that a binding past practice is the product of an agreement or a mutual understanding, and the County's policy of allowing Highway Department employees to use highway shops and equipment was not arrived at mutually. Those in charge of the Highway Department unilaterally decided to make certain items of County property available to employees during their off hours. A unilateral decision may be changed unilaterally. What happened here is that the County changed its employee shop use policy, a unilateral policy that existed for a long period of time.

While the Union may argue that the closing of Highway Department shops to employees has a financial impact on them, any consequence to their pocketbooks is unrelated to their wages, hours and working conditions. Moreover, the County notes that the Highway Commissioner has changed the policy before on two occasions, once in March of 1990 and again in February of 1993. The County

asks that the grievance be denied.

The Union argues that the County would simply discontinue a past practice which has existed for a very long time, for 45 years or more while the collective bargaining agreement was repeatedly bargained under the circumstance that private shop use by employees was permitted. The County never refuted that practice, as noted in the stipulations.

The Union asserts that it is evident that the use of the shop was a benefit to employees, as noted in the stipulations which show that mechanics have use of their own tools worth several thousands of dollars and which are too numerous and bulky to take back and forth to and from work on a daily basis. Also, employees save money by performing work on their own vehicles rather than hiring it done commercially. And the County has certain equipment available to employees that they would usually not keep at their homes. The Union points out that no one was ever injured, the County never sought to have employees sign releases, and the County even benefited on one occasion. Even after the Highway Commissioner announced the change to close the shops, the public was allowed to use a shop without supervision.

The Union argues that the contract language in Article 3 is clear, that the County recognized private shop use as a fringe benefit, and that the employees are entitled to the continuation of this benefit. The practice was long lasting, clear, known and understood by both parties, frequently occurring, and in concert with the contract language. The Union states that the County has no compelling reason for discontinuing the private use of highway shops, and has not even announced any specific reason for the closing.

Moreover, the cessation of a past practice does not occur during the term of a labor contract by simple employer declaration.

The Union asks that the grievance be sustained and that the County restore the private use of Highway Department shops and equipment.

The County, in a reply brief, reiterated the argument that there is no binding past practice. The County states that the law draws no distinction between a long time and a "very" long time, and that an employer need not demonstrate a compelling reason or any reason at all when it terminates a unilateral practice which does not affect wages, hours or working conditions.

DISCUSSION:

The employees' use of Highway Department shops for their personal projects or to work on their own vehicles for the past 45 years falls well within the language of Article 3, which says:

The Employer agrees that all amenities and practices in effect for a minimum period of twelve months or more, but not specifically referred to in this Agreement shall continue for the duration of this Agreement.

The matter in dispute was in existence for 12 months or more. Whether it came about some 45 years ago as a unilateral policy dictated from management or came about by management's acquiescence in the employees' use of the shops is irrelevant, since it is clearly an amenity or practice within the meaning of the collective bargaining agreement.

The County has argued that the shop policy cannot be considered to be a binding past practice within the term as used in labor relations. First of all, it is not necessary to determine whether a bona fide binding past practice exists for the purposes of either interpreting ambiguous contract language or filling a gap in the contract, where the contract states clearly that all

amenities and practices in effect....shall continue. An analysis of what past practices are binding and to be given effect is important for determining what should be given status as an implied term of the agreement. Where the contract status that practices and amenities are to continue, the only question is whether employee shop use for personal business constitutes a practice or an amenity.

There is little doubt that the use of an employer's space or equipment for personal use is an amenity. The fact that the employees use the shops after their working hours does not take it out of the realm of "amenities or practices." When an employer allows employees to use a company car for personal business, the personal business is conducted outside of working hours, but the employee receives a benefit from the use of the company car. The same is true here. The employees receive a small benefit or advantage in being allowed to use both the employer's premises and equipment to work on their own vehicles or projects. Such a benefit or advantage is an amenity, like a courtesy extended to someone.

For many successive contracts, the parties have agreed that it is not oppressive to continue the existing amenities and practices for the duration of the contract, while it is usually impossible to spell out all the practices under which people work. If the Employer wants to change one of those practices or amenities in effect, it needs to do so at the bargaining table, and not unilaterally during the term of the contract.

The County does not demonstrate why it felt it needed to change the practice and close the highway shops during off hours. Highway Commissioner William Schramm made a reference in his April 13, 1993, letter to a number of problems associated with the private use of highway shops. But none of those problems have been brought forward to justify overriding this practice. Also, the changes made in the practice by the Commissioner in 1990 and 1993 had no substantive effect on the use of shops for personal business.

For the reasons noted above, the grievance will be upheld.

AWARD

The grievance is sustained. The County is ordered to restore the practice of allowing employees to use highway shops after working hours for personal reasons.

Dated at Elkhorn, Wisconsin, this 4th day of February, 1994.

By Karen J. Mawhinney /s/