BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, KAUKAUNA LOCAL 1594

and

CITY OF KAUKAUNA

Case 94
No. 55851
MA- 10109

Appearances:

Attorney John S. Williamson, Jr., 103 West College Avenue, Suite 1203, Appleton, Wisconsin 54911, appearing on behalf of International Association of Fire Fighters AFL-CIO Kaukauna Local 1594.

Attorney Paul Van Berkel, City Attorney, City of Kaukauna, 180 West Wisconsin Avenue, Kaukauna, Wisconsin 54130, appearing on behalf of the City of Kaukauna.

ARBITRATION AWARD

City of Kaukauna and International Association of Fire Fighters, AFL-CIO, Local 1594 are parties to a collective bargaining agreement that was in affect at all times relevant to this proceeding. The agreement provides for binding arbitration of disputes. The Union initiated grievance arbitration and requested the Commission to appoint either a Commissioner or a member of its staff to serve as arbitrator. Debra Wojtowski was appointed as arbitrator to hear the grievance. Hearing in the matter was held on March 12, 1998 in the City of Kaukauna, Wisconsin. A transcript was made of the hearing. The parties filed briefs with the arbitrator for mutual exchange. The parties were given the opportunity to file reply briefs but declined to do so and the record was closed on April 17, 1998. The Commission advised the parties that Arbitrator Wojtowski was no longer employed by the agency and that the Commission would assign someone else from the agency to write the decision. The Commission on November 9, 1998 transferred the case to Paul A. Hahn for a decision.

ISSUE

Stipulated Issue

The parties agreed on the record that the arbitrator ". . . should select one of those questions as the framing of this issue." (Tr. 5-6) The Arbitrator selects the issue as presented by the Union:

> Did the City of Kaukauna violate Articles II and V of Local 1594's labor agreement by denying mileage reimbursement at the rate of 31.5 cents per mile effective January 1, 1998? And, if so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

RECOGNITION

A. The City recognizes the Union as the sole and exclusive bargaining agent for the members of the Kaukauna Fire Department excluding the positions of Assistant Chief and Chief.

. . .

ARTICLE V

SALARIES

. . .

B. Employees who possess a current paramedic license and are assigned to fill in for an employee of higher rank shall be paid out-of-class pay at the level that includes paramedic pay on the salary schedule. In addition to the attached wage schedule; it is understood that Fire Fighters who request through their department head or are required to train during nonregular duty hours (including initial training as an E.M.T. II) will be paid at the straight time 40 hour rate of pay for all classroom hours and also reimbursed for mileage to and from the training site, required text, tuition and miscellaneous classroom expenses.

. . .

ARTICLE XXIII

GRIEVANCE PROCEDURE

. . .

A. Grievances related to this Agreement, wages, hours and conditions of employment, may be processed in accordance with the grievance procedure.

. . .

Step 3. Arbitration. The arbitrator, in arriving at his determination, shall rule only on matters of application and interpretation of this Agreement. the findings of the arbitrator shall be final and binding on both parties. Arbitration may be initiated by either party serving upon the other notification in writing of intent to proceed to arbitration.

. . .

ARTICLE XXX

RIGHTS OF THE EMPLOYER

Subject to other provisions of this contract, it is agreed that the rights, function and authority to manage all operations and functions are vested in the employer and include, but are not limited to the following:

A. To prescribe and administer rules and regulations essential to the accomplishment of the services desired by the City Council.

B. To manage and otherwise supervise all employees in the bargaining unit.

C. To hire, promote, transfer, assign and retain employees and suspend, demote, dismiss or take other disciplinary action against employees as circumstances warrant.

D. To relieve employees of duties because of lack of work or for other legitimate reasons.

E. To maintain the efficiency and economy of the City operations entrusted to the administration.

F. To determine the methods, means and personnel by which such operations are to be conducted.

G. To take whatever action may be necessary to carry out the objectives of the City Council in emergency situations.

H. To exercise discretion in the operation of the City, the budget, organization, assignment of personnel and the technology of work performance.

BACKGROUND

This grievance involves the City of Kaukauna and International Association of Fire Fighters, AFL-CIO, Kaukauna Local 1594 representing employes of the City set forth in Article II – Recognition. (Jt. Ex. 1) The Union alleges a contractual violation by the City for failing to pay the fire fighters represented by the Local a mileage reimbursement rate in effect as of January 1, 1998 (31.5 cents per mile) pursuant to Article V of the collective bargaining agreement. (Jt. Ex. 2) The City takes the position that it is only obligated to pay the mileage reimbursement rate as set forth in a settlement agreement to grievance #8 dated November 13, 1992 of 27.5 cents per mile. (Jt. Ex. 3) The parties were unable to resolve the dispute; this led to the Union filing a grievance on October 16, 1997. (Jt. Ex. 2) The Employer responded denying the grievance on October 31, 1997 and November 20, 1997. (Jt. Ex. 2)

Article V - Salaries, paragraph B relates to reimbursement to the fire fighter employes for training that is performed by them on non-regular duty hours. Specifically, as to this grievance, the provision requires ". . . also reimbursed for mileage to and from the training site, required text, tuition and miscellaneous expenses." (Jt. Ex. 1) This language of the collective bargaining agreement has not been altered since the 1983 labor agreement. Since 1983, at various times, the City Council has set the mileage reimbursement rate, specifically in 1985 at 21 cents per mile and in 1991 at 27.5 cents per mile according to IRS guidelines. (Jt. Ex. 5 and 4) The Union has never been involved in the decision as to the amount or timing of the mileage reimbursement under Article V.

In 1991, when the City increased the mileage reimbursement rate for all City employes to 27.5 cents per mile it incorporated a provision, which it applied to the fire fighters, in its personnel policies to provide that only employes who carried a certain amount of liability insurance on their personal car being used for City business would receive the 27.5 cents per mile rate. Those employes who did not carry the required liability insurance would receive a lower rate of 20 cents per mile. (City Ex. 1) The Union grieved (by Grievance #8) this qualification for receiving the mileage reimbursement rate. The Union position was that establishing an insurance requirement for receipt of the 27.5 cent per mile rate was an unlawful unilateral change in a past practice for receipt of mileage reimbursement. (Jt. Ex. 3) The Union also argued in Grievance #8 dated November 13, 1992 that the City was violating a past practice that fire fighters would receive whatever mileage rate increase the City Council passed without being required to show proof of insurance. (Jt. Ex. 3) The parties settled grievance #8 on December 17, 1992 with the following provisions:

1. The City of Kaukauna agrees to Local 1594's demand that all affected employees be reimbursed at a rate of 0.275 cents per mile.
2. The City of Kaukauna agrees to Local 1594's request that the City bargain in negotiations any change of working conditions.
3. The City of Kaukauna agrees that employes shall not be required to show proof of specific insurance coverage unless both parties mutually agree upon it.

The settlement agreement was signed by Paul Hirte, Local 1594 President, on December 17, 1992 and by Mayor Neil Steinberg on December 28, 1992. (Jt. Ex. 3)

The Union also, by grievance #7 dated September 9, 1992, grieved that certain subjects in the City's Personnel Policies and Regulations Manual were mandatory subjects of bargaining. The parties, as part of a settlement of this grievance, agreed that Section 9-7(A) of the manual, Travel Reimbursement, was a mandatory subject of bargaining. (City Ex. 3)

On July 1, 1997 Mayor John Lambie informed Local 1594 that the City's Finance and Personnel Committee had voted in favor of raising the mileage reimbursement rate from 27.5 cents per mile to 31.5 cents per mile. (City Ex. 2) This increase of the mileage rate was to be effective January 1, 1998. (Jt. Ex. 2) The City offered to negotiate a change in the mileage reimbursement or the Union could receive the higher mileage rate to be effective January 1, 1998 by showing proof of insurance pursuant to the Personnel Manual. (City Ex. 2) It was this position by the City that the Union grieved on October 16, 1997. (Jt. Ex. 2)

The Union filed a grievance over the City position that to receive the 31.5 cents per mile mileage reimbursement a fire fighter would have to show proof of insurance. The parties processed the grievance through the contractual grievance procedure and were unable to resolve the grievance.

The hearing in this matter was held by Arbitrator Wojtowski on March 12, 1998 at the Kaukauna City Hall in the City of Kaukauna, Wisconsin. The hearing closed at 12:18 p.m. The hearing was transcribed. The parties were given the opportunity to file briefs and did so; briefs were filed with the Arbitrator on or about April 17, 1998. The parties were given the opportunity to file reply briefs but declined to do so and the record was closed on April 17, 1998.

POSITION OF THE PARTIES

Union Position

The Union initially argues that the City has always tied its mileage reimbursement rate for its City employes, including Fire Fighters, to the IRS guidelines. This is demonstrated by the resolutions passed by the City Council in the past that have tied mileage increases to the

IRS rate. The Union further argues that the reimbursement must approximate as closely as possible the actual mileage cost to the fire fighters and that this necessarily must be the highest rate adopted by the City Council, in this case 31.5 cents per mile. The Union argues that any lesser rate would constitute partial not full reimbursement. The Union points out that the City agrees that the fire fighters receive full, not partial, reimbursement for the actual cost of required texts, tuition and other classroom expenses.

The Union further takes the position that the parties' consistent interpretation of Article V Subsection B, regarding mileage reimbursement, is that once the City Council has adopted the IRS mileage rate that this has been applied to the members of Fire Fighters Local 1594, which supports the interpretation of the clear and unambiguous language of Article V. The Union takes the position that contrary to the settlement of Grievance #8, which set the rate at 27.5 cents per mile, the City by now taking the position that the fire fighters should not receive 31.5 cents per mile without negotiation, violates the clear unambiguous language of Article V that the fire fighters deserve to receive the full reimbursement which at the time of the grievance was 31.5 cents per mile. The Union argues that the change in working conditions language set forth in the settlement of grievance #8 requiring negotiations does not apply to the actual mileage rate but to any working conditions that attempt to reduce the fire fighters' mileage reimbursement rate by tying it to the amount of liability insurance carried by the fire fighter.

The Union further argues that the Council's adoption in 1997 of a rate based on the current IRS guideline of 31.5 cents per mile affects the monetary amount the fire fighters would receive as reimbursement; it does not affect the working conditions of the fire fighter. The Union position is that those working conditions require the reimbursement for mileage to be the IRS rate once the City Council has adopted that rate; therefore, there was no change in the working conditions affected by the Council's adoption of the 1997 rate.

Lastly, the Union argues that the settlement of Grievance #8 is not only consistent with but furnishes support for Local 1594's position. The Union argues for sustaining the grievance and that the City be directed as a remedy to reimburse its fire fighters for mileage to and from the training sites at the Internal Revenue Service rate of 31.5 cents per mile beginning January 1, 1998.

City Position

The City argues that the contract language in Article V, Subsection B related to reimbursement for mileage is "vague." The City takes the position that in the settlement of grievance #8 and grievance #7 neither actual mileage cost nor IRS rates were used in settling those particular grievances. The City takes the position that the City has never specifically passed a resolution or adopted a resolution that ties the City's mileage reimbursement rate to that rate established by the Internal Revenue Service. The essential thrust of the City's argument is that in settling Grievance #8 the parties agreed on a mileage reimbursement rate of

27.5 cents and that the parties also agreed that this rate could not be changed unilaterally by the City or the Union since it is a mandatory subject of bargaining. Lastly the City argues that any alteration of the existing mileage reimbursement rate for Local 1594 must be achieved by mutual agreement because it is a contract language modification. The City takes the position that the grievance should be denied in all respects.

DISCUSSION

This dispute involves the interpretation of the parties' labor agreement and primarily Article V, Section B. As arbitrator, I draw my arbitral authority from the contract language. Where language is not clear and is ambiguous, bargaining history and past practice may be used to interpret the language in question. 1/

1/ Arbitral authority is rooted in the parties' agreement. First and foremost, this agreement is the written contract executed by them. To the extent the contract is unclear, the most persuasive guides to the resolution of ambiguity are past practice and bargaining history. Each derives its persuasive force from the agreement manifested by the conduct of the parties whose intent is the source and the goal of the contract interpretation. GREEN BAY BOARD OF EDUCATION, CASE 185 NO. 53595 MA-9395 MCLAUGHLIN (1996).

The language of Section B provides for reimbursement of expenses for employes who attend job related training on non-duty time. The employes are reimbursed for books, tuition and other related expenses. Pertinent to this case is that employes are also reimbursed for mileage. There is nothing in Section B or in the labor agreement that sets forth the rate of that reimbursement, nor is there any formula for determining the rate of mileage reimbursement. The language of Section B has not changed from the 1983 contract to the current labor agreement. The parties agree that the language cannot mean actual cost to each employe as each employe's mileage cost would be different. The Union argues that because the City pays the full cost of the other training expenses the full cost of mileage should be reimbursed or at least the maximum mileage that the City authorizes should be received by the fire fighters. However, contrary to the Union's argument that the language of section B is clear and unambiguous, I find the language to be ambiguous; there simply is not any way by reading the labor agreement that one can determine with any degree of certainty what is the appropriate mileage reimbursement rate.

I cannot turn to any bargaining history for assistance as none was introduced at the hearing. I then may turn to past practice for guidance. The standards that have been accepted to allow past practice to interpret language of a labor agreement are not insignificant. 2/ I find in this case that the Union has not met those standards and as the moving party in this contract interpretation case it bears the burden of proof. Only two instances were introduced into the record where, since 1983, the City increased the mileage based on an IRS guideline. (Jt. Ex. 4 and 5) The Union attempted to find other instances but could not. I take judicial notice that the

Internal Revenue Service raised its mileage reimbursement rate between 1983 and 1997 more than twice. In 1997 the City raised the rate to $.315, which led to the present dispute. It is also clear that the practice was not accepted unequivocally by the parties as evidenced by the situation in 1992 that led to grievances #7and #8. Those grievances, arose out of the fact that the City offered two mileage reimbursement rates to its employes, including the fire fighters, based on the amount of liability insurance the employes carried on their individually owed cars used on City business. That position by the City, right or wrong, does not support a finding that there was a practice in effect accepted unequivocally by both parties. Even the Union in its argument at hearing and in its post hearing brief allowed that it was the City that controlled when the City increased the mileage rate.

2/ "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." CELANESE CORP. OF AMERICA, 24 LA 168, 172 (1954) JUSTIN.

This dispute and grievance mirrors the dispute and grievances between the parties that occurred in 1992 when the City introduced personnel policies that provided for a mileage reimbursement rate of $.275 or $.20 depending on the amount of liability insurance carried by employes. 3/ In appropriate circumstances, prior grievance settlements between parties may be used to aid in the interpretation of contract language. 4/ I find this case appropriate because the grievance before me has virtually the exact same set of facts and with the same contract language as grievances #7 and #8, introduced into this record as City 3 and Joint 3. The parties settled those grievances; unfortunately, the parties introduced no testimony as to the meaning and intent of those settlements. I therefore consider them on the written settlement documents and the facts at the time.

3/ City exhibit 3 [Settlement of Personnel Policies and Regulations Manual Grievance] and Joint exhibit 3 [Settlement of Mileage Reimbursement Rate Grievance.]

4/ "How Arbitration Works" Elkouri and Elkouri Fifth edition pages 508-509 (1997).

Grievances #7and #8 got their start in 1991 when the City raised the mileage reimbursement rate to $.275. (Jt.4) That rate was not given to the fire fighters. In 1992, the City created personnel policies that provided that only City employes with required liability insurance on their personal vehicles would receive the aforementioned rate. (City Ex. 1) This specific policy, and the policies themselves, led to the filing of a grievance. Grievance #7 dealt primarily with the policies themselves; the Union took the position that the City could not require it and its members to follow policies that were mandatory subjects of bargaining and/or were covered by the labor agreement. In settling this grievance, the Union and the City agreed that the labor

agreement would prevail over the personnel policies. The parties agreed that past practices would continue as they related to terms in the labor agreement; the Union added a general statement about past practices remaining in effect. The parties did not spell out specifically any practices they thought were in effect. More importantly for my analysis, the parties agreed that policy #9-7(A), which covered mileage reimbursement, was a mandatory subject of bargaining. (City Ex. 3)

Grievance #8, which was filed on November 13, 1992, two months after #7, specifically relates to the factors that are present in this case. The Union grieved the City's position that employes, including the fire fighters, would receive the $.275 mileage rate only if they carried the liability insurance amounts set forth in the newly adopted personnel policies. The Union argued, as it does now, that the City had unilaterally changed a past practice wherein the employes received the IRS rate adopted by the City without any restrictions. After several attempts at settlement language, detailed in Joint exhibit #3, the parties on December 17,1992 resolved the grievance. The City agreed to reimburse the employes at $.275 per mile, not to change any
working conditions without bargaining and to not require the employes to show proof of specific insurance coverage unless both parties mutually agreed to such a requirement. (Jt. Ex. 3)

The City now argues that it cannot unilaterally change the rate of $.275 without negotiation, which it is willing to engage in, because the parties agreed that negotiations would be the procedure in settling grievance #8. The City also states that, if the Union does not want to bargain, the employes could receive the rate of $.315 by carrying the appropriate liability insurance limits that are called for in the personnel manual. The Union argues that in bad faith the City is using the Union's victory in 1992, in grievance #8, against the employes by not continuing the practice of the employes receiving the higher mileage rate when adopted by the City which for the Union was confirmed by the grievance #8 settlement.

Arbitrators are required to often make decisions in the absence of good and necessary facts, and this is one of those occasions. Pay for mileage reimbursement is one of those subjects best left for the bargaining table and negotiation between the parties. In this case, I believe that is the way this arbitration must be decided. The December 17,1992 settlement between the parties recognized the mandatory bargaining nature of pay for mileage reimbursement as well as the requirement to bargain conditions that affected receipt of mileage pay by the employes. There is nothing in that settlement that states what would happen the next time the rate was increased by the City. To interpret the settlement of grievance #8 as proposed by the Union, would mean it would receive the more favorable interpretation: the Union members would continue to receive increases in the mileage rate placed into effect by the City automatically, while the City would have to bargain to try and attach insurance restrictions to the receipt of the higher rate, in this case $.315. This would make that settlement agreement one-sided unless one accepts the Union's past practice argument which I have found is not supported by the evidence.

Unless I were specifically guided by some evidence to uphold a one-sided agreement, I cannot accept that the Union position is what the parties intended with their grievance #8 settlement. 5/ I therefore find that the conditions set forth in that settlement, the mileage rate at

$.275 and no requirement on the employes to show proof of required insurance, remain in effect until such time as the parties negotiate conditions and a rate different from what is set forth in the grievance #8 settlement document dated December 17, 1992. That being my ruling, the City did not violate the parties' collective bargaining agreement when it refused to grant the employes the mileage reimbursement rate of $.315 per mile and has not violated the agreement by continuing to pay at the rate of $.275 per mile. Therefore I cannot sustain the grievance.

5/ Arbitrators strive where possible, however, to give ambiguous language a construction that is reasonable and equitable to both parties rather than one that would give one party an unfair and unreasonable advantage. Elkouri and Elkouri at pages 513 and 514.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 11th day of December, 1998.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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