

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 311, AFSCME, AFL-CIO**

and

**PORTAGE COUNTY**

Case 154  
No. 59515  
MA-11317

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**Appearances:**

**Mr. Gerald D. Ugland**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Mr. J. Blair Ward**, Assistant Corporation Counsel, Portage County, appearing on behalf of the County.

**ARBITRATION AWARD**

The Union and Employer named above are parties to a 1999-2001 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as the arbitrator in a dispute over cell phones and CB radios. A hearing was held on April 11, 2001, in Portage, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by June 29, 2001.

**ISSUE**

The Union's framing of the issue is preferred:

Did the Employer violate the collective bargaining agreement by banning the use of citizen band radios and cell phones by employees? If so, what is the remedy?

### **BACKGROUND**

This grievance arose as a result of a policy update issued on January 14, 2000, which states:

Personal cell phones are not allowed inside the County Highway facility or in county vehicles.

Personal CB radios are not allowed in county vehicles.

Hours of Work: 7:00 a.m. to 3:00 p.m., including two fifteen minute breaks at approximately 9:00 a.m. and 12:00 noon. Coffee consumption outside of vehicles is considered break activity.

CB radios will be removed by our mechanics the week of 1/17-1/21/00. If you have a CB radio mounted in county equipment, list your name and vehicle number below and it will be returned to you.

The policy noted above followed a meeting between the Highway Commission William Weronke and the bargaining unit members on January 11, 2000. Weronke told the crew that he was upset because he was being investigated by the Highway Committee chairman. According to employee Ken Young, Weronke said that if he was going to get that treatment, then he would take away their CB's and their cell phones. Young thought that Weronke believed that an employee reported the potential ethics violation or violation of County policy on a cell phone, although another employee understood that the phone call came from a shop telephone.

Weronke testified that he had been accused of using County equipment for his own personal reasons, and as a result of a phone call, Douglas Warner, a County Board Supervisor on the Highway Committee, showed up at his home. Warner wanted to investigate whether Weronke was using a hole saw kit for personal reasons. The kit was in a County vehicle in his driveway. The matter was later dropped. Weronke testified that he carries County equipment in his vehicle all the time. The incident occurred about a month before the January 11, 2000 meeting.

Young has worked for the County Highway Department for 29 years. He is currently the road foreman and was the Union President for six years. He recalled that CB's started getting popular around 1989 or 1990. Highway Department mechanics installed CB's that employees bought into the trucks. Young thought that employees had been bringing cell phones to work for the last three or four years. Young has had a CB in a truck and has had his own cell phone while working. He used the CB to contact outside contractors during the summer. He used his cell phone to contact the gravel and hot mix plants to coordinate work.

He believed his use of the CB and cell phone was efficient for everyone. Young used his cell phone twice during a critical time in his father's life. After the policy was instituted, his CB was taken out of the truck he drove. The County later provided him with a cell phone for talking to the plants and handling emergency calls as the road foreman.

Most of the trucks have two-way radios that work throughout the County. Weronke testified that there is no need for employees to have a CB radio or a cell phone in their vehicles.

Union President William Burse thought that CB's have been installed in County vehicles since at least 1989. He was aware that some employees have had cell phones in their vehicles for about four years when he started his employment. He used a CB when he replaced a driver in a large truck, and communicated with people in the gravel pits and black top plant. He believed that the people working there knew that he was waiting because of the CB communication, and that he would not have to sit and wait as long as he would if those employees had to walk out to talk to him. Also, Burse used the CB when other drivers would advise him where to turn the truck around when blacktopping or chip sealing. He did not use a CB in a truck while plowing snow. Burse did not feel that he needed a CB for safety reasons. He knew that most of the larger trucks had CB's in them, but not all of the trucks had them.

James Shevelson has been a mechanic with the Highway Department for more than 11 years. He is currently the Secretary and Steward for the Union. He has installed CB radios in trucks and was told to do so by his supervisor. Shevelson asked employees about when they had CB's installed in their trucks and made a list, which shows that only one person had a CB installed in 1989. Most of them were put in during the latter part of the 1990's. Altogether, 21 employees bought CB's and had them installed. Shevelson knew that not all of the trucks had CB's in them, but most of them seemed to have them. There are approximately 35 trucks owned by the Department.

Shevelson also interviewed employees about cell phones, and found that 11 employees were bringing them to work as of January 13, 2000. He testified that he did not talk with all employees.

Randolph Piotrowski has been employed at the Highway Department for eight years, working on state roads including the interstate. He put a CB in his truck in either 1994 or 1995. He got permission from a supervisor to use one. He used it for safety reasons, to alert semi drivers of his presence on the highway. In his section, he has to turn around at the bottom of a hill into a median from a passing lane, so he let other truck traffic know that there will be a slow moving vehicle on the interstate that is going to turn off. He was often thanked for that information. Drivers have thanked him when he was plowing snow in the passing lane and they thought he was in the driving lane, given the bright strobe lights. Truckers have called on their CB's to ask what lane he is plowing in, particularly at night in a snowstorm.

Piotrowski was injured in an accident in 1994, before he had a CB in his truck. He was hit by a smaller refrigerated truck and believes that he would have been more severely injured had a semi truck hit him. He believes that most professional truckers are monitoring a CB, and being able to alert them of his presence is a great safety measure. Piotrowski also noted that the employees use CB's a lot for communicating among themselves when they are using several trucks in the same area to clean out snow. They tell each other if cars are trying to pass and try to prevent accidents. Piotrowski testified that they have been told to keep their conversations to a minimum as other people monitor them on scanners. They try to stay off the air and use it for necessary communications. Some employees do not like to use the two-way radios available in the trucks, because other people in the County may monitor those communications. Piotrowski does not use a cell phone.

Jeffrey Peterson has been with the Highway Department for 29 years as a truck driver and working in the sign room. He installed a CB in his truck in 1989, and was probably the first person to use one. He asked if he could put it in and has communicated with management on it since then. Peterson used his CB to communicate with other trucks and the foreman, as well as to talk to people at the gravel pit or the hot mix plant to let them know he is there to get a load. He seldom used it when plowing snow and did not believe that the CB reduced risk on the road, but that its main value was for the efficiency during construction season. Peterson did not have a cell phone.

David Sopa worked for the Highway Department for 30 years and had a CB in the big truck that he drove (a heavy hauler) but not in the truck he used on County roads. The big truck was used during summer during construction. He talked to the road foreman, hired trucks and the Highway Commissioner on the CB regarding work. He thought using the CB was easier than using the two-way radio because other people also use the two-way radio system. The Commissioner called him on the CB, and the foreman also initiated calls on the CB to him. Sopa has used the CB to communicate with employees at the gravel pit and the hot mix plant.

Weronke testified that there was a County policy prohibiting personal items at work implemented in about 1993. The County Personnel Director came to the Highway facility and everyone was told to take home personal equipment that did not pertain to work activities. CB's were not specifically mentioned, but Weronke considered them to be included. There were exercise bikes and engines being worked on, and all equipment that did not pertain to work was to be taken home at that time. Weronke was not aware that cell phones were around in 1993. The first time he became aware of CB's in County trucks was about 1998.

State road supervisor Dale Peterson was aware of the CB use by employees in County vehicles. There was an incident involving an employee who called the Highway Commissioner in another County "Captain Cue Ball" over a CB radio. Peterson was told by the road superintendent in that County that they would not use Portage County to do their center lining work anymore. Peterson questioned the employee who allegedly made the statement but could

not prove it. The County advertised for other work after losing the work in that County. One supervisor told Peterson that they were going to use a private service, because Portage County employees could say anything they wanted on the CB's.

Weronke testified that he did not believe that CB's or cell phones provided a safety measure for employees, and it was not in their job duties to communicate with other truck drivers or the general public. He was aware of an employee using a cell phone to plan his weekend activities for about 10 or 15 minutes while working overtime for the Department. He had also monitored conversations with employees regarding inappropriate comments about management.

The Executive Board of the Union met with Highway Department management after the policy was issued on January 14, 2000, sometime within the following week, to present their side of the issue. The meeting was not held to discuss implementing the policy.

### **THE PARTIES' POSITIONS**

#### **The Union**

The Union asserts that the CB's were installed with the Employer's knowledge, permission and urging. They were used frequently over a long period of time. Piotrowski used a CB which was installed in 1995, and his supervisor said he could have it installed. Shevelson has worked on vehicles with CB's and has installed them in Highway Department vehicles. He knew of 20 trucks in the Department in which CB's were installed. He was told by his supervisor to install them in three trucks during 1998 and 1999. Peterson installed a CB in his truck in 1989 with the Employer's permission. Sopa has communicated with the Highway Commissioner on his CB. The Commissioner initiated the call. Sopa has talked with a foreman on the CB. Young observed that the Employer specifically authorized CB's that employees bought to be installed in new trucks. No one was aware of the Employer having refused to allow a CB to be installed.

The Union argues that the CB's were beneficial to the employees. Piotrowski used the CB for safety to make semi-trailers and large trucks aware of his presence on the highway. He would notify truckers that he was turning, that there was a slow moving vehicle on the interstate. His turnaround is at the bottom of a hill. He testified that drivers have thanked him for letting them know where his truck is on the freeway. In 1994, he was injured in an accident with a refrigerated truck, and at that time, he did not have a CB in the truck. He bought a CB for his own safety. The other benefit of having a CB is that the employees can coordinate their work in getting gravel or other materials. The better coordination allows employees to end their workday on time and have use of their private time.

The Union notes that at least 11 employees were using their own cell phones or carrying them while on the job. Employees had been allowed to bring cell phones to work for three or four years, and the Employer knew they had them and used them. Supervisors even called employees on their personal cell phones. The cell phones were beneficial to employees, as they used them to call home when working overtime, to make arrangements for childcare, and to deal with family problems or emergencies.

The Union believes that the banning of CB's and cell phones was a retaliatory act and not for a business purpose. The Highway Commissioner was upset that an employee reported him to the Highway Committee Chair for an ethics code violation, and prohibited the use of the CB's and cell phones in retaliation. While the Employer contends that one employee said something offensive on a CB, there is no just cause to discipline the whole staff.

The Union concludes by asserting that the possession and the use of CB's and cell phones were past practices which were improperly terminated. These were clear, long standing, frequently exercised past practices that did not contradict any explicit provision of the collective bargaining agreement. The practices benefited both employees and the Employer. The Employer suspended the practices in a fit of anger as retaliation for the alleged act of one employee who was not identified or disciplined. Although the Employer could put reasonable restrictions on the use of CB's and cell phones, it did not do so. Employees who bought their own CB's have suffered an economic loss, and the Union asks that if the Arbitrator finds in favor of the Employer, that the Employer should reimburse each employee who bought a CB for a Department vehicle.

### **The County**

The County submits that its position is supported in an arbitration case between a transit union and the City of LaCrosse, in which an arbitrator found the City's rule prohibiting personal radios was a reasonable work rule. The bus drivers used them for 40 years, but after a fatal accident in which a child was killed by a bus, the City posted a rule prohibiting personal radios or any electronic, visual or audio device on the bus. The arbitrator found no contractual basis in the collective bargaining agreement that would allow bus drivers to use personal radios in their buses. This is similar to the present case. There is nothing in the collective bargaining agreement here which would allow employees to use personal CB's and cell phones in County vehicles.

The County argues that the Union failed to show that there was a past practice. Some witnesses testified that they used cell phones and others testified that they did not even own a cell phone. The same was true for the use of CB's. Some felt the need to use CB's for their safety, while others would rarely use the CB because they did not see a need to do so. As far as communication with gravel pit and hot mix plant operators is concerned, it is the job of the Highway Department supervisors to coordinate between them and the County trucks. If

employees of the gravel pit and hot mix plant have to walk out to speak to County employees, that is a working condition of those operations, not related to the working conditions of County Highway Department employees.

The County asserts that it did not violate the collective bargaining agreement by requiring employees to follow the terms of the Personnel Policy prohibiting the use of personal property in the Highway facility. If the Arbitrator finds that a past practice existed, it should be limited to the use of CB radios and not cell phones, because the Union presented almost no evidence of employee use of cell phones. Further, any finding of a past practice of the use of CB's should be further limited to certain trucks for certain purposes. The Union's testimony demonstrated a consistent use of CB's in state section trucks while not in County section trucks. However, it remains the County's position that the policy update of January 14, 2000 was a management decision in the form of a reasonable work rule.

### **The Union, in Reply**

The Union responds to the County's assertion that the ban of CB's and cell phones was only the implementation of a prior policy, and states that the real reason for the ban was the Commissioner's revenge for someone turning him in for a possible ethics or policy violation. The Union asks why was the policy not enforced before? The policy itself does not prohibit having personal property at work, and it was developed to prevent employees using the shop. The Commissioner testified that he knew who called another County Highway Commissioner a nickname, but did not discipline that person. Thus, banning CB's and cell phones is group discipline for the action of one person contrary to the just cause concept.

While the County contended that no evidence of efficiency was presented, the Union asserts that the County has ignored repeated testimony of the coordination between privately contracted trucks and the gravel pit and black top plants. The County also ignored the fact that safety is improved by the use of CB's, the Union states.

Contrary to the County, the Union contends that universal use of a practice is not necessary to establish a practice. The County should have waited for contract negotiations to repudiate a past practice and allow the Union to bargain it into the contract. Custom or past practice need not emanate from language in the agreement. Finally, the Union asserts that the County's reliance on a transit case is misplaced, because the use of CB's for communication and safety is not the same as listening to commercial radio for entertainment or current events.

### **DISCUSSION**

It is generally accepted by arbitrators that, in the absence of written contractual language, a binding past practice must be unequivocal, clearly enunciated and acted upon, and

readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Both the personal use of CB radios and cell phones lack some of those elements.

Management knew of the practice of putting personal CB's in trucks, as it allowed mechanics to install them and knew that employees used them to communicate and had in fact communicated with employees on CB's. However, the practice was not necessarily unequivocal, as management had taken steps in 1993 to rid the workplace of personal equipment. While CB radios were not specifically dealt with during the 1993 incident in which the Personnel Director came to the Highway Department, employees were told to take all personal equipment home. Employees knew or should have known that their CB's were personal equipment, since they paid for them in the first place.

Moreover, the practice of putting CB's in trucks was not done over a long period of time, and it was only done by about half of the employees. The record shows that only one of them was installed in 1989. Others were as recent as 1999, 1998, 1997, 1996, 1995 and 1994. This does not meet the element of a "reasonable period of time" to establish a past practice. While some employees felt there were safety issues and efficiency concerns, there is nothing in the record that convinces me that the use of CB's rises to the level of a past practice that should be enforced as part of the collective bargaining agreement.

The personal use of cell phones has even fewer elements of a binding past practice. Only 11 employees had them, and they came into existence in the mid to late 1990's. There is no evidence of management's acquiescence in the use of cell phones by employees.

While a practice does not have to be universal or apply to every employee to become a binding past practice, it is more likely to be accepted where it affects all or most of the employees. The greater the number affected, as well as the greater the period of time involved, the more likely the practice was intended by both parties to carry forward. The use of CB's and cell phones lacks those elements, and there is no clear past practice that becomes binding on the parties.

The collective bargaining agreement provides in Section 2 that the County has the right to establish reasonable work rules. A question remains as to whether the County established a reasonable work rule in this case.

Frankly, the County owns the Highway trucks, and it can decide what equipment it wants in them. It is not reasonable to expect the County to reimburse employees for CB's now when it never required employees to put them in the trucks in the first place. The employees did it on their own initiative, although County personnel installed them. The County may take them out, return them to the employees, and use whatever equipment it wants in its own trucks. This rule is reasonable.



However, the rule regarding cell phones is too broad to be reasonable. The rule states: "Personal cell phones are not allowed inside the County Highway Facility or in county vehicles." It would be reasonable for the County to prohibit the use of a personal cell phone – or any phone, for that matter – during work time. But it is unreasonable to have a rule that would prohibit someone from carrying a cell phone. Cell phones are small and may be carried in a pocket, the same as a wallet, a photo of kids, money and other personal items. The County does not prohibit employees from carrying such personal items in the buildings or vehicles. Employees should not be prohibited from using their personal items such as money or phones during their breaks or lunch periods. To the extent that the rule would ban the presence of cell phones, it is overly broad and unnecessarily infringes on employees' personal items and privacy.

Thus, while the use of CB radios and cell phones is not a binding past practice, the County's rule that would prohibit employees from carrying cell phones on them inside the County Highway Facility or in County vehicles is not a reasonable work rule and should be limited to prohibit the use of phones during working hours only.

### **AWARD**

The grievance is denied in part and sustained in part.

The County violated the collective bargaining agreement, specifically Section 2, paragraph 2, by issuing an overly broad rule prohibiting cell phones inside the County Highway Facility or in County vehicles. The County is ordered to rescind that portion of the rule or to limit it to prohibiting the use of cell phones during working hours. The County's rule prohibiting CB radios in County vehicles is reasonable and does not violate the collective bargaining agreement.

Dated at Elkhorn, Wisconsin, this 16<sup>th</sup> day of July, 2001.

Karen J. Mawhinney /s/

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Karen J. Mawhinney, Arbitrator