BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHEQUAMEGON UNITED TEACHERS

and

WASHBURN SCHOOL DISTRICT

Case 55
No. 63509
MA-12610

(Personal Car Use Grievance)

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, P.O. Box 988, Hayward, Wisconsin 54843, on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Christopher R. Bloom**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, on behalf of the District.

ARBITRATION AWARD

Chequamegon United Teachers (herein the Union) represents a bargaining unit within the Washburn School District (herein the District) consisting of all regular full-time and regular part-time non-certified employees, excluding supervisory, managerial and confidential employees. The Union and the District were parties to a collective bargaining agreement covering the period July 1, 2002, to June 30, 2003, and providing for binding arbitration of certain disputes between the parties. At the time the dispute herein arose, the agreement had expired and the parties had not agreed to a successor contract. On March 26, 2004, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration regarding the non-payment of mileage expenses to bargaining unit members who travel between schools during the workday. The Undersigned was designated by the Commission to arbitrate the issue. The parties agreed to forego a hearing and submit the matter on a stipulation of facts and an agreed group of exhibits. The stipulation and exhibits were filed on June 10, 2004. The Union filed its brief on July 2, 2004, and the District filed its brief on July 6, 2004, whereupon the record was closed.

ISSUES

The Union would frame the issues as follows:

Did the District violate the collective bargaining agreement when it did not pay mileage to employees who were required to drive their own vehicles from one school building to another during their daily work shift?

If so, what is the appropriate remedy?

The District would frame the issues as follows:

Did the District violate the parties' collective bargaining agreement when it refused to compensate affected employees for mileage pursuant to the Personal Car Use article on page 13 of the collective bargaining agreement?

If so, what is the appropriate remedy?

Having reviewed the record and the parties' submissions, the Arbitrator adopts the issues as framed by the Union.

PERTINENT CONTRACT LANGUAGE

MANAGEMENT AND ASSOCIATION RIGHTS

. . .

B. The School Board, on its own behalf, hereby retains and reserves unto itself without limitation all powers, rights, and authority vested in it by applicable laws.

   The Board possesses the sole right to operate the school system and all management rights repose in it subject only to the provisions of this contract and applicable laws. These rights include but are not limited to the following:

   1. To direct all operations of the School District.

   2. To establish reasonable work rules and schedules of work.

3. To hire, promote, transfer, schedule and assign employees in positions with the school system.

. . .

8. To determine the method, means and personnel by which school system operations are to be conducted.

. . .

PERSONAL CAR USE

The Board of Education will pay $.25 per mile on approved trips for use of personal car if a school car is not available.

BACKGROUND

The background of the case is summed up in the Stipulations of Fact submitted by the parties:

Stipulation #1 – The parties have not completed negotiations for the Collective Bargaining Agreement covering the 2003-2004 year.

Stipulation #2 – Support staff employees have only been reimbursed mileage pursuant to the Personal Car Use article of the parties' collective bargaining agreement when they travel outside of the District. In the 1990-91 school year, the District opened the elementary building at a different location than the high school. As a result, several District employees were required to travel from the elementary building to the high school as part of their job duties. These employees have never been compensated for such travel. The language pertaining to Personal Car Use has been in the collective bargaining agreement for the duration of the District's practice.

Stipulation #3 – The Union was not informed of nor knew of the District's practice of not paying mileage for employees driving from one school building to another during the employee's workshift.

Stipulation #4 – The District has two buildings which are 0.5 miles apart

Stipulation #5 –
a) Mary Ann Sarver drives her personal car one way from the elementary building to the secondary building during her workshift.
b) Monique Mattson drives her personal car one way from the elementary building to the secondary building during her workshift.
c) Lorraine Mattson drives her personal car one way from the elementary building to the secondary building during her workshift.
d) Lisa Abeles-Allison drives her personal car one way from the elementary building to the secondary building during her workshift.

Stipulation #6 – The District has assigned Mary Ann Sarver, Lisa Abeles-Allison, Lorraine Mattson and Monique Mattson daily workshifts where each work part of the workshift at the elementary building and part of the workshift at the secondary building.

On February 4, 2004, the Union notified the District that it had become aware of the District's practice of not reimbursing employees for mileage traveled between the school buildings and insisted reimbursement to bargaining unit employees so situated begin forthwith at the rate of $0.25 per mile specified in the Personal Car Use article of the collective bargaining agreement. On February 13, the District declined and stated its position that according to the existing practice the provision did not apply to trips between District buildings, whereupon the Union filed a grievance. The grievance proceeded through the steps of the contractual grievance procedure without resolution and thereby arrived in arbitration.

POSITIONS OF THE PARTIES

The Union

The Union maintains that the language of the Personal Car Use article is clear and unambiguous and that it requires the District to reimburse mileage to all bargaining unit employees for any approved travel during the workday in their own vehicles, including required travel between the District's buildings. Nothing in the language indicates any intention by the parties to limit its application only to trips outside the District, but instead covers all trips for work related purposes during the workshift.

Moreover, there is not an existing practice that takes precedence over the contract language. The parties stipulated to the fact that the Union was unaware that the District wasn't paying employees for their travel between the District's buildings. There cannot be a binding

practice when one party is unaware of it. Numerous arbitration awards have rejected the existence of a binding practice when the Union was unaware of the practice, even when it was known to individual employees. (Citations omitted.) Even had the practice been known to Union, however, it would still be superceded by the clear language of the contract.

The City

The District asserts that the case is governed by the existing practice of the parties and that no mileage reimbursement is due to the employees for travel between District buildings. The language of the Personal Car Use article is ambiguous because the word "trip" is susceptible of various meanings and can only be properly interpreted by determining how the parties have interpreted the term, which is best seen by their practice.

To be binding, a practice must be 1) unequivocal, 2) clearly enunciated and acted upon and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Elkouri and Elkouri, How Arbitration Works, 6th Edition, pp.608-609 (2003). The practice here meets all three elements because it is clear and unequivocal, clearly enunciated and has been in place since the 1990-91 school year. The Union claims not to have known of the practice, but such knowledge may be inferred from the fact that the practice has existed so long and, further, the Union may have knowledge imputed to it from the fact that the employees were aware of the practice. Mutuality of agreement may be inferred from the failure of the Union to object to the practice over the years.

DISCUSSION

The contract language at issue in this case states, very simply, that "(t)he Board of Education will pay $0.25 per mile on approved trips for use of personal car if a school car is not available." (Jt. Ex. 10) This language was added to the contract sometime before the new elementary school was built in 1990-91 and at a time when all the District's facilities were located at a central campus. (Stipulation #2) Clearly, neither of the parties considered the language to cover the specific circumstance at issue here, therefore, because the necessity for staff members to travel between different school buildings during the workday did not then exist. Rather, it had an obviously more general application, whereby if, for any reason, a staff member was approved to travel during the workday and had to use his or her own vehicle, they would be reimbursed for their mileage.

The circumstances changed in 1991 when the new elementary building was opened half a mile from the high school and certain support staff personnel were required to spend part of each workday at both schools. (Stipulations #4, #5 and #6) At that time, the District administration apparently concluded that such trips were not covered by the Personal Car Use language and thus did not compensate the employees for those trips. (Stipulation #2) It is not

known whether the employees made a connection between the travel and the contract language, but it does not appear that they raised the issue with the District or the Union prior to 2004. In any event, the Union was unaware of the District's practice in this regard prior to 2004. (Stipulation #3)

The first issue raised by the parties is whether the language in question is clear and unambiguous. If it is, then its meaning will control the dispute without reference to how it has been interpreted by the parties. The Union argues that it is unambiguous and that it is intended to cover any authorized travel by an employee during the workday in which his or her own vehicle is used. The District argues that the word "trips" is ambiguous and could have a number of different interpretations. It maintains that the existing practice is the best determinant of the intended meaning of the term.

Generally, arbitrators will attribute to words their ordinary meanings, if possible, but it does not necessarily follow that the words are susceptible to only one meaning. If the words are susceptible to more than one reasonable meaning, the language is inherently ambiguous and reference to some other guide is necessary to interpret properly. Here, the language was clear and unambiguous at the time it was adopted. Without the issue of multiple schools to contend with, the parties most likely intended it to apply to those situations when a staff member would have to travel away from the school on school business during the workday. In all likelihood, at that time there was no regular need for such travel, at least not daily, so approved travel was dealt with on an *ad hoc* basis. This changed when the new school was added because for some employees travel during the workday became a daily requirement. The record does not reveal whether the District considered the implications of the Personal Car Use language at the time, but it is clear that the District did not consider such travel to be reimburseable. The Union, however, was unaware that reimbursement was not occurring. In any event, in 2004 the Union became aware of the situation and protested.

In my view, the language in the Personal Car Use article is clear on its face and is not qualified. It states unequivocally that all approved trips during the workday in an employee's own vehicle will be reimbursed. It is of no matter that the kind of trips now undertaken by the staff were not envisioned when the language was bargained. As it stands, it is inclusive of required trips between the District's school buildings during the workday.

The District argues that the existing practice of not paying employees for such trips clarifies the intent of the provision, but I disagree. As both parties noted in their arguments, for a practice to have binding effect there must first be an ambiguity in the underlying provision, which I do not find. Additionally, however, there must also be evidence that the practice is a clearly defined one accepted by the parties, which also does not exist here. The record is clear that the Union did not know of the practice until 2004, so it cannot be said to have accepted a practice of which it was unaware. The District cites authority that suggests that failure to object to a practice over an extended period can constitute acquiescence, but those authorities assume underlying knowledge of the practice. The District argues forcefully

but I decline to do so. In order to modify the meaning of contract language, there must be a mutual understanding between the parties. The Union and the District are the parties to the agreement; the individual bargaining unit members are not. As many arbitrators have held, in such cases knowledge on the part of the employees does not constitute notice to the Union such that it can create a binding practice [Cf., BONDUEL EDUCATION ASSOCIATION, CASE 1, NO. 54685, MA-9760 (JONES, 6/19/97), JUNEAU COUNTY, CASE 99 NO. 48894, MA-7754 and CASE 100, NO. 48895, MA-7755 (MCLAUGHLIN, 12/22/93)]. If the District wishes to restrict the application of the Personal Car Use language in the manner that it has heretofore, it must obtain such a concession through bargaining.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The District violated the collective bargaining agreement when it did not pay mileage to employees who were required to drive their own vehicles from one school building to another during their daily work shift. The District shall hereafter pay all affected bargaining unit members $0.25 per mile for all required travel between the District's schools in their own vehicles during the workday, retroactive to February 4, 2004.

Dated at Fond du Lac, Wisconsin, this 1st day of February, 2005.

John R. Emery /s/
John R. Emery, Arbitrator

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