

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SAUK COUNTY HIGHWAY EMPLOYEES
UNION, LOCAL 360, WISCONSIN COUNCIL 40,
AFSCME, AFL-CIO

and

SAUK COUNTY

Case 123
No. 53692
MA-9434

Appearances:

Mr. Todd J. Liebman, Corporation Counsel, Sauk County, Sauk County West Square Building, 505 Broadway Street, Baraboo, Wisconsin 53913, appeared on behalf of the County.

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

ARBITRATION AWARD

On December 28, 1995, Sauk County Highway Employees Union, Local 360, Wisconsin Council 40, AFSCME, AFL-CIO and Sauk County filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. The Commission, on January 19, 1996, appointed the undersigned to hear and decide this matter. A hearing was conducted on March 27, 1996 in Baraboo, Wisconsin. The proceedings were not transcribed. The parties submitted post-hearing briefs which were received and exchanged by May 7, 1996.

This Award addresses the distribution of paychecks.

BACKGROUND AND FACTS

Local 360, AFSCME is the exclusive collective bargaining representative of certain employees of the Sauk County Highway Department. The Employer and Union have a long-standing relationship and have been signatories to a series of collective bargaining agreements going back many years. There is no specific contractual provision relative to payday, or the distribution of paychecks. Employees are paid bi-weekly, with a check that reflects a Friday as payday. Friday has been the official County payday for many years. However, for years, checks have been handed out on Thursday, toward the end of the work day at approximately 3:30 p.m.,

in the Highway Department. From the testimony, it appears that banks routinely cashed post-dated checks. That is, banks treated a check dated Friday but presented the preceding Thursday after 3 o'clock in the afternoon as negotiable. Transactions occurring after 3 o'clock in the afternoon on a Thursday were treated as Friday transactions.

There were exceptions to the Thursday distribution of checks. Those exceptions occurred for a variety of reasons, including computer error/failure, long weekends (i.e., Thanksgiving) where payday was moved to Wednesday, and the year-end closing of fiscal records. A number of witnesses testified as to the frequency of the exceptions to the Thursday distribution of checks. While their testimony varied somewhat, I believe it fairly summarizes the collective testimony of these witnesses to conclude that checks were typically distributed on Thursday, with occasional (once or twice per year) deviation from the Thursday distribution, when checks would be handed out on Friday.

Sometime in the spring of 1995, the County's bank, First National, advised the County that it had implemented a system of same-day transactions. The effect of this change was to eliminate any delay in posting a transaction. For example, the cashing of a check on Thursday at 4 o'clock would now be credited as a Thursday transaction, and not posted the subsequent Friday. Upon being advised of this change, Dona Newman, County Controller, recommended that the practice of distributing checks on Thursday be eliminated. On May 4, 1995, County employees were issued the following memo:

To: All Sauk County Employees

About: Paycheck Distribution

Beginning with checks dated May 19, 1995, paychecks will be distributed on Fridays which is consistent with present Sauk County policy. P.M. shift workers at the Health Care Center will continue to receive their checks during their Thursday evening shift as provided by their labor contract.

Many times in the past, the County has distributed paychecks on the Thursday before the actual Friday pay date as a convenience for employees. However, the County's bank, First National, has changed its policy so that checks presented for payment on Thursday afternoon will no longer be posted as Friday transactions.

Because of this change in our bank's procedures, Sauk County will be required to distribute paychecks on the actual Friday pay date to remain in compliance with the policy established by the County Board.

The Union filed a grievance dated May 15, 1995 claiming that the Employer had violated the past practice of paying employes every other Thursday, and seeking a restoration of that practice.

The Highway payroll is administratively tied to a number of other payrolls. All County employes, with the exception of those employed at the Health Care Center, are on the Highway payroll cycle.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE III - MANAGEMENT RIGHTS

3.01 The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers or authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive right of the Employer to establish reasonable work rules. Any dispute with respect to these work rules shall not, in any way, be subject to advisory or final and binding arbitration, but any dispute with respect to reasonableness may be submitted to fact finding.

. . .

ARTICLE VI - GRIEVANCE PROCEDURE

6.01 Any difference or misunderstanding which may arise between the Employer and the employee, or the Employer and the Union as to the application and interpretation of this Agreement shall be handled as follows.

. . .

6.04 If a satisfactory settlement is not reached, as outlined in 6.03, either party may submit the matter to arbitration. The party wishing to arbitrate the matter shall notify the other within two (2) weeks after the highway committee's written answer is due that it has appointed an arbitrator. The other party shall, within five (5) days from receipt of such notice, respond by notification that it has appointed its arbitrator. The two arbitrators shall meet within five (5) days after the last appointment; and, if no

solution to the problem is found, they shall agree upon a third, who shall be chairperson. If the first two arbitrators cannot, within three (3) days, agree upon a third arbitrator, either or both shall notify the Wisconsin Employment Relations Commission and request the appointment of a third arbitrator. The three arbitrators shall meet, hear the parties concerned and render a written, final and binding decision at the earliest possible date. 1/ Any expenses incurred by the third arbitrator shall be borne equally by the parties.

. . .

POSITIONS OF THE PARTIES

It is the County's contention that the collective bargaining agreement has no provision concerning the distribution of paychecks, or payday in general, so the Union can point to no violation of the contract. Pointing to Section 3.01, the management rights provision, the County contends that, absent specific contract language to the contrary, the change in paycheck distribution is an absolute management right.

The County goes on to contend that this arbitrator lacks jurisdiction over this matter pursuant to Section 6.01. 6.01 clearly defines the arbitrator's jurisdiction to disputes regarding the "application and interpretation" of the contract. The County cites arbitral authority for the proposition that it cannot be obligated to arbitrate matters it has not contractually agreed to arbitrate.

The County denies the existence of a practice of Thursday paycheck distribution. The County points to the historic exceptions to the Thursday distribution and notes that the Union never grieved when checks were distributed on Fridays. The County points to Gilmorgan Pipe and Foundry, 46 LA 1007 (Dugan, 1966) an arbitration award sustaining the Employer's right to change payday from Thursday to Friday in order to reduce absenteeism. In that case, the right to change payday was characterized as a management right, and within management discretion.

The Employer considered, and rejected the distribution of checks on Thursday with a directive that they not be cashed on Friday for fiscal control reasons. The County is concerned that such a deviation from general accounting practices could create a potential adverse impact on its bond rating, an internal control problem, and a potential cash flow problem.

The Union takes the position that arbitrators have long recognized the role of practice and

1/ The parties to this proceeding waived the tripartite arbitration panel, leaving the undersigned as the sole arbitrator.

custom as a part of the collective bargaining agreement. The Union cites arbitral authority for the proposition that certain practices are enforceable through the collective bargaining agreement. The Union cites Arbitrator Crowley (City of Horicon, Case XIII, No. 32910, MA-3160) for the following proposition:

Although the collective bargaining agreement is silent with respect to pay periods, it is generally held by arbitrators that a practice which is clear and unambiguous and accepted by both parties for a long period of time, has become binding on them and may be an implied term of the parties' agreement.

The Union contends that there is a practice, and that it binds the parties. The Union cites authority for the proposition that in the absence of a written agreement, "past practice" to be binding on both parties must be 1.) unequivocal; 2.) clearly enunciated and acted upon; 3.) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Applying these criteria to this case, the Union concludes that a binding practice existed. The infrequent exceptions to that practice do not operate to undermine the existence of the practice itself.

DISCUSSION

I have jurisdiction to hear this matter. Article 6.01 essentially defines a grievance as "Any difference or misunderstanding which may arise. . .as to the application and interpretation of this Agreement. . ." This is a dispute as to how employees are paid. Its disposition turns on who has rights under the labor agreement. No provision of the Agreement excludes this class of dispute from coverage of the arbitration clause. Article 6.04 goes on to explicitly provide for the arbitration of this type of dispute. 2/

I believe a practice of distributing paychecks on Thursday to members of the Highway Department did exist. The parties to this dispute essentially agree upon the criteria necessary to establish a past practice. I believe those criteria were satisfied. I do not believe the occasional deviation from Thursday distribution rendered the practice equivocal. Essentially, paychecks were distributed on Thursday unless there was some business justification or necessity to do otherwise. The practice was clearly enunciated and acted upon; employees received their paychecks on Thursday regularly. All parties understood that the paychecks were distributed on Thursdays. Employees came to expect it. The Employer distributed the paychecks. The Employer's May 4, 1995 memo altering the paycheck distribution day acknowledges the fact that paychecks were previously distributed on Thursday as a convenience to employees.

2/ This is in stark contrast to the Section 3.01 treatment of the arbitrability of work rules.

A critical fact changed. At the heart of the practice was the fact that an employe could bring his or her paycheck to the bank after 3 o'clock in the afternoon, have it cashed, and have the transaction posted for the subsequent Friday. Friday was always the official payday. The record indicates that paychecks were always dated on Friday, notwithstanding their distribution on Thursday. It was the bank, and not the County, which changed its accounting practice to a same-day transaction. The practice was tolerable to the Employer until the underlying factual change created the very real prospect that an employe could receive his or her check on Thursday and cash it prior to its posted date. I believe this change in facts went to the very foundation upon which this practice was built.

This is not a case where the Employer changed the facts. Those matters under control of the Employer have remained constant. Payday has always been on Friday. The Employer's payroll system (i.e., paying Highway Department employes on the same cycle as all other non-Health Care Center employes) has remained constant. The change is external. I believe the Employer acted responsibly in its reaction to the change in accounting practices. For me to direct this employer to either change its payday to Thursday, or to distribute truly post-dated checks, would be for me to direct this employer to engage in a paycheck distribution system which it never willingly entered into. The facts indicate that Highway Department employes received their paychecks at approximately 3:30 p.m. That fell approximately one-half hour after the close of the bank's previous business day. To require the Employer to continue to distribute checks at that same day and time would be to subject it to an exposure that it was not previously subjected to.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 7th day of June, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

