BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 75

and

VILLAGE OF ALLOUEZ

Case 44
No. 60857
MA-11745

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jonathan M. Conti**, 1555 North RiverCenter Drive, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Davis & Kuelthau, S.C., by **Mr. William G. Bracken**, Employment Relations Service Coordinator, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, appearing on behalf of the Village.

ARBITRATION AWARD

The International Brotherhood of Teamsters Local 75, hereinafter referred to as the Union, and the Village of Allouez, hereinafter referred to as the Employer or the Village, are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the Employer's action to discontinue the practice of allowing Union members the use of the Employer's facilities, equipment and tools to work on their own personal vehicles during non-working hours. The undersigned was appointed by the Commission as the Arbitrator and held a hearing into the matter in Allouez, Wisconsin, on March 26, 2002, at which time the parties were given the opportunity to present evidence and arguments. The hearing was transcribed. The parties filed post-hearing briefs by June 12, 2002, marking the close of the record.

BACKGROUND

The underlying factual circumstances leading to this grievance are not in dispute. For many years preceding the grievance, the members of the Union were allowed by the Employer to use its facilities, equipment and tools located in the Public Works garages, Park shops and Water Department garage to clean and perform routine maintenance on their personal vehicles. This work had to be performed during non-work hours and only the employees themselves were authorized to be on the Employer's premises while doing so. On August 23, 2001, the Employer notified all of its employees that the practice would no longer be allowed "effective immediately" and that this action was being taken by the Village "for liability reasons" pursuant to the advice of the Village's insurance company.

ISSUE

The parties were unable to stipulate to the issue and left it to the Arbitrator to frame the issue in the award.

The Union would state the issue as follows:

> Did the Village violate the collective bargaining agreement or a past practice when it eliminated allowing bargaining unit employees the use of the Village's facilities, equipment, and tools to work on their personal vehicles during non-working hours, and if so, what is the appropriate remedy?

The Employer would state the issue as follows:

> 1. Did the Village violate the 1999-2001 Collective Bargaining Agreement when it issued a work rule prohibiting Village employees from using Village facilities and equipment for personal use?
>
> 2. If so, what is the appropriate remedy?

The Arbitrator states the issue as follows:

> Did the Employer violate the collective bargaining agreement when it discontinued the practice of allowing bargaining unit members the use of Village facilities, equipment, and tools during non-working hours to perform maintenance or other work on their personal vehicles? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 2. MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement or as may affect the wages and hours and working conditions of Employees, the Union recognizes that the management of the Village is vested exclusively in the Employer. All power, rights, authority, and responsibilities customarily executed solely by management are hereby retained. Such rights include but are not limited to the following:

A. To direct and supervise the work of its Employees;

B. To hire, promote and transfer Employees;

C. To layoff Employees for lack of funds or other legitimate reasons;

D. To discipline or discharge Employees for just cause;

E. To plan, direct and control operations;

F. To determine to what extent any process, service or activity shall be added, modified or eliminated;

G. To introduce new or improved methods or facilities;

H. To schedule the hours of work;

I. To assign duties;

J. To issue and amend reasonable work rules;

K. To require the working of overtime hours when necessary in the performance of Village business;

L. To take whatever action is necessary to comply with State or Federal law.

ARTICLE 24. DURATION OF AGREEMENT

. . .

> 24.02. This Agreement nullifies any previous existing policy or procedure established by and between the Village of Allouez and the employees of the Departments of Public Works and Park Maintenance covered by this Agreement. This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties and supersedes all previous Agreements.

. . .

THE PARTIES' POSITIONS

The Union

The Union maintains that the practice of allowing the employees the use of the Village's facilities and equipment was, and is, a clear and unequivocal past practice and that it is binding upon the parties. It cites Richard Mittenthal's article "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Rev. 1017 (1961) and its "characteristics" of a binding past practice and argues that the practice at issue here has each of those characteristics, i.e. *clarity* and *consistency*, *longevity* and *acceptability*. Ergo, this practice is binding on the parties. Further, evidence of the past practice is relevant to the issue presented here since it does not conflict with any clear and unambiguous contract language and thus may be introduced to provide a basis of rules governing matters not included in the contract.

The Union cites a number of prior awards and portions of Elkouri and Elkouri for the propositions that the practice here constituted a personal employee benefit of "peculiar personal value" and that arbitrators in the past have been more inclined to find such practices binding upon the parties. In short, it argues that this practice extended a significant personal benefit to the employees which could not have been unilaterally eliminated by the Employer.

The Union argues that the Employer's reliance on the management rights clause in support of its actions is misplaced because the management rights clause does not address the treatment of established past practices and hence does not negate the practice at issue here.

Nor can the Employer rely on the so-called "zipper clause" since the practice has been followed for many years and the zipper clause, as a "perfunctory sign off in a long series" of contracts, does not allow the Employer to unilaterally eliminate it. The Union cites WESTERN FRONTIERS, INC., 97 LRRM 1408 for the proposition that a zipper clause is not a "green light to unilateral action" and that pro-forma zipper clauses do not nullify a past practice where the practice does not conflict with the express terms of the contract.

Citing WINNEBAGO COUNTY, WERC, CASE 311, NO. 57139, MA-10524 (CROWLEY, 5/99), the Union says that, since the practice had become an implied term of the parties' collective bargaining agreement, the Employer could not abrogate the practice by issuing a work rule but must repudiate it by following the well-recognized procedure of giving timely notice to the Union of the repudiation giving the Union the opportunity to negotiate a provision in the agreement to continue the practice. In this case, the Union argues that the Employer failed to give it any notice of the intent to discontinue the practice during the negotiations for the current agreement, but rather, notified the employees of the termination of the practice one week after negotiations had concluded.

The Union argues that the Employer's stated reason for the repudiation, i.e. that its insurance carrier advised against its continuance due to potential liabilities, is exaggerated and outweighed by the benefit to the employees. It points to the fact that over the past 27 years during which the practice has been in effect, there have been no injuries to employees or anyone else, nor has there been any damage to personal property. In any event, says the Union, the Village could have alleviated some of the potential liability by having the employees sign liability waivers as a condition of the use of the facilities and equipment. The Union argues that the restrictions currently placed on the use of these facilities and equipment, i.e. the fact that employees are not allowed to bring family members or friends to the facilities nor are they allowed to work on vehicles other than their own, further alleviates the liability concerns of the Village.

Finally, regarding the Employer's assertion that a Wisconsin Department of Industry, Labor and Human Relations inspection of its Public Works building in March, 2001, which found a number of building code violations, presented a reason for the elimination of the practice, the Union posits that this is mere pretext since the Village continues to allow employees to work in the building and because the Village advised that even if a new Public Works building were to replace the existing one, the practice would still be prohibited.

The Employer

The Employer argues that the management rights provision in the CBA reserves all power, rights, authority and responsibilities normally reserved to management and that this includes the right to issue reasonable work rules. It argues that the elimination of the practice at issue here was just such a "work rule." Further, the Employer says that this particular work rule was issued to "ensure the health, safety and welfare of employees" and others and to comply with the advice of its liability insurance carrier that the discontinuance of the practice would limit the Employer's liability.

The Employer argues that the only limitation upon its exercise of the rights retained in the management rights provision would be a matter otherwise addressed in the CBA and it asserts that the agreement does not contain any other provisions which restrict its rights in this

regard or even mentions the issue of after-hours use of Village facilities, equipment or tools. Thus, argues the Employer, it is free to exercise its rights and issue the work rule eliminating the practice.

The Employer asserts that any "alleged" past practice is irrelevant to the outcome of this dispute because the management rights provision is clear and unambiguous as to the Village's right to issue reasonable work rules and, consequently, the Arbitrator "is precluded from resorting to the past practice of the parties" in order to resolve the dispute. In any event, no binding past practice exists in this case because the parties did not mutually agree to it and, to the extent that any practice existed at all, it was "mere happenstance."

The Employer argues that, regardless of the foregoing, the "zipper clause" found under Article 24 nullifies any past practice and asserts that the language in this clause alone supports the dismissal of the grievance.

Finally, the Employer says that the "work rule" here was reasonable because it was reasonably related to a legitimate objective of management, namely, "to be as certain as possible that (employers) are not unduly exposing their employees and others to injury and themselves to liability." In support of its argument that the practice exposed the Village to liability and employees to harm, it points to the occurrence of February 5, 2001. On this date an employee working on his car after hours spilled some gasoline into the storm sewer at the garage located next to the Village Hall. The odor of gasoline permeated the Village Hall and three apartments located above the garage. The Fire Department evacuated these buildings and, perhaps, some homes nearby, due to the smell and the Village was forced to put the apartment tenants up in a local motel. The Village also cancelled a hearing scheduled for that evening at Village Hall.

As a result of the events of February 5, 2001, the Village hired Insurance Services, Inc. to assess the various risks to the Village and to recommend alternatives for the reduction or elimination of them. Accordingly, two employees of that company provided the Village with their concerns, one of which was the use of Village facilities and equipment after hours. The Village contends that these two investigators concluded that the Village was subject to "significant liability" as a result of the practice. Further, the Village received a report from the Wisconsin Department of Commerce, Safety and Buildings Division, which recommended that the Village prohibit the use of its facilities and equipment by employees during off-work hours. Finally, the Village received a letter from a Mr. Robert Cooke, the manager of the safety and health division of a company called Alpha Terra Science, wherein he concluded that, in his opinion, allowing workers to use company facilities creates a potential of liability. The Employer argues that these reports and opinions support its actions and support the proposition that its actions were reasonable.

The Union's Reply Brief

The Union argues that the Employer's position that the management rights clause is clear and unambiguous and may not, therefore, be modified by a past practice is without merit because it does not mention the treatment of past practices and because such a clause may not be used to avoid or overrule another clear and unambiguous contract term. As a binding past practice, as the Union asserts this is, it becomes an implied term of the contract and may not be abrogated under the theory that the employer is merely exercising its management rights to promulgate a work rule.

The Union characterizes the "zipper clause" as "a perfunctory sign-off in a long series" of contracts between the parties and asserts that it is nothing more than a pro-forma clause which cannot nullify a past practice where the practice does not conflict with the express terms of the contract. Citing FRUEHAUF TRAILER COMPANY, 29 LA 372, 375 (JONES, 1957) and PRINTPACK, INC., 112 LA 1115 (CRIDER, 1999).

The Union argues that the Village fails to show that the risks associated with the practice are so significant as to outweigh the personal employee benefit of it. It points out that there have been no injuries and no property damage during the 27 years the practice has been in existence and that the employees are prohibited from bringing family or friends to the facilities during non-working hours. It also argues that the Village could have had employees sign liability waivers to reduce liability exposure, but did not do so, and points out that the gasoline spill in February, 2001, during which no one was injured and no property damage occurred, could have as easily happened during work hours.

The Village's Reply Brief

The Village argues that there is no clear and unequivocal past practice because there was no mutual agreement to the practice and because the practice lacks consistency. It lacks consistency, argues the Village, because "significant" restrictions were placed on it over the years. First, in 1996, the Village required employees to obtain permission before using the facilities and to check equipment in and out. Then, in 1997, the Village limited the use of its facilities and equipment to employees only.

The Village repeats its assertion that since the management rights clause language is clear and unambiguous as to the right of the Employer to issue reasonable work rules it may not be modified by a past practice.

The Village asserts that it is under no obligation to negotiate with the Union prior to issuing work rules and, therefore, the Union's position that the abrogation of the practice should have been bargained with the Union is without merit.

Finally, the Village repeats its prior arguments regarding the "zipper clause" nullification of the practice and its assertion that the "work rule" was reasonable.

DISCUSSION

The Employer argues that no past practice exists in this case and that if the Arbitrator were to find that one does exist, its existence would be irrelevant to the analysis of the issues here. Since the Union's grievance hinges upon the existence of a binding past practice, an analysis of that practice is required.

Initially, we need a clear and workable definition of "past practice." Richard Mittenthal provides it for us in his article "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Rev. 1017, 1019 (1961):

> First, there should be *clarity* and *consistency*. A course of conduct which is vague and ambiguous or which has been contradicted as often as it has been followed can hardly qualify as a practice. But where those in the plant invariably respond the same way to a particular set of conditions, their conduct may very well ripen into a practice. Second, there should be *longevity* and *repetition*. A period of time has to elapse during which a consistent pattern of behavior emerges. Hence, one or two isolated instances of certain conduct do not ordinarily establish a practice . . . . Third, there should be *acceptability*. The employees and the supervisors alike must have knowledge of the particular conduct and must regard it as the correct and customary means of handling a situation. Such acceptability may frequently be implied from a long acquiescence in a known course of conduct. Where this acquiescence does not exist, that is, where employees constantly protest a particular course of action through complaints and grievances, it is doubtful that any practice will be created.

The record here clearly supports the notion that the practice of allowing employees the use of Village facilities, equipment and tools after work hours was clear and consistent over a period of in excess of 27 years notwithstanding the Village's argument that two changes in the practice were instituted over that period of time. In 1996, the Village required that employees wishing to use the facilities after work hours seek permission to do so and further required employees wishing to use tools to check them in and out. In 1997, the Village limited the use of the facilities, equipment and tools to employees only. In both cases, the Union accepted the modifications without question. These changes had no substantive effect on the practice and do not support the argument that they defeat the requirement of consistency.

Certainly, the record confirms the fact that this practice meets the requirements of longevity and repetition. No one denies the fact that it has been in effect for over 27 years in its present form, save the two modifications mentioned above. Thus, an ample period of time has elapsed during which a consistent pattern of behavior has emerged.

The testimony of Village witnesses and Union witnesses alike prove that the employees and supervisors both had knowledge of the practice and regarded it as the customary course of conduct and, until August 23, 2001, no one protested it. Hence, the acceptability element is satisfied. I, therefore, conclude that the Union has proved, as it had the burden to do, the existence of a binding past practice and, as such, should be given status as an implied term of the agreement between the parties.

The Employer argues that, binding past practice notwithstanding, it has the authority under the management rights provision to issue reasonable work rules and that the elimination of the practice here was just that, an issuance of a reasonable work rule. It argues that the rule was "reasonable" because it was designed to protect the health, safety and welfare of the employees. First of all, the record does not support the argument that the practice was dangerous to the employees or to anyone else. In 27 years, no one had been injured nor had any property damaged resulted from the after work hours use of these facilities by the employees. The only incident associated with the use of the facilities which could be viewed as evidence of potential liability is the gasoline spill in 2001. This incident could have just as easily happened during regular work hours. As such, it cannot be said that the incident was caused by the practice. It was caused by the nature of the work which takes place in the facility on a daily basis. The Village had reduced its liability to third parties to a great extent in 1997 when it restricted the use to employees only. To further restrict its liability it could have taken the simple step of requiring each employee desiring to use the facilities to sign a waiver or hold harmless agreement. As for the Village's argument that it had the authority to discontinue the practice pursuant to the management rights provision, the Arbitrator disagrees. As a binding past practice, it has become a contractual obligation; it has become an implied term of the parties' collective bargaining agreement and, as such, could not have been abrogated by a work rule any more than any other express term of the contract. In this regard, the Arbitrator embraces Arbitrator Mawhinney's reasoning in MANATOWOC COUNTY (HIGHWAY DEPARTMENT), CASE 276, NO. 49581, MA-7995 (MAWHINNEY, 3/94):

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

Also see In re WEYERHAEUSER CO., 95 LA 834, 838 (ALLEN, 1990):

> My feeling is that where the past practice has been established for such a long period of time, where the employees working there have been given reasonable grounds for believing that it will continue and they therefore could be expected to adjust their personal lives to working under these conditions, and where the practice began through a definite understanding between the Company and the employees . . . then this is strong evidence that this is the kind of practice which will become a part of an Agreement unless the Agreement clearly states that this is not to be so. In the face of such established usage the plain management prerogative clause and the clause that this is the "entire understanding" between the parties is not enough to prevent this past practice from becoming a definite part of the Agreement. Those clauses have their specialized meanings to be sure, but they, by themselves are not enough to defeat such a history and pattern of circumstances as exists in this case . . . .

The Arbitrator rejects the Village's reliance on CITY OF WISCONSIN RAPIDS, CASE 106, NO. 47179, MA-7192 (MCGILLIGAN, 9/92), which it asserts stands for the proposition that where an employer has reserved the right to establish work rules, past practice becomes irrelevant. The parties in WISCONSIN RAPIDS had a long bargaining history which resulted in specific contract language prohibiting the practice of firefighters using City facilities and equipment after work hours and conclusively demonstrating the City's consistent non-acceptance of the practice the Union sought to preserve. It is doubtful that a binding past practice could have been shown under those facts but it was unnecessary for the Arbitrator to so find.

Past practices are not etched in stone. They may be repudiated by either party via notice to the other prior to or during the bargaining process. In this way, the other side has the opportunity to attempt to negotiate the practice into the contract if it so desires. Arbitrator Mittenthal had the following to say with regard to this issue:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For . . . if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>
> That inference is based on the parties' acquiescence in the practice. If either side should, during the negotiations of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In the face of a timely repudiation of a practice by one party, the

> other must have the practice written into the agreement if it is to continue to be binding." Proceedings of the 20th Annual Meeting of NAA, 1, 35-36 (BNA Books, 1967); Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," Proceedings of the 14th Annual Meeting of NAA, 30, 56-57 (BNA Books, 1961).

In this case, the Employer could have taken the issue to the bargaining table but chose to withhold notification of its intent to discontinue the practice until one week after the new collective bargaining agreement had been ratified. As they say, timing is everything and the timing employed by the Village in this instance was suspicious.

Finally, I reject the Employer's assertion that the so-called "zipper clause" found at Article 24 entitled "Duration of Agreement" eliminates the past practice between these two parties. This clause is a boilerplate "exclusive agreement" or "general waiver" clause which fails to specifically identify and nullify this binding past practice. Practices which are continued from contract to contract, even though not written into the four corners of the agreements, are as effective as though they had been. Arbitrator Edgar A. Jones in FRUEHAUF TRAILER CONPANY, 29 LA 372, 375 (JONES, 1957) said:

> The repeated execution of collective bargaining agreements which contain exclusive agreement provisions has no magical dissolving effect upon practices or customs which are continued in fact unabated and which span successive contract periods. Although not verbalized in the current agreement, such practices may nonetheless comprise as effective and binding a part of it as any of its written provisions . . .

Arbitrator Charles J. Crider addresses this issue well in PRINTPACK, INC, 112 LA 1115, 1117 (CRIDER, 1999):

> The rationale for the cases where a practice prevails over a zipper clause is set forth in Elkouris' HOW ARBITRATION WORKS at page 645: "All binding force of customary practice may be eliminated *if* the contract language is quite strong." Based on this authority, a purchaser such as Printpack relies at its peril on a boilerplate zipper clause to nullify practice. Printpack's rote clause is only a workaday contract sign-off – it does not conclusively show an intent to void a practice. A buyer must negotiate explicit, concrete and unambiguous language clearly stating the initial labor contract between the parties nullifies any practice not expressly included in the written agreement . . . .

The Village in this case also relies at its peril on the clause at Article 24 and since this clause does not "conclusively show an intent to void" the practice at issue here the grievance is properly sustained.

In light of the foregoing, it is my

AWARD

The Employer violated the collective bargaining agreement when it discontinued the practice of allowing bargaining unit members the use of Village facilities, equipment and tools during non-working hours to perform maintenance or other work on their personal vehicles and the grievance is sustained. The Village is ordered to reinstate the practice.

Dated at Wausau, Wisconsin, this 6th day of September, 2002.

Steve Morrison /s/
Steve Morrison, Arbitrator

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