BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
WAUSHARA COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION LOCAL 1824, AFSCME, AFL-CIO	Case 59 No. 54876 MA-9817
and	
WAUSHARA COUNTY	

Appearances:

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

Ms. Debra Behringer, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Wautoma, Wisconsin, on April 9, 1997. The hearing was not transcribed and both parties at that time presented oral arguments in lieu of filing briefs. This Award follows the bench decision which I there rendered in the County's favor.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the County violate the contract when it required grievants Larry Clark and Dale Lind to directly report for work at its Wautoma shop and, if so, what is the appropriate remedy?

DISCUSSION

The County operates and maintains separate shops for its highway operations in Wautoma, Hancock, and Poy Sippi, Wisconsin. Its Wautoma shop is the largest of the three.

Grievants Clark and Lind -- who live about 6 and 3 miles from the Poy Sippi shop and who have been employed by the County for about 20 and 30 years - are assigned to the Poy Sippi shop where they regularly report for work at 7:00 a.m. In previous years, if the County wanted them to report to the Wautoma shop, they first reported to the Poy Sippi shop and then drove

County vehicles to the Wautoma shop while on County time.

The County in May, June, and July, 1996, directed Clark and Lind to report directly to the Wautoma shop at 6:30 a.m. for road paving duties without first reporting to the Poy Sippi shop. They subsequently did so on about 11-22 instances in May, June, and July, when they used their own private vehicles to report to the shop. In none of those instances were they paid for either their driving time or mileage in going from their homes to Wautoma. Clark and Lind grieved their assignments, hence leading to the instant proceeding.

In support of their grievance, the Union argues that a past practice has arisen to the effect that Clark and Lind always report to the Poy Sippi shop before they go to the Wautoma shop and that, as a result, the County violated this past practice when it ordered them to directly report to the Wautoma shop. As a remedy, the Union seeks restoration of the prior practice and payment to the grievants for their mileage in going from their homes to Wautoma.

The County, in turn, asserts that no such prior practice exists and that, furthermore, it has the right to assign employes to the Wautoma shop under the contractual management rights clause.

As I ruled at the hearing, the County's position must be sustained because Article 2 of the contract, entitled "Management Rights", states:

> 2.01 - Except as otherwise herein provided, the operation and control of the Waushara County Highway Department is vested exclusively in the Employer and all management rights repose in it. These rights include, but are not limited to, the following:
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> (a) To direct all operations of the Waushara County Highway Department;
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> (b) To establish reasonable work rules and schedules of work;
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> (c) To hire, promote, transfer, schedule and assign employees in positions within the Department;
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> (d) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
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> (e) To relieve employees from their duties for lack of work or other legitimate reasons;
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> (f) To maintain efficiency of operations;
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> (g) To take whatever reasonable action is necessary to

comply with state or federal law;

(h) To introduce new or improved methods or facilities;

(i) To change existing methods or facilities;

(j) To determine the kinds and amounts of services to be performed as pertains to operations and the number and kind of classifications to perform such services;

(k) To contract out for goods and services as long as bargaining unit employees are not on layoff or reduced hours as a result of the subcontracting;

(l) To determine the methods, means and personnel by which operations are to be conducted;

(m) To take whatever reasonable action is necessary to carry out the functions of the Department in situations of emergency.

This language, then, on its face gives the County the right "To direct all operations. . ."; to "transfer . . . and assign employes in positions within the Department"; and "To determine the methods, means and personnel by which operations are to be conducted." That is exactly what the County has done here by requiring the grievants to report for work at its Wautoma shop in order to better carry out its paving operations, rather than its Poy Sippi shop.

Moreover, there is no other language in any other part of the contract which in any way limits the Company's right to make such assignments, just as there is no past practice proviso in the contract. In addition, the applicable position descriptions do not provide that employes must be assigned to only one shop -- which in essence is the Union's claim here.

Indeed, the parties previously litigated this very language after the Union in 1993 filed a grievance when the County assigned employe Harvey E. Nigh to the Wautoma shop. That grievance was ultimately denied by Arbitrator Edmond J. Bielarczyk, Jr., who ruled that the contract:

> "does not contain a provision which allows employes to exercise seniority rights over work site locations in their job classifications. Nor is there any evidence the parties have a binding past practice which grants an employe the right to exercise seniority over work

site location." 1/

Given all this, the County did not violate the contract when it directed Clark and Lind to directly report for work at its Wautoma shop.

It is true, of course, that 1996 marked the first time that the County ever required the grievants to use their private vehicles in doing so. However, it is immaterial that the County waited that long before it exercised its managerial right under Article 2 of the contract to do so because it is well-established that an employer does not waive a clear contractual right through its mere non-use.

For here, Highway Commissioner Robert E. Bohn had a legitimate business reason for having the grievants directly report to the Wautoma shop; i.e., the fact that they were needed for the County's paving operations. Moreover, Bohn explained: "It is common for employes to drive to a job." The record also shows that the County has experienced a dramatic decrease in its outside work and that, as a result, the County today has about 10 fewer employes than it did several years ago. Hence, it is necessary for employes to report directly to whatever shop which best needs their services.

It is this operational need which dictates work assignments rather than the customary way that shop assignments have been made in the past. For, the prior customary way was based on the County's need to have some of its employes work closest to those highways they covered. When that work shifts - such as what happened here with its paving operations - the County retains the right to change those work assignments because there was no prior mutual understanding between the parties that employes always must work out of the nearest shops.

Arbitrator Harry Shulman best explained this principle in Ford Motor Co. - United Automobile Workers, 19 LA 237 (1952) when he ruled:

> "A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice, but rather to the agreement in which it is based.
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> But there are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they

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1/ Waushara County (Highway Department) and Waushara County Highway Department Employees Union, Local 1824, AFSCME, AFL-CIO, Case 44, No. 48402, MA-759 (10/93).

> may be choices by Management in the exercise of managerial discretion as to convenient methods at 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. The relevant term of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion. . .But there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character.
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> A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit themselves to the unstated and perhaps more important matters which in the future may be found to have been past practice."

Here, too, the record establishes that Lind and Clark were assigned to the Poy Sippi shop because of prior "present ways, not prescribed ways. . ."

In light of the above, it is my

AWARD

That the County did not violate the contract when it required grievants Larry Clark and Dale Lind to directly report for work at its Wautoma shop; their grievance is therefore denied.

Dated at Madison, Wisconsin, this 11th day of April, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator