BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL #180, AFL-CIO

and

CITY OF LaCROSSE

Case 284
No. 53912
MA-9485

Appearances:
Davis, Birnbaum, Marcou, Seymour & Colgan, Attorneys at Law, by Mr. James G. Birnbaum, appearing on behalf of the Union.
Mr. James W. Geissner, Director of Personnel, appearing on behalf of the City.

ARBITRATION AWARD

Service Employees International Union Local #180, AFL-CIO, hereinafter referred to as the Union, and the City of LaCrosse, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in LaCrosse, Wisconsin, on May 16, 1996. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on July 17, 1996.

BACKGROUND:

Employes who work in the Water Pump House have a varying work schedule in that they may work for seven straight days then have two days off, then three days on and two days off and five days on and two days off, etc., so their work days and days off vary as far as the day of the week is concerned. Sometime in 1983, the grievant in this case was scheduled to work on Good Friday but his supervisor called him with less than 24 hours' notice and told him not to come in. The grievant filed a grievance and it was settled at Step 1. The terms of the settlement are murky, but it appears that it was that where a holiday fell on a regularly scheduled work day, the employe worked it or took the holiday at his option. This settlement was not reduced to writing; however, the parties stipulated that prior to January 1, 1996, Water Pump House employes had the option to work on a holiday if they so chose provided that the holiday fell on

their regularly scheduled work day. In the fall of 1995, the parties entered into negotiations for a successor agreement to that expiring on December 31, 1995. At a meeting on September 19, 1995, the Director of Public Works, Pat Caffrey, stated that the City was changing the policy with respect to holidays and the City would only work a minimum staff on holidays. Caffrey testified that there had been a gradual change in technology over the years with improved telemetry and a change in motor starters so that a full crew was not needed. The parties engaged in win-win bargaining and it is disputed whether Caffrey's statement was a proposal by the City or whether it was a repudiation of a past practice. The parties stipulated that collective bargaining sessions were held on:

1. September 19, 1995
2. October 5, 1995
3. October 16, 1995
4. October 17, 1995
5. November 8, 1995
6. November 16, 1995

The contract language on holidays was not changed in negotiations. On or about October 30, 1995, the City distributed a draft work schedule for 1996 with each employe selecting two holidays that he/she would work, with the most senior selecting first. On November 13, 1996, the 1996 work schedule was posted and the employe selections resulted in each being scheduled to work two holidays. The parties stipulated that the Union ratified the 1996-97 collective bargaining agreement on December 7, 1995, and the City ratified the 1996-97 collective bargaining agreement on December 14, 1995. Beginning January 1, 1996, Water Pump House employes were scheduled to work on a holiday by management, not by employe option.

On January 31, 1996, the grievant filed a grievance claiming a violation of the "82" grievance settlement and Article 12, Section A of the contract. The grievant's relief sought was to let employes work the holiday when it fell during his normal schedule. The City denied the grievance on February 29, 1996, and it was appealed to the instant arbitration. The parties stipulated that the grievance filed on January 31, 1996, the City's grievance answer, dated February 29, 1996, and the Union's appeal to arbitration are all within the time limits provided in the 1996-97 collective bargaining agreement.

ISSUE:

The parties were unable to agree on a statement of the issue. The Union stated the issue as follows:

1. Did the City violate the express language of the

Collective Bargaining Agreement, a grievance settlement and/or past practice when it changed the work week of the grievants when holidays fall within the work week?

2. If so, what is the appropriate remedy?

The City stated the issue as follows:

Did the City of LaCrosse violate the specific terms of Article 12(A) of the 1996-97 collective bargaining agreement when it failed to allow the grievants to work on the New Year's Day holiday on January 1, 1996?

If so, what is the remedy?

The undersigned frames the issue as follows:

Did the City violate the 1996-97 collective bargaining agreement, a grievance settlement and/or past practice when it determined whether or not an employe would work on a holiday that fell within the employe's regularly scheduled work week?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 12
OVERTIME

A. Employees subject to this Agreement shall be compensated at the rate of one and one-half (1 1/2) times their regular rate of pay for services rendered and hours worked over and above their regularly scheduled work week. In no case shall time and a half be authorized for services less than forty (40) hours in one week. For employee's (sic) on a 37 1/2 hour work week, overtime shall be at straight time cash or compensatory time for the first 2 1/2 hours of weekly

overtime.

B. Sick Leave, vacation, holidays (or celebrated holidays) and excused absences by the supervisor in writing shall be interpreted as time worked for purposes of calculating overtime hours within the weekly pay period.

. . .

ARTICLE 15
HOLIDAYS

. . .

B. Work Performed
In the event an employee works on one of the above holidays, he/she shall receive time and one-half for the time worked, plus holiday pay.

. . .

F. Celebration of Holidays For Continuous/Variable Shift Employees
If the holiday falls on an off day, the employee shall receive another day off (treated as a celebrated holiday) with pay or the employee shall receive one day of pay at straight time at the employee's choice.

. . .

ARTICLE 19
RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the city of La Crosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in the level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested

exclusively in Management.

New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of such rules.

UNION'S POSITION:

The Union contends that the express language of the contract mandates that the grievants are entitled to be paid for holidays falling within their scheduled work week. It refers to Article 15, Section F which provides what happens when a holiday falls on an off day and it argues that by implication, if a holiday falls on a scheduled work day, employes get augmented pay. The Union notes that Article 12, Paragraphs A and B indicate that employes get time and one-half for hours worked over their "regularly scheduled" work week. It asserts these provisions make no sense if employes are not entitled to work on a holiday that falls within their regular schedule. It maintains that the City made and then abandoned a proposal to modify the agreement to eliminate the employe's entitlement to work the holiday. It asks why the City made such a proposal if the contract did not mandate to the contrary. It argues that the City is attempting to get in arbitration what it could not in negotiation and rewarding this type of conduct destroys the integrity of the bargaining process.

The Union insists that the grievance settlement entered into in 1983 requires the City to continue to allow employes to work on holidays falling within their regularly scheduled work week until changed in bargaining. It observes that allowing the City to abandon its compromise without consideration is absolutely unreasonable.

The Union relies on past practice to support its position. It points out that for the last 13 years employes have been allowed to work holidays falling within their regularly scheduled work week. It anticipates that the City will argue that it announced in advance that it was changing past practice but the Union asserts that the City proposed to alter the contract to eliminate the past practice, but if it was merely past practice, there was no need to modify the collective bargaining agreement. It states that the contract language and grievance settlement mandate the past practice. It further alleges that because it is a mandatory subject of bargaining, the City was required to bargain over it and it abandoned its proposal, so the practice remains.

The Union seeks rejection of the City's changed circumstances argument because it is only appropriate to be made at the bargaining table and besides it does not wash. It denies that it is featherbedding and while changes have occurred over the years, employes still have duties to perform as these were not entirely eliminated. It maintains that this is not a compelling reason to ignore the contract, past practice and a grievance settlement. It asks that the grievance be granted and the employes made whole.

CITY'S POSITION:

The City contends that the new work schedule for employes does not violate the collective bargaining agreement. It points out that Article 19 reserves to the City the right to determine the methods, processes and manner of performing work. It submits that over the last ten years, the operation of the Water Utility has changed due to increased technological

advancements so there is no need to have a full complement of staff on holidays and changes have already occurred on the second and third shifts. It argues that the Union's attempt to block changes on the day shift is tantamount to featherbedding.

It claims that the Union's reliance on a verbal agreement to resolve a grievance is not corroborated. It observes that no written document was produced and the Union never called the City's representative to testify about the verbal agreement and the Director of Public Works and the Superintendent of the Water Utility testified they were unaware of any such agreement.

The City states that it notified the Union of its intention to change how employes would be scheduled on holidays effective January 1, 1996. It points out that the agreement does not contain a maintenance of standards clause, so the City could take the action it did. It requests that the grievance be denied.

UNION'S REPLY:

The Union contends that the City seeks to ignore the grievance settlement. It asserts that a collective bargaining agreement is defined broadly to include a settlement of a grievance which often constitutes binding precedent for the parties. It notes that the grievant's testimony about the 1983 settlement was uncontroverted and is corroborated by the City's unaltered practice for the past 13 years. It also points out that the grievant referenced this in the grievance filed on January 31, 1996, and named the supervisor who entered into the grievance settlement on behalf of the City. It states that remarkably, the City suggests that the Union had some duty to subpoena the City's own witness to corroborate the existence of the settlement agreement but it is not the Union's obligation to prove the City's case; rather, if the City intended to contradict the grievant's testimony, it should have done so but didn't. It argues that the failure to offer such evidence is conclusive on the issue of the existence of the settlement.

The Union notes that the City characterizes the change as an "announcement" rather than a "proposal" but how it is characterized is irrelevant because the City was modifying the contract and the Union was justified in relying on the City's abandonment of the issue at the bargaining table.

The Union denies that it is insisting on featherbedding and even if there was such an issue, the City had to change it in bargaining and not unilaterally impose its own will. The Union agrees there is no maintenance of standards clause in the contract but it is not necessary because of express contract language and it is not necessary to maintain what is already contractually required. The Union insists that it did not waive any right to challenge the City's unilateral actions by a grievance. It does not deny that the City proposed some schedules but these were outside the collective bargaining meetings and the Union did not have to grieve anything until it was implemented. Once the City actually change schedules, the Union takes the position that it was

then justified in challenging the action and did not waive its right to do so by not challenging it earlier.

CITY'S REPLY:

The City contends that the Union's assertion that the City violated the express language of the agreement is without merit. The City observes that the Union claimed that Article 15, Paragraph F by implication meant that if a holiday fell on a regularly scheduled work day the employe is entitled to the augmented pay rate for the holiday. The City questions what "augmented" means and points out that the language is clear and deals with the situation when a holiday falls on an off day and the clear language states the employe gets "another day off." It argues that this helps define what a holiday is, i.e. a day off with pay. The City states that Article 15, Paragraph B specifically spells out what happens when an employe is required to work on a holiday. It observes that the language clearly states "In the event" an employe works the holiday which can hardly be interpreted as the employe deciding whether he/she will work on a holiday. It asserts that the provision merely sets forth the compensation if an employe works the holiday and the instant case is about who decides if employes work on a holiday. The City cites Roberts' Dictionary of Industrial Relations, fourth edition for the definition of the term "holiday" and claims that it is identical to the parties' collective bargaining agreement term, holidays, and all employes receive paid holidays in accordance with the definition.

The City maintains that the Union's reliance on Article 12, Paragraph B is without merit. It suggests that the Union's argument is a very desperate reach to make a semantic argument to obscure the real issue and that is whether the City's actions to provide the grievant a paid day off violate Article 12, Paragraph A. The City takes issue with a number of the facts alleged in the Union's brief and disputes who was required to call Bruce Knudson, the City official who resolved the 1983 grievance, the procedure to discontinue a past practice, the amount of wages lost due to the change and the testimony related to the change in technology.

The City denies that it ever made a binding verbal promise to allow certain Water Pump House employes to decide if they work a holiday or not. It argues that there is no proof the Union purchased any practice and the claim of such a promise was not proved.

With respect to the Union's assertion that there is a binding past practice, the City claims that it notified the Union of its intent to alter the staffing at the Water Pump House and was not attempting to modify the collective bargaining agreement. The City insists that it was being up front with the Union and neither the 1994-95 or 1996-97 contracts contains a past practice clause and even if it did, the City's actions would not be a violation. The City contends that it announced a change in staffing because of recent technology changes and under Article 19, Reservation of Rights, the City has the right to determine the schedule of work unless limited by another clause and there is no such clause in the agreement.

In response to the Union's argument that changed circumstances do not support a change in holiday work policy, the City maintains this also misses the point. It insists that the City merely gave an explanation why it was changing the staffing and it does not need to pass a test. The City relied on its contractual rights and arbitrators have held that when conditions change, practices based on those conditions can also change. The City also asserts that a practice which is not subject to unilateral termination during the term of the contract is subject to change at the end of the contract term simply by giving notice and the party receiving notice must have the practice written into the contract to prevent its discontinuance.

The City argues that the issue as proposed by the Union is outside the definition of a grievance and there is no violation of the collective bargaining agreement. It concludes that the Union's reliance on a verbal agreement is not proved and if it were, changed circumstances makes it no longer binding. The City observes that it notified the Union of its decision during negotiations, and while not necessary, the Union was allowed ample opportunity to negotiate over it. The City restates that the agreement does not contain a maintenance of standards clause. It requests that the grievance be denied.

DISCUSSION:

The Union makes three arguments in support of its position. The first argument is that the City violated the express language of the contract. The Union relies on Article 15, Paragraph F which provides that if a holiday falls on an off day, the employe gets another day off or a day of pay at the employe's option. The Union argues that this implies that if a holiday falls on a regularly scheduled work day, the employe gets augmented pay. This is not implied at all. Article 15, Paragraph B expressly states that in the event an employe works on a holiday, he/she receives time and one-half for time worked plus holiday pay. There is no need for reaching an implication as to pay where there is express language which clearly states what the pay is. What the Union is saying is that if a holiday falls on a regularly scheduled work day, the employe will work the holiday. This is not implied by Article 15. Article 15 provides for paid holidays which means that employes don't work that day and get paid. Article 15, Paragraph F simply means that an employe will get the same number of paid holidays as anyone else. Employes who are regularly scheduled to work Monday through Friday would normally get paid for holidays that fall on a Monday, such as Memorial Day and Labor Day, but if they work it, they get time and one-half. Nothing in Article 15 provides or implies that an employe may work a holiday unless directed to do so by the City. It is concluded that the clear and unambiguous language of Article 15 does not provide that employes may work on a holiday; rather, they will be paid for the holiday and not work or if the City requires them to work, then the employe gets time and one-half plus holiday pay.

The Union also relies on Article 12, Paragraphs A and B. Again this language does not support the Union and is clear and unambiguous. Article 12, Paragraph A provides that employes

who work hours over and above their regularly scheduled work week get time and one-half for all hours worked over 40 hours. This is the normal requirement of the Fair Labor Standards Act and applies to all employes and does not imply that the City is required to work anyone overtime.

Paragraph B merely provides that sick leave, vacation, holidays and excused absences are considered as time worked to calculate overtime. Thus, if an employe works Monday through Friday and Monday is a holiday, the Fair Labor Standards Act does not recognize the holiday as hours worked as part of the 40 hours required before time and one-half must be paid. The contract language does, so that if this employe had to work Saturday, the Monday hours that was a holiday but not worked would count toward the 40 hours, and the employe would get time and one-half on Saturday for hours worked above the 40 hours. Thus, it makes perfect sense and does not require employes to work on a holiday. It allows employes not to work on a holiday and have those hours treated as hours worked for overtime purposes under Paragraph A. Article 19 allows the City to determine the schedule of work and to determine whether employes will work or not work on a holiday. Nothing in the contract requires the City to work any employe on a holiday. It must be concluded that the City's decision to schedule only a minimum staff to work on a holiday does not violate the express language of the contract; rather, the express language of the contract reserves to the City the right to decide whether or not to require an employe to work the holiday.

The second argument made by the Union is that the Union and City entered into a settlement agreement in 1983 which allowed Water Pump House employes to work a holiday at their choice. The parties have argued over whether there was such a grievance settlement and what it is and who has the burden of proof. Assuming arguendo that the Union has proven a grievance settlement in 1983, and it was that Water Pump House employes could work holidays falling within their regularly scheduled work week at their option, the issue is whether it is binding on the City. The undersigned concludes that it is not. It is generally held that a grievance settlement cannot be used to fix the meaning of the contract unless the contract language is ambiguous. 1/ As discussed above, the provisions of the collective bargaining agreement are clear and unambiguous and the settlement agreement does not give meaning to any ambiguous provisions. Additionally, a grievance settlement may be binding where it deals with a subject not covered by the contract, but here holidays and the City's right to determine the schedule of work is clearly a subject of the contract, hence the 1983 grievance settlement applies to the specific 1983 incident (i.e., the 1983 incident stands as settled), but it does not establish any binding precedent because the agreement has provisions on the subject and the contract language is clear and unambiguous. Thus, the Union's arguments on the 1983 settlement agreement are not persuasive.

The third argument relied on by the Union is past practice. It is undisputed that there has been a past practice over the last 13 years that Water Pump House employes have been assigned to

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1/ Kiowa Corp., 72 LA 96 (McKenna, 1979); International Harvester Co., 19 LA 812 (Emery, 1953); Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at 206-208.

work holidays falling within their regularly scheduled work week. The Union has argued that this past practice is binding on the City until changed in negotiations. There are binding and non-binding past practices. A non-binding past practice is essentially the decision by the City to exercise its management rights in a certain way over a long period of time, but this is always subject to a unilateral change by the City. This principle was stated quite succinctly by Umpire Shulman in Ford Motor Co., 2/ as follows:

> They (practices) may be . . . choices by Management in the exercise of managerial discretion as to the convenient methods of the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things . . . Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.

The City has reserved the right to determine the schedule of work so assigning employes to work holidays would be an exercise of this right and the mere fact that this was done in a certain way for 13 years would not create a binding past practice such that the City could not exercise its right to schedule employes differently in the future. If the past practice falls within this category, the City could change it at any time. In the instant case, the Union suggests that the past practice came out of the grievance settlement in 1983, so this past practice is not the way the City unilaterally chose to exercise its management rights. This past practice is not subject to termination at any time but may be terminated at the end of a contract term by giving notice that it will not continue the practice into the next contract. Arbitrator Burns in City of LaCrosse (Transit), Case 259, No. 50518, MA-8278 (1994), cited Arbitrator Richard Mittenthal as follows:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
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> The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiations of a later

2/ 19 LA 237, 241 (1952).

> agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, they must have the practice written into the agreement if it is to continue to be binding. 3/

As noted above, the past practice is apart from any basis in the contract.

3/ "Past Practice and the Culmination of Collective Bargaining Agreements," Proceedings of the NAA (1961).

It is undisputed that the City indicated on September 19, 1995, during a bargaining session, that the City was going to discontinue the practice because it felt that there was over- staffing on holidays which was inefficient due to technology advances over a number of years. The Union contends that the City was making a proposal in bargaining and later dropped it so the past practice continued. The Union argues that the City was proposing to modify the contract and abandoned that proposal. This argument is not persuasive because the plain language of the contract reserves to the City the right to schedule work. The City's announcement or "proposal" was that any past practice as to schedules on holidays would change at the end of the contract. Essentially, the City was not seeking to modify any language of the contract; rather, it was stating that it intended to rely on the language of the contract. The past practice was a limitation on the reserved rights of management as there is no other language in the contract that limits the City's right to schedule work on holidays. The City has the right to rely on exercising the plain language of the contract and notification that any practice contrary to it will no longer be recognized, shifts the burden onto the Union to get language in the contract that limits the exercise of the City's reserved management rights. In other words, the City did not have to seek language in the contract because it had language already in the contract which provided it the right to schedule work. Once the City made known its intentions, the Union could not just sit on its hands and do nothing without the past practice being abrogated. 4/ Thus, the argument that the City had to make a change in the contract is not persuasive. The Union's failure to obtain language incorporating the past practice into the contract resulted in the terms of the contract standing on their own without any past practice limiting the contract language. Additionally, the City's proposed work schedule distributed on or about October 30, 1995, as well as its final work schedule posted on November 13, 1995, support the City's argument that it gave notice that the past practice would no longer be followed after the 1994-95 collective bargaining agreement. Thus, whether the practice could be changed unilaterally or changed after notice at the end of the contract, the City met its obligations necessary to abrogate the past practice.

Another factor supporting the City is the change in technology, i.e., telemetry and remote starting of pumps made the assignment of additional personnel on a holiday no longer necessary. Whether this occurred over a long period or a short period of time is irrelevant. Arbitrators have generally held that where the underlying basis for a past practice no longer exists, absent language in the contract to the contrary, the practice may be eliminated. 5/ Thus, the City's abrogation of the past practice was based on factors other than a desire to eliminate augmented pay for employes.

4/ See Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985), at 443.

5/ Gulf Oil Co., 34 LA 99 (Calin, 1959).

Given the clear and unambiguous contract language, the non-precedential grievance settlement, the change in technology eliminating the underlying basis for the past practice and the City's notice to the Union during negotiations that the past practice would change at the end of the agreement, it is concluded that the change in holiday scheduling does not violate the contract, the grievance settlement and/or past practice.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The City did not violate the collective bargaining agreement, a grievance settlement and/or past practice when it determined whether or not an employe would work on a holiday that fell within the employe's regularly scheduled work week, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 25th day of October, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator