BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between DODGE COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 1323-A, AFSCME, AFL-CIO and DODGE COUNTY	Case 192 No. 52137 MA-8852

Appearances:

Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Roger Walsh, Attorney at Law, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County 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 8, 1995, in Juneau, Wisconsin. The hearing was transcribed. Afterwards the parties filed briefs whereupon the record was closed on August 22, 1995. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the statement of the issue. The Union proposed the following issue:

> Did the County violate Section 17.15 of the labor agreement when it refused to reimburse the grievant for costs associated with an accident which occurred during the course of his employment?
>
> If so, what should the remedy be?

The County proposed the following issue:

Did the County violate Section 17.15 of the collective bargaining agreement by refusing to reimburse the grievant the $500 deductible amount he paid under his automobile insurance policy for an accident in which he was involved on November 14, 1994?

If so, what is the appropriate remedy under the contract?

The practical difference between these proposed issues is that the Union's wording seeks to reimburse the grievant "for costs associated with an accident . . ." while the Employer's wording is limited to "the $500 deductible amount he paid under his automobile insurance policy . . ." During the course of the hearing, it became apparent that although the grievant originally sought reimbursement for all expenses connected with the accident, the only remedy the Union sought herein was reimbursement for the $500 deductible already paid by the grievant. Since the Employer's wording of the issue is limited to that very matter (i.e. the $500 deductible), the arbitrator adopts the Employer's wording of the issue. Thus, the issue to be decided here is:

Did the County violate Section 17.15 of the collective bargaining agreement by refusing to reimburse the grievant the $500 deductible amount he paid under his automobile insurance policy for an accident in which he was involved on November 14, 1994?

If so, what is the appropriate remedy under the contract?

PERTINENT CONTRACT PROVISION

The parties' 1994-96 collective bargaining agreement contains the following pertinent provision:

ARTICLE XVII - REIMBURSEMENT OF EXPENSES INCURRED BY COUNTY EMPLOYEES

17.1 **Car Travel.**

. . .

17.15 Damage to employee vehicles which is verified as a

result of the transporting of clients in a professional capacity will be reimbursed by the County. Such damage shall include, but not be limited to, the cleaning (interior and exterior), replacement and/or repair to the affected employee's vehicle. Employees shall report instances of such damage in a timely manner. The Division Manager shall review all such claims for reasonableness and shall authorize reimbursement for all valid claims.

. . .

BACKGROUND

In negotiating their 1994-96 labor agreement, the parties added a new section to Article XVII ("Reimbursement of Expenses Incurred by County Employees"). This new section was numbered Section 17.15. The bargaining history for that section follows.

During negotiations, the Union expressed concerns to the Employer about the liability of employes transporting clients in the employe's own vehicle. Employes carry their own personal car insurance. The Union's first bargaining proposal sought to amend Section 17.14 as follows: (Note: the new language is underlined.)

17.14 The Employer must exhibit proof of automobile insurance premiums for those employees who must use their cars for County business, <u>which shall be reimbursed in full by the Employer.</u>

<u>In addition to the aforementioned the County shall carry liability insurance for each Employee required to provide a vehicle, and be considered the Primary Carrier for any and all claims involving the Employee for any and all incidents (including client damage) occurring during the Employees working hours, which shall include travel to and from the Employee's residence to their place of employment or their first or last stop.</u>

This proposal had two purposes: 1) to have the County reimburse employes for car insurance premiums the employes had to pay, and 2) to have the County provide the primary liability insurance on the employes' cars. According to local Union President Neil Whiting, the intent of this proposal was that "if anything were to happen, if somebody got hurt or damage to the vehicle, that the County would pretty much just take care of it." 1/ The County rejected this proposal. The implication of this rejection was that employes had to continue to carry their own automobile personal liability insurance. Next, the Union raised the idea of the County purchasing a fleet of vehicles for employes to use. This idea was also rejected by the County. Next, the parties discussed a specific incident which occurred about five years previously when a client vomited in an employe's car, the employe requested reimbursement of his cleaning expense and the employe's supervisor rejected the request. This led to further discussions between the parties about the possibility of the Employer reimbursing employes for other similar situations where a client damaged an employe's vehicle. At some point during these discussions, the Union made the following bargaining proposal which dealt with reimbursement:

> Damage to employee vehicles which comes as a result of the transporting of clients in a professional capacity will be reimbursed by the County. Such damage shall include, but not be limited to the cleaning (interior and exterior), replacement and/or repair to the effected employee's vehicle. Employees shall report instances of such damage in a timely manner.

Union President Whiting indicated that the purpose of this proposal was for the County to reimburse the employe for any damage done to the employe's vehicle by a client. 2/ This proposal spurred more discussions between the parties about the types of damage that a client could cause to an employe's vehicle. The specific examples which were discussed were a client damaging a car stereo, a client destroying seat covers with a sharp object, a client kicking the car, and a client pulling the antenna or rear view mirrors off. The parties' discussions about the types of damage covered by the Union's bargaining proposal were limited solely to damage inflicted directly by clients on an employe's vehicle. There were no discussions by the parties about the Union's bargaining proposal applying to damage to an employe's vehicle caused by a collision with another vehicle. The County later offered a counterproposal to the above-noted Union proposal. The Employer's proposal mirrored the Union's proposal with two exceptions: 1) it changed the word "comes" to "is verified" and 2) it added a sentence that "such damages shall be reimbursed with reasonable limitations as may be set by the division manager under any given

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1/ Tr. 50.

2/ Ibid.

circumstances." The Union accepted the change of "comes" to "is verified," and countered the additional sentence with "the division manager shall be given the discretion to review all such claims." The County rejected the Union's proposed final sentence. The Union then proposed that "disputes would be subject to the grievance procedure." The County rejected this sentence as well. The County then proposed the following sentence:

> The division manager shall review all such claims for reasonableness and shall authorize reimbursement for all valid claims.

The Union accepted the sentence as proposed. This agreed-upon language was incorporated into the contract as Section 17.15.

Insofar as the record shows, the situation noted below in the Facts section marks the first time an employe has sought reimbursement for damage under Section 17.15. Consequently, there is no prior practice indicating how the parties have previously interpreted this provision.

FACTS

James Wiersma is a social worker employed by the County. Part of his job involves transporting juveniles in his own car from one location to another. On November 14, 1994, he was assigned to drive his car to the Norris Adolescent Center in Mukwonago, Wisconsin, to pick up a fourteen year old boy and drive this boy to the Lutheran Social Services receiving home in Beaver Dam, Wisconsin, so he would be available for a court hearing the next day (November 15, 1994). After arriving in Mukwonago, Wiersma read a report on the boy in question made by a psychologist. The psychologist diagnosed the boy as having oppositional defiant disorder, pervasive developmental disorder, mental retardation, learning disorder, attachment disorder and explosive disorder. This report essentially confirmed what Wiersma already knew about the boy being transported because Wiersma had transported the boy before. Thus, Wiersma was aware of the boy's temperament and behavior problems. When Wiersma transported the boy a month earlier, he (the boy) was not a problem.

Wiersma and the boy then left Mukwonago with Wiersma driving and the boy riding in the front passenger seat of Wiersma's car. The first 45 minutes of the drive were uneventful. During that time the boy did not give Wiersma any trouble, did not kick or scream, or pound on the car. Instead, Wiersma and the boy talked with each other. About 45 minutes into the trip, Wiersma noticed that the boy was holding a thin metal object five to six inches long with a triangle attached to each end. Wiersma asked the boy to put the object on the console between the two front seats. The boy obeyed Wiersma's directive. Sometime later, Wiersma noticed that the metal object was

no longer on the console and he asked the boy where it was. While Wiersma asked the boy about the whereabouts of the metal object, Wiersma looked at the boy and not at the road. When Wiersma turned back to look at the road, he saw that the car ahead of him had stopped to make a left turn and he (Wiersma) could not stop his car in time to avoid hitting that car from behind. Wiersma estimated these events occurred in about ten seconds. No one was injured in the accident. Wiersma was driving about 30 miles per hour when the accident occurred.

Police officers were called to the scene of the accident and Wiersma was cited by police for inattentive driving. Wiersma contested the charge. In a subsequent hearing the judge amended the charge from inattentive driving to following too closely. Wiersma was assessed three points and fined approximately $80 for same.

It cost about $4,500 to repair Wiersma's car. Wiersma's insurance company paid all of this amount except the $500 deductible amount provided for in Wiersma's automobile insurance policy. Wiersma paid the $500 deductible.

Following the accident, Wiersma requested reimbursement for all expenses connected with the accident. The division manager denied the request and Wiersma filed the instant grievance which was subsequently appealed to arbitration. As previously noted in the Issue section, the requested remedy was modified at the arbitration hearing from reimbursement for all expenses to reimbursement for the $500 deductible already paid.

POSITIONS OF THE PARTIES

It is the Union's position that the County violated Section 17.15 by not reimbursing Wiersma the $500 deductible he paid under his car insurance policy for the November 14, 1994, car accident. It asserts at the outset that Wiersma's claim for reimbursement is not unreasonable. In its view, there is a clear relationship between Wiersma's job duties and the accident in question. It submits that the accident would not have occurred but for Wiersma's transporting a client in a professional capacity. The Union contends the accident occurred because Wiersma was distracted by the client's conduct in the car, namely the metal object missing from the car's console. According to the Union, Wiersma's distraction was caused by a concern for his own safety, the client's safety and the condition of his car. In the Union's view, all these concerns and fears were rationale. The Union also disputes the County's factual assertion that Wiersma "had plenty of time to pull over and stop his car to check on the whereabouts of the metal object." Next, the Union argues that Section 17.15 is clear and unambiguous and therefore should be applied exactly as written. In its view, the language makes no distinction between damage which is caused directly by clients and other types of damage. The Union therefore asserts that the damage which occurred in the car accident is the type of damage covered by Section 17.15. The Union contends that by not reimbursing Wiersma for his insurance deductible for that accident, the Employer has placed limitations on Section 17.15 that are not explicitly included in the agreed-upon language. Next,

with regard to the bargaining history, the Union submits that the testimony of County negotiators that the parties did not intend to reimburse employes for collisions conflicts with the plain meaning of Section 17.15. Finally, the Union argues that it never waived its right to challenge the division

manager's discretion in reviewing claims filed under Section 17.15. In order to remedy this alleged contractual breach, the Union asks the arbitrator to uphold the grievance and order the Employer to reimburse Wiersma for the $500 deductible he paid.

It is the County's position that it did not violate Section 17.15 by refusing to reimburse Wiersma for the $500 deductible he paid under his car insurance policy for his November 14, 1994 car accident. It first contends that there is no basis for the Union's contention that Wiersma was concerned for his own safety or was worried that the boy would damage his vehicle. It notes in this regard that when the accident occurred, Wiersma was travelling at the posted speed limit of 30 miles per hour. It also notes that there was no sudden emergency and no immediate danger. Given the foregoing, the County asserts that Wiersma had plenty of time to pull over and stop his car to check on the whereabouts of the metal object. The County submits that the Union's claim of concern for personal safety or damage to his vehicle is pure fabrication. In the County's view, Wiersma was just plain negligent in his driving. Next, the County calls the arbitrator's attention to the fact that the damage to Wiersma's automobile was not caused directly by the client; rather it was caused by the collision. The County argues that collision damage is covered solely by the employe's own personal automobile insurance policy which the employe had to carry. Next, the County argues that Section 17.15 does not cover the type of damage that occurred in the November 14, 1994 car accident. In its view, that provision does not clearly and unambiguously provide reimbursement for all types of damage to an employe's vehicle that results from transporting clients. It specifically submits that the meaning of the term "verified" is unclear and ambiguous. According to the County, the intent of the parties in adding Section 17.15 to the 1994-96 contract was to provide for reimbursement of costs incurred by an employe in certain limited circumstances, namely where the damage is directly caused by a client when the client is being transported in the employe's car. To support this premise, the Employer cites the examples that were discussed in bargaining, to wit: cleaning cost if a client vomited in the car, and costs related to the repair or replacement of antennas, stereos, rear view mirrors, dents in the dash board, and ripped or cut seat covering. The Employer emphasizes that all the types of damage discussed in bargaining were directly caused by the client to the employe's vehicle. The County contends that by claiming the damage involved in Wiersma's car accident is the type of damage covered by Section 17.15, the Union is conveniently ignoring the statement of local Union President Whiting that the Union's revised proposal was to at least get reimbursement for damages "that were done to a person's vehicle by a client." The County also believes the Union is ignoring the discussion the parties had during the negotiation of Section 17.15 wherein the examples of damage covered were limited to just those directly caused by a client. Given the foregoing, the County believes its interpretation is in line with the mutual intent of the parties that was expressed and discussed during the negotiations for the 1994-96 contract. It asserts that the Union's proposed interpretation of Section 17.15 is simply an attempt to obtain in grievance arbitration a broad reimbursement provision that it sought, but failed to obtain, in negotiations. Finally, the Employer also argues that based on the language that was ultimately incorporated into Section 17.15 and the discussions of the parties concerning same, the decision of the district manager on what and how much is to be reimbursed is final and is not subject to review under the

grievance procedure. The County therefore requests that the grievance be denied.

DISCUSSION

It is noted at the outset that although the parties' dispute who was responsible for the car accident which occurred on November 14, 1994, the undersigned believes he need not express an opinion on same in this decision. In my view, responsibility for the accident is not material to a resolution of this contractual matter. That being so, no additional comments will be made herein concerning responsibility for the accident.

As previously noted in the Issue section, at issue here is whether the County has to reimburse Wiersma for the deductible amount he paid under his car insurance policy for the car accident he had. The Union contends the County is obligated to reimburse Wiersma for his deductible while the County obviously disputes this assertion.

Before addressing this issue, it is noted that the County contends that disputes over reimbursement are not subject to the grievance procedure. That contention notwithstanding, it is assumed for purposes of this decision that reimbursement decisions are subject to the grievance procedure. This assumption has been made solely to enable the undersigned to address the merits of the underlying reimbursement dispute.

In the discussion that follows, attention will be focused first on the applicable contract language. If the language does not resolve the matter, attention will be given to evidence external to the agreement, namely the parties' bargaining history.

Both sides agree that the contract language applicable here is Section 17.15. It is new language which was added to the parties' agreement in the most recent negotiations. It provides as follows:

> Damage to employee vehicles which is verified as a result of the transporting of clients in a professional capacity will be reimbursed by the County. Such damage shall include, but not be limited to, the cleaning (interior and exterior), replacement and/or repair to the affected employee's vehicle. Employees shall report instances of such damage in a timely manner. the Division Manager shall review all such claims for reasonableness and shall authorize reimbursement for all valid claims.

An overview of this language follows. The first sentence provides that the Employer will reimburse employes for the "damage" to the employe's vehicle "which is verified as a result of the transporting of clients in a professional capacity . . ." The next sentence goes on to identify some,

but not all, of the types of "damage" which are covered by the first sentence. The third sentence instructs employes to file damage reports in a timely manner, and the fourth sentence of the section identifies who reviews and authorizes reimbursement for such claims, namely, the division manager.

In the context of this case, the question is whether Section 17.15 covers damage caused by a collision. On the one hand, the term "damage" can certainly be read broadly to cover all types of damage, including damage caused by a collision, which occurs when an employe is transporting clients. Under such an interpretation, the client would not have to directly cause the damage. On the other hand, the term "damage" can also be read more narrowly than was just noted. Specifically, it can be construed to not cover every type of damage to an employe's car that could result from the transport of a client in the employe's car, but rather to be limited by the second sentence to just damage directly caused by a client. In my view, either of these interpretations of the term "damage" is plausible. That being so, it is unclear from the language itself whether damage caused by a collision is covered by Section 17.15.

Inasmuch as an ambiguity exists concerning whether Section 17.15 covers damage caused by a collision, attention is now turned to the other evidence relied upon by the parties, namely their bargaining history. Bargaining history is a form of evidence commonly used by arbitrators to interpret ambiguous language.

In this case, the bargaining history supports the County's contention that the parties did not intend Section 17.15 to cover damage caused by a collision. To begin with, the record indicates that the Union initially sought to have the County reimburse employes for their automobile insurance premiums, or provide the primary liability insurance on the employes' automobiles, or purchase a fleet of automobiles for use by the employes. All these proposals were flatly rejected by the County. The Union then took a different tact in bargaining and proposed a new reimbursement provision for Article 17. Local Union President Whiting indicated that this new provision was intended to get reimbursement for damage "done to a person's vehicle by a client." 3/ The parties then discussed in bargaining types of damage which could be caused by a client. Among the examples discussed were cleaning costs if a client vomited in the car, and costs related to the repair and replacement of broken antennas, stereos and rear view mirrors and damaged seat covers. Insofar as the record shows, all the types of damage discussed under the Union's bargaining proposal were directly inflicted by clients on an employe's vehicle. In other words, all were done directly by the client to the employe's vehicle. None of the parties' discussions ever dealt with damage to an employe's vehicle caused by a collision with another vehicle. If the Union ever intended that the reference to "damage" in the proposed language covered collisions and insurance deductibles, it never advised the County of same. Since it did not, the County never concurred that the term "damage" applies to collisions and insurance

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3/ Ibid.

deductibles paid afterwards. This bargaining history persuades the undersigned that the mutual intent of the parties when they discussed Section 17.15 in bargaining was that the provision was limited to just damage caused directly by a client. Under these circumstances, it would be a circumvention of the parties' intent to interpret Section 17.15 to cover collisions and insurance deductibles paid afterwards since it would give a meaning to that provision which was not mutually intended. In so finding, the undersigned is simply trying to give affect to the parties' intent as evidenced by their bargaining history.

Having so found, the next step is to apply that interpretation to the damage involved here. The record indicates that Wiersma's car was damaged when it collided with another car. Thus, the damage to Wiersma's car was caused by the accident itself. While Wiersma was transporting a client at the time the accident occurred, and the client's conduct certainly contributed to the accident, the fact of the matter is that the damage to the vehicle was caused by the accident; not the client. That being the case, the damage inflicted to Wiersma's car was not covered by Section 17.15, but rather is covered by the employe's own personal automobile insurance policy. It is therefore held that Wiersma's car accident is not the type of "damage" covered by Section 17.15. It follows from this decision that the County was not contractually required to reimburse Wiersma the insurance deductible he paid following his car accident.

In summary then, it is held that Section 17.15 is ambiguous concerning whether it covers damage caused by a collision; that it is therefore appropriate to review the parties' bargaining history to interpret this language; and that the parties' bargaining history conclusively establishes that when the parties discussed the types of damage covered by the proposed new language, it was limited to just damage directly caused by a client. Applying that interpretation here, it has been held that the damage for which reimbursement is being sought (i.e. an insurance deductible) is not the type of damage covered by Section 17.15. Accordingly, the County is not contractually required to reimburse Wiersma for the $500 deductible he paid under his car insurance policy for the accident which occurred November 14, 1994.

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

AWARD

That the County did not violate Section 17.15 of the collective bargaining agreement by refusing to reimburse the grievant the $500 deductible amount he paid under his automobile insurance policy for an accident in which he was involved on November 14, 1994. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 12th day of October, 1995.

By Raleigh Jones /s/

Raleigh Jones, Arbitrator