BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 2386, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS	Case 19 No. 47621 MA-7333
and	
TOWN OF BELOIT (FIRE DEPARTMENT)	

Appearances:
Mr. John Celebre, State Representative, IAFF, 5626-42nd Avenue, Kenosha, Wiscon
Forbeck & Monahan, S.C., Attorneys at Law, 2715 Riverside Drive, Beloit, Wiscon

ARBITRATION AWARD

Local 2386, International Association of Firefighters, hereafter the Union, and Town of Beloit (Fire Department), hereafter the Employer or Town, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator, to resolve the instant grievance. On July 22, 1992, the Commission appointed Coleen A. Burns, a member of its staff, as impartial arbitrator to resolve the instant dispute. Hearing was held on September 15, 1992 in Beloit, Wisconsin. The hearing was not transcribed and the record was closed on January 21, 1993, upon receipt of written argument.

ISSUE:

The parties stipulated to the following statement of the issue:

> Did the Town of Beloit violate the collective bargaining agreement by unilateral implementation of the requirement for pre-certification for any non-emergency hospitalization or surgical procedure?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

ARTICLE V
ARBITRATION

. . .

Section 5. Scope of Award

The decision of the arbitrator shall be limited to the grievance and shall not have jurisdiction or authority to add, amend, modify, nullify or ignore the agreement

and such past practices as are existent in the Department. The decision of the arbitrator shall be final and binding upon the parties.

ARTICLE VIII
MANAGEMENT RIGHTS

Section 1. General Rights

The Union recognizes the perogative (sic) of the Town and the Chief of the Fire Department to operate and manage its affairs in all respects: in accordance with the responsibilities and powers of authority which the Town has not officially abridged, delegated, or modified by this agreement, and such powers and authority are retained by the Town.

Section 2. Enumerated Rights

These management rights, which are normally exercised by the Chief of the Town of Beloit Fire Department, include, but are not limited to the following:

. . .

G. To contract out for goods or services, including such services as are presently being performed by bargaining unit employes.

. . .

Section 3. Discretion

The Town reserves the total discretion with respect to function and/or missions of the Department, including the budget, organization and technology of performing this function or mission except as may be modified by State law. The Union agrees that it will not attempt to abridge these management rights; and the Town agrees

that these rights shall not be exercised to undermine this agreement. These rights shall be exercised in a reasonable manner.

. . .

ARTICLE XVI
BENEFITS AND SALARY SCHEDULE

. . .

Section 13. Hospitalization and Major Medical Insurance

The Town agrees that each member of the Union shall be provided full coverage hospitalization and major medical insurance including 100% maternity benefits in accordance with deductible/co-insurance program within the limits of the policy carried by the Town. The maximum out of pocket expense per year for the members

> including deductible and co-insurance will be: Single -$150.00 Family - $300.00
>
> . . .
>
> ARTICLE XVII
> MISCELLANEOUS PROVISIONS
>
> . . .
>
> Section 5. Amendment Provision
>
> This agreement is subject to amendment, alteration, or addition only by a subsequent written agreement between, and executed by the Town and the Union where mutually agreeable. The waiver of any breach, term, or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.
>
> Termination: This agreement shall be in effect upon the date of signing and shall remain in full force and effect until and including December 31, 1993, and shall be automatically renewed from year to year unless either party is notified in writing by the other party before July 1, of the year or expiration.
>
> . . .

BACKGROUND:

The Town and the Union are parties to a collective bargaining agreement which covers regular full-time employees of the Town of Beloit Fire Department, excluding all officers above the rank of Shift Commander and the civilian Town employees. The agreement was executed on March 5, 1991 and is in effect from the date of execution through December 31, 1993.

On or about January 1, 1992, Benefit Trust Life became the carrier for hospitalization and major medical insurance for the Town of Beloit and, thereby, members of the bargaining unit. On or about, January 16, 1992, the President and Vice-President of Local 2386 filed grievance No. 92-05-27 with Fire Department Chief Lippincott. The grievance alleged, inter alia, the following:

> The health insurance policy for members of Local 2386 has been changed effective 1/15/92. This change requires the employee to receive pre-certification for any hospitalization or suregery (sic) needed. This is a negotiated benefit to the members of Local 2386 and an agreement between the Town of Beloit and Local 2386 through contractual bargaining. This cannot be changed arbitrarily by the Town of Beloit without further negotiations with members of Local 2386 or their representatives.
>
> Local 2386 of the International Association of Firefighters requires that the Health Insurance policy agreed to by the Town of Beloit and Local 2386 in the current labor agreement signed 3/5/1991 be reinstituted without further delay and that no further attempt by

> the Town of Beloit to change the agreeded (sic) upon health insurance policy for members of Local 2386 be made without consent of the members of Local 2386.

The parties met on March 3, 1992 relative to grievance No. 92-05-27. On March 4, 1992, Town of Beloit supervisor C.A. Ankrum and Town of Beloit Chairman Jay Olson provided R. McFall, President of Local 2386, written confirmation of the meeting which stated, inter alia, as follows:

> As discussed, it was the Union's position that there was a significant change made in the medical insurance program for 1992 which would have necessitated renegotiating this benefit.
>
> The area of Union concern was in the "pre-certification" requirement for scheduled hospital and surgery for the employees. In the past, there had been no requirement for pre-certification. As explained in the meeting, the pre-certification requires two phone calls by the employee, one to the "pre-certification" group with an 800 number. The other is a call to the Town Clerk with the pre-certification number, hospital and doctor's name, along with the date of entry into the hospital. For pre-certification, the insurance provider may require a second opinion which will be paid 100% by the
> insurance carrier. The employee can select clinic or hospital and doctor for this 2nd opinion.
>
> It is the Town's position that this is a benefit to the employe to potentially give alternative treatments and therefore is not a significant change and does not violate the contract. Pre-certification is not required for the emergency services; however, if hospitalization is required, certification is necessary in 48 hours. This means the employe needs to make the call to the 800 number as per above. Sometimes this is handled automatically by the hospital.

* * *

On April 30, 1992, Town attorney Kenneth W. Forbeck responded to the grievance as follows:

> This letter is a follow-up to my letter to you of March 31, 1992, regarding the above referenced matter.
>
> I have now had an opportunity to review the grievance as filed by Local 2386, as well as to review the contract between that Local and the Town of Beloit dated March 5, 1991.
>
> I am afraid I must categorically dispute the existence of any grievance whatsoever with regard to the question which you posed in your March 20, 1992, letter.
>
> First of all, if you will review Article XVI, Section 13, Hospitalization and Major Medical Insurance, that paragraph simply provides that the Town agrees that each member of the Union shall be provided

full coverage hospitalization and major medical insurance, including 100% maternity benefits, in accordance with deductible/ co-insurance program within the limits of "the policy carried by the Town."

This provision of the agreement between the parties says nothing about the Union having any right or say in the type or kind of policy carried by the Town of Beloit. All that is required is that each member of the Union be provided with full coverage for hospital and major medical benefits. The policy currently carried by the Town provides that full coverage.

I would also refer you to Article VIII, Management Rights, Section 2, Enumerated Rights, Sub-section G, which recognizes that the Town of Beloit has as one of its management rights the right to "contract out for goods and services. . .".

This management right, that is this right to contract out for goods and services, has been exercised by the Town of Beloit. They changed medical insurance carriers for the benefit of the Town of Beloit and frankly for the benefit of the Union employees. They had the right to do so and the contract between the parties does not restrict this right.

The reason for pointing out the above contractual paragraphs is to hopefully avoid the necessity of further going through this grievance procedure. While I was not involved in any way prior to this stage of the grievance procedure with this particular grievance, upon review, I have absolutely no idea how or why the Union believes they have a right to grieve this particular issue. It appears to me to be very clear that under the language of the agreement between the parties, there has been no violation.

What I would ask you to do is to review the agreement between the parties and the language referred to in this letter. If you do not agree with the analysis I have provided to you above, then what I would ask you to do is to provide our office with the names of parties you would consider to be acceptable to act as an arbitrator in this matter. Frankly, I believe that this will be a useless process and that the Union will ultimately be required to pay the costs of the proceedings, however, if you intend to persist, we need names which you would suggest.

I await your reply.

The grievance was, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Union:

During negotiations for the current contract, the parties discussed and agreed to changes in the health insurance benefits provided to bargaining unit

employes. The Union agreed to accept the Town's proposal to diminish health care benefits by implementing deductibles and co-insurance and they agreed to limit an employe's out-of-pocket expenses to $150 per year for a single plan and $300 per year for a family plan. When the parties met to define their positions relative to their health insurance agreement, the Town's representatives assured the Union that any future changes to the health insurance benefits would be bargained with the Union before implementation.

In January of 1992, the Town entered into a health care agreement with Benefit Trust Life without the prior knowledge or agreement of the Union. The Town imposed a pre-certification requirement for all hospitalizations and surgeries, except in emergency cases. By unilaterally implementing the pre-certification requirement, the Town violated the letter, spirit and intent of the agreement.

Comparison of the insurance language in the 1989-90 labor agreement to that in the 1991-93 agreement clearly shows that the parties negotiated changes in the health care plan and that those changes did not include any pre-certification requirements. The language common to both clauses calls for 100% coverage. The pre-certification requirement denies all coverage to those who fail to pre-certify.

Moreover, the Employer made promises during the bargaining of the current contract that they would maintain the same coverage. At the bargaining session on February 5, 1992, Supervisor Chuck Ankrum, a member of the Town's bargaining team, assured the Union that the insurance coverage would remain unchanged for the term of the agreement. It was clearly understood that, in the event that the Town desired to make other changes in coverage, the parties would negotiate prior to the implementation of the changes.

Under the terms of Article XVII, Section 5, of the Agreement, the agreement is subject to amendment, alteration, or addition only by subsequent written agreement between the Town and the Union. There is no written agreement to amend the insurance benefits provided by the contract and the Union has not waived its rights in this matter.

The contract executed on March 5, 1991 is in effect for the years 1991-93. The Employer implemented its unilateral change of the health care benefits in January of 1992. The time between these two dates is at least nine months and this nine months represents a clear past practice regarding the level of benefits provided under the agreement. Under Article V, Section 5 of the labor agreement, the arbitrator must give effect to past practices that are existent in the Department.

The Employer's managements rights do not allow them to unilaterally change insurance benefits. The pre-certification requirement does not fall within the "limits of the policy" language of Article XVI, Section 13, because the limitation of the pre-certification requirement was not in effect when the contract was signed. The grievance should be sustained and the Arbitrator should issue the appropriate remedial order.

Employer

Article XVI, Section 13, Hospitalization and Major Medical Insurance, does not name a particular insurance company, does not name a particular type of insurance, and does not say anything about the requirements which an insurance company may reasonably have for those insured under their policy.

Under the provisions of Article VIII, the Union recognizes the prerogative of the Town to operate and manage its affairs in all respects in

accordance with the responsibilities, powers and authority which, as stated in Section 1 of Article VIII ". . . the Town has not officially abridged, delegated or modified by this agreement". Among the management rights enumerated in Article VIII, is the exclusive right to contract or subcontract for goods and services. A medical and hospitalization policy is a "good or service" which may be contracted for by the Town of Beloit and is specifically and particularly within the purview of the rights of management as expressed in the agreement between the parties. There is nothing contained in the agreement between the parties which restricts or abrogates this right.

The Town of Beloit, for economic reasons, determined to change health care providers. It did so in early 1992. The employes retained full coverage, hospitalization and major medical insurance in accordance with the contract between the parties. The Town of Beloit does not require pre-certification for these procedures, rather it is a new insurance carrier who requires these procedures. The record does not establish that the procedures required by the new medical insurance carrier are onerous or create a burden for the employes.

The test applicable herein is whether the matter which is being questioned and disputed is a matter which is "primarily related" to wages, hours or conditions of employment, or whether it is primarily related to the formulation or management of public policy. This test is to be administered on a case by case basis and is a balancing test.

The Town maintains that a change in insurance company does not, in anyway, relate to wages, hours or employment conditions. Employes have received what its Union has bargained for, namely, full coverage hospitalization and major medical insurance.

The requirement by the new insurance carrier that there be pre-certification for non-emergency hospitalization or surgery is not in any way "primarily related" to wages, hours, or conditions of employment, but rather, is primarily related to management's rights, and thus, is not a subject of collective bargaining.

The employes are not being deprived of anything that they have bargained. In fact, having a paid second opinion for a non-emergency surgical or hospitalization procedure may, in fact, be of benefit to the employes in that they receive a second opinion which will hopefully help them better understand their medical condition.

It is inappropriate for the arbitrator to consider any of the testimony contained in the transcript since the parties were in a bargaining stage of the proceedings. There is no evidence to suggest that any of the parties are, or were, schooled in the law or the nuances of the law when they were negotiating. Negotiations culminated in the agreement and the agreement was put in writing. It is the final written agreement between the parties which should control in this matter. The discussion between the parties, as evidenced by the transcript, is an attempt to compromise or negotiate a compromise between the parties. Wisconsin law, and more specifically Section 904.08 Wisconsin Statutes, makes conduct or statements made in compromise negotiations inadmissible under the rules of evidence in the State of Wisconsin. The transcript submitted by the Union should be ruled inadmissible and not be considered in these arbitration proceedings.

If the transcript is determined to be admissible, fair reading of the transcript submitted indicates that what the Union was negotiating with regard to medical insurance coverage was that, if the Town exercises its management prerogative to change insurance companies, the Union expected that the coverage would be the same. The emphasis is on coverage. The Union wanted comparable

insurance. The new insurance provided by the Town provides comparable coverage. The grievance is without merit and must be denied.

DISCUSSION:

It is undisputed that, in January of 1992, the County implemented a health insurance plan which required pre-certification for any non-emergency hospitalization or surgical procedures. It is also undisputed that the bargaining unit employes had not previously been required to have such pre-certification. Contrary to the argument of the Town, the Union has not raised, or litigated, the issue of whether or not the Town may change insurance carriers. Rather, the issue in dispute is whether the County violated the collective bargaining agreement by implementing a health insurance plan which required pre-certification.

Contrary to the argument of the Town, the issue of whether or not the change in the health insurance carrier or the pre-certification requirement is primarily related to the wages, hours or conditions of employment is not relevant to the disposition of the instant case. The undersigned is not determining whether or not the Town violated its statutory duty to bargain. Rather, the undersigned is determining whether or not the Town has violated the collective bargaining agreement.

The prior collective bargaining agreement, effective in 1989 and 1990, contained the following language in Article XVI, Section 13, Hospitalization and Major Medical Insurance:

> The Town agrees that each member of the Union shall be provided with full coverage hospitalization and major medical insurance, including 100% maternity benefits, in accordance with the limits of the policy carried by the Town.

When the parties negotiated the current collective bargaining agreement, the language of Article XVI, Section 13, Hospitalization and Major Medical Insurance, was amended to provide as follows:

> The Town agrees that each member of the Union shall be provided full coverage hospitalization and major medical insurance including 100% maternity benefits in accordance with deductible/co-insurance program within the limits of the policy carried by the Town. The maximum out of pocket expense per year for the members including deductible and co-insurance will be: Single -$150.00 Family - $300.00

The undersigned construes the plain language of Article XVI, Section 13, to require the Town to provide the hospitalization and major medical insurance coverage which was provided by the Town at the time that the parties entered into the current collective bargaining agreement, except as modified by the express language of Section 13. A comparison of the 1989-90 provision to the 1991-93 provision demonstrates that the parties negotiated such a modification when they agreed to the deductible/co-insurance language.

The hospitalization and major medical insurance coverage which was in effect at the time that the parties entered into the current collective bargaining agreement did not contain the pre-certification requirement which was implemented in January of 1992. Nor was the language of Aticle XVI, Section 13, of the current collective bargaining agreement modified to provide such a pre-certification requirement. Accordingly, the undersigned has

concluded that the Town violated Article XVI, Section 13, of the 1991-93 collective bargaining agreement when it unilaterally implemented a health insurance plan which had a pre-certification requirement.

The Town's argument that it was the insurance carrier, and not the Town, which required a pre-certification requirement is not persuasive. If the insurance carrier selected by the Town could not provide the Town's employes with the coverage required by the collective bargaining agreement, then the Town should have selected a carrier which could provide such benefits, or should have bargained with the Union to change the contractual requirements. 1/

According to Richard McFall, President of the Union and Chairman of the Union negotiating team, the final bargaining session on the current collective bargaining agreement was held on February 5, 1991. Wayne Endthoff, Vice President and member of the Union negotiating team, taped this final session, with the full knowledge of all of the participants.

The Union transcribed the tape and provided a copy of the transcription to the Town's Attorney, who by letter of November 10, 1992, advised the undersigned that the transcript is essentially correct. The Town's Attorney further advised the undersigned that he had no objection to the admission of the transcript, for whatever value it may have. In written argument, however, the Town's Attorney argues that the transcript is inadmissable. The undersigned disagrees.

Contrary to the argument of the Town, evidence of discussions which occurred during the negotiation of a collective bargaining agreement is not an offer of compromise within the meaning of Sec. 904.08, Stats. It is well established that an arbitrator may consider evidence of precontract negotiations to establish the intent of the parties with respect to language which was the subject of such negotiation. 2/ Despite the Town's assertion to the contrary, the fact that the parties' representatives may not be schooled in the law, does not preclude an arbitrator from considering statements made by the parties during negotiations.

In the present case, there is no dispute as to the authenticity of the transcript. The discussion set forth in the transcript begins with Town Supervisor Ankrum reviewing the change in the hospital and medical insurance, i.e., the $150 and $300 cost to the employe reflected in the language which was adopted by the parties. Following some comments by Town Supervisor John Walters suggesting an understanding to meet in the future, if necessary, to discuss the provision of better or equal insurance by other companies, Union President McFall and Town Supervisor Ankrum had the following exchange:

> McFall: Okay, um, basically we agree to this plan but we haven't changed the wording in the contract where it says we will keep equal or comparable insurance. It's just the

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1/ The undersigned notes that the Town does not argue, and the record does not establish, that it was impossible for the Town's insurance carrier, or any other insurance carrier, to provide bargaining unit employes with the coverage required by the collective bargaining agreement.

2/ Elkouri and Elkouri, How Arbitration Works, BNA 4th Ed.(1985), p.357 - 359.

way it is.

Ankrum: In other words your coverage would be the same.

McFall: That's right.

Ankrum: Uh huh

McFall: That's right. So, I mean that part of the contract, uh, will stay as is.

Ankrum: Well that's what I said, I said the coverage will remain the same as the previous contract that's really what I was trying to say.

Ankrum and McFall went on to agree that the only thing that would be different on the insurance is the change regarding the $150 and $300 cost to the employe which had been referenced in Supervisor Ankrum's opening remarks.

Upon review of the evidence of negotiation history, as reflected in the transcript of the February 5, 1991 meeting, the undersigned finds no basis to conclude that the parties intended Article XVI, Sec. 13, of the collective bargaining agreement to be given any meaning other than that given effect by the undersigned herein.

As the Town argues, Article VIII provides the Town with various management rights, including the right to contract out for goods or services. As a review of the language of Article VIII reveals, the rights granted to the Town by Article VIII do not take precedence over the rights granted to employes by the collective bargaining agreement. Thus, the Town can not rely upon the language of Article VIII to deny bargaining unit employes the rights granted by Article XVI, Section 13.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following:

AWARD

1. The Town of Beloit violated the collective bargaining agreement by unilaterally implementing the requirement for pre-certification for any non-emergency hospitalization or surgical procedure.

2. The Town is to immediately cease and desist from providing a hospitalization and major medical insurance plan which requires the employes represented by the Union to have pre-certification for any non-emergency hospitalization or surgical procedure.

3. The Town is to immediately make whole any employe who has incurred hospitalization or medical expenses due to the implementation of the pre-certification requirement.

Dated at Madison, Wisconsin this 20th day of April, 1993

By

_____

Coleen A. Burns, Arbitrator

CAB/mm
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