Arbitration

of

CITY OF MADISON

and

LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 236

re

WERC Case 159, No. 47414
INT/ARB - 6458

INTEREST ARBITRATION AWARD

Decision No. 27406-A

ISSUE

The sole issue is whether the January 1, 1992 to December 31, 1993 Agreement shall contain a clause proposed by the Union stating

> 16.11 RESIDENCY REQUIREMENTS
>
> Employees covered by the terms of this Labor Agreement shall not be restricted in their right to choose their place of residency.

The Employer proposes that the Agreement, like previous agreements, contain no language on residency.

INTRODUCTION

The City of Madison, hereinafter called the City or the Employer and the Laborer's International Union of North America, Local 236, hereinafter called the Union, exchanged initial proposals for the 1992-1993 Agreement on October 16, 1991. Failing to reach a settlement after 20 meetings, the Union filed a petition for arbitration on May 13, 1992. An investigation was conducted by WERC Commissioner Herman Torosian who met with the parties in June, July and August and found that the parties were deadlocked. Final offers were received by September 18, 1992 and the WERC ordered arbitration on September 23, 1992. From a panel submitted by the WERC, the parties chose the undersigned who was appointed arbitrator by the WERC on October 14, 1992.

A hearing was conducted on December 18, 1992. Appearing for the City was Gary A. Lebowich, Labor Relations Manager; appearing for the Union was Bruce F. Ehlke, Attorney of Lawton & Cates. The hearing was transcribed and post hearing briefs were exchanged on February 26, 1993. Along with its brief, the Union submitted two exhibits (Ex. 49 & 50). The City objected to the submission of additional exhibits and in its February 25, 1993 letter pointed out that the City had not been given the opportunity to voir dire the exhibits and present evidence on the issues raised.

Since neither the parties nor the arbitrator had closed the record at the conclusion of the December hearing, and since the statutory criteria provide for the receipt of evidence during the pendency of the procedure, the arbitrator informed the parties by letter dated March 3, 1993 of his decision to conduct a further hearing on all issues related to the additional exhibits and to postpone the due date for reply briefs as requested by the City. After receipt of further communications from the parties the arbitrator ruled in his March 11, 1993 letter that Exhibits 49 and 50 were admissible and proposed dates for the additional hearing required by the submission of the exhibits. However, no hearing was conducted because the parties entered a joint stipulation regarding the matters referred to in Exhibits 49 and 50 and agreed that reply briefs would be exchanged on May 3, 1993.

BACKGROUND

Madison General Ordinances 3.27 and 3.35 (Exs. 32 & 33) require that employees reside in the City of Madison. These ordinances have applied to employees in the Union's bargaining unit since it's organization (City Brief, p.1). Article 1.4 of the Agreement provides that

> The terms and conditions of this Agreement shall supersede Ordinances and Resolutions wherein there is a conflict with the terms of this Agreement.

City Exhibit 39 shows that 10 of 15 employee compensation groups totaling 1643 of the 2491 employees are subject to the residency requirement. Employer Exhibit 31 relates the compensation groups to the units in which employees are represented. It shows that there are seven unions representing 12 units. Deleting the Laborer's from this compilation leaves six unions representing 11 units. Three Unions [MPPOA (the police Union), IAFF (the firefighter union), and IBT (Teamsters' Union)] representing five units including 848 employees are not subject to the residency requirement. Three Unions [AFSCME (municipal employees union), UPQHC (health care employee union), MCAA (attorneys union)] representing six units including 585 employees are subject to the residency requirement.[1]

The Teamsters were the first Union to secure a waiver of the City's residency requirement. In 1970, the City purchased the private bus company now known as Madison Metro, said purchase being facilitated by a grant of Federal funds under the Urban Mass Transportation Act. This act contained a provision (Section 13 C) requiring that employees would not suffer a worsening of employment conditions because of the acquisition of the bus company by the City. In compliance with Section 13 C, the City and Teamsters Local 695 agreed that

> No employee represented by the Union who is employed by the Company on the date of acquisition of the Transit System under the project shall suffer any limitation upon his freedom to choose his place of residency as a result of the project (Ex. 47, p. 5).

From 1970 to 1983, the employees represented by the Teamsters were considered by the City to be private employees of the Madison Service Corporation, a firm hired by the City to manage the bus system.

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[1]Excluded from this comparison are the ten tradesmen, 412 non-represented employees and 405 hourly part time and full time employees.

In 1983, the NLRB issued a decision finding that the City was the real employer of the Teamster unit and that these employees were public employees. The 1983-1986 collective bargaining agreement between the City and the Teamsters provided that employees employed on or before October 31, 1983 would not be subject to the residency requirement unless they established residency in the City on or after October 31, 1987. Subsequently this language was broadened to cover all employees. Article 36 of the 1990-1993 Teamster Agreement (Ex. 5) provides that

> Employees covered by the terms of this Labor Agreement shall not be restricted in their right to choose their place of residency.

After the bus company employees were declared to be municipal employees in 1983, the unions representing City police and firefighters attempted to implement the "me too" clauses in their contracts with the City. Article XXV of the Firefighter Local 311 contract stated:

> All members of the Fire Department shall be required to live within the City limits as a condition of employment. However, in the event that the City waives the City residency requirement for any group of employees, the requirement for members of the Fire Department shall be deemed to be waived. (Ex. 46, p.2)

Similarly, Article XXII of the Madison Professional Police Officer's Association Agreement provided:

> The Employer's application of City Ordinance Sec. 3.27 [Residency] for members of the Association shall be the same as applied to all other City employees. Any moderation to City Ordinance Sec. 3.27 shall be applied to employees represented by the Association (Ex. 47, p.2-3)

Although the City resisted the attempts to activate these "me too" clauses, the unions eventually prevailed after two arbitrations, two Circuit Court cases, two Courts of Appeals cases and one Wisconsin Supreme Court case (City. Brief, p. 10). Now, in this dispute, the Laborers Union attempts to attain the same results through the interest arbitration procedure under Section 111.70(4)(cm)

of the Wisconsin Statutes.

The residency pattern among major Wisconsin cities and among jurisdictions bordering Madison is mixed. City Exhibit 42 provides information about the residency requirements in the ten largest Wisconsin Cities. The Union states that of the nine cities other than Madison, only three (Milwaukee, Green Bay and Eau Claire) "appear to require that their union-represented employees reside within the city boundaries" (Un. Br. p. 7). The City interprets the same exhibit in a different fashion, suggesting that it supports a residency requirement although the requirement may be the county, the metropolitan telephone number, or a twenty minute trip from the work site.

Similarly, Employer Exhibit 41 and Union Exhibit 14 show residency patterns that can be interpreted to support either position. City Exhibit 41 shows that "six of the seven cities that surround the City have some type of residency requirement for all or some employees." (City Br. p. 13) However, "some employees" may mean only the city administrator, police chief and fire chief as in one of the seven cities (Fitchburg) or may mean within 25 miles of city hall and in Dane County as in another city (Monona Police). Perhaps the diversity of residency requirements is best illustrated by the Sun Prairie restrictions shown on City Ex. 41 --- Department Heads must live in the city, police are subject to a reasonable response time limitation, AFSCME employees are not restricted and non-union employees must live within ten miles of City Hall.

Union Exhibit 14 lists units by bargaining agent, showing that 19 of 24 AFSCME Local 60 units in and near Madison have no residency requirement. Five other AFSCME units representing Dane County employees have no residency requirement. Teamster Local 695 has four units in the area without a residency requirement in addition to the Madison Metro unit and has other units with some

residency requirement such as residency in the school district or county or within a ten minute response time. None of the 16 WEAC represented school units has a residency requirement and only one of the eight police units represented by the WPPA has a residency requirement.

Union Exhibits 49 and 50, submitted with the Union post hearing brief show that employees of the Monona Terrace Convention Center will be exempt from the City residency requirement. In its reply brief, the City points out that Madison General Ordinance 3.27 mandating residency provides for a number of exceptions to the residency requirement including "persons who are employed under a joint and cooperative arrangement with Dane County." (City Reply Br. p. 2)

CITY AND UNION ARGUMENTS

The City argues that the internal and external comparables support the continuation of a residency requirement. Furthermore, the City argues that the Union has not established a need for a change from the status quo, nor has it provided a quid pro quo. Mayor Soglin testified that there were three or four critical reasons to maintain the City residency policy. He said that employees who live in the city are apt to be more knowledgeable about the city. Second, they will have a personal stake in the city because they will be customers as well as employees. Third, he said, was the economic impact of the purchase of housing, groceries, automobiles, etc., by City employees. Lastly, the Mayor mentioned diversity in the work force, saying that the City wanted to make sure that the city work force reflects the residents and that the residents reflect the city work force. (Tr. pp. 91-92)

The Union argues that the residency requirement has had a "disruptive and deleterious affect" on its members (Un. Br. p. 3). Terry Holmes, the Business Agent of the Union mentioned several cases in which the residency requirement

caused a hardship for a City employee. The Union stated that it has attempted to bargain an exception to the residency requirement and introduced evidence to show that it made such a demand in negotiations as far back as 1968 (Un. Ex. 27) and as recently as the negotiations for the Agreement starting in 1990 (Un. Ex. 26). Holmes stated that the City refused to negotiate residency in each negotiations since 1976 except for 1988 (Tr. 19-20). The Union stated that it dropped its pursuit of a catch-up wage increase in the current dispute leaving residency as the sole issue (Un. Br. p. 4).

The Union argues further that it is only asking for waiver of the residency requirement comparable to that which "the City has already negotiated with three of its five principal employee bargaining units." (Un. Br. p. 6). The City argues that it was forced by UMTA rules to exempt the Teamster unit and that arbitrators and the courts extended that exemption to two other units. In effect, the City is saying that it was compelled to grant those waivers of its residency exemption and that it has maintained a residency requirement to the best of its ability.

The City argues that this arbitrator should not lightly extend the waiver to another unit which has not provided adequate reasons for the waiver and did not treat this proposal as an important one for which it was willing to make a concession on some other point. In support of this position Larry Oaks, a personnel analyst who took notes during the negotiations, stated that the first substantive discussion of residency took place in January, 1992. In response to a City request to provide specific language, the Union dictated its proposal to the City across the bargaining table. The City typed it and returned it to the Union (Ex. 48). It was identified as a "me-too" proposal similar to the ones in the police and firefighter agreements. Oaks stated that the City asked for clarification of the proposal "as to whether it was retrospective, immediate or

prospective" and concluded that "it was a prospective request." (Tr. 115). The City rejected the proposal and made no counter proposal on this topic.

Terry Holmes, the Union Business Agent, who was the Union spokesperson in the negotiations for the 1992-1993 Agreement testified that the initial proposal of the Union contained a waiver of the residency requirement (See Ex. 10). Holmes said that early in the negotiations when the residency waiver was being discussed, the City responded by asking "Would you be interested in a me-too clause?" (Tr. 21). Holmes explained that the Union might be interested in such a clause and that he expected that the parties would talk about residency again when they approached the end of the bargaining and most issues had been resolved.

Holmes said that later in the negotiations when he wrote up a full contract proposal he left residency out by mistake. He stated that he informed the City that residency was still an issue and that this led to the dictating of the proposal across the table and subsequent write up of the "me-too" residency waiver based on the firefighter contract language.(Tr. 125-127). Holmes testified that the City rejected this proposal saying that it did not want to talk about the subject and could not even give the Union the me-too clause. Holmes said that he told the City that since it did not want to bargain, the Union would go with the Teamster language and incorporated that language into its final offer (Tr.126-7).

In support of its argument favoring a waiver of the residency requirement, the Union introduced extensive exhibits showing City purchases from vendors outside of the City as well as those located within the City. (Exs. 18-22). The material was introduced to show that, despite the claim by the City that it favored purchasing items from vendors located in the City, it made many purchases from vendors located outside the City.

DISCUSSION

The arbitrator rejects the City argument that the failure of the Union to include residency waiver language in its proposal discussed in late January, 1992 and the fact that the residency issue was not discussed for almost five months until late in the mediation process "alone should require rejection of the Union demand." (City Br., p.2). When the City called the omission to the Union's attention, language was developed and incorporated into the Union proposal at that time.

Failure to bring the issue up until late in the mediation process after not discussing it for an extended period is not grounds for concluding that this issue was unimportant or dead. This issue had been discussed on innumerable occasions in past negotiations. The arbitrator doubts whether more frequent discussion of residency during bargaining would have been useful, given the City's desire to maintain the residency requirement and not to compromise on the issue.

In any event, it is clear that the residency waiver issue was unresolved and was discussed toward the end of the mediation process. Usually, during this process, the WERC investigator exchanges preliminary final offers and encourages both parties to amend their offers. In this instance, since there was no movement on either side on the residency issue, the issue as stated at the outset of this award was one which both parties preferred to take to arbitration rather than to abandon their long held positions.

The City argues further that the Union's failure to provide a quid pro quo for the residency waiver provides grounds for ruling in favor of the City which only wishes to maintain the status quo. The arbitrator believes that this argument lacks weight in this instance for two reasons. First of all, no quid pro

quo was sought by the City. If the City was willing to grant the waiver of the residency requirement in return for an acceptable quid pro quo, it could have made a counter offer suggesting the quid pro quo it would consider. Instead, the City preferred to reject completely the Union proposal without making a counter proposal, thereby making it rather difficult for the Union to introduce a quid pro quo.

Second, no evidence was introduced to show that a quid pro quo had been given by the bus drivers, policemen or firefighters in return for the waiver of the residency requirement. The failure of the City to gain a quid pro quo from those groups weakens it argument that the Union should provide a quid pro quo to achieve the same bargaining objective.

Both the Union and the City claim that a comparison with other Madison employees supports their positions. The arbitrator believes that the fact that the residency requirement has been waived for three of the five major groups with which the City bargains covering 848 of its employees outweighs the fact that a majority of Madison's unrepresented and represented employees are required to live in Madison. The arbitrator is influenced by his own belief that the police and firefighter units are the pattern setters for the other Madison units and that these are two of the units which have secured a waiver of the residency requirement through their me-too clauses.

As the arbitrator has stated previously (See pp. 5-6), the residency pattern among major Wisconsin Cities and among jurisdictions bordering Madison is mixed. There clearly are residency requirements for various groups of employees among most of the ten largest Wisconsin cities, although in many situations the requirement is the county, the school district or a time or distance requirement rather than the city. If the one of the offers in this

dispute required employees to live within the county or metropolitan area rather than the city, it would be closer to the pattern among major cities than either of the two offers from which the arbitrator must choose. Therefore, the arbitrator does not find the comparison with the residency requirements in other major cities for similar employees to be helpful in selecting one of the offers in this dispute.

So far as the comparisons with employees in jurisdictions bordering Madison. the arbitrator believes that the comparisons favor the Union more than the City. Dane County is a primary comparison and it has no residency requirement for its employees. Also, the arbitrator's review of Exhibits 41 and 42 show that most non supervisory employees either have no restriction on residency or have a restriction that is broader than the city, i.e. the county or a mileage or response time limit.

The arbitrator turns finally to the four arguments made by the Mayor and the Union rebuttal contained in its brief. The City claimed that residents are more likely to be more knowledgeable about Madison than non residents and have a personal stake in the Madison as customers. However, the City offered no evidence to support these two claims. For example, twenty to thirty percent of the employees in the firefighter, police and bus units live outside of Madison but no survey has been made to see if these employees differ in productivity, attendance, turn over, etc, from similar employees who live in Madison. Nor did any City witness claim that the waiver of the residency requirement was creating problems for the fire, police or bus departments.

The arbitrator is doubtful whether the waiver of the residency requirement will have a significant economic impact on Madison. Some of the area's major auto dealers and super markets on the periphery of the City where residents and non

residents shop may actually lie outside of City limits. If twenty to thirty percent of the employees represented by the Union move into portions of Dane County outside of Madison, one wonders what changes this will have on purchasing patterns and what its impact will be on Madison. No evidence was submitted in support of this claim of the City and therefore the arbitrator gives it little weight.

The diversity argument is one with emotional appeal. No one wants an all non-white inner city whose white public employees live outside of the city. However, no evidence was submitted to show that the selection of the Union final offer would cause or exacerbate such a situation in Madison. Therefore, the argument based on the possibility of "white flight" (Tr. 92) is given little weight by the arbitrator.

In conclusion, the arbitrator wishes to make one general comment. In reaching his decision, he has avoided the general philosophical question of balancing the rights of citizens to live where they wish with the right of the City to require that its employees live within City limits. Instead, the arbitrator is relying heavily on the comparability criterion in the statute and other factors generally taken into account in bargaining.

Furthermore, the arbitrator notes that, although it has been the desire and policy of the City to maintain a residency requirement, practical considerations have forced the City to subordinate this policy to its need to secure funding for projects deemed important by the City. The extent to which it has done so, when coupled with the patterns covering public employees in this geographic area, means that under the criteria in the municipal interest arbitration act, the City policy will not prevail when challenged by unions. Understandably, the City has had to subordinate its residency policy in order to obtain Federal UMTA funds for

busses and to gain Dane County financial support for the convention center (Exs. 49 & 50). However, this need to subordinate the residency requirement to practical considerations has weakened the residency policy to the point where this arbitrator finds that under the statutory criteria he must choose the Union final offer in this dispute.

AWARD

The arbitrator hereby selects the final offer of the Union and orders that it and the agreed upon stipulations be placed into effect.

6/18/93
June 18, 1993

James L. Stern
Arbitrator