BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE COUNTY JOINT COUNCIL OF UNIONS, AFSCME, AFL-CIO, LOCAL 254

and

EAU CLAIRE COUNTY, WISCONSIN

Case 202
No. 58934
MA-11117

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing on behalf of Eau Claire County Joint Council of Unions, AFSCME, AFL-CIO, Local 254, referred to below as the Union.

Ms. Mindy K. Dale, Assistant Corporation Counsel, Eau Claire County, Eau Claire County Courthouse, Room 2570, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, appearing on behalf of Eau Claire County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of the entire bargaining unit. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on September 13, 2000, in Eau Claire, Wisconsin. A transcript was made of that hearing, and provided to the Commission on October 5, 2000. The parties filed briefs and reply briefs by November 20, 2000.

ISSUES

The parties could not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the memo of February 29, 2000 violate Section 1.06 B. of the Collective Bargaining Agreement by requiring highway employees to purchase safety shoes and wear them when performing work in which a hazard has been identified by the County as required by OSHA standards?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

AGREEMENT

. . .

A. The Employer and the Union agree that at all times during the term of this Agreement they shall not violate the provisions of Wisconsin Statute 111.70. . . .

ARTICLE I
RECOGNITION AND MANAGEMENT RIGHTS

. . .

1.06 The Employer shall have the right to:

A. Carry out the statutory mandate and goals assigned to the Employer utilizing personnel methods, and means in the most appropriate and efficient manner possible.

B. Manage the employees; to hire, promote, transfer, assign or retain employees and, in that regard, to establish reasonable work rules.

. . .

APPENDIX A
HIGHWAY DEPARTMENT EMPLOYEES

. . .

A.04 General Provisions.

. . .

3. Tool and Clothing Allowance. . . . The employees shall be reimbursed $10 towards the purchase of safety shoes upon presentation of a receipt. . . .

BACKGROUND

The parties entered the following Stipulation of Fact at the September 13, 2000, hearing (references to dates are to 2000, unless otherwise noted):

1. Eau Claire County and Eau Claire County Joint Council of Unions, Local Nos. 254 and 2223, AFSCME are parties to a collective bargaining agreement effective January 1, 2000 through December 31, 2002. The agreement was signed on March 3, 2000.

2. In the context of contract negotiations, the parties executed a Letter of Agreement No. 2000-02, dated 11/29/99 and 12/l/99, titled "Safety Shoes," which states:

> Eau Claire County and Eau Claire County Joint Council of Unions hereby agree that during the term of the collective bargaining agreement, no union employee shall be required to wear steel-toed safety footwear unless the union and the county agree to such a requirement, or, if such a requirement is mandated by state or federal law.

The parties had executed an identical Letter of Agreement on 12/03/97, which expired with terms of the previous contract on December 31, 1999.

3. A risk assessment was completed on County jobs in 1995 and 1998 identifying workers performing jobs in which they were exposed to foot hazards. A County Personnel Protective Equipment Policy ("PPE Policy") adopted in 1995 established the requirement for these workers to wear protective footwear ("safety shoes"). Compliance with the requirements of the 1995 PPE Policy was inconsistent.

4. Alice Hanson was hired as the County's Safety Coordinator on June 2, 1999. In that capacity, Ms. Hanson performed her own Personal Protective Equipment (PPE) Hazard Assessment Survey and Analysis of highway department jobs in October of 1999. She also prepared an updated Foot Protection Program Policy.

5. On September 20, 1999, Alice Hanson presented a draft of the proposed Foot Protection Program at the Highway Department Employee Safety Committee Meeting.

6. On October 15, 1999, Alice Hanson provided training on personal protective equipment, including foot protection, to Highway Department Employees.

7. The updated Foot Protection Program Policy was approved by the Eau Claire County Loss Control Committee on October 25, 1999 to prevent foot injury to County employees and to come into compliance with OSHA standards.

8. On November 29, 1999, the Eau Claire County Committee on Administration approved an Ordinance requiring safety shoes to be worn as required by OSHA and to reimburse employees $40.00 per calendar year towards the cost of safety shoes. The Ordinance was approved by the Board on February 1, 2000. (Ord. 143-92)

9. On February 29, 2000, Alice Hanson sent a memorandum to all "Employees Performing Work with Foot Hazard." Employees were informed that the County would begin enforcing safety shoe requirements as of April 15, 2000.

10. By ordinance, the County currently reimburses employees $40.00 towards the purchases of safety shoes.

11. The County recently gave out $90.00 safety incentive awards to be used towards the purchase of safety shoes. Twenty-three (23) of the highway employees identified by the County as performing work requiring the use of safety shoes received these awards.

12. On May 16, 2000, the County agreed to delay implementation of the safety shoe requirement until June 15, 2000.

13. On May 22, 2000, the union filed a grievance requesting that the County "cease & desist from ordering employees to wear steel-toed safety shoes. Make whole all employees for full cost of shoe purchases."

14. The Union believes that the County has no authority to require highway employees to wear safety shoes due to the existence of the contractual Letter of Agreement. Therefore, the Union has refused to bargain the impact of the requirement.

The Foot Protection Program Policy noted in Items 3 and 7 of the Stipulation, as adopted by the ordinance referred to in Item 8 of the Stipulation, is referred to below as the Policy. The adopting ordinance is referred to below as the Ordinance. As the Stipulation indicates, the Policy has considerable history.

In 1995, the County used a private consultant to perform its initial risk assessment regarding protective footwear. In the Fall of 1997, the County prepared a draft safety shoe policy for implementation on January 1, 1998. The 1997 policy noted that it had been drafted to comply with Subpart I of Title 29 Code of Federal Regulations (CFR) through the following:

1. Completing Hazard Assessment for Footwear
2. Inform Employees of the Proper Footwear
3. Provide Training when Required
4. Maintain Records of Such Training
5. Enforce the use of Proper Footwear during Work.

The Union responded to County consideration of a mandatory safety shoe policy in the following letter from Steve Day to Marvin Niese, the County's Personnel Director, dated October 3, 1997:

> As we have discussed, it is the position of the Union that the possible County mandatory requirement of employees wearing steel-toed safety shoes is not mandated by law and may be an unreasonable work rule.

> You have stated that the County is now investigating which employees, if any, will be required to wear such shoes. You have also stated that at this point "there is nothing for the Union to grieve".
>
> Consequently, the Union will wait until we have been officially advised by the County (to this office) as to the status of this matter.
>
> For the record, we have introduced safety shoe reimbursement proposals in negotiations for the Highway, Parks & Forest, and Custodial departments. These proposals are not an admission that the Union accepts mandatory employee use of safety shoes; but rather a protection for the employees if any Union litigation efforts fall to prevent possible future mandatory requirements.

The Union made the following proposal to the County in November of 1997, during then pending negotiations for a labor agreement to commence on January 1, 1998:

> No employees shall be required to wear steel-toed safety footwear unless the Union and the County agree to such a requirement or if such a requirement is mandated by state or federal laws. Employees required to wear steel-toed safety footwear under the terms above shall be reimbursed by the County for their purchase of two pairs of such shoes or boots per year. Employees required to wear steel-toed safety footwear shall wear such footwear during all hours of work.
>
> Employees currently required to wear steel-toed safety footwear are Mechanics, Tire Repair/Equipment Mover, and Welder, in the Highway Department.

Roger Biegel, then and now the Union's President, testified that the County did not agree to this proposal due to cost considerations. The parties ultimately resolved the dispute by executing the 1997 Side Letter referred to in Item 2 of the Stipulation.

Hanson's duties include advising the County regarding compliance with OSHA regulations. Early in her tenure she advised the County that it had a duty to comply with 29 CFR sec. 1910.132, which states:

> (a) Application. Protective equipment, including personal protective equipment for . . . extremities . . . shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

. . .

(d) Hazard assessment and equipment selection.

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, the employer shall:

(i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
(ii) Communicate selection decisions to each affected employee; and,
(iii) Select PPE that properly fits each affected employee.

Note: Non-mandatory Appendix B contains an example of procedures that would comply with the requirement for a hazard assessment.

(2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

. . .

(f) Training.

(1) The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following:

(i) When PPE is necessary;
(ii) What PPE is necessary;
(iii) How to properly don, doff, adjust, and wear PPE;
(iv) The limitations of the PPE; and,
(v) The proper care, maintenance, useful life and disposal of the PPE.

(2) Each affected employee shall demonstrate an understanding of the training specified in paragraph (f)(1) of this section, and the ability to use PPE properly, before being allowed to perform work requiring the use of PPE.

She also advised the County it had a duty to comply with 29 CFR sec. 1910.136(a), which states:

> The employer shall ensure that each affected employee uses protective footwear when working in areas where there is a danger of foot injuries due to falling or rolling objects, or objects piercing the sole . . .

Early in her tenure, Hanson discovered that although the County had issued a directive concerning the use of safety shoes, the directive had not been complied with in a consistent fashion. After concluding that difficulties in compliance could be traced to uncertainty on which positions should be required to use safety shoes and what type of safety shoes should be worn, she decided to complete her own hazard assessment. She did so using employee position descriptions, industry standards on protective footwear, and OSHA standards including those governing the logging industry. Her review was designed to comply with OSHA certification requirements. Sometime after this initial phase of the assessment process, she reviewed County accident/injury records.

Hanson also met with the County's Highway Safety Committee. That committee meets every few months, and includes members of the bargaining unit. The Union does not, however, link participation of individual employees on the Safety Committee with the action of its bargaining team. Unit members who participate on the Safety Committee do not report to the Union, and have no authority to bargain on the Union's behalf. At the committee's September 20, 1999, meeting, Hanson introduced a draft "Foot Protection Program." She included with her draft an earlier draft-proposal for such a program, as well as the assessment of the private safety consultant regarding which positions require safety shoes. Hanson's draft did not specifically mention steel-toed shoes, but did require employee use of "safety shoes during the performance of work" involving "heavy objects that can fall or roll onto the toes or foot; sharp objects piercing the sole; sparks, molten metal, oil, or other liquids; penetrating chemicals; slippery or wet surfaces; (and) damp surface contact in areas with electrical hazards." The draft also stated "The County shall purchase or reimburse employees for one pair of safety shoes per year."

In October of 1999, Hanson participated in the Highway Department's in-house safety training, which included instruction on the use of safety shoes. Hanson testified that although she could not recall how she presented the point to unit employees, she believed "that everyone knew they were supposed to be wearing safety shoes" (Transcript [Tr.] at 45).

Hanson met again with the Safety Committee on November 15, 1999. The minutes for that meeting state that Hanson had "discussed the proposed foot protection program . . . with the County Board." The County Board's Committee on Administration voted on November 29, 1999, to amend Section 2.75.050 of the County Code thus:

> The director shall review all employee positions ~~at the airport, the Center of Care maintenance operations, the courthouse, and the highway, parks and forests and planning and zoning departments~~ and determine on the basis of work performed, work areas and job sites, the need for the employees filling such positions to wear safety shoes. Safety shoes shall be required to be worn by these workers in an effort to prevent foot injury. This requirement is designed to comply with OSHA codes, 29 CFR 1910.132 and .136. The selection of safety shoes shall be in accordance with ANSI Z41 (1991). For each position so designated by the director, the county shall appropriate the sum of ~~ten dollars twice~~ forty dollars per calendar year so as to partially defray the cost, to the employee, of obtaining safety shoes.

As passed by the committee, the ordinance change was to be effective January 1, 2000. This action was considered by the County Board at its meeting of December 7, 1999. The Board referred the matter to its Personnel Committee, which on January 12 recommended that the Board approve it. The Board approved the change on February 1.

The Policy was formally announced to unit members through a memo from Hanson dated February 29. The memo covers two sides of one sheet of paper. The first side reads thus:

> In an effort to improve upon the safety of employees, to reduce accidents and worker compensation costs, and to help you comply with the requirement that you wear protective footwear on the job, the Eau Claire County Board has authorized employees to be reimbursed $40 for the purchase of safety shoes each year. Employees will be responsible for purchasing protective footwear independently and reimbursement will be made after submitting the purchase receipt to your supervisor. Employees are encouraged to purchase safety shoes from one of the recommended vendors, as they provide a wide selection of high quality safety shoes and experienced service.
>
> In selecting a safety shoe one needs to recognize that a “steel-toed shoe” is only one of several features to consider. As well, there are different ratings for steel toes and other features. Also the label “steel toe” does not necessarily mean that it meets required specifications set by OSHA and industry (ANSI Z41 PT91). **All footwear manufactured to ANSI specifications will have "ANSI Z41 PT91" and the approved features marked in code on the inside surface of the tongue, gusset, or lining.** (An example of an approval label is shown on the back of this page.)

The right features for you are dependent on the particular hazards of your work. The following chart should help you select the appropriate foot protection. Other considerations when selecting protective footwear are fit, durability, strap on options, selection assistance, repair service and warranty.

If your job requires:	**Select footwear with these protective features.**							
	I/75	**C/75**	**PR**	**EH**	**H**	**I**	**F**	**T**
Work around heavy equipment and materials; pipe & culvert work; loading, moving heavy materials & objects	x	x						
Paving, seal coating; use of cutting torch, welding work					x		x	
Brushing, mowing, logging; Handle cutting tools & sharp materials, (Some work will also require metatarsal protection.)			x		x		x	
Handle or work around penetrating chemicals					x		x	x
Snowplowing;clearing; work on snow/ice covered surfaces						x	x	x
Operate, test, maintain highly energized equipment; work around sources of high electrical energy				x				
Work on wet surfaces; mop, wax, buff floors								x

Meet ANSI standard for
I/75=Impact Protection C/75=Compression Protection PR=Puncture Resistant
EH=Electrical Hazard Protection

No ANSI labeling requirement
H=6-8" Height I=Insulated T=Slip Resistant Tread F=Special Fabric (ex. water proof or water resistant, chemical resistant, abrasion/cut resistant, hot materials resistant)

. . .

Should you have questions about the safety shoe reimbursement program or safety shoes recommended, don't hesitate to contact me . . . or your supervisor who will be enforcing the safety shoe requirement as of April 15.

The second side includes a one-half page schematic illustrating the meaning of some of the acronyms used on the first sheet and the following text under the heading "Other Considerations":

> Leather is usually more durable and abraision restistant (sic) than man-made fabrics. Gortex provides best waterproof; Kevlar provides best cut/abrasion resistance. Urethane and vinyl for chemicals.
> Waterproof indicates greater protection than water repellant/resistant; fabrics can be enhanced with special treatment pre-use.
> As sole fabrics and tread designs vary so does the performance: (ex. urethane are good grippers, vibram lugs are rugged but less flexible, crepes wear out in oil, cleats & abrasors give good traction but can be rough on surfaces). Strap on gripping soles may be acceptable for some jobs.
> As long as ANSI impact and compression standards are met, toe clips some times can be used instead of built in steel toes. Some people, however, find toe clips to be inconvenient and pose other hazards.
> For winter boots needing "steel toes" look for the new non-metallic toes meeting ANSI standards.
> Metatarsal protection (meeting ANSI Mt standard) is required for logging work and recommended for brushing work.
> Width is as important as length.
> Foot fatigue and soreness can occur with long term standing. Shock absorption is affected by sole materials structure and innersole; weight of shoes and fit.
> Lining fabric and socks can affect sweating, warmth, comfort. Natural fiber is better than most man-made fabrics for wicking away perspiration. (Removable liners maybe (sic) helpful.)

Following the issuance of this memo, considerable confusion reigned within the unit.

Hanson addressed some of the confusion at Safety Committee meetings. The Union and the County met to discuss the Policy. In a letter to Day dated April 12, the County's Corporation Counsel, Keith Zehms, stated the County's position on the safety shoe requirement by forwarding a memo dated April 12, authored by Mindy K. Dale. That memo states:

. . .

> **OSHA Requirements.** In Wisconsin, safety and health in the public sector is regulated by the Department of Commerce. Wis. Admin. Code Comm 32.15 requires public employers to comply with the OSHA requirements adopted at Comm 32.50. Comm 32.50, Table 32.50-1 adopts as Wisconsin law the OSHA regulations found at 29 CFR Part 1910.

29 CFR 1910.132 sets out the general requirements for personal protective equipment (PPE). 29 CFR 1910.136 sets forth the more specific requirements for foot protection (citation omitted)

. . .

When these hazards are present the employee is required to wear shoes that meet the requisite ANSI standards. It is the employer's obligation to make sure that it meets the specific requirements for footwear set forth in 29 CFR 1910.136, as well as the more general requirements for PPE. For example, 29 CFR 1910.136 does not address the foot hazards that arise when an employee is working around chemicals; 29 CFR 1910.132's more general requirements would necessitate PPE to protect the employee's feet from chemical exposure.

The PPE standard, 29 CFR 1910.132, is a performance standard - it does not list specific requirements. 29 CFR 1910.132(d) requires that each employer do a hazard assessment to determine the hazards present which are likely to necessitate the use of PPE. If a hazard is present, the employer must select the appropriate PPE to protect the employee from the hazard, train the employee on its use and require the employee to wear it. These assessment and training requirements apply to foot protection. 29 CFR 1910.132(g). 29 CFR 1910, Subpt 1, App. B sets forth non-mandatory compliance guidelines for employers to use in making their assessments.

Where employees provide their own PPE, it is up the employer to assure its adequacy. 29 CFR 1901.132(b). OSHA's position has been that the employer must pay for PPE unless the item is personal in nature and can be worn by the employee both on and off the job. Safety shoes and prescription safety glasses generally fall into this category. If an item can be worn both on and off the job, the employee may be required to purchase his or her own PPE.

Impact on Eau Claire County. As stated above, OSHA standards are enforced in the public sector in Wisconsin by the Department of Commerce. Penalties for violations may be assessed in accordance with Wis. Stat. 101.02(13)(a) at not less than $10 nor more than 100 for each offense. Comm. 32.09. Each day in which a violation occurs could constitute a separate offense. Wis. Stat. 101.02(12). Thus, the financial impact on the County for non-compliance could be substantial.

Eau Claire County's Compliance. As explained above, state law, incorporating federal law, requires that employees wear protective footwear when hazards have been identified. I met with Alice Hans(o)n and reviewed and discussed the documentation she had collected, her memorandums and her conclusions.

An initial hazard assessment was done by R&F. Alice Hans(o)n then independently identified all the potential hazards in the types of jobs done throughout Eau Claire County that would require safety shoes of any type and listed the shoe protection necessary for each hazard. She then reviewed all the job descriptions and put together a list of positions where some type of special shoe must be worn.

In doing this, Alice followed the proper analysis and identified the appropriate factors. The next step is to match the employees and their respective job duties to the various "shoe requirements." This was to have been done by supervisors with their respective employees as set forth in Alice's February 29th memorandums to Supervisors and to "Employees Performing Work with Foot Hazards." The supervisors were to have followed up with training and enforcement.

Under the Letter of Agreement dated 12/l/99 between Eau Claire County and the Eau Claire County Joint Council of Unions, "no union employees shall be required to wear steel-toed safety footwear unless the union and county agree to such a requirement, or, if such a requirements is mandated by state or federal law." State law mandates that employees wear steel-toed shoes where a hazard necessitating steel-toed shoes has been identified. Not all employees, however, are required to wear steel-toed shoes. For example, employees who are involved in brushing and mowing would be required to wear puncture resistant shoes, made of a material that will protect their feet from abrasions and cuts, and high enough to provide protection for their ankles - in other words, a high-top leather boot with a good sole. If the employee also performs work around heavy equipment and materials where there is a risk of foot injury due to falling or rolling objects, steel-toes, which meet the requisite ANSI requirements, would be required.

Zehms offered, in the April 12 letter, to meet with the Union to discuss the dispute.

Day responded in a letter to Zehms dated April 17, which states:

. . .

At this time I do not believe it would be in any parties interest for the Union leadership to meet with either Ms. Dale or Ms. Hanson. Instead, I would like to express the views of the Union leadership on this subject, as follows.

Bargaining for the 2000 labor agreement. The Union and the County bargained for eight months and achieved a fair settlement of all issues. On 11/29/99 the County signed the attached letter of agreement on safety shoes. Exactly what has changed between then and now that gives the County the right to unilaterally require the wearing of safety shoes for some, or all, of the Highway employees? What new hazard has arisen since 11/99? What number of foot accidents has occurred since 11/99?

If the answer to those questions is "none", then the Union leadership of Local 254 believes that the County has bargained in bad faith by signing such a letter of agreement with full knowledge that it intended to implement mandatory safety shoes.

Job assessment for PPE under OSHA. It is true that the law requires the employer to make an assessment of jobs in order to determine if personal protective equipment is necessary. Such assessment, however, must take into account "the frequency of the employees' exposure to foot injury, the employer's accident experience, the severity of any potential injury that could occur and the customary practice in the industry."

In the Eau Claire County Highway Department, the last foot injury that required medical treatment was in 1995 and was the result of an ankle sprain. The incident which involved a crushed foot was in 1993 when Jerome Johnson crushed the sides, not the front, of his foot. To my knowledge**,** no other surrounding County Highway Department mandates the wearing of safety shoes (Except three employees of the Chippewa County crusher crew).

Such omissions in the County's assessment lead me to conclude that any such County unilateral action based on the current assessment may be an unreasonable work rule.

In addition, our Highway employees perform multiple tasks everyday, each of which may require different types of safety shoes as listed by Ms. Hanson's February 29, 2000 letter.

The cost of safety shoes. Assuming for the purposes of argument that the County successfully wins any litigation involving mandatory use of safety shoes, there is still the cost of the shoes to be considered. While the County, under OSHA, may not have to pay for the costs of safety shoes, the situation under WI Stats. 111.70 and/or grievance arbitration case law may be entirely different.

First, costs of work related equipment is a mandatory subject of bargaining. To implement that employees bear any cost of such mandated shoes is in my view, a prohibited practice. Second, currently the County provides PPE to the Highway Department employees at no cost (hard hats, chaps, ear plup, etc.). A grievance arbitrator may take a dim view of any work rule which requires employees to pay the majority of the cost of equipment which they have been forced to wear. Good safety shoes run anywhere from $100 - $150, and at least two pairs would be needed to allow drying time.

Conclusion. I do not intend this letter to be threatening. I am trying to convince the County that:

1. Given the safety record of the Highway Department, there is no dire need for the mandatory enforcement of safety shoes.

2. Wouldn't a voluntary program of offering $40 for anyone who wears safety shoes be the way to proceed for the term of this contract? With proper promotion and information the program might be a success. Under such a voluntary program, the Union would encourage all of its members to participate.

3. If such a voluntary program did not work, the County would, of course, be free to bring up such failure in the next round of bargaining.

. . .

Zehms responded in a letter to Day, dated May 16, which states:

. . .

Requirement for Safety Shoes

The fact that an employer has not had a high incidence of foot injuries does not eliminate an employer's obligation to require foot protection if a hazard has been identified.

The OSHA standard requires foot protection when employees are "working in areas where there is a danger of foot injuries . . ." 29 CFR 1910.136. It is the employer's obligation to "assess the workplace to determine if hazards are present, or likely to be present, which necessitate the use of personal protective equipment." 29 CFR 1910.132(d)(1).

You assert that the employer's assessment must take into account "the frequency of the employees' exposure to foot injury, the employer's accident experience, the severity of any potential injury that could occur and the customary practice in the industry." We're not sure where your quote is from, but we concur that in assessing the workplace, an employer should look at the frequency of exposure, its accident experience and the severity of the injury that could occur as a starting point. This analysis, however, is not conclusive. Additionally, wearing PPE that is "customary practice in the industry" is no defense to an OSHA violation. The PPE standard was expanded because employees were not receiving adequate protection based on customary practices. "Well, it(‘)s never happened before. . ." is not defense when an employee is injured and the hazard was readily identifiable.

As any employer, we want to take an approach that is reasonable. But we also want to make sure that employees are adequately protected. Employees will not have to have multiple pairs of shoes. If they perform a task requiring a steel-toed shoe, it is possible to buy a shoe that protects them from the other hazards to which they are exposed as well. They can then choose to wear shoes of lesser protection, if desired, when performing other tasks - or wear their steel-toed shoes all the time.

Alice Hanson met with a number of highway department employees and their supervisors. The concerns they have seem to stem from a lack of understanding of the need for safety shoes, how to select them and when to wear them. Enclosed is a copy of a flier that will be distributed to highway employees on Friday further explaining the program. Alice is available to individually counsel any employee who has questions.

Bargaining Obligation.

There has been no bad faith bargaining by the County. The Letter of Agreement provides that if mandated by state or federal law employees shall be required to wear steel-toed shoes. The County has now completed its identification of tasks which mandate safety shoes. Having identified hazards and our obligation under OSHA, we cannot wait until the expiration of the

current Agreement to insure that employees are protected. We also cannot make the program a voluntary one and fulfill our obligations under the OSHA standard. We can, however, review individual cases where there is a dispute over whether a job necessitates a steel-toed shoe.

As far as the cost, the County is paying $40.00 towards the cost of a safety shoe. The County also recently gave out **a** number of $90 safety incentive awards for the purchase of safety shoes. Of the 68 highway employees who have been identified as performing tasks that require steeltoed shoes, 23 of them received these awards. So approximately one-third (1/3) of the highway employees at issue have $130 to put towards shoes.

We will be implementing this program June 15, 2000. If you feel there is an impact, please advise. We are willing to sit down and bargain the impact.

The "flier" referred to in this letter was included in the paychecks of unit employes. That flier was authored by Hanson, and states:

Safety Shoe Buying Tips

What type of safety shoe is needed for Highway workers?

Basic shoes

- Will have impact and compression protection ("steel toe")
- that meets ANSI Z41 PT91 specifications.
- (Look for the ANSI "I/75 C/75" stamp in the boot.)
- Will be of good quality leather and oil resistant.
- Will be of 6-8" height.
- Will have soles and treads that are suited for the surfaces you walk on.

What other safety features should be selected?

For most - nothing else is required. For most, selection of other features (ex. insulation, special upper fabric, special insoles, etc.) is based on personal preference.

Will safety shoes be required to be worn at all times?

> Presently, safety shoes are required only when you perform jobs with foot hazards. Most employees will find that a comfortable basic safety shoe will allow them to work at any job without concern or inconvenience. It is the employee's responsibility to be prepared to work at any assignment; however, it is your choice if you wish to switch in and out of safety shoes. Safety shoe use will be enforced with those jobs that have foot hazards. Safety shoes are not required for jobs without foot hazards. Employees who do not have safety shoes present at work when they are assigned to do a task requiring safety shoes will be sent home for lack of work. They will not be offered alternate jobs.
>
> I hope this information helps you with your shoe shopping and clarifies the County Foot Protection Program. If you continue to have questions about specific safety shoe features, please feel free to contact me. I would be happy to assist you.

. . .

After this exchange of views, the parties further discussed the points raised by the Policy, but without resolution. The County has delayed implementation of the Policy pending at least the determination of this grievance.

Biegel testified that the issue of mandatory use of safety shoes has always been a "hot" issue for the Highway Department bargaining unit. Niese affirmed that the County was aware that the issue causes friction within the unit. Biegel noted that terms of the Side Letter posed a significant point during the ratification of the 2000-2002 agreement. In Biegel's view, County agreement to the 1997 and 2000 Side Letters reflected a mutual understanding that the County would not mandate the use of safety shoes unless there was mutual agreement or a change in State or Federal law. The parties discussed the Union's proposals in 1997 in some depth, before agreeing to the Side Letter. In 1999, there was little discussion of the point.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Brief

The Union states the issues for decision thus:

> Did Eau Claire County violate the Contract when it notified highway department employees on February 29, 2000 that steel-toed safety shoes would have to be worn as a condition of employment?

If so, what is the appropriate remedy?

After a review of the evidence, the Union argues that the parties mutually understood the Side Letters precluded unilateral County implementation of a safety shoe requirement.

At the time the parties executed the Side Letter, they were bargaining a labor agreement to take effect January 1, 1998. During bargaining the Union advised the County that existing law did not mandate the use of safety shoes, and the Union made a proposal to require employees in certain classifications to wear safety shoes. That proposal also sought County reimbursement for the shoes. The parties agreed to the Side Letter, but could not agree on the Union's proposal. By failing to challenge the Union's statement of the law, and by failing to bargain any labor agreement provision amending the Side Letter, "the County indicated its agreement with the Union's position." This meant a unilateral County requirement of safety shoes demanded "a change in the *status quo ante* of the law."

The Union contends that a review of the bargaining that created the 2000-2002 labor agreement establishes that the County "has the burden of proof to establish that there was either mutual agreement, or a change in the law." The 1998 and 1999 contractual years passed without any County imposition of a mandatory safety shoe policy. In the fall of 1999, the parties bargained for a three-year successor to the agreement that expired at the close of 1999. On November 29, 1999, the County signed off on an extension to the Side Letter. That same day a County Board committee approved an ordinance requiring safety shoes. Against this background, the Union asserts that the County had a duty to refuse to sign the Side Letter or to notify the Union that it had changed its position regarding its unilateral authority to implement a safety shoe policy. Any other conclusion denies the Union any meaningful ability to bargain regarding the issue of safety shoes.

The Union stresses that the "Arbitrator is called upon to interpret the contract in this matter; not OSHA." More specifically, the Union contends that the evidence shows no reason to believe that OSHA has changed regarding mandatory safety shoe policy for highway workers. The Union adds that the only constant throughout the process leading to the grievance is the County's desire not to fund employee use of safety shoes. Hanson's desire to address safety issues cannot obscure "what is the first and foremost goal of this County: to save money."

If characterized as a work rule, the safety shoe policy is unreasonable. County assessment of the scope of the requirement is inevitably and demonstrably subjective. In 1997, the County concluded 110 employees should be required to wear safety shoes. In 1999, the Safety Director concluded only 95 employees should be required to wear them. The number of County employees increased over this period of time. The Union concludes that "(t)his is the very definition of arbitrary and capricious" since "(i)t is at the whim of the County's judgment

as to who must wear safety shoes, and at substantial employee cost." That the County has suspended its implementation of the requirement only underscores how little confidence the County has in its position.

To remedy the contract violation, the Union requests, that "the Arbitrator order the County to cease and desist from implementing a mandatory safety shoe policy within the Highway Department for the term of the current collective bargaining agreement." Beyond this, the Union seeks that "any Highway Department employee who purchased safety shoes with the understanding that said mandatory policy would be enforced be made whole for the entire cost of the shoes purchased." To effect this remedy, the Union seeks that the arbitrator "retain jurisdiction . . . for a period of ninety days until full compliance with the 'make whole' part of the remedy can be ascertained by the Union."

The Employer's Brief

The Employer states the issues for decision thus:

> Did Eau Claire County violate Article 1, Section 1.06 B. of the Collective Bargaining Agreement and/or Letter of Agreement No. 2000-02 by requiring highway employees to purchase safety shoes and wear them when performing work in which a hazard has been identified by the County as required by OSHA standards?
>
> If so, what is the appropriate remedy?

After a review of the evidence, the Employer asserts that the 1997 and 2000 Side Letters clearly and unambiguously permit it to require employees wear safety shoes. Because the language is clear and unambiguous, there is no interpretive issue posed. Rather, the language of the Side Letters must simply be enforced.

Even if "extrinisic evidence" could be considered "in the face of such clear and unambiguous language" then the evidence "supports the County's position." The Union's view that the Side Letters require a "change" in OSHA has no support in the testimony. Union proposals and County responses indicate the parties agreed to limit the imposition of a safety shoe requirement to an OSHA mandate. That the Employer has made the administrative changes necessary to bring the County into compliance does not undercut the language of the Side Letters. Rather, it makes it possible to implement that language.

More specifically, the Employer argues that Wisconsin's Administrative Code "requires public employers to comply" with certain OSHA requirements, which pose a potentially "substantial" liability on the Employer for non-compliance. Contrary to the Union's

assertions, current OSHA regulations are "horizontal" standards, which are "general standards that affect all industries." Union citation of regulations directed to specific industries, or "vertical" regulations, is thus wide of the mark. More specifically, the Employer argues that 29 CFR 1910.132 and 1910.136 govern the grievance, and demand the action taken by the County. That action was to "do a hazard assessment", select the PPE necessary to protect the employee, "train the employee on its use and require the employee to wear it." The initial hazard assessment took place in 1995 and failed to identify the PPE to protect against the identified hazards. As a result, compliance with the 1995 policy was "inconsistent." Hanson has addressed the flaws in the earlier assessment.

OSHA mandates are difficult to apply to highway employees, and affect employees in various ways. Thus, "(n)ot all highway employees . . . are required to wear steel-toed shoes or wear them all the time." The Employer has addressed this by purchasing "toe-clips" and making them available to employees not required by their duties to wear steel-toed shoes at all times. Beyond this, the Employer has matched the duties of individual employees that require safety shoes with the type of shoe required. Only the Union's intransigence has impeded full compliance with governing OSHA requirements.

The Side Letters and Appendix A establish that the County has bargained "both about the requirement that employees wear safety shoes and the cost." Beyond this, the County has, by the Ordinance, set aside payment toward safety shoes as well as cash incentives for buying them. It follows that the County has no duty to bargain the point further, and "has the authority to require safety shoes be worn".

Viewing the record as a whole, the County concludes the policy issue posed is important, and the grievance should be denied.

The Union's Reply Brief

The Union specifically objects to any implication by the County that "the Union was informed that employees would be forced to wear safety shoes during the term of bargaining for the amended contract to be effective January 1, 2000." Nor can the language of the Side Letters be considered clear and unambiguous, especially given the Union's consistent advocacy that the Side Letter precluded the result sought by the County here. That the County has enacted ordinances has no bearing on the contractual issues posed by the grievance. Nor can the requirement enacted by the Employer be considered clear: "As of the date of the hearing, Eau Claire County Highway Employees had no idea what type of shoes they are supposed to buy." Nor will County injury records support any assertion that the County faces any significant liability under OSHA regulations. The delay in implementation underscores this conclusion: "if this program is so needed and so necessary for employee protection **or** for County protection from OSHA fines, then why has the County not implemented?"

The Union concludes by underscoring its remedial request from its initial brief.

The Employer's Reply Brief

The Employer restates its assertion that the language of the Side Letters is clear and unambiguous, "and gives the County the right to require its employees to follow OSHA regulations and wear safety-shoes where required." If the Side Letters should be read as the Union asserts, it is difficult to understand why the parties declined to state clearly that a safety shoe requirement demanded a "change" in governing state or federal law. Accepting the Union's view implies that "the parties would have been agreeing to violate existing state and federal law." Even if this assertion was plausible, the Union's assertion that the County had a duty "to refuse to sign the Letter of Agreement" is "ludicrous." It is unremarkable that the County would sign the Side Letters. The Side Letters only demanded County compliance with governing law. Even less remarkable is the County's action to implement its understanding of the terms of the Side Letters.

The Union's arguments also ignore that it "also signed off on the Letter of Agreement." The evidence will not support an assertion that the Union was unaware of "the County's intention to complete its implementation of the safety shoe requirement." Even if it was, any doubts the Union had regarding compliance with OSHA requirements could have been researched or brought to the bargaining table for extensive discussions. Testimony indicates the Side Letters were agreed to with little more than a nod.

That OSHA requirements have not changed since 1994 cannot obscure the County's ongoing duty to comply with the law. The Employer's ongoing efforts to do so should not undercut the Union's and the County's shared duty to comply with OSHA. Nor can Union speculation on the motive for County actions alter this. Even acknowledging that the County anticipates saving some costs cannot alter County actions to subsidize Union compliance with the safety shoe policy. That the County would prefer voluntary compliance should not be held against the County.

The safety shoe policy reflects, in significant part, that the County "hired its own expert" to complete the hazard analysis started in 1995. That it has limited compliance to those employees falling within OSHA mandates establishes that the policy could be implemented as "a reasonable work rule." The County concludes that the grievance lacks merit and should be denied.

DISCUSSION

Background

I have essentially adopted the County's statement of the issues. Like the County's, my statement of the issue focuses on Section 1.06 B. This is sufficient to cover all of the parties' arguments. The Side Letters, Section A of the Agreement section and Section 1.06 A demand that the County comply with external law. These provisions guide the interpretation of Section 1.06 B, for a reasonable work rule should not require the County to violate the law incorporated into the agreement. My statement of the issue departs from the County's by focusing on the memo of February 29. This is to reflect the need to address the actual implementation of the asserted work rule. The specific mention of the memo should not, however, obscure that the memo did no more than implement the Policy, which was codified by the Ordinance. My authority does not, however, extend to reviewing an ordinance. Rather, it turns on the contractual implementation of the Ordinance, and the issue's focus on the memo is to reflect this.

It is easier to state the background for resolving the issue than to resolve it. The parties' positions pose a thicket of issues, some of which are not practically resolvable in this arbitration. In any event, the grievance poses procedural and substantive difficulties. Procedurally, the parties dispute whether the County violated its duty to bargain under Sec. 111.70, Stats. Substantively, the parties dispute whether the Policy violates the labor agreement.

The Duty to Bargain Issues

Wisconsin defines the County's duty to bargain at Sec. 111.70(1)(a), Stats., and enforces it at Secs. 111.70(3)(a)1 and 4, Stats. The Union questions the County's conduct in executing the 2000 Side Letter while the Ordinance was being moved through the adoption process. The adoption process started during negotiations, but was completed during the term of the 2000-2002 agreement. The duty to bargain in the absence of a labor agreement is not the same as during the term of a labor agreement. The Policy became effective during the term of the 2000-2002 labor agreement. No evident purpose is served by questioning the County's conduct prior to the execution of the labor agreement except as a matter of bargaining history. To conclude otherwise ignores the parties' successful creation of a three-year agreement.

The Commission has stated the duty to bargain during the term of an agreement thus:

> (T)he parties' duty to bargain during the term of a contract is limited to (1) mandatory subjects of bargaining which (2) are not already covered by the contract or as to which the right to bargain has not been waived through bargaining history or specific contract language. CITY OF MADISON, DEC.

> NO. 27757-B (WERC, 10/94); SCHOOL DISTRICT OF CADOTT, DEC. NO. 27775-C (WERC, 6/94); AFF'D CADOTT EDUCATION ASS'N V. WERC, 147 WIS.2D 46 (CTAPP 1995).

The Policy addresses "safety shoes," directs County administrative personnel to determine the applicability of "OSHA codes 29 CFR 1910.132 and .136" to employee positions, mandates the use of safety shoes, and increases reimbursement rates for affected employees.

Neither party disputes that the Policy covers a mandatory subject of bargaining. This is consistent with Commission case law, which recognizes a close connection between "a relationship to safety and thus to conditions of employment" CITY OF FOND DU LAC (FIRE DEPARTMENT), DEC. NO. 22373 (WERC, 2/85) AT 10. Beyond this, each party argues that the 2000 Side Letter, read in light of other agreement provisions, addresses the subject matter covered by the Policy. Thus, viewed as a negotiating point, neither party had a duty to bargain during the term of the labor agreement concerning the Policy.

The Policy does not, however, stand only as a negotiating point. Rather, it prompted unilateral County action on a point addressed in the labor agreement. More specifically, the County increased the reimbursement rate for safety shoes beyond that stated in Appendix A. The County urges this is "gap filling" through County ordinance. This argument cannot, however, obscure that the Ordinance changes the agreed upon reimbursement rate through unilateral action. "Gap filling" presumes the contract does not address the point. Appendix A does, and the County's action thus rewrote contract language. This unilateral action cannot be squared with the County's duty to bargain: "Through an Ordinance, the County cannot escape the obligations imposed on it by the Municipal Employment Relations Act (MERA)." JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92) AT 13. That the County could not be compelled to negotiate a reimbursement rate other than that specified in Appendix A does not free it to unilaterally alter that rate.

The County argues that the Union declined to bargain the impact of the Ordinance, as demonstrated by Zehms' letter of April 12, and Day's response of April 17. This point has persuasive force, but ignores the position the Ordinance put the Union in. Was it supposed to bargain a reduction in the reimbursement rate to bring it back to the contractual standard? The County's unilateral action thus put the Union in an untenable position, arguably highlighting the futility of bargaining to unit members. In sum, the County's unilateral alteration of the reimbursement rate cannot be squared with the labor agreement or with the County's statutory duty to bargain.

The County further contends that Hanson's actions to implement the Policy were apparent to all, including unit members serving on the Safety Committee. This argument affords no basis to overturn the conclusion stated above. There is no indication the unit members serving on the Safety Committee had authority to negotiate for the Union.

Thus, implementation of the Policy violated the County's duty to bargain by unilaterally altering benefits set by contract. This conclusion arguably poses more questions than it solves, but at a minimum prefaces the substantive issue concerning the interpretation of the 2000 Side Letter.

The Interpretation of the Side Letters

The language of each the Side Letters mandates that "no union employees shall be required to wear steel-toed safety footwear" absent agreement by "the union and county" or "a requirement mandated by state or federal law." There has been no mutual agreement to the requirement, and thus the interpretive issue posed by the Side Letters is whether "state or federal law" mandates the result sought by Hanson's February 29 memo.

Resolution of this point is problematic. It is thus appropriate to isolate those areas of certainty that are possible regarding the Side Letters. First, the Side Letters, unlike the Ordinance and the underlying OSHA provisions, address a single type of "safety shoe" -- "steel toed safety footwear". The Ordinance addresses "safety shoes", which incorporates the broad language of CFR 1910.132 and 1910.136, which address protective footwear generally. This difference in scope is significant. A safety shoe need not be a steel-toed shoe. The Union's attempt to read the Side Letters to cover all "safety shoes" thus has no persuasive basis in the language of the Side Letters.

Nor does evidence of bargaining history alter this. The Union's November, 1997 proposal addressed "steel-toed safety footwear." Thus, there is no basis in the language or the bargaining history of the Side Letters to conclude that the County limited its ability to implement a work rule governing the use of non-steel-toed safety shoes.

The Side Letters incorporate "state or federal law." This cannot persuasively be read to demand a change in law during the term of the Side Letters. Nothing in the language of the Side Letters refers to a "change" in underlying law, and the absence of a reference to "change" undercuts the Union's position. Beyond this, accepting the Union's view demands concluding that the parties agreed the Side Letters could be used as a defense against complying with an existing statutory mandate. The evidence demonstrating continuing County efforts to define its OSHA obligations affords no factual support for this conclusion. Beyond this, the conclusion conflicts with Section 1.06 A, which demands the County act consistently with its "statutory mandate".

Nor does bargaining history undercut this conclusion. The evidence indicates a County Board member stated a willingness to ignore the parties' conflicting positions on safety shoes in favor of the language of the 1997 Side Letter. This evidence, however, fails to establish either that the County agreed to a specific interpretation of OSHA regulations or that it was under no duty to comply with those regulations without Union agreement. Just as unit member participation on the Safety Committee cannot, standing alone, bind the Union, individual board member statements cannot, standing alone, bind the County.

Thus, the 2000 Side Letter does not stop the County from requiring the use of non-steel toed safety shoes as a work rule under Section 1.06 B. Nor does it require a change in OSHA law to authorize County implementation of a State or Federal safety mandate.

This poses the fundamental interpretive issue – whether the Policy implements a requirement "mandated by state or federal law." Subsection (5) of Section 3 of the Occupational and Safety Act (the OSH act) exempts "any . . . political subdivision of a State" from its coverage. Wisconsin has, however, acted to bring itself within the scope of the OSH act. Sec. 101.055(1), Stats., grants "employees . . . of any political subdivision of this state rights and protections relating to occupational safety and health equivalent to those granted to employees in the private sector under the occupational safety and health act". Thus, the mandate questioned here is an amalgam of state and federal law.

The Ordinance focuses the mandate on "29 CFR 1910.132 and .136." These requirements are incorporated into Wisconsin law in the administrative rules of the Department of Commerce at Comm. 32.15 and 32.50. More specifically, Comm. 32.15 mandates that:

> (A)ll places of employment and public buildings of a public employer shall comply with the federal Occupational Safety and Health Administration (OSHA) requirements adopted under s. Comm 32.50.

Comm. 32.50 authorizes the Department of Commerce to incorporate federal standards into state law. Item 2 of Table 32.50-1 incorporates "Occupational Safety and Health Standards, Title 29 CFR Part 1910, July 1, 1998" into Wisconsin law under Comm. 32.15. Comm. 32.09 enforces these requirements through Sec. 101.12(13)(a), Stats.

The interpretative issue thus posed is whether the statutory mandate isolated by the County will support the enforcement of the Policy, as elaborated by Hanson's memo of February 29. The evidence will not support the County's argument on this point.

As preface to examining this conclusion, it is necessary to examine the mandate asserted by the County. "Mandate" is defined as "an authoritative command" see, for example, *Webster's New Collegiate Dictionary* (Merriam, 1977); *Webster's Third New*

International Dictionary, (Merriam-Webster, 1993); and *American Heritage Dictionary*, (Houghton-Mifflin, 1985). The general mandate relevant to the Side Letters is set forth at CFR 1910.136, which mandates that an "employer shall ensure" the use of "protective footwear". "Protective footwear" is a specific type of PPE, and CFR 1910.132 specifies how an employer is to "ensure" the proper use of PPE. CFR 1910.132(a) generally mandates use of PPE, including footwear. Subsections (b) through (f) state, in varying degrees of specificity, duties placed on the employer. Those duties include the maintenance of PPE, whether employee or employer owned [1910.132(b) & 1910.132(d)(2)(e)]; the assessment of workplace hazards and the PPE appropriate to the hazard [1910.132(d)(1)]; the selection of appropriate PPE [1910.132(d)(1)(i)(ii)(iii)]; and training employees in PPE use [1910.132(f)].

The "mandate" established at 29 CFR 1910.132 and .136 is a slightly more specific mandate than the general duty imposed on an employer to maintain a safe workplace at Sec. 5(a)(1) of the OSH act, and at Sec. 101.055, Stats. Nevertheless, 29 CFR 1910.132 and .136 do not purport to identify specific PPE to effect this general mandate. Rather, they direct employers to determinePOSL;;LJ specific hazards and the PPE to address them.

The record affords no basis to doubt the diligence or sincerity of the County's efforts to comply with the hazard assessment and training obligations imposed by OSHA requirements. The flaw in the County's enforcement effort turns on the selection and communication of appropriate safety shoes, including steel-toed shoes.

Hanson's February 29 memo passes the selection obligation to employees. It asserts that use of safety shoes is mandatory and will be enforced, then turns the mandate over to employees: "Employees will be responsible for purchasing protective footwear independently". The memo devotes considerable effort to guiding that selection, but the selection is ultimately left to the employee, as shown by the reference in the "Other Considerations" section that "toe clips some times can be used instead of built in steel toes." Similarly, the statement that "(m)etatarsal protection . . . is required for logging work and recommended for brushing work" passes onto employees the determination of which work applies to them and which shoe is appropriate to that work. The selection chart further underscores the County's passing of the compliance obligation to the employee: "The right features for you are dependent on the particular hazards of your work . . . (and t)he following chart should help you select the appropriate foot protection." The memo even indicates the selection of a steel-toed shoe may not comply with the Policy.

The Policy thus draws its authority from the general mandate of CFR 1910.132 and .136, but passes the specific duty to select PPE to unit employees. At a minimum, considerable ambiguity surrounds this selection. OSHA regulations are less than clear regarding the type of hazard present in highway work performed by County workers or the degree of exposure to it that warrants use of steel-toed shoes. Nor does the evidence clarify

this ambiguity. Both County hazard assessments turned on the examination of position descriptions. How accurately those assessments reflect daily duties, which employees perform those duties and how often those duties are borne by the same employee on a daily basis remains speculative.

This ambiguity ultimately flows from the OSHA regulations themselves. While the County cannot be faulted for the existence of the ambiguity, the ambiguity cannot be resolved under the OSHA regulations or the Side Letters by being passed on to employees. Under CFR 1910.132(d)(1)(i), (ii) and (iii) it is the "employer" that "shall" select PPE by type and by fit and communicate selection decisions to each "affected employee."

The February 29 memo is flawed by treating unit employees as a class and by delegating the risk of the selection process to the "affected employee." Significantly, the memo calls for a considerable exercise of employee discretion regarding the assessment of the need for, and the specific type of, PPE. At a minimum, this cannot be squared with the language of the Side Letters. "(M)andated" cannot be squared with a call for the exercise of significant discretion by the employee.

The February 29 memo puts affected employees at risk of an improper selection. The memo asserts supervisors will enforce the requirement. This puts the County's authority to assign work and to discipline into play. Without definitive direction to an affected employee regarding the specific PPE to be used, I do not believe this can be squared with OSHA regulations. Those regulations broadly mandate proper use of PPE, and ultimately locate the duty to select on the employer. There is no reason to believe an OSHA enforcement agency would recognize either an employer's or an employee's exercise of discretion, standing alone, as compliance. Hanson affirmed this in her testimony. This cannot be squared with the February 29 memo, which directs employees to exercise discretion in the selection of PPE, but gives no indication that in cases where the employee's choice differs with the employer's, the employee's choice will be honored.

In sum, the 2000 Side Letter incorporates "state or federal law", and limits County implementation of work rules regarding steel-toed safety shoes. The Policy seeks to require safety shoes as a work rule, and does so by incorporating the provisions of CFR 1910.132 and .136. These OSHA regulations are made part of state law in Chapter 32 of the Wisconsin Administrative Code. They generally mandate the use of safety shoes as PPE, but fail to offer guidance linking hazards, or the amount of exposure to hazards, to specific shoe selection. The Side Letters incorporate this vague mandate into the labor agreement. Consistent with OSHA regulations, Hanson identified general hazards that may bear on employee use of safety shoes. Her February 29 memo sought to impose the Policy on unit employees by demanding they exercise discretion in determining how to link the hazards of their positions to specific safety footwear.

The memo passed an employer duty to employees in a manner inconsistent with OHSA regulations generally and in violation of the 2000 Side Letter specifically regarding steel-toed shoes. The memo treats unit employees as a class, and fails to link specific hazards and necessary PPE to individual employees.

The Appropriate Remedy

The issue of remedy poses the complexity of the issue on the merits. The County has the authority, under Section 1.06, to establish reasonable work rules. The 2000 Side Letter impacts this only regarding steel-toed shoes. However, the February 29 memo flaws the County's attempt to impose a general safety shoe requirement by passing the risk of selection onto unit employees. Beyond this, the Policy unilaterally altered contractual reimbursement rates in violation of the County's duty to bargain. The allocation of cost regarding safety shoes for highway workers is less than clear under OSHA regulations, see for example, UNION TANK CAR COMPANY, OSHRC DOCKET NO. 96-0563 (1997).

The remedy must recognize this conflicting mix. The County has the authority to create a work rule regarding safety shoes, but an employee should not be put at risk of discipline without a clear understanding of how to comply with it. An employee should not have to experiment to determine whether their choice of PPE comports with the County's or OSHA's view of compliance. Allocation of the cost of compliance with any work rule is, in any event, complicated by the vague mandates of the OSH act and by the language of the Side Letter.

These complications make unpersuasive the Union's argument that the "status quo ante" should be restored, with make-whole relief. The evidence manifests more a technical than a bad faith violation of the duty to bargain. The evidence demonstrates the parties' bargaining relationship is long-term and functional. The difference posed here was not intended to, and did not, undercut the Union's role as bargaining representative. More significantly, the Union's argument fails to address the County's demonstrated concern that it may not be complying with governing Wisconsin safety regulations. Beyond this, the Union's argument ignores practical difficulties. If the "status quo ante" is to be restored and make whole relief ordered, should those employees who took advantage of the increased reimbursement rate or the safety incentive plan be forced to repay it? How useful is a proceeding in which employees may be required to testify on whether they purchased safety shoes to take advantage of an increased benefit or to avoid adverse employer action?

The evidence shows fundamental uncertainty on how to apply generally stated OSHA-based duties. The County's conduct is less a duty to bargain issue than a contractually misplaced effort to pass the ambiguity of OSHA regulations onto employees. On balance, I have determined that the only effective way to cut through the complexity of this matter is to return it to the bargaining process. The Award entered below directs the County to cease and

desist from enforcing the Policy until its terms, including any increase in reimbursement, have been bargained. At a minimum, this requires the parties to:

1. Identify position(s) that under governing law require use of steel-toed shoes.
2. Identify the degree to which any such position(s) will be required to use the shoe, i.e. whether the shoe must be worn on a task by task or shift by shift basis.
3. Identify those positions that, under governing law, require the use of non-steel-toed safety shoes.
4. Identify the degree to which any such position(s) will be required to use the shoe, i.e. whether the shoe must be worn on a task by task or shift by shift basis.
5. Link the positions thus identified to the affected employee.
6. Determine the level of reimbursement for any required use of safety shoes.
7. Identify possible County responses to non-compliance with any work rule governing safety shoes.

The parties have already considered each of these points, at least in part. However, it is apparent the specific link between identified hazards, the individual employee affected by the hazards and the PPE appropriate to them remains to be definitively addressed. The allocation of cost also remains to be definitively addressed. In light of the 2000 Side Letter, no employee should be required to use a steel-toed shoe unless that use is mandated under existing state/federal law.

This remedy passes the complexity of this issue to the parties, but I can envision no better alternative. The difficulty with the record posed here is that acceptance of the Union interpretation of the Side Letter puts the County in the position that an employee could assert the use of open-toed sandals is appropriate footwear for brushing, welding or heavy equipment repair work. Acceptance of the County interpretation puts the County in the position to unilaterally rewrite the contract, and pass any costs related to OSHA compliance onto employees. The extremes are evident. Reasonable and final resolution is not.

It is apparent that the award poses ambiguity. The record will not, in my opinion, permit more complete closure. The ambiguity of the underlying OSHA mandate cannot formally be resolved on this record and thus has been returned to the parties. I have retained jurisdiction to acknowledge the complexity of the matter, and to afford what service, if any, further hearing may offer.

AWARD

The memo of February 29, 2000 violated Section 1.06 B. of the Collective Bargaining Agreement by requiring highway employees to purchase safety shoes and wear them when performing work in which a hazard has been identified by the County as required by OSHA standards.

As the remedy appropriate to this violation, the County shall cease and desist from enforcing the Policy until it has met its duty to bargain with the Union concerning the specific PPE, including steel-toed footwear, required of any unit employee affected by the Policy, and the reimbursement, if any beyond that specified in Appendix A, appropriate to such compliance. To address any ambiguity in this remedy, I will retain jurisdiction over the grievance for not less than forty-five days from the date of this Award.

Dated at Madison, Wisconsin, this 2nd day of February, 2001.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

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