BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 278-B, AFSCME, AFL-CIO

and

SCHOOL DISTRICT OF HURLEY

Case 32
No. 52748
MA-9088

Appearances:

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

Mr. Roger Myren, Administrator, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1993-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance concerning snow days for office staff.

The undersigned was appointed and held a hearing on August 31, 1995 in Hurley, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on October 5, 1995.

Issues

The Union proposes the following:

1. Did the Employer, by notifying the employes of the District's office staff that it would no longer honor the longstanding past practice of allowing these employes the benefit known as paid "snow days", violate these employes' rights and deny them an economic benefit which they have had by virtue of past practice?

2. If so, what is the remedy?

The Employer proposes the following:

> Should the Employer be compelled to pay for "snow days", an admitted historical past practice without contract language existence, even though a recent negotiation proposal addressing "snow day pay" was submitted by Local 728-B AFSCME and withdrawn?

Relevant Contractual Provisions

ARTICLE 21 -- MANAGEMENT RIGHTS

1. Except as otherwise specifically provided in this agreement, the District retains all the rights and functions of management that it has by law.

2. Without limiting the generality of the above statement, this includes the right:

   A. To direct all operations of the District.
   B. To hire, promote, transfer, schedule and assign employees in positions within the District.
   C. To suspend demote discharge, and take other disciplinary action against employees.
   D. To relieve employees from their duties.
   E. To maintain efficiency of District operation.
   F. To take whatever action is necessary to comply with state and federal law.
   G. To introduce new or improved methods or facilities.
   H. To change existing methods or facilities.
   I. To determine the kinds and amounts of services to be performed as pertains to District operation.
   J. To determine the number and kinds of classification to perform such services.
   K. To create, combine, and eliminate positions.
   L. To determine the methods, means, and personnel by which District operations are to be conducted.
   M. To take whatever action is necessary to carry out the functions of the District in situations of emergency.
   N. To establish reasonable work rules.
   O. To establish maintenance and disciplinary control in use and operation of District property.

3. The employer recognizes its obligation to bargain the impact of any changes in hours, wages, and/or conditions of employment during the terms of this agreement.

Discussion

There is no dispute that the District has for many years paid for snow days claimed by the District's office clerical employes. This practice continued in full through February 25, 1993, and the parties stipulated that even after the District announced that this practice was no longer in effect, it has continued to pay snow days in 1994 and 1995 for those clerical employes who claimed the day. The parties further stipulated that because of the Employer's opposition, at least one employe has not claimed a snow day, and used a vacation day instead. The parties also stipulated that on February 10, 1995, three other employes worked on a snow day when they otherwise might not have, again because of the Employer's opposition. The parties also stipulated that there is no mention in the collective bargaining agreement of a snow day benefit for any employes in the bargaining unit.

The crux of the case is that in the negotiations which led to the current collective bargaining agreement, the Union proposed contract language as follows:

> In the event school is closed because of inclement weather, or for other emergencies as determined by the District's Administration, employes shall be granted these days off with pay.

Four Union witnesses testified that when the Union proposed the above language be added to the new agreement, the purpose of the proposal was to extend the existing benefit, which office employes had received via a past practice, to other employes in the same bargaining unit who had never received it -- the custodians and the cooks. All four testified that when the Union subsequently dropped this proposal, the effect was to leave the past practice as it stood, and that the intent in dropping the proposal was merely to drop the extension of the benefit to other employes not then receiving it.

Three of the Union witnesses also testified that the decision to drop the proposal was taken largely because of a comment, made during the Union's brief negotiations with management by one of the management negotiating team, Ken Genisot. Geri Zaleski testified that Genisot and District Administrator Myren were the only Employer representatives, but that Genisot did most of the talking. She stated that during one conversation, Genisot referred to the snow days proposal and said "leave well enough alone, you have snow days." Donna Thomas testified to the same effect, in slightly different terms, stating that Genisot also said "don't rock the boat", adding "you girls already have this." Michelle Rosen testified that her recollection of the meeting was the same as Thomas'. The fourth Union witness, Jim Mattson, testified that in the fairly informal meeting, in which several conversations were going on, he did not hear this discussion. Rosen confirmed that the negotiations were "pretty informal", but added that Genisot's statement had a bearing on the Union dropping the issue, along with their impression that the cooks did not seem to care very much and that the custodians had said they had to work on snow days anyway. The District did not offer any evidence to rebut these statements.

On February 8, 1994, Myren sent office staff a memorandum politely objecting to office

staff accounting for January 17 and 18, 1994 as paid work time when school had been called off on those days and stating that he was aware that the employes had not been at work for the full day. On February 22, the Union filed a grievance, contending that the effect of Myren's memo was to deny an existing benefit.

The Union contends that the evidence demonstrates that the Union at no time intended to withdraw from the existing practice of snow days paid for office staff, and merely withdrew the proposal to extend this benefit contractually to all employes in the unit. The Union argues that there is no evidence to the contrary in the record. The Union requests that the Employer be ordered to maintain this economic benefit for the office staff.

The District contends that when the contract, as it was, was silent as to any benefit concerning snow day pay, the District has maintained the past practice fairly until the practice was placed in doubt by being made the subject of a specific proposal in collective bargaining. The District contends that the Union's proposal clearly raised the issue anew, that it made no distinction between employes then receiving the benefit and other employes, and that the Union subsequently withdrew the proposal. The District argues that upon the Union's withdrawal of its proposal, the question concerning propriety of snow day pay for some employes in the bargaining unit was resolved in favor of equal treatment for all employes in the unit, and that the Union received other advantages from the new collective bargaining agreement. The District contends that the Union therefore knowingly withdrew from any claim to continued receipt of snow day pay for any employe, and requests that the grievance be denied.

I find that the issues fairly raised by this proceeding can best be summarized as follows:

1. Did the District unilaterally change a binding past practice when in 1994 it requested office employes to cease claiming pay for snow days?

2. If so, what is the remedy?

I note initially that there is no doubt about the binding nature of the past practice up till the contract negotiations which placed it into question. The practice met all of the usual standards by which ambiguities in collective bargaining agreements are determined to constitute clear evidence of a past practice which may be enforced as an implied term of the collective bargaining agreement: it was clear to both parties that it existed, it was of long standing, it was applied uniformly. The fact that it applied only to office staff and not to cooks or custodians does not deprive it of the "uniformity" condition which is a prerequisite for finding that a benefit exists; not all benefits extend to every class of employe.

The evidence emerging from the negotiations persuades me that the Union did not, in fact, abandon the benefit of this past practice during those negotiations. The four Union witnesses'

testimony to the effect that their intent in presenting Union proposal number 12 was merely to extend the benefit to other employes was unopposed. No evidence was offered by the District to demonstrate that the District was in any way led to rely on the Union's withdrawal of this language, in such a way as to indicate that the Union intended anything more than to leave the status quo as it was. No evidence was presented to indicate that during the negotiations management clearly and unambiguously disavowed the past practice or stated that it would terminate at the end of the then-existing collective bargaining agreement. And no evidence was offered to counter the Union witnesses' testimony to the effect that they acted partly in reliance on a management negotiator's statement to the effect that "you already have this benefit". In all, the evidence is quite sufficient to demonstrate that the past practice remained in place following the Union's withdrawal of the attempt to expand it to other classes of employe.

Since the District opted to process the dispute to arbitration without insisting in the interim that all office staff not receive pay for snow days, only certain employes are entitled to a monetary remedy. The Award below so notes.

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

AWARD

1. That the existing practice of payment for snow days for office employes remained in place following the negotiations which led to the present collective bargaining agreement, and that the District is obligated to make such payments for employes who have since worked on such days only because of the District's opposition.

2. That as remedy, the District shall maintain the "snow days" practice for office clerical employes, and shall further pay to employes who remained at work because of the Employer's opposition to such practice a sum of money, equal to wages each would have earned for the hours during which other office clerical employes insisted upon leaving and being paid.

Dated at Madison, Wisconsin this 21st day of November, 1995.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator