

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

RICHLAND CENTER DEPARTMENT OF PUBLIC  
WORKS EMPLOYEES LOCAL 2387-A, AFSCME,  
AFL-CIO

and

CITY OF RICHLAND CENTER (DEPARTMENT  
OF PUBLIC WORKS)

Case 46  
No. 52226  
MA-8879

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Union.

Boardman, Suhr, Curry & Field, Attorneys at Law, Firststar Plaza, Suite 410, One South Pinckney Street, P. O. Box 927, Madison, Wisconsin 53701-0927, by Mr. Stephen C. Zack, appearing on behalf of the City.

ARBITRATION AWARD

The City of Richland Center, hereafter the City or Employer, and Richland Center Department of Public Works Employees Local 2387-A, AFSCME, AFL-CIO, hereafter the Union, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a staff member as a single, impartial arbitrator to resolve the instant grievance. Hearing was held on April 26, 1995, in Richland Center, Wisconsin. The hearing was not transcribed and the record was closed on May 11, 1995, upon receipt of post-hearing briefs.

ISSUE:

The Union frames the issue as follows:

Did the Employer violate the collective bargaining agreement and/or past practice when it terminated the practice of allowing employees to use the Wastewater Shop for minor maintenance of their personal vehicles?

If so, what is the appropriate remedy?

The Employer frames the issue as follows:

Is the City permitted to not allow employees the personal use of the City's equipment and/or facilities?

The Arbitrator frames the issue as follows: 1/

Did the Employer violate the collective bargaining agreement and/or past practice when it notified employees that employees could not use the wastewater plant garage for the minor maintenance of their personal vehicles?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

**ARTICLE II - MANAGEMENT RIGHTS**

2.01 The Employer shall have the sole and exclusive right to determine the Table of Organization, the number of employees to be employed and assigned to any job classification and the job classifications needed to operate the Employer's public jurisdiction, the duties of each of these employees, the nature, hours and place of their work, and all other matters pertaining to the management and operation of the City of Richland Center Department of Public Works, including the hiring, promotion, transfer of any employee. The Employer shall have the right to demote, suspend, discharge or otherwise discipline any employee for cause. The Employer may establish and enforce reasonable work rules and regulations. To the extent that rights and prerogatives of the Employer are not explicitly

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- 1/ The sole issue raised in the grievance is management's statement "that use of the plants (sic) garage will no longer be available for personal auto repair, washing, ect. (sic)." Neither the written grievance, nor the Union's written argument, contests the right of the City to forbid the personal use of City equipment, such as tools.

granted to the Union or employees such rights are retained by the Employer. It is agreed that the Employer shall not use these rights and powers in conflict with any provisions of this agreement or for the use of undermining the Union or discriminating against its members.

The Union and the employees assent and agree not to interfere with, abridge, nor attempt to interfere with, any of the prerogatives of the Employer with respect to the operation, management and direction of the Department of Public Works.

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#### BACKGROUND:

On September 22, 1994, Plant Superintendent Mike Meyer advised employe Jim Birch of the following:

I want to make it clear what my policy is on using the utilitys (sic) building and equipment. Any use of the plants (sic) facilities for an employees (sic) personal use must be o.k.ed my (sic) me. The plants (sic) garage will no longer be available for personal auto repair, washing, ect. (sic) Any plant tools must be signed out for and returned by the next work day. Signed out equipment must be returned promptly (sic) and in good condition. Failure to do this will result in total discontinuation of private use of tools. This policy will be posted in the near future but it is in effect now as far as you are concerned.

On September 23, 1994, a grievance was filed which challenged management's statement that "use of the plants (sic) garage will no longer be available for personal auto repair, washing ect. (sic)." The grievance was denied at all steps and, thereafter, was submitted to arbitration.

#### POSITIONS OF THE PARTIES

##### Union

A practice existed by which employes could, without seeking prior permission from their

superintendent, utilize the wastewater shop for the performance of minor maintenance on their personal vehicles. The principal that custom and past practice may be given effect as terms of the collective bargaining agreement has been accepted by arbitrators and the United States Supreme Court. (cites omitted)

The practice at issue is not at variance with any term of the written agreement; the practice is unequivocal; the practice was clearly enunciated and acted upon; and the practice is readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Such a practice may not be terminated unilaterally during the term of the agreement.

By terminating the practice on September 22, 1994, the Employer violated the practice and, therefore, the Agreement. The Arbitrator should sustain the grievance and order the Employer to restore the practice.

### City

The labor agreement does not address the practice relied upon by the Union. Nor has this practice been the subject of bargaining between the parties.

In the past, there has been occasional use of the wastewater plant for washing personal vehicles or changing the oil of personal vehicles. On occasion, employees have taken tools home for personal use. However, the practice relied upon by the Union is not unequivocal, clearly enunciated, ascertainable, frequent, or mutually accepted by the parties. Moreover, even with management consent, a practice is not binding unless it concerns a major condition of employment or involves a gratuity.

Any past use of the wastewater plant or equipment constituted a privilege extended to employees and is not a condition of their employment. Consistent with its management rights, and with a concern for liability and safety factors, the City decided to no longer permit the personal use of the wastewater plant or equipment. The City has not violated the collective bargaining agreement and the grievance must be denied.

### DISCUSSION

The Union argues that the right to use the wastewater plant shop for minor maintenance of an employee's personal vehicle is enforceable as a binding past practice. The Employer denies that there is any binding past practice. The Employer asserts that any personal use of plant facilities or tools was a privilege extended to employees by management and that the Employer has the management right to unilaterally withdraw this privilege.

Union witness Merlyn Anderson, a member of the Union's bargaining unit, has been an employee of the wastewater plant for twenty years. Anderson recalls that, as a "courtesy" to employees, the former wastewater Plant Superintendent, Bill Keller, allowed employees to use the plant garage to wash the employees' personal vehicles; that employees have always understood that they were not to abuse this "courtesy"; that not all employees took advantage of this "courtesy";

and that, with the exception of the former Plant Superintendent, who routinely washed his personal vehicle at the plant garage, employe use of this "courtesy" was "occasional and infrequent." Anderson maintains that, for twenty years, no one had ever said that there had been a change in this "policy" of permitting employes to use the wastewater plant garage.

Anderson acknowledges that, approximately one year prior to hearing, when the wastewater plant was under construction, he washed his personal vehicle at the plant garage on the weekends that he worked. According to Anderson, he washed his personal vehicle to remove corrosive materials which adhered to his van as he drove through the construction site. Anderson states that he did not ask permission from Meyer to use the plant garage to wash his personal vehicle and that he does not know whether or not Meyer was aware of this use of the plant garage. Anderson does not claim, and the record does not demonstrate, that there were any other instances in which Anderson washed his personal vehicle, or otherwise maintained his personal vehicle, at the plant garage.

Union witness Jim Birch, a member of the Union's bargaining unit, has been an employe of the wastewater plant for five years. Birch recalls that, when he was hired, the former wastewater Plant Superintendent and other employes told Birch that he could use the wastewater department garage for his personal use whenever he wanted. Birch states that, once a month during the summer he washed his personal vehicle in the plant garage; that three times a month during the winter he washed his personal vehicle in the plant garage; and that once a month he used the plant garage to change the oil in his personal vehicle. Birch further states that he has observed each of the other wastewater department employes, except Meyer, wash personal vehicles at the plant garage; that he has observed Meyer's wife vacuuming her personal vehicle at the plant garage; and that he has observed Meyer changing the headlights on Meyer's personal vehicle at the plant garage. Birch claims that Meyer has observed Birch's personal use of the plant garage, but acknowledges that, normally, Meyer was not present when Birch used the plant garage for personal reasons. Birch denies that he was required to ask permission from the Plant Superintendent to use the plant garage for his personal use and asserts that he did not ask such permission.

Mike Meyer has been the wastewater Plant Superintendent since July of 1990. Meyer recalls that, during his tenure as Plant Superintendent, employes used the wastewater plant for personal use on five or six occasions. 2/ Meyer believes that employes were required to ask

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2/ Meyer states that he knew that Anderson had washed his personal vehicle at the plant garage when the plant was under construction, but that Meyer did not consider this to be personal use since Anderson was required to drive to the plant. Meyer recalls that, on a couple of occasions, Birch asked for permission to change the oil in his personal vehicle and that, on a couple of occasions, Jim Stanek asked for permission to wash his personal vehicle.

permission to make personal use of the plant garage and that employes did ask permission to make personal use of the plant garage. 3/ Meyer states that, for safety and liability reasons, he had not been comfortable with the personal use of the plant garage, but that he did not decide to discontinue the personal use of the plant garage until Birch left an oil spill on the floor and Meyer slipped on the oil spill.

### Summary

Anderson and Birch, the only bargaining unit employes to testify at hearing, each recall that the "practice" of permitting employes to use the wastewater plant facilities to maintain an employe's personal vehicle was established under the administration of the former Plant Superintendent Keller. Anderson and Birch, however, do not have the same recollection of this "practice."

It is evident that Birch routinely used the plant garage to wash his personal vehicle and to change the oil in his personal vehicle. It is not evident, however, that the personal use of the plant garage by other bargaining unit employes has been other than "occasional and infrequent," as claimed by Anderson. The undersigned considers Birch's routine use of the plant garage to be an aberration and not indicative of any "mutual understanding" of the parties. 4/

Birch was hired at the end of Keller's tenure as Plant Superintendent. 5/ Anderson was employed at least fourteen years prior to Keller's retirement as Plant Superintendent in 1990. One may reasonably conclude, therefore, that Anderson has the better understanding of the "practice" developed under Keller's administration.

Crediting Anderson's testimony, the undersigned is persuaded that the mutual understanding of the "practice" developed under the administration of the former Plant Superintendent was (1) that permission to use the plant garage for personal use was a "courtesy"

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- 3/ While Meyer recalls telling an employe that the employe was required to ask permission to use the plant garage to maintain the employe's personal vehicle, Meyer does not claim, and the record does not demonstrate, that Meyer informed the other bargaining unit employes of this requirement.
- 4/ Since it is not evident that Meyer knew of the extent of Birch's personal use of the plant garage, it is not reasonable to conclude that Meyer acquiesced to such routine use of the plant garage.
- 5/ Birch's testimony demonstrates that he has been employed for five years. Since Meyer became plant superintendent in July of 1990, it is reasonable to conclude that Birch served less than a year under the former Plant Superintendent.

extended to employes by the Plant Superintendent and (2) that this "courtesy" could be revoked by the Plant Superintendent if the Plant Superintendent determined that there had been an abuse of this "courtesy."

Meyer's decision to forbid personal use of the wastewater plant garage was in response to the fact that Birch left an oil spill on the floor of the plant garage when Birch changed the oil on his personal vehicle and Meyer slipped on this oil spill. By leaving the oil spill, which was a hazard, Birch abused the "courtesy" which had been extended by the former Plant Superintendent. Since the decision to revoke the "courtesy" was a response to an "abuse" of the "courtesy," Meyer acted consistently with the "mutual understanding" of the "practice" which had been developed under the administration of the former Plant Superintendent.

As the Employer argues, the contract does not contain any provision which requires the City to allow employes to use the wastewater plant garage for the purpose of maintaining personal vehicles. Nor is the Employer decision to not allow employes to use the wastewater plant garage for the purpose of maintaining personal vehicles contrary to any past practice.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer did not violate the collective bargaining agreement and/or past practice when it notified employes that employes could not use the wastewater plant garage for the minor maintenance of their personal vehicles.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 4th day of August, 1995.

By Coleen A. Burns /s/  
Coleen A. Burns, Arbitrator