BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, WISCONSIN COUNCIL 40, LOCAL 1558

and

AMERICAN NATIONAL RED CROSS, BLOOD SERVICES, BADGER-HAWKEYE-REGION

Case 31
No. 56728
A-5706

(grievance dispute concerning November 1, 1997 step increases)

Appearances:

Mr. Laurence S. Rodenstein, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Local 1558.

Berry Moorman, P.C., by **Attorney Fred W. Batten**, 600 Woodbridge Place, Detroit, Michigan 48226-4387, appearing on behalf of the Employer.

ARBITRATION AWARD

At the joint request of the parties, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz to hear and decide a grievance dispute concerning whether certain employes are entitled to retroactive wage schedule step advancement effective November 1, 1997. The dispute involves the parties' November 1, 1994 -- October 31, 1997 Agreement (referred to as the Agreement or the 1994-97 Agrement) and the parties' successor agreement tentatively settled on May 8, 1998, and subsequently ratified (referred to as the Tentative Agreement.)

By agreement of the parties, the record was submitted by stipulation. It consisted of a set of documentary exhibits, some of which were identified as joint, but none of which were disputed. Those documents included a time line listing various factual developments giving rise to the dispute and the arbitration. The parties agreed to submit briefs and reply briefs (if desired). They further agreed that "[i]f the arbitrator determines that testimony is necessary, a hearing will be scheduled by the arbitrator. Either party may request a hearing, but the arbitrator shall decide whether testimony is necessary."

After a simultaneous exchange of initial briefs, the Arbitrator received the Employer's reply brief on April 29, 1998. On the same date the Arbitrator was advised that the Union would not be filing a reply brief and that neither party would be requesting an opportunity to submit additional evidence. Accordingly, the record was closed as of that date.

On the basis of the record submitted, the Arbitrator issues the following Award.

ISSUES

The parties did not agree on a statement of the issues. The Union would state the issues as follows:

> 1. Did the Employer violate the collective bargaining agreement when it failed to advance the grievant(s) along the salary schedule pursuant to Appendix A of the 1994-97 Agreement?
>
> 2. If so, what is the appropriate remedy?

The Employer would state the issue as follows:

> Whether the contract negotiations which resulted in the May 8, 1998 Tentative Agreement resolved all issues?

The Arbitrator frames the issues for determination as follows:

> 1. Are Wendy Kluver, and all those similarly situated, entitled to a remedy for the Employer's failure to grant them wage schedule step advancement effective November 1, 1997?
>
> 2. If so, what shall that remedy be?

PORTIONS OF THE 1994-97 AGREEMENT

ARTICLE 8 - GRIEVANCE AND ARBITRATION

The parties agree that grievances are to be resolved as soon as possible and to that end establish this procedure.

8.1 A grievance is defined as any dispute involving the meaning, application or interpretation of the terms and provisions of this Agreement. A grievance shall be submitted to the Employer within ten (10) working days of its occurrence or knowledge thereof or it shall be barred.

. . .

8.5 Time limits set forth in the foregoing steps may be extended by mutual agreement in writing. Failure to abide by such time limits or any extension thereof shall cause the grievance to be barred.

. . .

ARTICLE 20 - COMPENSATION AND CLASSIFICATION

20.0 Employees shall be paid in accordance with Appendix A attached hereto and made a part hereof. Employees hired prior to November 1, 1985 shall receive the compensation step of their classification based upon unit seniority as defined in Article 10 and shall receive an adjustment step each November 1 thereafter based upon unit seniority as defined in Article 10. Employees hired after November 1, 1988 shall receive the starting rate of their classification when hired. Following successful completion of probation, they shall receive the next compensation step of their classification. Upon completion of one year of service, they shall receive an adjustment to the one year step of their classification and, thereafter, shall receive adjustments each November 1 based upon unit seniority as defined in Article 10.

. . .

ARTICLE 34 - NOTICE OF STRIKE OR PICKETING

34.0 The Union recognizes the critical impact of the Employer's operations on the health of the public. Therefore, the Union agrees that it will give notice to the Employer and the Federal Mediation and Conciliation Service

before the employees covered by this Agreement engage in any strike, picketing or other concerted refusal to work as if the Employer were entitled to the protection of Section 8(g) of the National Labor Relations Act, as amended.

This Article shall survive the expiration of this Agreement and shall remain in full force and effect until the occurrence of any of the following:

(a) the execution of a new labor agreement between the parties, or
(b) the written relinquishment by the Union of its representation of the employees covered by this Agreement, or
(c) the issuance of any order by the National Labor Relations Board that has the effect of terminating the Union's representation of the employees represented by this Agreement.

ARTICLE 37 - TERM

37.0 This Agreement shall go into effect as of November 1, 1994 and continue until midnight October 31, 1997 and shall be considered automatically renewed from year-to-year thereafter, unless on or before sixty (60) days prior to the end of the effective period, either party shall serve written notice upon the other that it desires to renegotiate, revise or modify this Agreement subject to the provisions of Article 34 - NOTICE OF STRIKE OR PICKETING. In the event any such notice is served, the parties shall operate temporarily under the terms and provisions of this Agreement until a new Agreement is entered into, at which time such new Agreement shall be effective as the parties may agree.

. . .

[The Agreement's Appendix A consists of three pages of grids respectively entitled "November 1, 1994 Compensation Steps," "November 1, 1995 Compensation Steps," and "November 1, 1996 Compensation Steps. For each classification, a set of increasing rates are provided under column headings of "Hire, Completion of Probation, One Year, Two Year, Three year, Four Year, Five Year, Eight Year and Ten Year."]

PORTIONS OF THE MAY 8, 1998 TENTATIVE AGREEMENT

1) Wages:
- a) Modified Wage Structure implemented effective May 18, 1998.
- b) 1.5% Retro-wage adjustment from November 1, 1997 through May 18, 1998 based on actual earnings.

c) 1.5% effective May 18, 1998 (assuming notification of ratification no later than May 28, 1999).
d) 3% structure increase effective first full pay period after November 1, 1998.
e) 3% structure increase effective first full pay period after November 1, 1999.
f) Employees will receive the greater of the structure increase or 3% on the employee's then existing wage rates (1.5% for May 18, 1998).
g) Employer may continue past practice of hiring at above start rates for reference lab applicants.

. . .

[The Tentative Agreement's attached "Modified Wage Structure" consists of three pages of wage rate grids respectively entitled "Schedule Effective May . . . 1998", "Schedule Effective November 1998," and "Schedule Effective November 1999." For each classification, a set of increasing rates is provided under column headings of "Hire, Probation, YrOne, YrTwo, YrThree, YrFive, YrSeven, YrNine, YrEleven, and YrThirteen."]

BACKGROUND

The Employer is a federally-chartered corporation that provides regional blood services from locations in Madison and Green Bay, Wisconsin. The Union represents the Employer's non-professional personnel at those locations. The Employer and Union have been parties to a series of collective bargaining agreements since November 1, 1988, including the Agreement and the Tentative Agreement.

Grievant Wendy Kluver has been employed by the Employer since July, 1993. At all material times, the Grievant's grade classification has been T2. Grievant Kluver had four years of experience as of November 1, 1997.

As of November 1, 1997, the parties' 1994-97 Agreement had passed its nominal expiration date, but the evergreen clause in Article 37.0 remained in effect. It is undisputed that the Employer did not advance Grievant's wage step placement on November 1, 1997, and did not advance other employes similarly situated, such that those employes' wage rates remained at the rates effective on November 1, 1996.

On May 8, 1998, the parties reached Tentative Agreement on a new contract, which was subject to ratification. That Temporary Agreement provided, in pertinent part, as set forth above.

On May 11, 1998, Grievant and another bargaining unit member met with the Employer's Human Resources Manager, John Ridgely. As described in the undisputed timeline, the employes met with Ridgely "to inquire about 11/01/97 wage adjustments; John Ridgely says no 11/01/97 adjustments, all wage adjustments having been negotiated in new contract."

On May 19, 1998, a Union Steward filed a grievance on behalf of Kluver "and all other employees to whom this grievance applies or affects" asserting that as of May 11, 1998, the date Grievant was "officially notified on,"

> The employer has failed to comply with the appendix A Compensation Steps in effect on 11-1-97, by not advancing the employee's wages from the Three year to the Four Year T-2 Step after October, 1997.
>
> By its action, stated above, Red Cross management has violated Article 37.0 and Appendix A Compensation Steps, and all other sections which may apply of the LABOR AGREEMENT dated and signed on December 14, 1994.
>
> (. . . corrective action desired):
> 1.) Retroactive payment of wages lost from November 1, 1997 through the time a Tentative Agreement for a new contract has been ratified by the union.
>
> 2.) Advancement to the T-2 Four Year Step prior to the ratification of a new contract, ensuring that any wage increase contained in the new contract is based on the T-2 Four Year Step wage from the preceding contract.

Later that same day, the Union held a ratification meeting with its members at the Green Bay location regarding the Tentative Agreement.

On May 21, 1998, Union Representative Larry Rodenstein had a telephone conversation with Ridgely regarding the above grievance. Rodenstein told Ridgely that the "issue would be clarified" at the Madison ratification meeting. After that phone conversation, and also on May 21, 1998, the Union held a ratification meeting at the Madison location regarding the Tentative Agreement, at which the contract was ratified.

On May 26, 1998, in a letter from Ridgely to the Union's Local President, Mary Kay Schimming, the Employer denied the grievance, stating "There was no violation of the contract or change in practice. Your requested settlement of this grievance is respectfully denied."

On May 28, 1998, Local President Schimming orally advised Ridgely that the grievance was dropped.

On June 5, 1998, the Employer made a retroactive 1.5% lump sum payment to all bargaining unit members.

On June 9, 1998, Schimming filed a grievance on behalf of all Local Union employess. It asserts that as of a May 11, 1998 "date of the alleged infraction,"

> The Employer has failed to comply with Appendix A Compensation Steps in effect on November 1, 1997, by not advancing wages for Local 1558 employees that fall into this category [in violation of contract sections] 20.0, 37.0 and any other articles that may apply.
>
> (. . . corrective action desired): Retroactive payment of compensation step wages for affected Local 1558 employees starting November 1, 1997 to present.

On June 12, 1998, Ridgely issued a written first step denial of the June 9 grievance, stating, in pertinent part, "We have not changed our past practice in compensation step adjustments. The grievance is not timely. Your requested settlement is respectfully denied."

On June 22, 1998, the Employer and Union met for a second step meeting concerning the June 9 grievance, after which Ridgely again denied it in writing on the same bases. Schimming then wrote Ridgely on June 23, advised him that the Union found his decision regarding the June 9 grievance

> totally unacceptable. We are therefore appealing this grievance to Arbitration; according to the terms of the labor agreement, Article 8.4.
>
> The Executive Board and the Bargaining Committee disagree with the Employer that this grievance is not timely. As in past, with all the grievances filed, this dispute falls into the correct progression of the contract.
>
> Please contact Larry Rodenstein at AFSCME Council 40 for details regarding the arbitrator.

As noted in the timeline, however, the grievance that the Union attached to its request for WERC grievance arbitration services was the grievance dated May 19, 1998.

Because both the May 19 and June 19 grievances assert the same basic claim, and the Arbitrator has formulated the issue to address that claim regardless of any uncertainty about which of the grievances was intended to be submitted to arbitration.

Additional background information is set forth in the positions of the parties and the discussion, below.

POSITIONS OF THE PARTIES

The Employer's Initial Brief

The grievance in this matter should be denied. The parties never intended in their negotiations for the new agreement that any wage adjustments provided for in the 1994-97 Agreement would be implemented as of November 1, 1997. Rather, the parties' resolved this issue through their new agreement, as specified in the Tentative Agreement. This position is supported by the parties' past practice, the language of the Tentative Agreement, and the conduct of the Union in withdrawing the original grievance. Further, the Union's grievance is untimely since it was filed six months after the November 1, 1997 wage adjustment arguably should have been made. Finally, the Union is estopped from arguing that a wage adjustment should have been made on November 1, 1997, because the Union permitted the contract to be ratified with full knowledge of the Employer's contrary understanding of the Tentative Agreement.

With regard to past practice, the record shows that parties have bargained past the nominal expiration dates of two prior agreements, the 1988-91 and 1993-94 agreements. Both of those agreements contained language providing that wage adjustments shall occur on November 1 of each year and that the parties shall operate temporarily under the terms and provisions of the expired agreement "until a new agreement is entered into, at which time such new agreement shall be effective as the parties may agree." No wage rate changes were in fact implemented on the November 1 date following those contracts' expirations. Rather, whatever wage rate changes were agreed to by the parties in each of those negotiations were implemented retroactive to November 1. Thus, there is a past practice of not automatically making wage rate changes on November 1.

However, unlike the settlements reached after those two agreements expired, in the 1998 Tentative Agreement, there was no agreement to make wage rate adjustments retroactive to November 1, 1997. Rather, the parties agreed that employes would receive a 1.5% lump sum payment based upon wages that had been actually earned between November 1, 1997 and May 18, 1998, and another 1.5% wage increase effective May 18, 1998.

The fact that the Employer made changes to employe benefits after October 31, 1997 and prior to the Tentative Agreement on May 8, 1998, such as crediting employes with annual leave time, personal leave and sick leave, is entirely consistent with the Employer's position and past practice. Employes did not stop accruing benefits after October 31, 1997, just as employes did not stop earning wages after that date. The past practice is that there was no change in the amount of wages and/or accruals after October 31, 1997, or after other contracts expired, pending negotiations.

In the negotiations which resulted in the 1998 Tentative Agreement, the parties addressed wage changes in a very special way. They agreed that the timing of compensation step increases would change, i.e., there would be fewer compensation steps than there had been in prior collective bargaining agreements. They also agreed that the wage adjustment for the period from November 1, 1997 through May 18, 1998 was a retroactive lump sum payment.

The Union's argument that the Employer is obligated to make wage adjustments as of November 1, 1997 is flawed because the Tentative Agreement specifies a benefit based upon "actual earnings" from November 1, 1997 through May 18, 1998. "Actual earnings" was a specific reference to wages that employes had earned at the time the agreement was entered into, not a to-be-calculated wage rate. If any group of employes was to have some increased benefit going back to November 1, 1997, that increased benefit would have been identified in the Tentative Agreement.

With regard to the Union's conduct, Grievant Kluver knew the Employer's position on the retroactive November 1, 1997 wage adjustment as early as May 11, 1998. A grievance was filed on May 19, 1998, and the Employer and Union discussed the issue on May 21, 1998, prior to the ratification meeting in Madison. After the Union completed its ratification process, the Union dropped the grievance on May, 28, 1998. Especially in those circumstances, the May 19 grievance, as it relates to wage adjustments that arguably should have taken place back on November 1, 1997, is untimely under the terms of the Agreement.

The June 9 grievance is even more untimely. It was filed not only more than ten working days after Grievant and another unit employe were told of the Employer's position on May 11, 1998, but also more than ten working days after the May 19 grievance asserting the same claim was dropped. Timeliness is important not as a technical defense, but because the Union, through its conduct in connection with ratification of the contract and in dropping the original grievance, communicated its agreement that there was no November 1, 1997 wage adjustment.

The Tentative Agreement was negotiated so as to insure that all unit employes received a benefit for having worked without a wage increase after October 31, 1997. This was an across the board lump sum payment based upon what employes had earned from November, 1997 to May, 1998. Effective May 18, 1998, and according to the Tentative Agreement, all

unit employes received the greater of the new wage rate structure or 1.5% to be added onto their "then existing wage rate." The Union did not misunderstand the Tentative Agreement. Rather, it understood the Employer's interpretation at the time that the Madison employes ratified the Agreement and, thereafter, dropped the grievance.
Therefore, the grievance must be denied.

The Union's Brief

The grievance in this matter should be sustained.

The 1994-97 Agreement, like the parties' prior agreements, has an evergreen clause, i.e., the parties shall operate under the terms of the expired agreement until a new agreement is entered into.

The 1997-98 negotiations were the longest and most difficult negotiations in which the parties participated. Several newspapers, radio and television media outlets reported that the State AFL-CIO proposed to boycott donations to the blood supply if a satisfactory result was not achieved in the negotiations. Finally, without implementing this boycott, the parties reached a Tentative Agreement in May of 1998.

When the parties entered into their Tentative Agreement, a new wage rate schedule was negotiated which provided for different annual step increases from the 1994-97 Agreement. This new schedule was effective May 18, 1998.

Subsequent to the ratification process, the Union learned that the Employer was denying eligible employes their annual step movement (effective November 1 of each year). It is undisputed that wage step progression has historically occurred only once a year (not on the employe's anniversary date) on November 1, the first day of each new contract year. On occasions in the past, those step increases have been paid retroactively. Thus, the practice of granting eligible employes wage rate step advancement retroactive to November 1 is a well accepted past practice reasonably relied upon by the parties. The central difference in the instant situation is that the negotiations were not concluded this time until May of the following year. However, there was no dispute about the retroactivity of the November 1, 1997 step increase raised at the bargaining table.

Although the Employer has failed to pay employes their step rate increases on November 1, 1997, it has recognized the Agreement's evergreen clause in other areas. For example, the Employer advanced Grievant annual leave and personal leave between December of 1997 and January of 1998. This demonstrates that the Employer recognizes the authority of the Agreement's evergreen clause and the Employer's obligation to comply with it. Moreover, the Employer has granted other unit employes similar non-wage benefits during this same period preceding the settlement in May of 1998.

Arbitral and judicial opinion supports the proposition that contract terms function during a hiatus unless an explicit waiver or clear negation is acknowledged. Citing, CITY OF CANTON, OHIO, 105 LA 141 (LALKA, 1995)(City's failure to pay step increases during contract hiatus held improper) and NOLDE BROTHERS, INC. v. BAKERY WORKERS, 430 U.S. 243, 94 LRRM 2753 (1977)(grievance initiated after contract expiration regarding denial of contractual severance pay benefits held arbitrable). Contracts are living documents which do not go into hibernation during periods of negotiations, especially where a contract includes an evergreen provision. Citing, INTERNATIONAL PAPER, 101 LA 278 (DUFF, 1993); CITY OF CLEVELAND, 103 LA 534 (MILLER, 1994) (employe hired during hiatus under 90 day probationary period and fired during fourth month of employment held protected by just cause notwithstanding successor agreement change to 120 day probationary period); RYAN-WALSH STEVEDORING, 89 LA 831 (BARONI, 1987) (employer required to pay for hiatus work at expired contract rates rather than lower rates in new contract.)

In this case, the record is devoid of any clear negation to a continuation of the Agreement's terms. The evergreen clause serves to maintain and incorporate the terms of the Agreement into and throughout the period of negotiation, which occurred after the Agreement's expiration, until a successor is incorporated. The Tentative Agreement's new schedule does not obviate the Employer's obligation to advance eligible individuals on the 1994-97 schedule retroactive to November 1, 1997. The Agreement's evergreen clause creates a presumption for the maintenance of the status quo, i.e., that the Employer provide for annual step increases on November 1 of each year. There has been a clear and longstanding past practice that has been relied upon for annual step movement. There is no waiver, either explicit or implicit, of this past practice within the record.

The parties' evergreen clause can only be terminated if the Union notifies the Employer of its intent to strike and/or picket (Article 34). Since no such notice was provided, and since there is no evidence that this clause was terminated, the Employer is obligated to provide step movement in the same manner that it provides new annual vacation accruals. The Employer is attempting to deny step movement following nominal contract expiration despite the parties' having agreed to it in the Agreement.

In conclusion, Grievant, and all other affected eligible employes, are entitled to receive their annual step movement, effective November 1, 1997. The Employer's position would eliminates a right conferred by the terms of the Agreement. Therefore, the grievance should be sustained and all eligible employes should be advanced, pursuant to the terms of the Agreement's Appendix A, effective November 1, 1997.

Employer's Reply Brief

The Union's representation that "there was no dispute about the retroactivity of the November 1, step increase raised at the bargaining table" is not fully accurate. During bargaining, the Employer did not propose, and the Union did not request, any step increase

retroactive to November 1, 1997. The evergreen clause must not make the retroactive step increase automatic. If it had been automatic, such an increase would have been made in November of 1997 or the Union would have grieved it in November of 1997. Although both parties must plead guilty to not having specifically addressed this retroactivity issue, it is clear that the parties addressed this in paragraph 1(b) of the Tentative Agreement and that the 1994-97 Agreement provides that the "new agreement shall be effective as the parties may agree" (Agreement, Article 37).

The absence of any reference in the Tentative Agreement to an agreement on retroactive November 1, 1997 step increase speaks volumes, particularly in light of the Union's pre-ratification knowledge of the Employer's interpretation of the Tentative Agreement and the Union's withdrawal of the first grievance.

Contrary to the Union's argument, it is not true that the Union first learned that the Employer was denying the November 1, 1997 step increases after the Union's ratification of the Tentative Agreement. At least two affected employes discussed this issue with management on May 11, 1998, and were told of the Employer's position on that date. The first grievance was filed on May 19, 1998. The unit employes, and presumably the Union, had known since November of 1997 that no adjustment to compensation had been made. The Union's spokesperson and the Employer's Human Resources Manager talked about the grievance on May 23 before the Madison ratification meeting and the Employer was assured that the issue would be clarified at that meeting. After ratification, the grievance was withdrawn.

The authorities cited in the Union's brief do not resolve the issue before the Arbitrator. The Employer does not disagree that had there been no new agreement, then the November 1, 1997 adjustments would have been required. But for past practice, and perhaps notwithstanding past practice, the Union could have insisted that these adjustments are required. However, in May, 1998, the parties negotiated a new agreement altering the Appendix A Compensation Steps. Retroactive wage adjustments were negotiated based on "actual earnings" from November 1, 1997 to May 18, 1998. New wage rates were based upon where employes fit on the grid negotiated as of May 18, 1998. All issues were wrapped up in those negotiations.

The real issue in this case is whether the parties did not in fact intend to address all wage issues/step increases occurring after October 31, 1997. The issue of retroactivity and pay changes from November 1, 1997 through the ratification of the new contract was addressed by the parties in agreeing to have a retroactive wage adjustment for all employes. The grievance is not only untimely, but it also seeks to negotiate a benefit not secured at the bargaining table.

DISCUSSION

Reading the 1994-97 Agreement alone supports the Union's claim in this case. That Agreement contains an evergreen clause which continues in effect the Appendix A wage rate schedule providing for step increases for eligible employes and the language of Art. 20 providing that “employees. . . shall receive an adjustment step each November 1 [thereafter] based upon unit seniority. . . ."

However, the Agreement evergreen clause provides only that "the parties shall operate temporarily under the terms and provisions of [the 1994-97] Agreement until a new Agreement is entered into, at which time such new Agreement shall be effective as the parties may agree." (Emphasis added).

The parties' Tentative Agreement reached on May 8, 1998, provides that a modified wage structure would be "implemented effective May 18, 1998." The three attached wage schedules are respectively entitled "Schedule Effective May . . . 1998", "Schedule Effective November 1998," and "Schedule Effective November 1999." The Tentative Agreement specifically addresses retroactive pay by providing for a "1.5% Retro-wage adjustment from November 1, 1997 through May 18, 1998 based on actual earnings."

The parties' use of the term "actual" in the Tentative Agreement language quoted above seems at least consistent with an intention to include only earnings that were in fact received during the "November 1, 1997 through May 18, 1998" period, and to exclude earnings (such as step increases) that arguably should have been received during that period but were not.

More importantly, the parties' express inclusion of Tentative Agreement language addressing the subject of retroactive wages payable under the settlement provides a strong indication that they intended to exclude any other form of retroactive wage payments that would otherwise have been payable.

Especially so where, as of the time the parties entered into the Tentative Agreement: the 1994-97 Agreement wage and evergreen clause provisions on their face required the Employer to have made such payments effective on November 1, 1997; the Employer had not, in fact, made any such payments; the affected employes knew from their paychecks that they had not received any such payments; no grievance challenging that nonpayment had been filed; and Secs. 8.1 and 8.5 of the 1994-97 Agreement would, at least on their face, have time barred any such grievance at least to the extent of limiting retroactive relief to the 10 working days prior to the date on which such a grievance was filed.

The parties' history of not implementing November 1 step increases until after reaching agreement on a successor contract does not persuasively support a different interpretation of the Tentative Agreement. The record shows that, notwithstanding the evergreen clause, the parties' have historically not automatically made any wage rate changes on November 1 when

negotiations for a new agreement continued beyond that date. Instead, it appears that on the two such occasions of record, the parties waited until the successors to the 1988-91 and 1993-94 agreements were settled, and then the parties implemented whatever retroactive changes were provided for in the new agreements. However, unlike the 1994-97 Agreement, the May 8, 1998 Tentative Agreement did not include a wage schedule effective on the preceding November 1. Rather, the only Tentative Agreement provision concerning retroactive wage adjustments provides for a 1.5% retro-wage adjustment for all employes covering the retroactive period, and the initial Tentative Agreement wage rate schedule takes effect in May of 1998.

Thus, it appears that the retroactive wages paid following expiration of the 1988-91 and 1993-94 agreements were paid pursuant to and in accordance with the terms of the new contracts reached between the parties at those times, and not on the strength of the evergreen clause in the expired agreements involved. In the instant case, the new contract reached is materially different from the 1994-97 Agreement, warranting the materially different retroactive payments made by the Employer in this case.

The Union's conduct also supports the Employer's position in this case. It is not clear whether the Union knew at the time it agreed to the Tentative Agreement language on May 8, 1998 that the Grievant and others similarly situated had not in fact received step increases on and after November 1, 1997. However, it is clear that the Union was aware of that fact before the Union completed its membership ratification process. Specifically, Grievant and another bargaining unit member met with Ridgely on May 11, 1998, inquired about November 1, 1997 wage adjustments, and were told that the Employer took the position that there would be "no 11/01/97 adjustments, all wage adjustments having been negotiated in the new contract." After the Union filed a grievance on the subject on May 19, 1998, Union representative Larry Rodenstein had a telephone conversation with Ridgely regarding that grievance during which Rodenstein told Ridgely that the issue would be clarified at the Madison ratification meeting scheduled for later that day. It is undisputed that after Ridgely denied the grievance by letter to Union Local President Schimming on May 26, 1998, Schimming orally advised Ridgely on May 28, 1998 that the grievance was dropped. Only after the Employer made retroactive payments on June 5, 1998 in accordance with its previously-stated understanding of the retroactive pay requirements of the new agreement, did Schimming file the June 9 grievance reasserting the claim that the affected employes were also entitled to retroactive step increases as of November 1, 1997.

In those circumstances, the Union, by its conduct, confirmed that the Union shared the Employer's previously-stated position that the new agreement limited the Employer's retroactive pay obligations to payments that did not include retroactive step increases for eligible employes effective November 1, 1997. It was reasonable for the Employer to rely on the Union's above-described conduct as indications that the Union shared the Employer's previously-stated understanding that the new agreement relieved the Employer of any obligation to pay the retroactive step increases at issue in this case. After having benefited from the Employer's implementation in reliance on the Union's conduct, the Union cannot now be permitted to reassert and prevail on a different interpretation of the new agreement.

The Arbitrator therefore concludes that the Employer's Agreement evergreen clause obligation to pay step increases effective November 1, 1997 was negated by the terms of the Tentative Agreement and by the Union's conduct described above.

The authorities cited by the Union do not persuasively support a contrary conclusion. In CITY OF CANTON, the arbitrator noted that the employer had expressly assured the Union at the bargaining table that employes would not lose any benefits under the new agreement, and in RYAN-WALSH STEVEDORING, the arbitrator noted that the employer had expressly assured the employes at the shape up that the work they were being asked to perform would be paid at the (higher) old contract rates; in this case there is no evidence that the employer gave any such assurances. In INTERNATIONAL PAPER, the arbitrator upheld the employer's retroactive application of concessions contained in the new agreement, rejecting the union's argument that the employer had waived its right to do so by maintaining the status quo during the hiatus. In CITY OF CLEVELAND, the new agreement duration clause made it "effective upon ratification" except for items (not including the probationary period change) that were expressly given retroactive effect; in this case paragraph 1(b) of the Tentative Agreement expressly provides for retroactive wage adjustments in the form of specified payments to all employes. In NOLDE BROTHERS, the Employer had refused to arbitrate a dispute about severance pay benefit provisions of the expired agreement where there was no successor agreement; in the instant case the Employer has not refused to arbitrate, and there is a successor agreement specifically addressing the subject of retroactive wage adjustments.

For those reasons, the Arbitrator concludes that Wendy Kluver, and all those similarly situated, are not entitled to retroactive wage rate schedule step advancement effective November 1, 1997.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the Issues noted above that

> Wendy Kluver, and all those similarly situated, are not entitled to a remedy for the Employer's failure to grant them retroactive wage rate schedule step advancement effective November 1, 1997.

Dated at Shorewood, Wisconsin, this 2nd day of July, 1999.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

MLG/ans
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