BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WINNEBAGO COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION, LOCAL 1903, AFSCME, AFL-CIO

and

WINNEBAGO COUNTY

Case 311
No. 57139
MA-10524

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. John A. Bodnar, Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

Winnebago County Highway Department Employees Union, Local 1903, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Winnebago County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties mutually agreed to the undersigned to act as the sole arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. Hearing was held in Oshkosh, Wisconsin, on February 10, 1999. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which were received on April 14, 1999.

BACKGROUND

The basic facts underlying the grievance are not in dispute. For as long as anyone can remember, Highway Department employes were allowed to use the County shop after hours to work on their own vehicles. Employes could perform minor repairs, wash their cars in the winter time and even perform major work such as an engine overhaul. Employes had to sign in and the work on personal vehicles could not interfere with Department work (Ex. 11).

On October 8, 1996, the County Board passed a resolution which adopted a new Personnel Policy Manual which provided in part, as follows:

> USE OF EQUIPMENT AND FACILITIES. Employees are not to use County equipment or facilities for non-County purposes.

(Exs. 6 and 7)

On October 8, 1997, the Highway Commissioner, Ray Grigar, distributed new handbooks to Highway Department employes informing them that the after hours shop privileges were eliminated. A grievance was filed on October 20, 1997, which was denied on October 21, 1997, and was then processed through the steps of the grievance procedure where it was denied and appealed to the instant arbitration.

ISSUE

The Union suggests the following:

> Did the County violate the collective bargaining agreement by discontinuing the past practice of allowing Highway Department employes to use the County Shop to work on employee vehicles and other personal projects when off duty?
>
> If so, what is the remedy?

The County proposes the following:

> 1) Was the grievance filed in a timely manner?
>
> 2) Did the Highway Commissioner have the authority to implement a work rule, in order to comply with the County's personnel policy, so as to prohibit the use of the highway garage by employes for non-County purposes? If not, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Was the grievance timely filed?

2. If so, did the County violate the parties' collective bargaining agreement by discontinuing the past practice of permitting Highway Department employes to use the Highway Shop to work on their personal vehicles outside work hours?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 1

MANAGEMENT RIGHTS

. . .

3. The Union recognizes the exclusive right of the County to establish work rules.

. . .

ARTICLE 9

GRIEVANCE PROCEDURE

The parties agree that the prompt and just settlement of grievances is of mutual interest and concern. Only matters involving the interpretation, application or enforcement of the terms of this agreement shall constitute a grievance under the provisions as set forth below.

All such grievances shall be processed as follows:

Step 1. If an employee has a grievance, he shall first present the grievance orally to his immediate management supervisor. The said grievance shall be presented within the first five (5) working days after the date of the event or occurrence which gave rise to the complaint. Said grievance may be presented by the employee either alone or accompanied by one (1) Union representative.

Step 2. If the grievance is not settled at Step 1 within five (5) working days after having been presented to the immediate management supervisor, it

shall be reduced to writing and presented to the department head. Said grievance may be presented by the employee either alone or accompanied by the Union, at the option of the Union.

The department head shall confer with the aggrieved employee and the Union before making his determination.

The decision of the department head must be in writing and submitted to the aggrieved employee and the Union within seven (7) working days from his receipt of the grievance in writing. This period of time may be extended by mutual agreement of the parties involved.

Step 3. If the grievance is not settled at Step 2, the aggrieved employee, either alone or accompanied by the Union, at the option of the Union, may appeal in writing to the Winnebago County Director of Personnel. Any such appeal must be made within ten (10) working days after receipt of the decision of the department head in Step 2.

The Director of Personnel may confer with the aggrieved employee and the Union before making his determination.

The Director of Personnel shall notify the aggrieved employee and the Union in writing of his decision within ten (10) working days after receipt of the said appeal. This period of time may be extended by mutual agreement of the parties involved.

Step 4. If the employee's grievance is not settled at Step 3, the Union may submit said grievance to arbitration by giving notice in writing to the Director of Personnel within fifteen (15) working days after receipt of the decision of the Director of Personnel at Step 3.

UNION'S POSITION

The Union believes the County is misinterpreting an employe benefit as a work rule. It agrees that if the "shop use" were a work rule, the County could revise or eliminate it but "shop use" is an employe benefit and is a condition of employment, citing MANITOWOC COUNTY, CASE 276, NO. 49581, MA-7995 (MAWHINNEY, 1994). The Union contends that "shop use" became a binding past practice over the years and the County allowed it long before there was a Union and this privilege was continued from contract to contract to contract and the parties repeatedly bargained under the circumstance that personal use of County facilities was permitted. The Union argues that the policy became a mutually agreed-upon working condition which the County could renounce at the bargaining table but not by fiat.

The Union asserts that the County's claim that public policy considerations override any past practice is not supported by any justifiable public policy arguments. It asserts that the County is inconsistent in determining what is and is not a County purpose and has stated that individual departments determine policies for personal use of County vehicles so the use of County facilities should not be treated any differently when covered by the same language in the Personnel Policy Manual.

The Union claims that the County eliminated a long-standing past practice. It observes that the free use of a County facility is a significant benefit just as much as free parking and designated break areas, benefits also not mentioned in the agreement. Citing MANITOWOC COUNTY, above, the Union takes the position that this benefit became a binding past practice because it was long lasting, clear, known and understood by both parties and did not conflict with any provision of the contract. The Union argues that there was no compelling reason to change a binding past practice. It submits that the County's reason is to slavishly follow the County Personnel Manual which is grossly unfair because the County does not consistently follow its own guidelines. It insists that the County allows personal use of County equipment and facilities all the time. It alleges that the policy statement is overly broad and inconsistent with actual County practice and should be given little or no weight. The Union observes that the County tries to demonstrate to its constituents that it does not waste taxpayer dollars and that public servants do not have unreasonable benefits not available to the general public. It points out that the problem is that sometimes it is in the public good to provide public employes with access to County equipment and facilities as, for example, sheriff deputies' personal use of patrol cars and exercise space at the Public Safety Building and nursing home.

The County argues, according to the Union, that these do not violate the Policy Manual but use of the shop does. The Union disagrees that a public purpose is necessary for it to prevail but states that having well-running vehicles serves a County purpose just as physically fit deputies. The Union submits the controlling issue is whether the County can eliminate a long-standing past practice without negotiating the loss with the Union. The Union contends that a binding past practice should override a generic policy handbook.

In conclusion, the Union requests that the grievance be sustained and the old "shop use" policy be reinstated and the County must negotiate a benefit loss such as this at the bargaining table.

COUNTY'S POSITION

The County contends that the grievance was not filed in a timely manner. It points out that the grievance was filed by the Union as a class action and Article 9 requires that the grievance be filed within five (5) working days of the event giving rise to the grievance. It asserts that this event was passage of the resolution on October 8, 1996. Additionally, it notes that a similar grievance was filed in the Parks Department on April 7, 1997, so the Union had actual notice of the implementation of the policy as of that date. The County refers to Step 3

of the response to the grievance wherein it specifically stated that Local 1903 had grieved this rule and accepted denial of the grievance. The County concludes that it is clear the grievance was filed well past the five (5) working days and it should be dismissed as having been untimely filed.

The County argues that it was within its authority to implement the policy discontinuing use of the Highway Shop by Highway Department employes. The County recognizes that pursuant to Sec. 111.70, Stats., it is required to bargain with respect to wages, hours and conditions of employment but is not required to bargain subjects reserved to management and direction of the government unit. It observes that some issues will touch simultaneously on wages, hours and conditions of employment and upon managerial decision making and policy and recognizing this, the courts have applied a "primarily related" standard. It states that the "primarily related" task balances the competing issues to determine whether an issue should be characterized as a mandatory subject of bargaining or not. The County contends that management of the use of its Highway Shop and facilities is a legitimate function of management. It cites arbitral and hornbook authority for the proposition that the failure to exercise a management right does not preclude it from the right to start exercising it.

The County refers to Article 1 of the agreement which provides the exclusive right of the County to establish work rules and the policy forbidding use of the Highway Shop is a work rule. According to the County, the contract has a provision on work rules so the parties have bargained to agreement on this matter and the parties are entitled to rely on the bargain they have struck. It observes that a contract provision takes precedence over a contrary past practice if there is one.

In the instant case, the County asserts it was not required to bargain the implementation of the new rule because it had the authority to implement such a rule under Article 1. It states that the present contract was not ratified until August, 1998, so the Union had a full year to bargain the rule and its impact. It alleges that it had clearly notified the Union of its intent to discontinue the personal use of facilities and the fact that the full ramifications were not explained does not render the language ineffective to change a past practice which clearly falls within its terms.

Alternatively, it argues that the Union has the burden of proving that the policy affected wages, hours and conditions of employment. It submits that use of the garage does not affect wages or hours and the only question is whether it affects "conditions of employment." It claims that concerns with regard to liability to employes as well as non-employes, possible worker's compensation claims, use of County equipment for personal purposes, fairness and equity and no public benefit, on balance, favors the County. It differentiates the non-duty use of squad cars which deters crime. On the other hand, the County states that the Union, which has the burden of proof, provided no evidence of any substantial impact upon the quality or safety of the work environment, the work load of employes or their work assignments. In short, it maintains that implementation of the policy has not had any substantial impact upon

the conditions of employment and in exercising the balancing test, the County's interest in management and direction of the County far outweigh any possible impact upon wages, hours or conditions of employment. It concludes that the grievance should be denied.

UNION'S REPLY BRIEF

The Union contends that the grievance was timely filed. It notes the County claims the grievance should have been filed when the County passed the new personnel policy (October 8, 1996) or in April, 1997, when the County eliminated use of the Park Department garage. The problem with this, according to the Union, is that the County allowed Highway Department employes to use the highway garage until the following October, 1997. It asserts that a grievance does not arise until some member is harmed and this did not occur until the Highway Commissioner denied use of the garage. The Union relies on a second reason; that being the policy manual does not explicitly refer to the use of the highway garage, so reasonable people could differ on whether it applied to shop privileges. It observes that there were only five full-time Park Department employes, two, who were laid off, and a third being investigated for possible theft of County property. It notes that 90 percent of the highway employes were affected and the Park and Highway Departments are distinct units and each could not use the other's shop. It concludes that notice to one is not notice to the other and the grievance is timely.

The Union observes that the County addressed the "primarily related" test as a means of determining whether an issue is a mandatory subject of bargaining but the County provided no case that addresses the elimination of shop privileges. It submits the key case is MANITOWOC COUNTY, cited in its main brief. It argues that the bottom line is the County unjustly eliminated a valuable employe benefit. The Union disagrees with the County's assertion that it should have bargained the impact of the lost benefit in negotiations because the County never notified the Union that it was eliminating this benefit at the negotiating table. Instead, the Union points out that it grieved the matter when notified at a unit meeting and the matter was processed through the grievance procedure. The Union maintains that it should not be forced to negotiate for a benefit that it already had and if anyone should have brought it up in negotiations, it was the County, but it did not do so.

The Union rejects the policy concerns brought up by the County with respect to liability asserting there was but one accident in thirty years which involved an inappropriately parked car, no one was hurt or disciplined and such is not sufficient to eliminate the benefit. According to the Union, the County's attempt to diminish the value of shop use privileges fails as the use of the shop saves time and money and ensures well-maintained vehicles so employes can respond to weather emergencies quickly and reliably. The Union further claims that the 1996 policy is overly broad and vague plus other County employes enjoy numerous benefits not applicable to all County employes.

The Union concludes that the grievance was timely filed and the use of the highway shop was a long-standing binding past practice which the County never sought to eliminate at the bargaining table and it requests the grievance be sustained and the "shop use" practice be reinstated.

COUNTY'S REPLY

The County distinguishes MANITOWOC COUNTY cited by the Union on the grounds that language of the MANITOWOC contract limited adoption of work rules by the County and contained a maintenance of standards clause, whereas the parties' contract has no similar language. The County also points out that the parties' contract expired subsequent to the date that the new personnel policy and Department handbooks were distributed so the Union had full knowledge of the County's intent to discontinue the "shop use" practice and the Union chose not to bargain the policy or its impact. It submits that the fact that the full ramifications were not explained to the Union does not render ineffective the change in past practice. The County also distinguishes MANITOWOC COUNTY on the basis that MANITOWOC did not have a strong managements rights clause as the County does, so it was not required to bargain the implementation of the new rule as it already had bargained the authority to implement such a rule.

The County respectfully requests that the grievance in this matter be denied in all respects.

DISCUSSION

The first issue for determination is whether the grievance was timely filed. The County asserts that the event giving rise to the grievance occurred on October 8, 1996, when the County passed a resolution prohibiting employes from using County equipment or facilities for personal use. The problem with the October 8, 1996 date is that after October 8, 1996, the Highway Department employes continued to use the highway garage in the same manner as they always have for at least a year, so there was either waiver on the County's part or the resolution did not apply to Highway Department employes. Certainly, the County has the right to pass resolutions dealing with the use of its facilities but it also has a statutory obligation to bargain over the wages, hours and conditions of employment of employes in the bargaining unit. Here, the resolution abrogated a practice of the type which cannot be changed during the term of the agreement without bargaining. Thus, the County's reliance on the October 8, 1996 date is erroneous because the practice continued unabated after that date and the Union was deprived of the right to bargain over the discontinuance of the practice.

The County's arguments relating to the discontinuance of parking at the Parks Department is also not persuasive. As noted in CITY OF EAU CLAIRE, CASE 190, NO. 44089, MA-6164 (CROWLEY, 10/90), wherein the arbitrator stated "the City's practice elsewhere with

respect to not permitting indoor parking cannot be applied to the water treatment plant where it has consistently and regularly permitted indoor parking there for employes' personal vehicles." The reverse being that an employer allowing personal use of a facility does not have to allow it at all other facilities where it has not allowed it in the past.

Therefore, the withdrawal of the grievance in the Parks Department does not establish the event giving rise to the grievance. The event giving rise to the grievance was the Highway Commissioner's issuance of new handbooks prohibiting the practice. Thus, it is concluded that the grievance is timely filed.

Turning to the merits of the case, the County makes an argument that the issue of use of the highway facility is "primarily related" to the direction and management of the County and not to wages, hours and conditions of employment. The County's argument is related to a statutory standard as to whether a subject of bargaining is mandatory or permissive. Generally, past practices which involve a benefit of peculiar personal value to employes such as free coffee, free meals, personal use of radios, assistance in starting cars in cold weather, free indoor parking, and as noted in MANITOWOC COUNTY, CASE 276 (MAWHINNEY, 2/99), use of the Highway Shop by employes after working hours, are primarily related to wages, hours and conditions of employment. Thus, any change must be negotiated and not unilaterally implemented because, on balance, the use of the Highway Shop is primarily related to conditions of employment.

The County relies on the management rights clause which gives it the right to establish work rules and it asserts that it was not required to bargain over the implementation of the rule prohibiting use of County property and facilities which takes precedence over a contrary past practice. Generally, the reasonableness of a work rule may be challenged through the arbitration process. Additionally, while express language in a contract takes precedence over a contrary past practice, the promulgation of a work rule cannot take precedent over a contractual obligation. For example, if the contract allows three people to take vacation at the same time, a work rule limiting vacation usage to only two people at the same time would not be enforceable. Thus, the County's reliance on Management Rights is not absolute. As Arbitrator Mawhinney stated in MANITOWOC, SUPRA:

> For many successive contracts, the parties have agreed that it is not oppressive to continue the existing amenities and practices for the duration of the contract, while it is usually impossible to spell out all the practices under which people work. If the Employer wants to change one of those practices or amenities in effect, it needs to do so at the bargaining table, and not unilaterally during the term of the contract.

In the instant case, it is undisputed that there was a long-standing practice for over 30 years to allow employes use of the County shop to work on personal vehicles after working

hours. This past practice became an implied term of the parties' collective bargaining agreement which could not be abrogated by a work rule during the term of the contract just as an express provision could not be abrogated by a work rule.

There is a well-recognized procedure to change or abrogate a past practice. The repudiation must be timely. In negotiations for the succeeding contract, the Employer must give notice that the practice will no longer be a binding condition of employment. This notice then gives the Union the opportunity to negotiate a provision in the contract to continue the practice.

The County contends that it notified the Union of its intent to discontinue the practice of personal use of the facilities in October, 1997, which resulted in the grievance. It asserts that the Union had a full opportunity to bargain the practice for almost a year. This argument was addressed by Arbitrator Mawhinney in SCHOOL DISTRICT OF MELLEN, CASE 43, NO. 56406, MA-10273 (1/99), wherein she stated:

> Next issue. The District argued that even if there were a binding practice, the Union was put on notice by the processing of this grievance that the District was terminating the practice, and the Union failed to secure language to keep the practice. While it is generally recognized that past practices need not become enshrined and last forever, it is also recognized that the party wishing to end the practice repudiate it before or during negotiations for a successor contract.
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> Arbitrator Richard Mittenthal has been widely quoted on this subject, particularly the following:
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> > "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 . . . 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.
> >
> > "That inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiations of a later 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, the other must have the practice written into the agreement if it is to continue to be binding." Proceedings of the 20th Annual Meeting of NAA, 1, 35-36 (BNA Books, 1967); Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the 14 Annual Meeting of NAA, 30, 56-57 (BNA Books, 1961).

The question is whether there was an effective and/or timely repudiation of the past practice. The quote above from Mittenthal appears to state that a timely repudiation of a past practice must occur during negotiations for the successor agreement. Other arbitrators have indicated that a repudiation of the past practice could take place before such negotiations, or at any time during the agreement, although the practice would be continued for the life of the current agreement.

An effective and/or timely repudiation of a past practice should, at a minimum, put one party firmly on notice that the other party will no longer adhere to the practice in the successor contract, or that it will no longer give its acquiescence to the practice. Further, the repudiation should be given in a manner that places the parties in a position whereby the party wishing to retain the practice knows that it has to bargain to obtain language securing the practice.

That did not happen in this case. While the Union was aware that Hamilton was objecting to the use of unpaid leave by the processing of the grievance, the Union was not clearly on notice that the District was repudiating the past practice and that it should seek to obtain language during negotiations. The Union's grievance committee notified Hamilton on February 11, 1998, that it wanted to initiate Level 2 of the grievance procedure. Hamilton gave a response at Level 2 on February 24, 1998, and the grievance committee appealed it to the Board on March 3, 1998. The Board denied the grievance on March 25, 1998, and the Union notified Hamilton on March 27, 1998, that it was appealing for arbitration. Among other things, the steps of a grievance procedure allow parties to reach an accommodation. So while the contract was being ratified – in February of 1998 – and executed on March 24, 1998, the grievance was still being proceed through the steps. The Board had not even reached its decision until a day after the contract was executed.

More importantly, however, is the fact that the Board was in negotiations during this period of time and knew how personal leave had been administered and knew that it had to bargain for a change, even though the language was arguably in its favor. Thus, the District was well aware that the past practice

> regarding personal leave weakened its position in enforcing restrictions on personal leave. The District was prepared to put money on the table to tighten the personal leave restrictions, but the Union rejected the money. While the District was negotiating hard for these restrictions, it knew that Hamilton and/or the Board was unhappy with the way unpaid leave was being used by some, particularly Wiener. It's (sic) proposal to the Union even tried to restrict the use of personal days in conjunction with days off without pay to extend a vacation (see the last sentence of the proposal).
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> Thus, under the facts and circumstances of this case, the District should have been the party to repudiate the past practice during the negotiations for the successor contract. I find that its handling of Weiner's grievance was insufficient to put the Union on notice that it was repudiating the past practice. The District needed to put the Union squarely on notice and give it the opportunity to bargain to obtain language to secure the past practice. The District's failure to do so means that the practice should remain in effect at least through the current collective bargaining agreement.

In the instant case, the issue was never addressed in negotiations but was left to the grievance and arbitration process. In other words, the parties apparently intended to resolve the issue in grievance arbitration rather than in negotiations. Under these circumstances, the Union could conclude that the County was satisfied that the issue would be resolved in arbitration and it did not have to put forward any proposals; otherwise there would be no need to proceed to arbitration because if it was negotiated, the successor contract would have resolved the grievance. Thus, the County did not timely repudiate the practice so as to allow the Union the opportunity to attempt to negotiate the practice into the language of the parties' collective bargaining agreement.

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

AWARD

The grievance is sustained. The County is ordered to restore the past practice of permitting Highway Department employes to use the Highway Shop to work on their personal vehicles outside work hours.

Dated at Madison, Wisconsin, this 20th day of May, 1999.

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

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