STATE OF WISCONSIN
BEFORE THE INTEREST ARBITRATOR

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In the matter of the petition of

General Teamsters Union Local 662

To Initiate Arbitration
Between Said Petitioner and

Stanley-Boyd Area School District

Daniel Nielsen, Arbitrator
Decision No. 26204-A

Appointment:	11 /15 /89
Hearing Held:	04/ 23 /90
Record Closed	06 /08 /90
Award Issued:	07 /03 /90

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Appearances:

Davis & Kuelthau, S.C., Attorneys at Law, 111 East Kilbourn, Suite 1400, Milwaukee, WI 53202-3101, by **Mr. Roger E. Walsh**, appearing on behalf of the Stanley Boyd Area School District.

Mr. James J. Newell, Business Agent, Post Office Box 86, Eau Claire, WI 54701-0086 appearing on behalf of General Teamsters Union Local 662.

ARBITRATION AWARD

On November 15, 1989, the undersigned was appointed by the Wisconsin Employment Relations Commission as arbitrator to hear and decide a dispute between the Stanley-Boyd Area School District (hereinafter referred to as the District) and General Teamsters Union Local No. 662 (hereinafter referred to as the Union) over the conditions of employment to be contained in the collective bargaining agreement between the parties for the school year 1988-90. The Union represents the cooks and custodians employed by the District, and the sole issue in dispute is whether employees classified as cleaning custodians will receive a paid or unpaid half-hour duty free lunch period.

A number of postponements were requested by the parties, and a hearing was ultimately held on April 23, 1990 in Stanley, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted post-hearing briefs and reply briefs. The record was closed on June 8, 1990.

Now, having considered the evidence, the arguments of the parties, the statutory criteria, and the record as a whole, the undersigned makes the following Award.

I. Background and Final Offers

The District provides general educational services to the people in the area of Stanley and Boyd, in northwestern Wisconsin. In providing these services, the District employs, among others, cooks and custodians. The Union is the exclusive bargaining representative of these employees.

There are seven employees in the custodial unit, serving two school buildings. Five are classified as Custodial/Maintenance employees, and two are Cleaning Custodians. At the Boyd Elementary School, one employee works during the school year from 7:00 a.m. to 11:00 a.m., with a two hour unpaid lunch period, and then from 1:00 p.m. to 5:00 p.m. At the Stanley facility, four custodial/maintenance employees work during the school year, with one on first shift, one on a swing shift and two on second shift. These employees all receive a one-half hour paid lunch period, during which they are on call. During the summer months, all Custodial/Maintenance employees at both schools work from 7:00 a.m. to 3:30 p.m., with a one-half hour unpaid, duty free lunch period. Cooks and laundry workers also receive paid lunch periods during the school year. Secretaries and Aides had received paid lunch periods until the 1989-90 school year, when the District implemented a policy of paying for the lunch period only if duties were assigned during lunch. The policy with respect to secretaries and aides is the subject of a separate and unresolved grievance arbitration proceeding. These lunch period practices are a matter of custom in the District, and are not specifically addressed in the collective bargaining agreement.

In September of 1988, the District hired two employees in the new classification of Cleaning Custodian. At that time, an impasse had been reached in negotiations between the District and the Union, in part over the issue of whether employees in the new classification should receive a paid lunch period during the school year, as did all other custodians. The District had taken the position that the cleaning custodians should not receive a paid lunch, but instead should have a duty free, unpaid lunch period year 'round, while the Union maintained that the duty free lunch should apply only during the summer months. The District informed the Cleaning

Custodians about the impasse when they were hired , and told them that they would receive an unpaid lunch.

The Union's final offer consists of the stipulations reached in bargaining. The Union contemplates the continuation of the paid lunch period practice, and its application to the Cleaning Custodians. The District's final offer includes the stipulations reached in bargaining, and a modification to Article 18 - Rest Period and Meals:

> "Employees classified as Cleaning Custodians will receive a one-half (1/2) hour unpaid lunch period during their regular workday."

II. Statutory Criteria

This dispute is governed by the terms of Section 111.70(4)(cm)7, the Municipal Employment Relations Act. MERA dictates that arbitration awards be rendered after a consideration of the following criteria:

> "7. Factors considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:
>
> a. The lawful authority of the municipal employer.
>
> b. Stipulations of the parties.
>
> c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
>
> d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.
>
> e. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.
>
> f. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes in

private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost-of-living.

h. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity of employment, and all other benefits received.

i. Changes in any of the foregoing during the pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact finding, arbitration or otherwise between the parties in the public service or in private employment."

While each of the factors is not fully discussed, each has been fully considered in arriving at the Award.

III. Positions of the Parties

A. *The Position of the District*

The District takes the position that the paid lunch hour received by other unit employees should not extend to the two employees in the new classification of Cleaning Custodians, since it is unnecessary and is the product of past practice rather than contract language. The only reference to works hours and lunch in the contract are Article 17, which guarantees an eight hour day and forty hour week for custodial employees, and Article 18, which guarantees continuation of the practice of providing free meals to employees. The Union's final offer does not specify whether lunch periods are paid or unpaid, leaving the District with the authority under the Management Rights clause to:

"determine the number of employees to be employed, the duties of each and the manner, nature and place of their work, to determine what constitutes good and efficient School practices and operation, the right to make and enforce reasonable rules and regulations and all other matters pertaining to the management and operation of the Employer."

This, the District argues, will give the District the right to determine whether these workers should receive a paid lunch or an unpaid lunch. That determination, however, would be subject to the grievance procedure. The Union's final offer should accordingly be disfavored in this proceeding, because its ambiguity will inevitably lead to litigation between the parties.

The District asserts that the Union's offer is not supported by internal comparables. The practice of allowing a paid lunch hour is not uniform within the custodial unit, as the custodian at the Boyd Elementary School never receives this benefit, and the remaining custodians receive the paid lunch only during the school year. Again, the Union's offer is silent on exactly which practice should be followed. The District asks whether the work schedule at Boyd, where the custodian never receives a paid lunch, could be applied to the Cleaning Custodians. Certainly this interpretation would lead to additional litigation, and the District reiterates its position that the Union offer should be disfavored as a result.

The District does not need to have the Cleaning Custodians on-call during their lunch periods, and has chosen to instead allow them a duty free lunch, during which they may leave the building. Given that there are no duties for them to perform, the provision of a paid lunch would amount to requiring the District to pay employees for not working. This, the District argues, is unreasonable. The District merely seeks the same arrangement that ten of the twelve schools in the Cloverbelt Athletic Conference have adopted. Only two schools in the conference have paid lunch hours for their custodians, and one of the two remaining schools is currently litigating the issue in an interest arbitration proceeding. Thus the overwhelming majority of the external comparables support the position of the District in this proceeding.

For all of the foregoing reasons, the District asks that its position be adopted.

B. The Position of the Union

The Union takes the position that this case turns on considerations of internal equity and that its position, being the more equitable, should be adopted. The citation of external comparisons by the District should be ignored, the Union argues, because there is no evidence of what the other terms and conditions of employment are in

schools that don't have the paid lunch hour, and meaningful comparisons cannot therefore be made with those schools.

The District attempted unsuccessfully to eliminate the paid lunch period for custodial workers in this round of bargaining. Having abandoned their position for existing employees, they now seek to impose this condition of employment on the new Cleaning Custodians. The Cleaning Custodians perform less complicated tasks than the Custodial/Maintenance workers, and are accordingly paid less. It is unfair to pay these employees at a lesser rate and deny them the lunch period benefit available to all other unit members. While there might be a legitimate distinction between the classifications on wages, there is no basis for a distinction in the area of benefits. All other custodial benefits are available to Cleaning Custodians, and there is no reason to treat these two workers differently.

While it may be true that the Cleaning Custodians' duties would not regularly require that they be called to work during lunch, there is no guarantee that such a summons will never happen. Moreover, the paid lunch has not been tied to the regular performance of work during the lunch period other classifications. The District Administrator admitted that cooks and laundry personnel receive a paid lunch period, even though they are never required to perform any work during that time. Aides and clerical workers also received this benefit until it was unilaterally terminated by the District in the 1989-90 school year. Thus the paid lunch may be viewed strictly as a benefit, rather than an operational necessity. As such, it is irrelevant that Cleaning Custodians are not required to perform work during their lunch periods.

For the foregoing reasons, the Union asks that its final offer be accepted.

C. The District's Reply Brief

The District notes that wages and fringe benefits have been agreed on in this set of negotiations, and that the Union cannot therefore complain that the districts not having paid lunch hours might have superior compensation in other areas to make up for it. The Union agreed to the wages and fringes knowing that the District would not concede the paid lunch for Cleaning Custodians, and any analysis of the case must focus on that sole issue. The survey of comparable districts conclusively illustrates that the benefit sought for Cleaning Custodians is unusual in the athletic conference.

Contrary to the Union's claim, most of the District employees who receive a paid lunch receive it because they are required to be on call. Only cooks and laundry workers currently receive the benefit without being on call, and those employees receive wages and benefits that are substantially below those of other workers. It is likely, the District asserts, that the paid lunch period is an offset for the lower compensation package these workers otherwise receive. Furthermore, the contract contains a provision applying to cooks and laundry workers which states:

> "Work schedules will be set by the District Administrator, as governed by the attached Memorandum of Understanding, and pay will be consistent with this Agreement and past practice." (Article 17 §1, emphasis added).

This language commits the District to maintaining its past practice with respect to the lunch periods of cooks and laundry workers, but no such protection applies to custodial workers.

While the Union claims it is enforcing a past practice, the District argues that this is a new classification and thus there is no past for a practice to have existed in. The only past practice has been to pay the lunch period for custodians who must remain on call. The contract speaks to maintaining past practices in several cases, but nowhere does it require maintenance of a past practice regarding custodians' lunch periods.

The employees of the District do not enjoy standardized benefits, and the Union's argument for extending this "uniform benefit" must accordingly fail. The norm within the school district is differing conditions of employment depending upon classification and length of the work year, and an unpaid, duty free lunch period for the Cleaning Custodians will break no new ground in this relationship. The District's offer reflects the reality of these employees' working conditions. They will not be performing work during the lunch period, and are not entitled to pay for that time. The Union's final offer is ambiguous, and relies upon an arguable past practice for its substance. The offer of the District should therefore be accepted.

D. The Union's Reply Brief

The Union characterizes the District's arguments over the supposed ambiguity of the contract as an attempt to "muddy the waters" in what is actually a clear-cut case. The Union is merely seeking to extend to Cleaning Custodians the same historical benefits enjoyed by other members of the bargaining unit, and all other represented non-teaching employees of the District. The District well understands that the effect of selecting the Union's offer would be to guarantee a paid lunch to Cleaning Custodians, and has acknowledged as much in bargaining. There is no reason, the Union argues, to treat these two workers differently than their counterparts.

The Union scoffs at the District's suggestion that its offer is not supported by internal comparisons, noting that all but one of the custodial employees receive a paid lunch, and that the variation for the employee at Boyd Elementary is the result of a long standing mutual agreement between the parties. The fact is that the paid lunch during the school year is a uniform benefit for all non-teaching employees for the District, and the Union is simply seeking to extend to these two employees that same benefit.

The Union argues that the external comparisons drawn by the District have no relevance to this dispute. Internal patterns should control on benefit issues, as a matter of equity. The Union points to the tentative agreements reached in this round of bargaining, and the fact that the custodial employees received substantially lower pay increases than clerical employees and aides as evidence of the concessions made to preserve the paid lunch benefit for all unit employees.

IV. Discussion

A. The Meaning of the Offers

The question at the outset is a fairly peculiar one -- what exactly do the final offers mean in this case? The Union's offer consists of the stipulations reached in bargaining, and is silent on the remaining issue in dispute, the paid lunch hour for Cleaning Custodians. The Union cites the status quo for the entire bargaining unit, and insists that selection of its offer will extend the paid lunch period to the Cleaning Custodians during the school year via an unwritten past practice for custodial employees. The District cites the actual hours worked in this new classification, and

asserts that it will have the right to deny a paid lunch period to these two employees no matter which offer is selected, since there is no past practice of providing a paid lunch period to them.

The existing right to a paid lunch period for custodial/maintenance employees[1] rests on a well established past practice rather than any contract language. Such unwritten practices are generally held to be binding during the term of the Agreement where the evidence of their existence and mutuality can be clearly established in the record. This flows from the assumption that the parties cast their bargaining proposals in terms of the entire network of agreements and understandings between them, and intend to be bound by them unless explicit notice to the contrary is given in negotiations. This assumption has greater force where benefits and wages are the subject of the practice than where the custom deals with management prerogatives such as the assignment of tasks or the use of a particular method of production. The negotiators are far more likely to expect that the former will be maintained than the latter, and far more likely to have bargained in reliance on that expectation.

The mere fact that past practices may be binding upon the parties does not, however, give them the same status as clear contract language. Practices are tied to the conditions underlying them in the first place, and may be modified, or even eliminated, as those conditions are changed. Further, it is a commonly accepted tenet of labor relations that where unequivocal notice of an intent to terminate an unwritten practice is given during negotiations, the burden shifts to the party seeking to maintain the practice to reduce it to writing and have it included in the contract.

In this case, there is little dispute over the existence of the paid lunch break during the school year for the bargaining unit employees at Stanley, the employer having abandoned its proposal to terminate that practice. The two Cleaning Custodians, however, have never enjoyed the benefit as they were hired after an impasse developed in negotiations over that very point and the District had implemented its offer. Moreover, while the practice of on-call paid lunch periods for Custodial/Maintenance workers in this bargaining unit has some historical grounding

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[1] Other than the maintenance employee at Boyd Elementary School whose two hour lunch period during the school year is unpaid.

in the need to have these employees available for work during lunch [2], the District credibly asserts that the Cleaning Custodians' duties do not require their availability during lunch. While the Union argues that these workers could potentially be called away from their lunch to perform work, that is nothing more than speculation. The District has stated its intention to insure a duty free lunch for the Cleaning Custodians, has maintained that schedule for the eighteen months prior to the hearing, and has proposed contract language guaranteeing continuation of the work schedule. Given these circumstances, the undersigned cannot reasonably assume that the District is not serious about excusing these two workers from their duties at lunchtime.

While a party is generally entitled to some deference in interpreting the meaning of its own final offer, the undersigned can find no tacit agreement to allow Cleaning Custodians a paid lunch period, and cannot read that meaning into the status quo offer of the Union. Far from acquiescing in the paid lunch period for Cleaning Custodians, the District has made clear its unwillingness to extend that benefit to this new classification, and has refused it to these two employees since the day they started work. This refusal is rooted in a reasonable distinction between the Cleaning Custodians and the Custodial/Maintenance workers, specifically the fact that the Cleaning Custodians' duties do not require that they be on call during meals. The distinction might well be insufficient to deny the benefit in an interest case where specific contract language is proposed to insure the paid lunch. The laundry workers and cooks, after all, receive the paid lunch without any realistic expectation that they will be called upon to perform any work during their meals, and the Union is quite correct in asserting that internal patterns are more persuasive in fringe benefit cases than are the practices in other school districts.[3] The preliminary question before me, however, is whether the past practice for other classifications can be extended to this new classification without specific contract language. Inasmuch as mutuality is the essence of a binding past practice, and there is no mutuality with

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[2] The practice with respect to maintenance employees is in this way distinct from that followed with the laundry employees and cooks, who have had duty free paid lunch periods.

[3] See, for example, Dane County (Sheriff's Department), Dec. No. 25576-A (2/6/89) at pages 13-14; Village of Greendale, Dec. No. 25579-A (3/14/89) at page 17; Northeast Wisconsin VTAE, Dec. No. 25689-A (5/28/89) at page 16; Manitowoc Schools, Dec. No. 26263-A (6/27/90) at pages 13-16.

respect to paid lunches for the Cleaning Custodians, I conclude that the practice cannot automatically be extended to them through the Union's offer.

In arriving at my conclusion, I am mindful of the fact that the Union has proceeded in the good faith belief that their offer would yield a paid lunch period for Cleaning Custodians, and of their possible feeling that the District has sandbagged them by raising the technical defect in the Union offer in the brief to the arbitrator rather than at the bargaining table. No record was made on the conduct of the parties in negotiations, nor the representations they may have made to one another on this issue, and I can find no basis for estopping the District from pointing out the flaw in the Union's theory.

Based upon the foregoing analysis, I find that the Union's offer would leave the contract silent on the issue of paid lunch periods for Cleaning Custodians, neither extending the benefit to those employees against the wishes of the District nor foreclosing the benefit in the future if the parties should mutually desire to extend it. The District offer would clearly foreclose any paid lunch benefit for the two employees, and exempt them from working on-call during their lunch periods.

B. Selection of a Final Offer

Given the interpretation of the Union's offer, there is little practical difference between the positions of the parties. The final offer of the Union would leave the parties free to create a practice with respect to the lunch period, as is the case with all other unit employees, while the District offer would establish, for these two employees alone, a prohibition on working on-call over lunch. The offer of the Union reflects the contractual status quo for maintenance workers at Stanley, while the District's offer formalizes the prevailing conditions for the Cleaning Custodians.

It might be assumed that accepting the District's position in the argument over the meaning of the Union's offer will automatically lead to an Award in the District's favor. However, having interpreted the Union's offer as contractual silence with no substantive effect, the undersigned is left with the District as the proponent of substantive contract language, and it is the District that bears the burden of justifying its proposal. Given the similarity between the offers, this burden is lower than it would be if the choice were in fact between language guaranteeing the paid lunch and language prohibitng it.

As indicated above, internal patterns are usually more compelling in cases involving benefits and contract language than are external comparables. While the vast majority of districts in the athletic conference do not have paid lunch hours, no other represented non-teaching employee of this District is subject to contract language such as the District proposes.[4] The key substantive argument raised in favor of the District's offer -- the fact that these employees are not needed during lunch periods -- is mooted by the requirement that there be mutual agreement before the paid lunch benefit is extended. The procedural argument in favor of the District's offer -- that the ambiguity of the Union offer will result in litigation -- is answered by the express holding in this case that there is not currently a binding practice of providing paid lunch periods to the Cleaning Custodians and that selection of the Union's offer does not create a right to a paid lunch period. It is true, however, that the District's offer makes clear the status quo for the Cleaning Custodians and to that extent is less likely to generate grievances than the more ambiguous offer of the Union.

Neither offer is reasonable, in the sense that each leaves the actual practices regarding paid lunch periods for this unit subject to argument. The District's offer has the very slight advantage of clarity, as far as it goes, and given the similar practical effects of both parties' positions, this slight advantage is sufficient to prompt selection of the District's final offer.

AWARD

The Final Offer of the District will be incorporated into the 1988-90 collective bargaining agreement.

Signed this 3rd day of July, 1990 at Racine, Wisconsin:

/s/ Daniel Nielsen
Daniel Nielsen, Arbitrator

[4] In making this observation, I do not express any opinion on the pending grievance of the secretaries and aides.