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STATE OF WISCONSIN

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

In the Matter of Petition of

OPINION AND AWARD

DRIVERS, SALESMEN, WAREHOUSEMEN
MILK PROCESSORS, CANNERY,
DAIRY EMPLOYEES AND HELPERS
UNION LOCAL 695

Case 10
No. 44504 INT/ARB-5765
Decision No. 26765-A

and

To Initiate Arbitration
Between Said Petitioner and

CITY OF FORT ATKINSON

Gil Vernon, Arbitrator

APPEARANCES:

On Behalf of the City: Donald Smith, City Attorney

On Behalf of the Union: Mariane Goldstein Robbins, Attorney -
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.

I. BACKGROUND

The Employer and Union are party to a collective bargaining agreement covering the term January 1, 1989, through December 31, 1990. Section 11.03 of that agreement stated the following:

"Economic Wage Reopener. The scheduled wage increases shall be minimums; in the event the cost-of living exceeds 4.75% during the term of this Agreement, this Agreement shall be automatically open for negotiation of additional increases over and above the scheduled wage increases."

The scheduled increases were 3.9% effective January 1, 1989, and 4.25% effective January 1, 1990.

In February 1990 the Union requested negotiations for a wage reopener based on their belief that the cost of living had exceeded 4.75% during the term of the agreement. It was the Employer's position that the cost of living had not exceeded 4.75%. In spite of a volley of correspondence, the Parties could not agree as to whether the contract should be reopened.

Ultimately on April 17, 1990, the Union filed a prohibitive practice charge with the WERC complaining the City was refusing to bargain. At approximately the same time a grievance was filed contending that the Employer was violating the contract by not agreeing to reopen contract negotiations.

On June 28, 1990, the City advised the Union that it was agreeable to negotiations and also advised that the first topic of discussion should be the grievance noted above. Based on the City's June 28 letter, the Union withdrew its complaint before the WERC.

On August 31, 1990, the Union petitioned the WERC for the initiation of Interest Arbitration pursuant to Section 111.70 (4) (cm) Wis. Stats. An investigation followed. However, it should be noted that the Arbitrator was advised that it was conducted telephonically by a member of the WERC staff. The record reflects that the investigator was advised October 5, 1990, by the

Parties (jointly) that they were stipulating to skip mediation and go directly to arbitration on the January 1, 1990, wage adjustments.

On November 30, 1990, the Union sent to the investigator its revised and final offer for the increases under the wage reopener. The final offer called for an additional .75% increase. Sometime after November 27, 1990, the City submitted a final offer as follows:

"The City of Fort Atkinson has not violated any provisions of Article XI S 11.03 of the labor agreement of the labor agreement (term January 1, 1990, through December 31, 1990) and all allegations as such are denied."

On December 13, 1990, the investigator advised the City in a letter that its final offer had to be phrased as a quantitative wage proposal. The City subsequently submitted a final offer of 0%. Subsequently, the investigation was closed.

On January 28, 1991, the Commission issued its Finding of Facts which inaccurately reported that the Parties, during the course of their negotiations, had exchanged proposals on matters to be included in a new collective bargaining agreement to succeed the Agreement which expired on December 31, 1990. As the above background indicates, this is not true. The proposal was for a limited wage reopener during the term of the contract which expired December 31, 1990. The proposal had nothing to do with the successor contract.

The WERC also ordered the Parties to select an Arbitrator to resolve their dispute. The undersigned was selected to serve. A hearing was set for July 22, 1991.

At the hearing, the City took the position that (1) the Union was not entitled to the reopener, (2) that the Arbitrator's authority was limited to a determination if there was to be a reopening of the contract, and (3) that if it was determined a reopener was in order, that the remedy was limited to the Arbitrator directing that the Parties engage in negotiations. Basically, the Employer viewed the proceedings as a grievance arbitration. After discussions on and off the record, the Arbitrator advised the Parties that the hearing would proceed as an Interest Arbitration and that he would be, after evidence and arguments, selecting one of two final offers filed with the Commission--to wit, 0% versus .75%. The hearing proceeded and post-hearing briefs were submitted. The Parties exchanged briefs approximately September 9. However, the Employer objected to certain exhibits/documents attached to the Union's brief. The Parties worked out a stipulation concerning the exhibits and the Arbitrator received the written stipulation October 15, 1991. The record was then considered closed.

II. ARGUMENTS OF THE PARTIES

A. The Union

As factual background to their argument, the Union notes that Union spokesperson Sam Anderson testified that during negotiations for the 1989-90 contract, an informal executive session was held between himself and the City's chief representative City Council President Jim Jensen, during which the Parties agreed that the reopener could occur at any time the consumer price increase rose above 4.75% during the term of the agreement whether after six months or after 15 months. Jensen also testified that he held executive sessions with Anderson and did not dispute the discussion concerning when the reopener could take effect. Jensen himself did not expect the consumer price index to rise to that extent at any time during the contract term. Both Parties agree that the precise consumer price index to be utilized was not discussed by the Parties. Anderson also testified that he understood that the consumer price index to be utilized under the wage reopener clause was the national consumer price index. In February of 1990, Anderson received through the Wisconsin Department of Industry, Labor and Human Relations, consumer price index figures for January 1990. This information established that the consumer price index nationally had increased by approximately 5.2 percent in the preceding year.

The CPI for urban wage earners and clerical workers rose 5.5% during the same period. They also note that the City took the position that the

Milwaukee area consumer price index for urban wage earners and clerical workers was the appropriate index. At hearing, this position was stated by City Council President Jim Jensen and supported by the labor agreement between Teamsters Local 695 and the City of Fort Atkinson for 1977-78 when Mike Spencer had been the union representative for the unit. The City also presented the reopener clause from the contract between the City and the Fort Atkinson Professional Police Association which utilizes the increase in the Consumer Price Index for all wage earners in the Milwaukee area. However, the Union notes this was contradicted by City Clerk Treasurer John Wilmet who testified that, in his view, the appropriate index was that for small metropolitan areas in the North Central region.

The Union's first argument is that under the terms of the Parties' labor agreement, the contract automatically opened for negotiation of additional increases in 1990. It is their position that by proceeding to interest arbitration, the City has conceded that the reopener was properly implemented and the present dispute is properly before the Arbitrator. Without waiving its position in the this regard, the Union submits that the evidence in the record amply supports its position that the requisite cost of living increase triggered application of the economic reopener set forth in Section 11.03 of the Parties' agreement.

The Union also anticipates that the City will allege that the increase of 4.75% necessarily must occur within the first year of the Parties' labor agreement. However, in the Union's opinion, there is no support for this position in the language of the contract. Rather, the agreement provides for a reopener if the increase of the cost of living "exceeds 4.75 percent during the term of this agreement." If there was any question, they refer to the bargaining history. It is undisputed that during executive session, Sam Anderson and City Council President Jim Jensen agreed that the triggering increase could occur at any duration within the collective bargaining agreement, 6 months or 15 months.

The other preliminary issue involves the identity of the consumer price index utilized to measure the increase in the cost of living. Union Representative Sam Anderson understood the Parties' agreement to involve the national consumer price index for urban wage earners and clerical workers. It is actually unnecessary to resolve this, in their opinion, since the cumulative increase in each one of the proposed indexes rose above 4.75% during the term of the Parties' labor agreement. The City may argue that the reference to a 4.75% increase in the cost of living was intended to mean an annual increase in the cost of living rather than an a cumulative increase over the term of the labor agreement. However, the Union submits that the express terms of the labor agreement indicate that the triggering increase was cumulative "during the term

of the labor agreement" not limited to the increase in one year. Even in terms of annual increases, the City's first proposed index (the urban wage earners index for Milwaukee) the consumer price index rose by 5% from January 1, 1989, to December 31, 1989, during the first contract year alone. It is the Milwaukee area price index which was utilized by Teamsters Local 695 and the City of Fort Atkinson in the late 1970s when the Parties previously negotiated an increase tied to a cost-of-living increase. Even the consumer price index for small metropolitan areas in December of 1988 was 117.17 (1982-84 equals 100). By January 31, 1990, that same index had risen to 123.5 (1982-84 equals 100), an increase of 5.46 percent. This figure is a cumulative increase over the first 13 months of the labor agreement. The 12-month increase from January 31, 1989, to January 31, 1990, is 4.9 percent, again over 4.75.

On the merits of their proposal, the Union believes that their offer should be accepted as more reasonable when viewed in light of the statutory criteria. They first look at the cost of living factor noting that (1) the national consumer price index for urban wage earners increased from 119.2 at the commencement of the Parties' labor agreement to 132.2 at the end of the contract term, an increase of 10.9 percent and (2) Milwaukee area and small metro area urban wage increased 7.6 percent (5% in 1989, 2.6% in 1990).

The Union states as well that the purpose of the two-year 3.9 and 4.25% settlement was to achieve a certain degree of catch-up. The purpose of the

reopener was to allow them to protect this catch-up if a substantial portion of the Union's catch-up was eaten up by inflation. They suggest that their wage increases were virtually eroded by inflation. Thus, the additional .75% increase sought by the Union here will provide at least some relief from the cost of living increase during the term of the labor agreement.

The Union also submitted evidence of the wages provided to employees in the same or similar classifications in DPW units in comparable communities. A review of these rates compared to the classifications in the City shows the comparable rates are generally much higher. In fact, the disparity ranges in Fort Atkinson from \$.41 to more than a dollar below the rate in comparable communities.

In conclusion, the Union believes that the small additional increase sought by the Union is more than justified by the wage rate in comparison communities as well as by the cost-of-living increase.

B. The City

It is the position of the City that the Union was not entitled to reopen the contract and, therefore, they made no offer to increase wages.

The City notes that the Union argues that the contract should be reopened because the February 1990 national CPI reached 5.2%. It is the City's position that the CPI must remain at a level above 4.75% for a period of time which, in

this case, it did not. They argue the contract should not be reopened because the CPI may exceed 4.75% in one month.

There is also a dispute concerning which CPI to use. They suggest that the Union, for partisan reasons picked, the national CPI because it was the highest index at the time. In fact, the CPI used in all other areas of the country was less than 4.75%. The City believes that another index should be used. They note that the City's contract with the Police Association uses the CPI for all wage earners in Milwaukee. Moreover, there was no showing nor can there be that any Union contract with the City has in the past use the national CPI as a wage opener clause. Additionally, there was no evidence presented at the hearing that shows either Party discussed the national CPI when this contract was first negotiated. The City also believes that logic, fairness, and equity would seem to dictate that the CPI used as a wage reopener should be considered in an area in which the City of Fort Atkinson is located. In this regard, at no time did the CPI for the Milwaukee area exceed the 4.75% prior to the Union's demand to reopen. It is suggested that Fort Atkinson should not be held accountable for the CPI as it exists over the whole country or in other areas of the country, but only the area in which the city is located.

The City also takes the position that the Union never presented any facts or figures as to why they felt that they should be entitled to a .75% increase in their wages. They point this out because they feel that there should have been

some offer of proof as to the justification for the .75% increase. To the City's knowledge, there was no evidence presented showing that other wage earners in similar positions in the Fort Atkinson area received wages in excess of what the Union already had before they claimed that they were entitled to a wage opener.

III. OPINION AND DISCUSSION

It is undisputed that the contract was to be reopened if the "cost of living" exceeded 4.75% "during the term of the contract." The problem is that the Parties failed to discuss which cost of living index would be utilized, and there is a disagreement over what kind of time frame would be utilized. The Union representative testified that if the cost of living (U.S. average) exceeded the 4.75% at any time during the contract, whether it be six months or fifteen months, the reopener would apply. The City Manager said he thought they were agreeing on the Milwaukee CPI and testified there was no discussion as to what period of time it had to exceed 4.75%.

Accordingly, the Arbitrator is left to decide as threshold issues (1) which index was to be used, i.e., the U.S. average, the Milwaukee-W, or the small cities' index and (2) which time frame should be operative, i.e., should the CPI exceed 4.75% on average over three months, six months, or twelve months before the reopener is effective or is the reopener effective when any particular

month exceeds 4.75% over the same month one year earlier or is it cumulative from the beginning of the contract? Indeed the phrase "during the term of the contract" is ambiguous and could mean any of these things. Other meanings might be possible as well.

In addressing this issue, it is most significant that the Parties previously had agreed to and utilized a cost-of-living mechanism in negotiations. In the 1977 and 1978 agreement, the Parties agreed to increase the wages in the second year of the contract by the use of a COLA.

Article XXVII (Duration) stated in pertinent part:

"This Agreement shall become effective as of January 1, 1988 and remain in full force and effect to and including December 31, 1978. On January 1, 1978, wages shall be adjusted to reflect any increases in the cost-of-living as determined in the Consumers Price Index (1967 all items Milwaukee area average), published by the U.S. Department of Labor, Bureau of Labor statistics, for the period of November 1976 to November 1977."

Notably the Parties used the Milwaukee CPI and used a 12-month time frame.

Given the fact that the subject of which index to use was not discussed in the negotiations for the instant contract and given the fact there was no meeting of minds on which time frame to use, there are many reasons to use the same approach in this case as previously used by the Parties. In other words, the Milwaukee CPI-W should be used and a 12-month time frame should be used fixed at an appropriate and relevant time. First, it seems reasonable to hold the Union accountable for putting the Employer on notice if it intended to employ a CPI index and time frame different than that used in the previous contract.

Second, an internal comparable (the Police Association) utilized in its 1990-91 contract the CPI-W for Milwaukee and took a one-year retrospective picture at a fixed period of time to determine if the reopener would kick in.¹ It also seems inherently reasonable to use the Milwaukee CPI due to the proximity of Fort Atkinson to it. The U.S. average doesn't seem reasonable since it includes huge, high-cost cities like New York, Boston, and Los Angeles.

The next reason the prior approach should be used is that the Union's time frame could be unwieldy and lead to unusual and impractical results. The contract could reopen the first month after it was signed. It also might reopen the last month, conceivably after the successor contract was signed if negotiations had concluded early. Under the Union's interpretation, it could also be argued that the contract could be reopened more than once. Cost-of-living reopeners in the Arbitrator's experience are usually less complicated and utilize an approach similar to the Police Association contract. Moreover, the use of the Milwaukee CPI-W almost dictates the use of an annual time frame since it is published only twice per year. Data is published for January through June and July through December.

The last reason this approach makes sense for this case is that it is consistent with the Parties' discussions concerning the duration of the

¹Contracts with vendors are not relevant for comparable purposes.

agreement. Evidently the Union wanted only a one-year contract. Management wanted a two-year contract. Of course the risk in accepting a two-year contract is if there is significant inflation in the first year, it is more difficult to redress the situation a whole year later. In a one-year contract the effect of inflation on a wage increase can be addressed more contemporaneously. Given the fact that the Parties compromised on a two-year agreement with a cost-of-living reopener, it seems reasonable to apply that reopener at the end of the first year. This gives the Union much the same opportunity it would have under a one-year contract and that is to repair any erosion that occurred to wages during the first twelve months of the contract.

In view of the foregoing, the Arbitrator interprets and applies the wage reopener to mean that negotiations were to reopen if the Milwaukee CPI-W exceeded 4.75% during the period of January 1, 1989, and December 31, 1989.

In reviewing the data, the CPI-W for Milwaukee published in January 1990 (Union Exhibit 2) stood at 123.1. One year previous it was 117.2 This calculated to a 5.0% rate of inflation over the same month 12 months earlier. (This is reflected on page 2 of Union exhibit 2.)

Accordingly, the contract was ripe to be reopened, and the question now is whether 0% or .75% is most appropriate. The Arbitrator concludes that .75% is more reasonable. The wage increase in 1989 was 3.9%. Thus, the relevant cost-of-living figure was 1.1% greater than the wage increase which

represents a substantial degree of erosion. Even though it appears the Parties were willing to accept a certain degree of erosion due to the fact the reopener cap was higher than the 3.9 increase, a .75% increase is more reasonable than no increase. If there were no increase, there would be no recovery of a significant degree of erosion. Moreover, the additional increase will not unduly advance the employees relative to the comparables. In fact, it is needed to maintain modest catch-up. It is noted as well that no argument has been made concerning the City's ability to pay or the welfare of the public.

AWARD

The Union's final offer is selected.

Gil Vernon, Arbitrator

Dated this ___ day of December 1991.

*(According to Mr. Vernon's Report and Fee Statement
this Award was dated 12-11-91.*

*WERC
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