BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LACROSSE CITY EMPLOYEES UNION
LOCAL 180, SEIU, AFL-CIO, CLC

and

CITY OF LACROSSE

Case 292
No. 56541
MA-10315

(Grievance of Steven Reget)

Appearances:

Davis, Birnbaum, Marcou, Seymour and Colgan, LLP, Attorneys at Law, by **Mr. James G. Birnbaum**, on behalf of LaCrosse City Employees Union Local 180, SEIU, AFL-CIO, CLC.

Mr. Peter B. Kisken, Deputy City Attorney, on behalf of the City of LaCrosse.

ARBITRATION AWARD

LaCrosse City Employees Union Local 180, SEIU, AFL-CIO, CLC, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of LaCrosse, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on September 11, 1998 and February 11, 1999, in LaCrosse, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by April 16, 1999. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues, but could not agree on a statement of the substantive issues and agreed the Arbitrator would frame the issues to be decided.

The Union would state the issues as follows:

> Did the City violate the Collective Bargaining Agreement and past practice when it failed to pay the Grievant, a Highway Department employe, for the time between his home and the shop after he was recalled for emergency work? If so, what is the appropriate remedy?

The City proposed the following issues:

> Did the City of LaCrosse violate the specific terms of the 1998-1999 Collective Bargaining Agreement by failing to compensate the Grievant when he was called into work from the time the Grievant received the telephone call at home to the time he arrived at work on March 9, 1998? If so, what is the remedy?

The issues to be decided may be stated as follows:

> Did the City violate the parties' Collective Bargaining Agreement when it failed to pay the Grievant from the time he received the call to come in to work to the time he arrived at work on March 9, 1998? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement have been cited:

ARTICLE 2
GRIEVANCE PROCEDURE

> Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:
>
> . . .
>
> The arbitrator shall not add to, or subtract from the terms of this agreement.

. . .

ARTICLE 10
WAGES AND SALARY SCHEDULE

A. Wages and Salary Schedule

The salaries of employees for calendar year 1998 shall be set out on Schedule "A" attached hereto and made a part of this agreement. Schedule "A" represents a general wage adjustment in the hourly rate of 3.0%. Salaries for 1999 shall be set out on Schedule "B" attached hereto and made a part of this Agreement. Schedule "B" represents a general wage adjustment in the hourly rate of 3.0% over Schedule "A". For purposes of implementation the salaries will be effective the first complete pay period in January as applicable.

. . .

ARTICLE 19
RESERVATION OF RIGHTS

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

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

. . .

ARTICLE 25
AMENDMENT PROVISION

This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union

wherein mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

. . .

ARTICLE 28
ENTIRE AGREEMENT

The following constitutes an Entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

BACKGROUND

The Union represents employes of the City's various departments, including the Streets Department. For the past two years, Randy Hinze has been the Streets Superintendent and Rolland Grosskoph has been the Assistant Streets Superintendent. Hinze was Assistant Superintendent for one year before becoming Superintendent and for twelve years before that was in the bargaining unit in the Streets Department. Grosskoph was in the bargaining unit before becoming Assistant Superintendent and for twenty-two years was responsible for keeping the time records in Streets.

Prior to Hinze becoming Streets Superintendent, the position was held by Dick Smith for approximately six years. Before Smith, the Streets Superintendent position was held by Donald Gehrig from 1977 to 1990. Before that, Gehrig had been in Streets for fourteen years (1956-1970) as Time Clerk, Assistant Superintendent for three years, and back in the bargaining unit until he left in 1970. Before Gehrig, Ambrose Marco had been Streets Superintendent.

The Grievant, Steven Reget, has been employed by the City for over twenty-three years in the Streets Department and currently holds the position of Equipment Operator IV. The Grievant's regular shift is 7:30 a.m. to 3:30 p.m. and at times he is called in to work outside of his regular hours. On March 9, 1998, the Grievant was called in to work early and on his time sheet for that day he counted as time worked from the time he received the call to come in early, rather than from the time he arrived at work – an approximately 25-30 minutes difference. The Grievant filled out his time sheet for that day showing 1 ¾ hours of compensatory time worked (9 ¾ total hours) while his punch card showed 9 ¼ hours total. The Grievant was only paid for the 9 ¼ hours.

When employes report to work they ordinarily punch in on a time clock and punch out when they leave. Employes also fill out a time sheet at the end of each day that states the time worked on different tasks and equipment and the total hours worked that day. When employes are called in to work outside their regular hours they at times do not punch in because they go directly to the worksite or are in a hurry to get their equipment ready and start working. Again, the employe's time will still be indicated on his/her time sheet. The Assistant Superintendent collects the time sheets each day and reviews them for such things as "out of rate" pay, the hours, and the equipment operated, and then leaves them for the Account Clerk (the timekeeper) to review and place the data in the computer. The current Account Clerk is Michael LaFleur (who replaced Grosskoph) and he is responsible for billing the time, timekeeping, payroll, etc. LaFleur testified that he normally does not review the employes' punch cards or compare them with the time sheets, and has no way of knowing if the hours stated on the time sheet were actually worked or included time, as in the Grievant's case, from when he first received the call to report to work early.

There is a considerable dispute as to what, if any, practice there has been as far as from what point in time an employe is paid when he is called in to work outside of his regular hours. The Grievant and other employes testified that they have always counted their time from when they received the call to come in to work. Others testified that the time starts when the employe reports to work/punches in. The Grievant testified that he has always used the time he receives the call as his "start" time and that he was told to do so by his supervisor, who was either Smith or Gehrig at the time, and has never been told it was wrong until now. The Grievant also testified that the time is twenty to thirty minutes maximum. While he is aware of what some of the other employes do in this regard, he cannot say specifically who does or does not claim the time or what percentage of the employes claim the time.

Gehrig testified for the City that he was not aware of anyone claiming time from the time they were called and that employes were paid from the time they reported to work. Gehrig testified he never told the Grievant, or any other employes, to claim that time. Gehrig testified he reviewed the employes' time sheets every morning, but rarely reviewed their punch cards, and that he would sit down with employes after plowing to straighten out any discrepancies.

Both Hinze and Grosskoph testified that when they were called in for emergencies, they claimed the time from when they punched in. Grosskoph testified he has never heard of a policy of paying from when one receives the call to report to work in all his years in the Department and that no employe ever asked him about it during the 22 years he was timekeeper. Hinze testified that the policy is that an employe is paid from when he punches in and that there is no practice of paying from when the call is received. A number of others testified that they had only claimed time from the time they reported to work or punched in and never from when they received the call to come in early.

The Grievant also testified that in early 1997, he was called in to plow and on his time sheet he claimed time from the time he was called. A few days later, he checked his punch card and found that the time on his punch card was a half hour less than what he had submitted on his time sheet. He testified that he asked LaFleur who had changed it and was told that Hinze had. When the Grievant asked Hinze why he had changed the time, Hinze told him there was a difference between the his punch card and his time slip. The Grievant testified he then told Hinze he had always been paid for that time and was told by Hinze he would look into it, and that later he was paid for the time. LaFleur testified that in late 1996 or early 1997, Hinze questioned the Grievant's time sheet because his hours were somewhat higher than everyone else had for the day. LaFleur then checked the Grievant's punch card and noted that there was a half hour difference from the latter's time sheet. LaFleur testified Hinze told him not to pay the Grievant for the time as he wanted to check on it. Later, when the payroll needed to be submitted, LaFleur asked Hinze what he should do about the Grievant's time and, according to LaFleur, Hinze told him to just pay it. Hinze testified that while it is possible such a discussion with the Grievant did occur, he does not recall such a conversation and does not believe it occurred.

The Grievant grieved the City's refusal to pay him from the time he received the call to come in early on March 9, 1998. The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that this case involves a past practice regarding the payroll practices in the City's Streets Department for Street employes who are called in to perform unscheduled emergency work. In that regard, it asserts that past practices are as much a part of the collective bargaining process as the express language of the contract. STEELWORKERS V. WARRIOR AND GULF NAVIGATION CO., 80 S.Ct. 1347, 1351-1352 (1960). To establish a past practice, it must be demonstrated that it is bilateral, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a long period of time. Elkouri and Elkouri, Fifth Edition, at p. 632-633. In this case, the record establishes that the practice at issue was bilateral (originated by Supervisor Marco, and acted upon by unit members), unequivocal (no ambiguity as to the practice), clearly enunciated and acted upon (by at least six separate employes), and readily ascertainable over a long period of time.

The Union asserts that both the Agreement and past practice requires the City to compensate the Grievant for the claimed time in this case. The Agreement specifically requires the City to pay employes the established hourly rates for the time they are performing duties for the City. Article X, Section A. The issue in this case is when the clock starts with

regard to calculating the amount of time for which the employe is to be paid. As the contract is silent on the issue of when the clock starts, it is appropriate to consider and review the practices of the City regarding its Street employes. In this case, the Grievant and numerous members of the bargaining unit testified that Superintendent Marco and Assistant Superintendent Smith, persons who occupied the position of either Assistant Superintendent or Superintendent for approximately 15 years, specifically informed employes that they should claim the time from the time they are called at home until they otherwise complete their assigned duties. (Testimony of Reget, Iverson, Thrower, Sieber, Tauscher and Theisen.) The City offered no countervailing testimony to the direct statements made by these supervisors. Statements by supervisors who were never called as witnesses constitute admissions against interest and here are uncontroverted. The only former Superintendent or Assistant Superintendent called as a witness was Gehrig. While he denied the existence of any such practice, the City's own documents and uncontroverted testimony of the Union witnesses make his testimony incredible.

The Union also asserts that the City's own records establish the practice. The practice for the City was for employes to submit both handwritten time slips as well as punch cards. The uncontroverted testimony is that these time cards were regularly reviewed by supervisors for discrepancies. Despite this careful review, not until the Grievant in this case was any City employe who ever claimed that time ever denied pay for it when they were called in.

The City also had specific knowledge of the practice, which is also established by the actions of the current Superintendent, Randy Hinze. It is uncontroverted that on March 13, 1997, the Grievant claimed time from when he was called at home to when he otherwise completed his duties and submitted a time slip and time card. Those records and the records of a similarly-situated employe, Amundson, were specifically reviewed by Hinze, who questioned whether or not the Grievant should be paid for that time and he was specifically informed of the practice. Hinze thereafter specifically authorized and approved payment to the Grievant. Further, after the first day of hearing, the parties submitted affidavits concerning City payroll records and practices. The City submitted an affidavit of Randy Hinze challenging some of the statements and information contained in the Union's affidavit of Mike LaFleur, requiring a second day of hearing. While the Union produced every witness who testified and was subject to cross-examination concerning the information contained in Union Exhibit 4 (the affidavit of Mike LaFleur and attached time records), the City failed to call Hinze to support his affidavit. Accordingly, his affidavit is hearsay and not admissible. Thus, the record is uncontroverted that despite his specific knowledge of the records, a specific conversation with the Grievant, and a specific conversation with LaFleur, Hinze nonetheless specifically authorized payment for the time. It is incredible for Hinze to now testify he was unaware of the practice.

The argument that the practice was never published in the Agreement or posted on a bulletin board is irrelevant, as it is not required that policies or practices be written. The fact that a practice was not memorialized in writing, does not in any way refute the existence of the practice.

The argument that there were some bargaining unit members who were not aware of the practice is also not relevant or persuasive. To establish the existence of a past practice, it is not necessary for the Union to prove that every member of the unit was familiar with the practice. Knowledge is only required that is attributable to the employer. Further, numerous employes in Streets testified as to their specific knowledge of the practice. Thus, it was not a practice that was individual to the Grievant, but covered a significant number of employes in the Department over the years.

Finally, while there is nothing inappropriate in the City's desire to alter or modify a practice, the mechanism for doing so is to address those issues in bargaining. Here, the City is attempting to get a "freebie". The Arbitrator would do a great disservice to the parties and the collective bargaining process by rewarding the City's efforts to avoid its collective bargaining obligations.

In its reply brief, the Union first asserts that it does not recall that at any point during the hearing was the affidavit or Hinze either marked or introduced as an exhibit. To the extent the City's brief constitutes a post-record attempt to introduce that document, the Union objects on the grounds that it is hearsay. Despite every opportunity to do so, the City chose not to recall Hinze to testify about the content of the affidavit and therefore it is clearly hearsay and inadmissible or should be given no weight whatsoever. The Union agrees that there is no specific contract language which specifically states that employes should be paid from the time they are called at home until they otherwise complete their duties. Likewise, there is no specific language in the Agreement which defines the time at which the clock starts to run. Thus, this is precisely the situation where, given the ambiguity in the language, it is necessary to rely upon the past practices to determine how employes have been paid in the past.

While the City attempts to gloss over the uncontroverted testimony regarding statements by its own agents as to the existence of the policy, no less than five employes testified as to being informed specifically of the practice by various supervisors. While the City argued that LaFleur was unaware of the practice, his uncontroverted testimony is that in 1997 when the Grievant brought the practice to the attention of Hinze, after specifically reviewing and questioning the Grievant's request, Hinze told LaFleur that in fact the Grievant should be paid for that time. This is not a case of an isolated employe engaging in maverick behavior; rather, it is a clearly articulated standard originating from at least four of the City's own superintendents.

The record also establishes that employes relied upon, and acted upon the directions of their supervisors in claiming the time. The Grievant, Theisen, Tauscher, Sieber, Iverson and Thrower all testified without contradiction that they had routinely and regularly claimed such time over the years. Similarly, it is undisputed that at all times, other than the circumstances here, no employe was ever denied payment for the time from the time of the phone call at home until they completed their duties. Employes were aware of and availed themselves of this practice for many years. It was a consistent practice for those who were aware of it, and who were instructed to claim the time as such. The City's own records establish the existence of the practice. It is undisputed that the Superintendents have regularly, routinely and carefully reviewed the time records of employes. The fact that it is uncontested that each of the Union's witnesses who testified has received payment for the disputed time following the submission of time records to the City, charges the City with knowledge of the existence of the practice.

The City argues that for the Union to prove its case, it would have to call each employe and establish that each was aware of the practice in order to prevail. However, the City offers no authority for such a "grandiose burden of proof". Simply because two retired employes were not aware of the practice, in no way takes away from the fact that seven employes were aware of the practice and availed themselves of it. The Union agrees that the practice ought to have been extended to all employes and asserts that why the supervisors only informed certain employes of the practice is unexplained and it is unfair. However, the unfairness and negligence of supervisors to equitably disclose the existence of the practice should in no way deny the Grievant his entitlement to payment under the practice of which he was informed, and under which he had previously been paid. It is not the Union's duty or obligation to monitor the individual payroll requests of each individual employe. The only way the Union becomes aware of the existence of a concern or dispute is when an individual brings it to the Union's attention. In contrast, the City's supervisors, as part of their assigned responsibilities, regularly and scrupulously review and question time card submissions. The City should not be rewarded for its own negligence.

Finally, the City's argument that review of the time records by LaFleur only uncovered three examples in the past of where the practice was engaged in is irrelevant. It is uncontroverted that the Grievant and other employes did not make a claim for the time from when they were called at home each time they were called in. Rather, the practice at issue here is those occasions when the employe does make the claim. Second, it is not frequent that employes are called out on emergency work. Hence, the number of instances in which the practice was engaged in would not be a substantial number. Moreover, the review of the time records by LaFleur only went back six years, while witnesses indicated that the practice has been ongoing for over the past 20 years. The practice at issue, is that in the Streets Department, when employes make claims for the time from when they are called until the time

they are otherwise finished with their duties, they are paid, and the City has failed to offer one example where an employe who made such a claim was denied payment. Thus, the Union has presented a "virtually unchallenged" record of the existence of a past practice which is clear and consistent with regard to those who have claimed the time and were paid for it. The City was fully aware of the existence of the practice and specifically affirmed it with the Grievant approximately a year before the instant grievance arose. Thus, the grievance should be granted.

City

The City asserts that the grievance should be denied because the facts indicate that the Agreement does not provide for "travel time pay" and the testimony presented does not establish a past practice of paying Street employes such pay.

The clear language of the Agreement does not support the Union's argument that the Grievant should be paid from the time he is called at home for after-shift work, rather than the time he arrives at the shop. The City cites as relevant provisions of the Agreement the provision that the Arbitrator should not add to, or subtract from, the terms of this Agreement in Article II – Grievance Procedure; Article XIX – Reservation of Rights; Article XXV – Amendment Provision; and Article XXVIII – Entire Agreement. Nothing in the Agreement indicates that Street employes are to be paid from the time they receive a phone call at home to report for emergency work. While past practice is frequently used to establish the intent of ambiguous contract provisions, it is not ordinarily used to give meaning to a provision that is clear and unambiguous. PHELPS-DODGE COPPER PRODUCTS CORPORATION, 16 LA 229, 233 (1951). Here, the language is clear and explicit and the grievance should be denied.

The testimony does not support the Union's contention that there is a past practice of paying Street employes in the manner asserted. The City cites arbitral authority as to the requirements for establishing a past practice and asserts that a party relying on past practice to prove its case must establish the existence of the claimed practice by "strong proof". Thus, to prevail in this case, the Union must demonstrate strong proof of a clear, consistent, long-standing and mutual practice of paying Street employes in the manner asserted. The Union has failed to do so. The Grievant, like most of the Union witnesses, was unable to document which, if any, Street Department Superintendent told him to claim this extra time. He simply recalls that "no supervisor ever said it was wrong". He is similarly vague as to whether other employes in the Department claim the travel time, but is aware that there is no written policy providing for such. The next Union witness, LaFleur, is the current Account Clerk in the Street Department, and is in charge of payroll. He testified that in the eight years he has worked as a driver in the Department, he never claimed "travel time" and is not aware of the

practice of paying for such time. Further, no Street superintendent ever indicated to him that there is such a policy or practice and he testified that if he thought he was entitled to the pay, he would have claimed it.

LaFleur's testimony is significant. He was directed by the Union to review all of the payroll records of its witnesses from 1993 to present in order to find all of the instances in which an employe claimed, and was paid for such travel time. Out of the thousands of time cards he reviewed, LaFleur found only four instances in which an employe was compensated in the manner asserted. Of these, Theisen admitted on cross-examination that the Union was in error regarding his claimed travel time and the other three instances were convincingly dismissed by Hinze's rebuttal affidavit.

Union witness Thrower testified that former Superintendent Gehrig told him to claim time from the time he was called at home, however, Gehrig unequivocally testified that employes were paid from the time they arrived at the shop and not when they were called at home. He further testified there was no policy or practice of paying employes from the time they were called and that he was never aware it was done and had never heard of it being done. If anyone would have known about this issue, it would be Gehrig, as he was employed by the Street Department in a variety of positions from 1956 through 1970, and as Superintendent from 1977 through 1990.

Union witness Tauscher testified that he claimed the time from the time he was called, but that no one had instructed him to do this. Rather, he thought that "everyone" did it, but testified he never talked to any other drivers or supervisors regarding the matter. Union witness Iverson also testified he thought all the other drivers were claiming this pay, and that he did not know of anyone who was not claiming such pay, even though he conceded that no Street superintendent had ever told him to do so. His testimony is not supported by the study done by LaFleur, or by the relatively small number of Union witnesses called to testify in this case. If every driver in the Department was claiming this pay, why did not every driver testify in that regard? The claimed past practice is, in reality, a "bog of contradictions, fragments, doubts and one-sided views."

A practice provides no guide where evidence regarding its nature and duration is highly contradictory. The bulk of the Union's testimony consists of mere general statements without reference to specific names or dates. Where names have been mentioned, those individuals, even though available, were not called by the Union. It is well established that a past practice may not be established by mere general statements without references to names or dates. In contrast, the City's witnesses presented testimony that was clear, credible and concise. Gehrig, a former Superintendent, testified that all employes were paid from the time they reported at the shop, rather than when they were called at home. Retired Streets employe Athnos testified that he worked in the Department for 28 years and was often called in after his

shift to plow or sand, but that his time started when he arrived at the shop, not when he was called at home. No Streets superintendent had ever indicated to him that he was to claim the time from when he was called at home during his lengthy employment with the Department. Retired Streets employe Bartz testified that he had worked in Streets for over 11 years and was called in after his shift to plow or sand, and that it was his clear understanding that his time started when he arrived at the shop, not when he was called at home, and that there was no practice of commencing time from the time of the call. Bartz testified he was not aware of other employes who claimed this extra time, and that if others did claim such time, he would have known of it based on his conversations with employes. The testimony of Gehrig, Athnos and Bartz is particularly credible in that these are retired employes who do not have any special allegiance to the City.

Another City witness, Grosskoph, has been in the Streets Department for 27 years during which period he drove, kept time records for 22 years, and has been the Assistant Street Superintendent for two years. He worked under four Street Superintendents, including Marco, Gehrig, Smith and Hinze, and testified that there was never a practice to pay Street employes from the time they received a call at home for emergency work, and that he had never heard of such a practice. Hinze testified that he has worked for the Department for 15 years and is the current Superintendent, and was employed as the Assistant Superintendent under Dick Smith. He testified that employes get paid from the time they arrive at the shop, and that he has never heard of paying employes from the time they receive a call at home. Hinze also submitted an affidavit which has been introduced into evidence and serves to rebut the testimony of the Union witnesses. Pat Caffrey, Director of Public Works, has been employed by the City in a variety of managerial positions for approximately 23 years. As Director of Public Works, Caffrey oversees the Streets Department and he testified that if there had been a practice of paying employes from the time they were called at home for after-shift work, he would be aware of it, but that there is no such practice and he has never heard of it being done. The City's final witness, James Geissner, Director of Personnel, testified that he is familiar with the various past practices in the Streets Department and researches those practices before negotiating each contract. He testified that there is no such practice regarding travel time and that this is the first he has heard of such an alleged practice.

Based on the testimony, it is clear that the Union has not met its burden of presenting "strong proof" of the existence of the past practice asserted by the Grievant. Testimony revealed that if an employe was paid from the time he left his home, it was done so inadvertently, and certainly does not meet the tests of consistency and longevity required to establish a practice. Further, when the City was made aware of this issue, management was surprised and was not aware of any such practice. Thus, the alleged practice was not mutually acknowledged by the parties, but was rather, if done at all, unilaterally enacted without management's knowledge by a few employes in a sporadic manner. Finally, the result argued

for by the Union would produce a profoundly inequitable and nonsensical result, i.e, only a few drivers would receive the pay from the time they are called at home for emergency work, while many other drivers would not receive such pay because they are unaware of the practice. If a practice exists for one driver, it should exist for every driver, particularly when a monetary benefit is involved. The Union's argument in this case that each driver is on his own with respect to pay, produces an unfair result.

In its reply brief, the City disputes that the Grievant could recall which, if any, Streets Superintendent told him to claim the time; rather, he simply recalled that "no supervisor ever said it was wrong". The City also disputes the Union's factual claims regarding several other Union witnesses. Iverson testified that no Streets Superintendent ever told him to claim travel time, and employe Tauscher testified that he never talked to any supervisors regarding travel time. On cross-examination, employe Theisen testified that the Union was in error as to the alleged example of his having claimed travel time, and that it was not in fact travel time. Employe Thrower testified that former Superintendent Gehrig told him to claim travel time, however, Gehrig testified that this was not the case. Finally, employe Sieber testified that former Superintendent Smith told him to claim travel time, however, the Union failed to call Smith as a witness to support that testimony, even though Smith was available at the time and living in the area. Thus, the hearsay evidence should be rejected. While the Grievant testified he has for the last 17 or 18 years claimed the time from when he was called at home, that simply is not credible. LaFleur reviewed the payroll records of all the Union witnesses from 1993 to present to find all of the instances in which an employe claimed and was compensated for travel time and found only four in which an employe was compensated in the manner asserted. One of those instances regarding the Grievant, March 13, 1997, has been rebutted by Hinze.

The City completely disagrees with the Union's version of the facts regarding March 13, 1997. Hinze testified he never heard of travel time before the current grievance, and that he never talked to LaFleur regarding the March 13, 1997 incident. Hinze also stated in his rebuttal affidavit that the Grievant told him that he had worked 14 hours on March 13, and therefore he was paid for 14 hours. Had the Grievant indicated to Hinze that a portion of the 14 hours was for travel time, Hinze would not have paid him for that time. While the Union argues that the Hinze affidavit constitutes hearsay and should not be admitted, that affidavit is part of the record in this case. At the close of the first day of hearing, the Union requested additional time to review Street Department time records, and the parties agreed to submit additional exhibits in that regard, and, if necessary, present rebuttal testimony. The Union submitted the affidavit of LaFleur with attached exhibits and the City submitted an affidavit of Hinze to rebut the LaFleur affidavit, and at that time those affidavits became a part of the record in this case. For some unknown reason, the Union chose to present rebuttal

testimony which simply was what was already contained in the LaFleur affidavit, and chose not to call Hinze to test the validity of his affidavit. To suggest that Hinze's affidavit is hearsay simply because the City chose not to call him as a witness at the rebuttal hearing is invalid.

The City also disputes the Union's claim that Marco and Smith informed Union members that they should claim the time from the time they are called at home and that the City offered no countervailing testimony to those statements. Former Superintendent Marco is deceased, and all of the City witnesses, some of whom were drivers under Marco and Smith, testified that they had never heard of travel time pay. Grosskoph specifically testified that he worked under both Marco and Smith and had never heard of a policy that drivers receive travel time pay. Hinze stated that he worked under Smith at one time and that he spoke with Smith in preparation for this hearing, and that the latter stated that he had never heard of travel time pay.

The City also disputes the assertion that its records establish a past practice of paying travel time. LaFleur reviewed all of the payroll records of all of the Union witnesses and was only able to find three time cards in which an employe claimed travel time and those time cards were addressed by the affidavit of Hinze, and none were actually for travel time pay. The City also disputes the assertion that the testimony of former employes who stated that they were unaware of such practice is irrelevant. Past practice is defined as a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action. If certain Street employes testified that they have never heard of such a practice, it is certainly not well established, nor is it a clear or a consistent pattern of conduct. The City concludes that the Union has not met its burden of presenting strong proof of the existence of any past practice of paying travel time, and asks that the grievance be denied.

DISCUSSION

The Union relies on past practice to support the Grievant's claim that he is entitled to be paid from the time he receives a call to report in to work outside of his regular work hours. Assuming for the moment that Article 25, Amendment Provision, and Article 28, Entire Agreement, do not preclude the binding effect of such a practice, the first matter to be addressed is whether the Union has established the existence of the practice it claims. As both parties note, to establish a binding past practice it must be shown that the practice is unequivocal; clearly enunciated and acted upon; and readily ascertainable over a reasonable period of time as a fixed, and established practice mutually accepted by the parties – mutual acceptance may be tacit. Elkouri and Elkouri, *How Arbitration Works*, Fifth Edition, pp. 632-33.

In this case, the Union has presented the testimony of the Grievant (Steven Reget), and employes Thrower, Sieber, Tauscher, Iverson and Theisen that a practice has existed for many years in the Streets Department of paying employes from the time they receive the call to report to work outside of their regular hours. The Grievant's testimony in this regard has previously been summarized. A summary of the other employes' testimony follows.

Thrower has been in the Streets Department seven years and testified that he has always claimed the time from when he was called when he has been called in from home, that he was told by Gehrig to do so and that he has always claimed it, and been paid for it. Thrower also testified he does not know who does or does not claim the time, but knows a few employes that do it. Thrower lives ten to fifteen minutes from the Shop.

Sieber, an employe with 25 years in the Streets Department, testified that the first time he was called in to work outside of his shift he asked his supervisor what he should put down for a "start" time and was told by his supervisor at the time, Smith, to put down the time he was called. Sieber testified he has always done so since then and has never been told it was wrong. Sieber also testified he does not know what other employes do, but in his view, everyone does it differently.

Tauscher, now in the Parks Department, but having been in the Streets Department from 1972 to 1994, testified that he always claimed the time from when he was called when called in for emergencies. He could not recall who had told him to do it that way, except that it had not been a supervisor, and it was his understanding that everyone did it that way.

Iverson has been in the Streets Department over 24 years and testified he has always claimed time from when he is called when called in, and that as far as he knew until this case, everyone has always claimed from the time they are called and been paid for it. Iverson testified he did it that way the first time because that is the way other employes were doing it.

Theisen testified he has worked in the Streets Department from 1966 to 1976 and from 1978 to the present and that he has claimed the time from when he is called each time he has been called in to plow – hundreds of times over the years. He testified he was told to do so by then-Superintendent Marco and that is the only supervisor who told him to claim the time from when he is called. Theisen testified he began working nights in the early 1980's and did so until recently, so he would not have been "called out" during that time except on weekends or holidays.

In addition to those employes, LaFleur, the Account Clerk who followed Grosskoph in that position, testified he has been in the Streets Department for eight years and has been called in to drive at times. LaFleur testified that he does not claim the time from when he receives

the call and that he was not aware of any practice of paying employes from that time, other than one instance where the Grievant was paid that time in 1996 or 1997. LaFleur also testified that he generally only reviews the time sheets filled out by employes, and not their time cards that they punch in and out, so that he would not be aware if employes were claiming time from when they were called, as opposed to when they reported to work. LaFleur further testified that based on his discussions with other employes, everyone does it differently.

In addition to Gehrig, Hinze and Grosskoph, the City also called two former employes of the Streets Department, Athnos and Bartz. Athnos, now retired, but who was employed in Streets for 28 years, testified that his understanding had been his time started when he punched in when he was called in to plow or sand, and that he had never been told by a supervisor that the time started when he was called. He also testified that he does not know what other employes did in that regard. Bartz testified he worked in the Streets Department 11 or 12 years and that he was not aware of a policy of paying from the time one is called when called in. He testified that it was his understanding that one is paid from the time they punch in.

LaFleur testified he reviewed the time records from 1993 to February, 1999 for the employes who testified for the Union that they claimed the time from when they received the call to report to work. That review resulted in four instances where LaFleur concluded employes were paid from the time they were called: the Grievant, on March 13, 1997, and January 13, 1993, Tauscher on February 21, 1993 and Theisen on November 26, 1993 (a holiday).

Contrary to the Union's assertion, all of the Union witnesses who testified that they claimed the time from when they were called when called in for plowing, sanding or salting, testified they did so every time they have been called in for that work (except the one time Sieber stopped to help a neighbor that was stuck). LaFleur's review of their time records, resulting in at most, four such instances, contradicts their claim in that regard. It is a reasonable assumption that those employes who testified for the Union were called in for work outside their regular hours an aggregate total of more than four times in the six year period LaFleur reviewed.

Crediting the testimony by the Union's witnesses, that testimony at most, established that some employes have at times claimed, and have been paid for, the time from when they are called when called in outside their regular work hours, and that other employes have not claimed or thought they were entitled to such time. Contrary to the Union's assertion, a "practice" that is only known and engaged in some of the time by some of the employes who are covered by the same circumstances, is neither unequivocal, nor clearly enunciated, nor "fixed". Therefore, the evidence fails to establish that what has occurred at times in the past

rises to the level of a binding past practice. That being the case, it is unnecessary to decide whether Articles 25 and 28 would preclude the establishment of a binding practice. It is also unnecessary to address several evidentiary issues raised in the proceeding.

The parties' Agreement being silent as to the payment claimed by the Grievant, and the Union having failed to establish the existence of a consistent practice of paying employes from the time they are called when they are called in to work outside of their regular work hours, it is concluded that the City did not violate the parties' Agreement when it did not pay the Grievant for the time from when he received the call to come in to work until he arrived at work on March 9, 1998.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 24th day of September, 1999.

David E. Shaw /s/
David E. Shaw, Arbitrator

DES/gjc
5940