

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
CITY OF MARSHFIELD :
and : Case 83
MARSHFIELD CITY EMPLOYEES, LOCAL 929, : No. 41985
AFSCME, AFL-CIO : MA-5520
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Appearances:
Mr. David White, Staff Representative, AFSCME Council #40, for the Union.
Mulcahy & Wherry, S.C., by Mr. Dean R. Dietrich and Mr. Jeffrey T. Jones,
for the Employer.

ARBITRATION AWARD

Marshfield City Employees, Local 929, AFSCME, AFL-CIO, herein the Union, pursuant to the terms of its collective bargaining agreement with the City of Marshfield, herein the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and decide a dispute between the parties. The Employer concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Marshfield, Wisconsin on June 12, 1989. No transcript of the hearing was taken. The parties completed the filing of post-hearing briefs on July 18, 1989.

ISSUE

the parties stipulated to the following issues:

Did the Employer violate the collective bargaining agreement when it refused to allow the workers formerly assigned to the Transfer Station to exercise bumping rights when their Transfer Station work was eliminated? If so, what is the appropriate remedy?

BACKGROUND

The Employer had operated a Transfer Station at which hard refuse was compacted and then transported to another location for disposal. Prior to 1984 the refuse was transported to Black River Falls for disposal. Because of the amount of refuse and the distance involved (120 miles round trip), two drivers were employed. In 1984 the Employer began sending the refuse to Wisconsin Rapids. As a result of the reduced transport distance (60 miles round trip), the Employer discontinued one Transport Station driver position. The affected employee was allowed to bump a less senior employee, which caused a series of bumps to take place thereafter. No employees were laid off due to open positions at the time.

In 1989 the Employer decided to subcontract the entire Transfer Station operation to a private firm, which action eliminated two positions, i.e., the operator position held by Robert Tauschek and the driver position held by Leonard Cordes. Tauschek and Cordes were transferred to the Employer's Street Department and assigned duties therein at the same wage rates as they had been receiving in their Transfer Station positions. Tauschek and Cordes were not given the option of bumping less senior employees when they were transferred to the Street Department. The transfers did not cause the layoff of any employees because several positions became available through attrition.

Subsequent to the transfer of Tauschek and Cordes to the Street Department, five positions in that Department, with higher wage rates than they were receiving, have been posted for employee bids. Neither Tauschek nor Cordes applied for any of those positions. All five positions were filled by employees with less seniority than Tauschek or Cordes.

RELEVANT CONTRACT PROVISIONS

Article 3 - Seniority - Job Listings

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Section 3. All vacancies or newly created positions in job classifications shall be posted by the City on the union bulletin board located near the time clock for a period of five (5) consecutive working days overlapping two (2) weeks (exception to five (5) consecutive working days shall be a posting which is posted on a Monday morning shall not be removed until the end of the workday of the following Monday). All vacancies shall be posted within ten (10) working days after being vacated by the incumbent. The posted notice shall contain ample space for interested employees to attach their names thereto. The employee with the most seniority, who can qualify, shall be assigned to the position. The Union shall be provided with a photocopy of the posting immediately following the removal of the posting from the board. The City shall advise the Union in writing in the event it deletes a position from the table or organization covering the bargaining unit.

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Section 6. When an employee is laid off due to a shortage of work, lack of funds, or the discontinuance of a position, such employee may take any other position for which he/she may qualify and that his/her seniority will permit the employee to hold.

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Article 14 - Grievance Procedure

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Section 5. The arbitrator shall have no authority or power to add to, modify, or delete from the express terms of this agreement.

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Article 20 - Management Rights

Contracting and Subcontracting.

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(B) The Union recognizes that the City has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union nor to discriminate against any of its members. The City further agrees that it will not layoff (sic) any employees who have completed their probationary periods at the time of the execution of this agreement, because of the exercise of its contracting or subcontracting rights except in the event of an emergency, strike or work stoppage or essential public need where it is uneconomical for city employees to perform said work; provided, however, that the economies will not be based upon the wage rates of the employees of the contractor or subcontractor, and provided it shall not be considered a layoff if the employee is transferred or given other duties at the same pay. Any unreasonable exercise of the management's rights by the City as set out in this paragraph may be appealed by the Union through the grievance procedure.

Position of the Union

Article 3, Section 6, clearly provides that where a position is eliminated, the incumbent has bumping rights. The positions held by Tauschek and Cordes were eliminated and they should have been given the right to bump less senior employees. Such a right to bump is supported by the fact that in 1984 a transfer station driver position was eliminated and the incumbent was allowed to bump. At the end of the bumping process no employees were laid off. Neither did any layoffs result from the transfer of Tauschek and Cordes.

If the Employer is allowed to assign whatever duties it wishes to an employee whose position is eliminated simply because the employee is losing no income, then the meaning of seniority will be greatly diminished and the job posting procedure could be totally undermined.

Position of the Employer

The provisions of the agreement must be read as a whole. Since Article 20(B) expressly addresses the loss of an employee position due to subcontracting, whereas Article 3, Section 6 does not, then Article 20(B) is more specific and governs in this matter. Because the language of Article 20(B) is clear and unambiguous, then it must be given effect. Pursuant to said language, an employee who is transferred, due to subcontracting, to another position with different duties at the same rate of pay has not been laid off. That is exactly what occurred in this case. Since the employees were not laid off, then Article 3, Section 6 is inapplicable.

The 1984 incident fails to support the Union's position. The 1984 incident did not involve a subcontracting situation. A position was eliminated because of a change in operations, rather than a subcontracting of the operations. Thus, under Article 3, Section 6, the incumbent was laid off and allowed to bump less senior employees. Said situation is different from the instant case wherein the employees were transferred due to the subcontracting of the entire Transfer Station operation.

DISCUSSION

The facts in this case are relatively brief and are not in dispute. When the Employer subcontracted its refuse Transfer Operation, the positions held by Tauschek and Cordes were eliminated and they were transferred to positions in the Employer's Street Department at the same wage rates as they had been receiving at the Transfer Station. They were not allowed to bump less senior employees when they were transferred.

The dispute is over which contract provision covers this situation. As argued by the Union, Section 6 of Article 3 provides that an employee, who is laid off due to, inter alia, the discontinuance of a position, can bump less senior employees. That right is not limited to any specific reasons for the discontinuance of a position. Thus, the language of Section 6, Article 3 is found to be of a general nature since it is not limited to specific situations.

Standing alone, said language would appear to cover the instant matter. However, the language of Paragraph B in Article 20 clearly provides that a nonprobationary employee will not be laid off as a result of any subcontract of an operation by the Employer, except in certain situations, and, further, that an employee who is transferred or given other duties at the same pay is not considered to have been laid off. Said language is directly on point in relation to the instant case. That language deals with the specific topic of positions eliminated by the subcontract of an operation, which is what occurred herein. Accordingly, the specific language of Paragraph B in Article 20 takes precedence over the general language of Section 6 in Article 3. Further, Paragraph B, Article 20 expressly states that the transfer of an employee at the same rate of pay due to a subcontract of an operation shall not be considered a layoff. Therefore, Section 6, Article 3 cannot be applied to the instant case because that language applies only to layoffs, which, under Paragraph B of Article 20, the instant case is not.

The contractual language unequivocally supports the actions of the Employer in this case. Neither is the Union's position supported by the 1984 incident in which an employe was allowed to bump when his position was eliminated. In 1984 a position was eliminated because of a change in the Transfer Station operation. There was no subcontract involved. Consequently, the affected employe was laid off and properly was allowed to bump less senior employes in accordance with Article 3, Section 6. Since no subcontract was involved, Paragraph B of Article 20 did not apply. Thus, the 1984 incident is distinguishable from the instant matter and has no relevance as a precedent.

The Union's contention that, if the grievance is not sustained then the seniority and job posting provision will be undermined, is not persuasive. The Employer's ability to transfer employes to other duties at the same pay is limited only to situations where an employe's position is eliminated by contracting or subcontracting and does not extend to situations when positions are eliminated for other reasons. Moreover, it is clear that the Employer's actions in this case did not undermine the job posting procedure, since five positions in the Street Department were posted after Tauschek and Cordes were transferred. Each of the five positions carried a higher wage rate than either Tauschek or Cordes was receiving. Neither employe chose to bid on any of the postings, all of which were awarded to less senior employes.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the Employer did not violate the collective bargaining agreement when it refused to allow Robert Tauschek and Leonard Cordes, the workers formerly assigned to the Transfer Station, to exercise bumping rights when their Transfer Station work was eliminated; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin this 13th day of September, 1989.

By _____
Douglas V. Knudson, Arbitrator