

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 WAUSAUKEE SCHOOL DISTRICT : Case 33  
 : No. 50583  
 and : MA-8310  
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 LOCAL 1752-D, AFSCME, AFL-CIO :  
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Appearances:

Godfrey & Kahn, S.C., by Mr. William Bracken, Coordinator of Collective Bargaining Services, on behalf of the District.  
Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1752-D.

ARBITRATION AWARD

According to the terms of the 1993-95 collective bargaining agreement between Wausaukee School District (District) and AFSCME Local 1752-D (Union), the parties requested that the Wisconsin Employment Relations Commission designate an impartial arbitrator to hear and decide a dispute between them regarding the District's alleged unilateral action effective on January 1, 1994, to require that all school buses be stored at the District bus garage in Wausaukee, Wisconsin. The undersigned was designated Arbitrator by the Commission and a hearing was held on August 2, 1994 at Wausaukee, Wisconsin. A stenographic transcript of the proceedings was taken and received by August 8, 1994. The parties submitted their post hearing briefs by August 24, 1994, which were exchanged by the undersigned. The record was then closed.

Issues:

The parties were unable to stipulate to the issues to be determined herein, although they agreed to allow the undersigned to frame the issues based upon the relevant evidence and arguments submitted in this case. The District raised an initial issue of arbitrability, as follows:

1. Is this matter arbitrable within the meaning of Article 14 - Grievance Procedure in the master agreement? If not, the Arbitrator should dismiss the grievance.

The District framed the substantive issues as follows:

2. If the grievance is arbitrable, did the Board violate Article 17 - Management Rights when it decided to store buses at the bus garage in the Village of Wausaukee? If so, what is the appropriate remedy?

The Union resisted the issue of arbitrability on the ground that the District had failed to object to the arbitrability of the grievance prior to the instant hearing. The Union therefore phrased the substantive issues as follows:

3. Did the Employer violate the whole collective bargaining agreement when it decided to store all buses at the bus garage in the Village of Wausaukee? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, I conclude that the District's first issue (1.) and the Union's substantive issue (3.) shall be determined in this case.

Relevant Contract Language:

ARTICLE 2 - RULES AND REGULATIONS

The Employer shall adopt and publish rules for the health, safety, discipline and housekeeping of the School District, which may be amended from time to time. The Employer shall give the Union notice at least ten (10) days prior to the effective date of any rule.

. . .

ARTICLE 17 - MANAGEMENT RIGHTS

The operation of the School system and the determination and direction of the working force, including the right to plan, direct and control operation; to carry out the statutory mandate and goals assigned to the School Board in the most appropriate and efficient manner possible; to manage the work force and assign work to employes on said jobs; to determine the means, methods, materials, and schedules of operation; to determine the work to be performed; to maintain the efficiency of employes; to determine the number of employes on jobs; to create, revise and eliminate jobs;

to establish and require the employees to observe reasonable rules and regulations; to hire and layoff; to maintain order; and to suspend, demote, discipline and discharge employees for cause, are the functions of the School District Board of Education. The Board shall not exercise these rights in violation of the specific provisions of this Agreement.

Background:

The District and the Union have had a collective bargaining relationship since approximately 1980. Since April, 1986, the District has had rules/policies directing the Transportation Supervisor (a non-unit employe responsible directly to the District Administrator) to take certain action, inter alia,

. . . .

14. The Transportation Supervisor shall establish and enforce operational rules and regulations necessary for the efficient operation of the transportation system. . . .

Also, since April 9, 1986, the District has had rules/policies directing bargaining unit bus drivers in relevant part as follows:

1. Bus drivers must be familiar with and adhere to all requirements listed by the Motor Vehicle Department in regard to Public School Transportation.
2. All bus drivers must have a current bus license as provided in State Statutes.
3. All bus drivers must attend all bus meetings as determined by the District Administrator.
4. Bus drivers shall be neat and clean in appearance at all times when performing duties.
5. Bus drivers must check their buses every morning for oil, water, and hammer check the tires.
6. Bus drivers must sweep the inside of their bus daily and wash their bus as necessary. The sweepings from the bus shall be taken to a satisfactory depository.

7. Bus drivers are to be on their buses ten minutes prior to dismissal time to supervise the loading of the students and maintain order and discipline.
8. Bus drivers are to obey the policies established by the Board of Education.
9. Bus drivers shall enforce the transportation rules as outlined in the Student Handbook and shall take such action as is necessary and shall report all infractions to the District Administrator.
10. Bus drivers shall be responsible for rigid enforcement of discipline on their buses at all times.
11. Substitute bus drivers shall be paid by the District office at the same rate as established by the Board.
12. Bus drivers are under the immediate supervision of the Transportation Supervisor.
13. Bus drivers are to follow the rules and regulations established by the Transportation Supervisor.

It is undisputed that the drivers have been fully aware of these rules/policies.

Of greatest significance to this case is the following Policy Number 505 relative to bus maintenance and storage which became effective on April 9, 1986:

The buses shall be maintained at the central location. Any exception to this policy would have to be determined by the Transportation Committee.

A set of rules determined by the Transportation Supervisor and approved by the Transportation Committee will apply.

It is undisputed that for many years (since before 1978) prior to the issuance of the above quoted rule/policy bus drivers who did

not live in Wausaukee itself, but who lived on their routes were routinely allowed to keep their buses at their homes. Even after the Board issued the above-quoted bus storage rule/policy on April 9, 1986, the Board continued to allow drivers who lived on their routes to maintain their buses at home and to allow drivers who lived within five miles of their route to take their buses home, for a total of five extra miles per day. This home bus storage policy was in effect from at least the 1970's until February 1, 1988, when the policy was changed and codified by the District to allow drivers who lived twenty miles off their routes to take their buses home, so long as they did not exceed twenty extra miles per day. The written policy issued by the Transportation Committee on this subject read as follows:

. . .

Discussion centered around a formula whereby bus drivers could keep their vehicles at home, despite there being occasional extra miles put on the vehicle by so doing. The committee concluded that the following formula would be observed when determining whether a driver may maintain a vehicle at home:

- All routes will be determined by calculating mileage from the bus garage or the driver's home, whichever is less.
- Excess mileage, up to 20 miles per day, may be put on a vehicle and still kept at home; those miles will not count in the pay formula.

These guidelines will apply to all vehicles owned by the district.

The above-quoted February 1, 1988, policy change came about because one driver had to drive more than five miles from his home to the bus garage and back and the Board had notified this driver, on January 22, 1993, that he would no longer be able to take his bus home after his morning run. However, after issuing this notification to the driver, the Board issued its February 1, 1988 written bus storage policy and the driver resumed using his bus to go home after his morning run.

On April 23, 1993, the following policy was implemented by the District:

507: BUS STORAGE LOCATION POLICY

Replaces policy on personal mileage to and from home.

Buses will be kept at the bus garage or at the driver's home at the discretion of the Board and in the best interest of the School District. 1/

Again, it is undisputed that nothing changed after the above policy was issued by the Board and drivers continued keeping their buses at home if they lived outside Wausaukee, Wisconsin, on their routes, or within twenty total miles of their routes.

On two occasions, the Board called all buses into the central garage in Wausaukee, Wisconsin. The first occasion occurred in 1977. After the call-in, buses were kept at the central garage for approximately one month, but the buses were then released to the drivers on the same basis as before for housing at their residences. It was at this time that the Board issued rules covering bus drivers who keep their buses at their homes. The five-mile rule was in place at this time although it remained unwritten and was not referred to in the rules, which read as follows:

1. Drivers of buses that do not come to Wausaukee on a daily basis will maintain a supply of oil, antifreeze, window cleaner and paper towels at home. It is the responsibility of such drivers to acquire a supply of named items from the bus garage.
2. Drivers must be reasonably certain that battery is fully charged when parking bus.
3. When a vehicle has been inoperative for two or more days, driver will start and completely warm engine on day prior to use.

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1/ Employees stated that they did not receive copies of or see the April 9, 1986 or the April 23 policies. Policies 505 and 507 were contained in the District's policy book, available to employees.

4. Bus engines will be run from two to five minutes when temperatures are 32 degrees F. and above; and five to eight minutes when temperatures are 32 degrees F. and below.
5. All buses will be operated at slower speeds until normal operating temperatures are reached.
6. Engine heaters will be activated a minimum of six hours prior to starting when weather forecast is for temperatures at or below 10 degrees F.
7. It is the driver's responsibility to be sure engine or block heater is working.
8. Driver is required to furnish and maintain jumper cables in good working order. Cables to be used by driver if battery charge becomes too low to start engine.
9. Driver must have available a suitable battery, battery charger or another vehicle which can be used to jump start bus engine if bus battery is found to be too low to start bus.
10. All LP fueled engines will be idled at speeds to 1,000 to 1,200 rpm during warm-up period. Any prolonged idling will be at approximately 1,000 rpm.
11. Driver will replace light bulbs that are simple and easily accessible.
12. Driver will report all malfunctions to bus superintendent as soon as possible.
13. If assigned bus is determined to be inoperative, a spare bus can be obtained at bus garage. Transportation to and from garage will be the responsibility and at the expense of the driver.
14. Driver will deliver assigned bus to bus garage upon request of any school official and provide their own

transportation to and from bus garage.  
The district will incur no additional  
labor expense for said delivery.

15. Any school official will have access to all school property (example: bus, supplies, etc) at all times; including school owned equipment stored on private property.
16. School buses will be housed at private residence only when it is determined to be in the best interest of the school district, recommended by transportation supervisor and approved by transportation committee.
17. Upon recommendation of the transportation supervisor and approval of the transportation committee, any bus will be recalled to the bus garage with no obligation to the driver.
18. When bus is stored at driver's home, driver will provide electricity for engine heater.

The second instance when the District called all buses into the central garage occurred in the early 1980's. This was done apparently to discipline two drivers, yet all drivers were required to bring their buses into the garage. After one week the buses were again released to the drivers to be kept at their residences on the same basis as before, the five-mile rule then being in place.

The Board has had general written rules applicable to all bus drivers for many years. On or after February 1, 1988, when the Board formally changed the unwritten five-mile rule to a written twenty-mile rule for bus storage, the Board placed a work rule in its general rules which read as follows:

. . . .

55. Excess mileage, up to 20 miles per day, may be put on a vehicle and still kept at home; those miles will not count in the pay formula. 2/

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2/ Other than Work Rule 55, the general rules for bus drivers



. . .

From February 1, 1988, until January 1, 1994, the twenty-mile rule and all other policies/rules regarding storage of buses at home remained in effect.

Facts:

The District covers an area of 450 square miles from which its students must be bused to and from school if they are not transported by their families. Prior to September, 1993, the District owned and operated school buildings in Amberg, McAllister and Wausaukee, Wisconsin. The District also had two additional rental sites which it operated in order to accomplish its educational mission. In August, 1993, the District hired Cleland Methner as District Administrator. Mr. Methner came on board at the District in the month of August, 1993. Beginning in September, 1993, the District opened its new

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are not otherwise relevant to this case and have not been quoted.

building in Wausaukee, Wisconsin, closed its various facilities elsewhere and ceased renting additional space from others. All students were thereafter transported by bus to the new Wausaukee facility for school, unless they were otherwise transported by their families to school.

On July 19, 1993, the Transportation Committee decided to change the twenty-mile rule to a three-mile rule. Although the Board and the Union had then reopened the 1993-95 contract for negotiation of a successor collective bargaining agreement, the Board did not raise the issue of bus storage with the Union. The Transportation Committee's memo which drivers became aware of unofficially, was dated July 19, 1993 and read as follows:

. . .

1. Drivers may keep their bus at home if the total mileage does not exceed three miles per day.
2. Stops for groceries, banking, etc., will not be allowed enroute.

. . .

Although the Board apparently did not intend unit employees to see the above-quoted policy, bus drivers obtained a copy of it in late July, 1993. The drivers as a group then sought discussions with District Administrator Methner. Mr. Methner listened to the drivers' concerns. He promised to discuss the matter with the Board. The Board addressed the topic of bus mileage at its August, 1993 meeting and decided to rescind the July 19th policy. The formerly effective bus storage policies and the twenty-mile rule remained in effect at the start of the 1993-94 school year and thereafter until January 1, 1994.

Sometime in September, 1993, the Union and the District met for one face-to-face meeting for collective bargaining purposes. At this single meeting, the parties settled the 1993-95 contract covering bus drivers. The issue of housing buses was never discussed at this meeting, nor did either party submit any bargaining proposals regarding the subject.

On November 19, 1993, the Board again decided to change its rules/policies regarding bus storage to require that all buses be housed at the central bus garage. The District issued a letter to Union President John Otto dated November 19, 1993 which reads in relevant part as follows:

. . .

This letter is to give the Union notice of the Board of Education's intention to change the rule of allowing some bus drivers to keep their buses at home.

Pursuant to Article 2 - Rules and Regulations: The Board of Education is giving bus drivers the required ten-day notice that all buses will be stored in the bus garage in the Village of Wausaukee with an effective date of Monday, November 29, 1993. Under this rule change, all buses will be required to be stored immediately at the bus garage after all runs as of the date of implementation.

This rule change is being made as a result of problems that have arisen from the old rule. The Board is very concerned because of the recent accident that occurred which was not related to the transportation of students, but rather from the personal use of the bus after students were brought to school. Safety and liability are extremely important concerns to the Board. Other factors that have contributed to this change are as follow:

- Cost of added miles on buses because of buses housed at driver homes.
- Will be easier to perform routine maintenance and other safety inspections
- Buses will be more easily accessible to sub-drivers when parked in a central location.

It is clear that this change will not only improve the transportation system, it will also reduce operating costs at a time when District resources are very tight.

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On November 22, 1993, the Union faxed a letter to the District to ask to bargain over the "implementation and impact of the District's decision" to change bus storage policies and to stay the implementation of the policy during discussions. At this time, eight drivers were housing their buses at their homes. The District did not respond to Mr. Ofria's fax but it did not

implement the policy change on November 29th, as the Union had requested. On December 15, 1993, driver Anne Biernasz delivered a letter to the Board suggesting a settlement of the dispute between the Union and the Board regarding bus storage. This letter suggested that buses be maintained at the residences of employes who had them before the District issued its November 19th letter but that employes would promise not to use the buses for "personal use" and that they would also promise to follow all District "bus drivers rules" as well as to plug the buses in at their homes at no cost to the District during the Winter. At its December, 1993 Board meeting, the Board rejected the Biernasz proposal and decided to implement the change in bus storage, effective January 1, 1994. By letter dated January 4, 1994, the District confirmed this decision in writing. On January 6, 1994, Union Representative Ofria requested that the instant grievance be moved immediately to arbitration. The District did not specifically object to the timeliness of the filing of the grievance until the instant hearing.

It is undisputed that in the school year 1992-93, 6,000 to 7,000 personal miles were driven by bus drivers under the old bus storage policy then in effect.

#### Positions of the Parties

##### Union:

The Union urged that because the contract is silent on the subject of bus storage and Winter bus plug-in requirements, and because there has never been a "zipper" clause in the parties' contracts, bus storage rules constitute a past practice which should control in this case. In addition, the Union observed, the subject of bus storage was never broached by the parties in their negotiations. In the Union's view, the ability to park their buses at home has been viewed by employes as a benefit. Drivers have historically waited to post into routes close to their homes.

The benefit was real -- saved costs on transportation to and from work, saved costs on car wear and tear, saved time not having to commute to work and use of the bus to run personal errands on the way to and from home along their routes.

The Union pointed out that the District failed to raise the timely filing of the grievance as a defense until the hearing in the instant case, evidencing its "bad faith." The Union therefore urged the Arbitrator to reach the merits of this case.

In regard to the merits of the case, the Union argued that because the home storage policy existed both before and after unionization, it became an assumed benefit to unit employes which could not be unilaterally changed by the District. The Union argued that this was particularly true where, as here, the District had allowed the practice to exist for years, had never negotiated with the Union on the subject for the more than ten

year period of union representation and had never attempted to repudiate the bus storage practice. Indeed, the Union pointed out, the District's secret attempt to implement a change in the bus storage rules/policies in July, 1993, which led to the District's withdrawal of that proposed change after bus drivers objected, requires a conclusion that the bus storage practice should remain in effect through the 1993-95 contract. In addition, the Board's failure to raise the subject of bus storage at contract negotiations for the 1993-95 agreement further buttresses such a conclusion.

The Union noted that no contract can address all assumed benefits. The District's practice regarding bus storage in effect over a twenty year period prior to January 1, 1994 was clear, unequivocal, consistent and mutually accepted and acted upon by the parties in the Union's view. Even though the practice changed over time with the District's issuance of its written policies in 1986 and 1993, the District thereby expanded and maintained the bus storage policy which, the Union claimed, employees then reasonably relied upon as a part of their benefit package. In the Union's opinion, the District's recall of buses as an occasional disciplinary measure and the District's recall of buses to the central garage on two occasions lasting one month and one week respectively were insufficient to destroy the practice which continued to exist both before and after the recalls. The Union noted that no written bus storage policy existed until 1986 and that after its issuance, the written policy had no effect on the practice as it had existed, by that time, for approximately twenty years. The Union urged that it was up to the District to negotiate its new policy into a successor labor agreement in these circumstances.

The Union resisted the District's arguments at hearing that its bus storage policy was subject only to its discretion. The Union noted that the rule was to store buses at driver residences and that the exception to that rule was to require buses to be stored at the central garage. The Union asserted that the circumstance of the District's move into its new school building in 1993 was insufficient to show the dramatic change of circumstances necessary to justify a change in the bus storage practice, mid-term of the contract. The Union claimed that it had reasonably relied upon the District's bus storage policy in formulating its wage proposals since 1986, and noted that the contract has been silent regarding hours of work and bus route descriptions.

The Union further contended that the District's lack of fair dealing demonstrated by this case should be counted against the District on the merits. In this regard, the Union asserted that the District acted in "bad faith" in asserting that the grievance was not arbitrable for the first time at the hearing. Second, the

District's failure to raise the issue of bus storage at bargaining in 1993, after having withdrawn its clandestine attempt to institute a three-mile rule in July 1993, also constituted "bad faith", in the Union's view, sufficient to require a ruling on the merits in favor of the Union.

In all of these circumstances, the Union sought a "make whole" remedy and an order from the Arbitrator that the District resume the bus storage past practice for the remainder of the 1993-95 contract.

District:

The District observed that the labor agreement defines a grievance as

". . . a dispute between the School District and the Union covered by this agreement involving the meaning, interpretation or application of the provisions of the agreement." Thus, the District urged, the Union's failure to cite a violation of a particular provision of the contract during the pendency of the instant case and its admission at hearing that the contract is silent on the issue of bus storage, require that the grievance be dismissed. The District also noted that Article 14 of the contract precludes the Arbitrator from inter alia, "amending, modifying or adding to" the labor agreement. Thus, the District sought the dismissal of the grievance on procedural grounds.

Even assuming that the grievance is found arbitrable, the District contended, it had followed Article 2 of the labor agreement to the letter by properly notifying the Union, within the time frame stated in Article 2, of its intended change in the rule regarding bus storage. Because the District had followed Article 2 and because the Union admitted at trial that bus storage was a proper subject for District rule-making, the District urged that it had not violated any part of the labor agreement by its actions.

In addition, the District contended, Article 17 - Management Rights specifically reserves to the Board the right, inter alia, to control the method, means and materials used in its operations, to establish rules and regulations and require adherence to them, and to assure the efficiency of employes. Because the District did not otherwise violate a specific term of the labor agreement, the District observed, it was free to exercise its Article 17 rights as it did in this case.

The District also asserted that the Board's decision to change the bus storage rules was based on economy, efficiency, bus maintenance needs, public relations and liability reasons, supported by the record evidence in this case. Thus, the District

contended, the Board's decision to change its rules was neither arbitrary nor capricious and it must be upheld by the Arbitrator.

The Board noted that such a conclusion is fully supported by the bus storage rules in effect prior to January 1, 1994, which expressly left rule changes to the Board's discretion, "in the best interests of the District" (April 23, 1993 bus driver rules).

In addition, the new bus storage rule, effective January 1, 1994, clearly allowed the change to be made by the District for both "safety" and "housekeeping" reasons (Article 2).

The District essentially contended that no past practice could override or destroy the District's clear management right to set and change rules regarding bus storage. In addition, the District argued, the Union failed to meet its burden of proof to show that a past practice actually existed. The Union also offered no evidence to show that the alleged past practice of automatically storing buses at drivers' homes was ever actually mutually agreed upon per se, so as to constitute a waiver of the District's discretionary authority. The District noted the "practice" was not unequivocal, that it had changed over time and that it did not become a constant and clear right or benefit. The District observed that the "practice" was not clearly enunciated, as it was at odds with both the Board's rules/policies and with the record facts. On this point, the District asserted that it had changed this "practice" over time to allow drivers to drive up to five miles and later up to twenty miles off their routes and it had recalled buses to the central garage on several occasions. Thus, the "practice" was neither clear nor readily ascertainable over a reasonable period of time, in the District's view.

In addition, the District contended that even if an effective past practice is found here, the underlying basis for the practice has changed so that modification or elimination of the practice may be accomplished by the Employer with impunity. The erection of the new central school building alone caused such a change of circumstances, in the District's view. Add to this change of circumstances, the occurrence of a bus accident in a local bank parking lot, public relations concerns regarding employes abusing the twenty-mile rule to use their buses to do shopping, banking and engage in leisure activities (such as bowling), and a conclusion is required that the District should be able to change its "practice" to avoid inefficiency and eliminate employe abuse of that "practice".

The District contended that the Union waived its right to bargain over the issue of housing buses when it failed to request bargaining over bus storage rule changes in 1986 and 1993 and when it failed to follow up on the Board's refusal to accept the December 15, 1993 Biernasz "proposal" or to follow up on then-Union Representative Ofria's initial demand to bargain

regarding the January 1, 1994 bus storage rule change. In any event, the Union failed to raise the issue of bus storage at the bargaining table when the 1993-95 contract was reached. On this point, the District observed that in July, 1993, the bus drivers were aware of the District's intention to change the twenty mile rule



to a three mile rule, yet the Union failed to raise and to negotiate a twenty mile rule into the 1993-95 contract. Thus, the District asserted, the Union by this case, is asking the Arbitrator to award it something it has consistently failed to gain at the bargaining table.

The District argued that in any event, the remedies of mileage and work time sought by the Union are unreasonable in this case. The District pointed out that the bus storage rules themselves state that the Board will be under no obligation to the drivers should the Board decide to house buses centrally. In all of these circumstances, the District sought denial and dismissal of the grievance in its entirety.

Reply Briefs:

The Union chose not to file a reply brief in this case.

District's Reply:

The District urged that the instant grievance is not arbitrable under well-established precedent which provides that unless both parties agree to arbitrate cases, arbitration cannot proceed. The District asserted that the record in this case demonstrates that the issues are not substantively arbitrable because they do not relate to any provision of the contract. The District observed, then, that it could raise the issue of arbitrability at any time without being guilty of "bad faith", as the Union claimed. The District also noted that by its January 4, 1994 letter, the District had, in fact, notified the Union that it had found no violation of the contract by the acts alleged by the Union in the instant grievance. Thus, the District urged that the Union was put on notice on January 4, 1994, that arbitrability would be an issue.

The Union's contention that a past practice exists ignores the unrefuted fact that the District's bus storage rules/policies were created through the exercise of its reserved management rights, in the District's view. In support of this argument, the District pointed out that its written rules/policies and the facts of this case demonstrate that the District retained the discretion to house buses at the central garage and that it used its discretion to recall all buses to the central garage on several occasions, without drawing any complaints from the Union.

In any event, the District argued that the Union failed to meet its burden of proof to show the existence of all of the necessary elements of a true practice. Specifically, the District noted, the Union did not submit sufficient evidence to prove the elements of mutuality, clarity and consistent application of the

"practice" over time. Indeed, the District observed, it had changed the five personal miles rule to a twenty personal miles rule, in its discretion, and used bus location as a disciplinary tool at times, without objection from the Union. The District also observed that its 1986 and 1993 written policies demonstrated that the District's clear intention was to break with the "practice" as it may have existed before 1986, and place the subject of bus storage back within its sole discretion.

The District argued that the Union failed to present any evidence of a District "bad faith" conspiracy regarding bus storage. In contrast, the District asserted that it was the Union's duty to seek bargaining after the District issued and withdrew its July, 1993 three personal miles rule. A prohibited practice, not a grievance should have been filed, in the District's view, to address the claimed "bad faith" allegations of the Union.

The District asserted that it proved substantial, undisputed business reasons for eliminating home bus storage. Based upon all of its arguments and the record herein, the District sought denial and dismissal of the grievance in its entirety.

Discussion:

The initial issue that must be determined in this case is whether the grievance is the type of dispute which is "covered by" the effective labor agreement between the parties "involving the meaning, interpretation or application of the provisions" of the agreement. I believe that this is such a dispute. Although the District is correct that the contract does not contain a specific provision relating to bus storage, it also does not contain a "zipper" clause which might effectively bar a case such as this one. In addition, the contract does contain a management rights clause (Article 17) and a provision relating to District "Rules and Regulations" (Article 2). This case clearly concerns the proper meaning, interpretation and application of Articles 2 and 17, where as here, the District has changed its bus storage rules/policies mid-term of the 1993-95 labor agreement. Thus, I find the dispute to be substantively arbitrable and not otherwise barred from arbitration by the specific terms of the agreement.

A second procedural question was specifically raised by the District for the first time at hearing 3/ -- whether the Union

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3/ I disagree with the District that general language placed in a grievance answer denying a grievance will suffice to put a union on notice that the employer intends to raise timeliness as an issue in the grievance procedure.

timely filed the instant grievance. I believe the record evidence clearly demonstrates that the Union timely filed the grievance. In this regard, I note that after the District sent its November 19, 1993 letter to Local Union President Otto, AFSCME Staff Representative Ofria sent a "fax" to District Administrator Methner dated November 22, 1993, requesting bargaining and asking the District to stay the implementation of its November 19th policy change until the parties could meet and discuss the matter.

The District apparently accepted this approach, as it did not object to it and it stayed the implementation of the new bus storage policy/rule. Thereafter, the District considered a December 15th written settlement proposal submitted by Driver Anne Biernasz at the District's December meeting. The District officially rejected that settlement proposal by its letter dated January 4, 1994, to which Representative Ofria responded by his letter dated January 6, 1994. In his letter, Ofria requested expedited treatment of the grievance and that the grievance be moved to arbitration immediately. In these circumstances, there is no doubt that the Union timely filed and processed the instant grievance by requesting expedited arbitration on January 6, 1994, 4/ and that the delay in processing the grievance, between November 22, 1993 and January 4, 1994, was mutually agreed to by the parties as demonstrated by their mutual actions. 5/

Turning to the merits of this case, the record facts relating to the substantive issues are largely undisputed. However, it is the proper interpretation of those facts upon which the parties hotly disagree. In my view, it is overwhelmingly significant that the decision where to store buses (worth tens of thousands of dollars) is normally viewed as a management right. In this case, the District, for many years, allowed employees to house buses at their homes and allowed employees to use their buses for their own personal transportation, within certain limitations set by the District. The fact that the District allowed some drivers to take their buses home and/or to use them for personal reasons, thus granting them a pecuniary benefit, does not diminish the District's management right to alter or cancel this benefit at any time and for any reason while its employees were not represented by a labor organization.

I note that the Union became the exclusive representative of the bus drivers in approximately 1980. At this time, there was no written policy or rule on home bus storage and nothing was placed

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4/ I note also that Article 14 of the labor agreement does not contain a specific deadline for the initial filing of the grievance.

5/ The District's waiver argument will be dealt with infra.

in the parties' initial agreement regarding bus storage. On April 6, 1986, the District issued its first general rules covering bus drivers and on April 9, 1986 it issued Policy 505 which stated that ". . . buses shall be maintained at the central location" and that any exceptions to this rule could only be granted by the Transportation Committee. Thus, by creating and implementing Policy 505, the District made clear that home bus storage should be regarded by employees as discretionary with the District, not as an employee benefit.

In my view, it was at this point that the Union was obligated to request impact bargaining, file a grievance and/or attempt to place the home bus storage and personal mileage practices into the contract. Yet, the Union took no action in 1986 or thereafter. The fact that the District did not require that buses be stored at the central garage after it issued Policy 505 does not diminish the District's act of capturing (or recapturing) the complete discretion to house buses centrally and to make any exceptions to this general rule within its discretion. 6/ In addition to the 1986 rule, the Transportation Committee relaxed the five personal miles allowance to a twenty personal miles allowance in February, 1988. Obviously, the Union was not going to object to this relaxation, but I note that in advance of it, the District, in its discretion, had recalled one bus driver's bus to the central garage as a disciplinary measure without drawing an objection or grievance from the Union. Even if the February 1, 1988 written relaxation of the personal mileage allowance were viewed as codification of a "practice," the record clearly shows that this relaxation did not change or affect the clear terms of Policy 505, issued in April, 1986, which reserved to the District the discretion to house buses at the central location at any time.

Indeed, the home bus storage rules, although changed by the District again on April 23, 1993, did not change in any way, the District's "discretion" to require buses to be housed at the central location "in the best interest of the School District", as evidenced by the terms of the April 23, 1993 Policy No. 507. In fact, Policy 507 clearly stated that it was intended to "replace" the prior (1988) "policy on personal mileage. . . ."

Again, it was up to the Union to address home bus storage at negotiations or through other means to preserve its claimed "practice". In addition, several of the general home bus storage rules then in effect, underscore the discretionary nature of the District's decision to allow home bus storage. In this regard, I

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6/ I disagree with the Union's assertion that the rule was to house buses at home. The record demonstrates quite the opposite.

note that general rules 14 and 17 (quoted above) show that drivers were expected to return buses to the central garage at any time when ordered to do so by any "school official" or by the Transportation Supervisor and Transportation Committee and that the District would not be liable for any driver transportation or labor costs in these instances. Also, general rule 16 emphasizes that home bus storage will be allowed only when determined to be "in the best interest of the School District, recommended by Transportation Supervisor and approved by Transportation Committee."

At this point, the District had clearly established its management discretion to have and to recall buses to the central garage without liability to drivers. However, where the District, in its discretion, allowed home bus storage, the employees could use their buses to drive twenty extra miles per day for personal reasons. Thus, there was no reason for the District to negotiate a home bus storage provision into the agreement. Indeed, the District could rely upon its 1986 and 1993 policies as well as the language of Article 17 ". . . to determine the means, methods, materials . . . of operation . . ." as insuring its continued discretion to determine where buses would be housed.

The fact that the District also recalled all buses several times during the period from 1980 to date, for disciplinary or operational reasons, without drawing any objections from the Union, merely supports the conclusion that the question where to house buses was, at least since April, 1986, discretionary with the District. In these circumstances, it was unnecessary for the District to negotiate a personal mileage provision into the agreement. Rather, it was the Union's duty to do this to preserve one of the benefits of home bus storage.

It is also clear from this record that even assuming a personal mileage "practice" could be found in this case, the underlying reasons for the "practice" changed dramatically in the Fall of 1993, when the District began operating solely out of its newly built central building located in Wausaukee, Wisconsin. At this time the District ceased operations out of its facilities in Amberg and McAllister, Wisconsin and its old Wausaukee school building as well as the two rental sites it had used for years prior to 1993. Where the underlying reasons for a "practice" are significantly changed or eliminated, the practice may be unilaterally discontinued by the employer even though it may have been previously viewed as a benefit by employees. In all of the circumstances of this case, the District's action in changing the personal mileage allowance for bus drivers mid-term of the collective bargaining agreement did not violate that agreement. I therefore issue the following

AWARD

This matter is arbitrable within the meaning of Article 14 - Grievance Procedure in the master agreement.

The District did not violate the whole collective bargaining agreement when it decided to store all buses at the bus garage in the Village of Wausaukee.

The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin this 23rd day of November, 1994.

By Sharon A. Gallagher /s/  
Sharon A. Gallagher, Arbitrator