BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL DRIVERS AND DAIRY EMPLOYEES LOCAL UNION #563	Case 281 No. 41953 MA-5511
and	
CITY OF APPLETON	

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, appearing on behalf of the Union.

Mr. Greg Carman, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1988-1989 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Lynette Stern. The undersigned was appointed and held a hearing on July 12, 1989, in Appleton, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript of the hearing was made, both parties filed briefs, and the record was closed on August 21, 1989.

ISSUE:

The Union states the issue to be decided as the following:

> Did the City violate the parties' collective bargaining agreement when it laid off the grievant, Lynette Stern, from the position of full-time Ramp Cashier, while assigning bargaining unit work to junior part-time employee Linda Wirta and other employees outside the bargaining unit? If so, what is the appropriate remedy?

The City states the issue as the following:

> Did the City of Appleton violate the collective bargaining agreement by assigning bargaining unit work outside the unit and/or disregarding Article 24 of the Labor Agreement -- the Seniority Clause. If so, what is the appropriate remedy?

The Arbitrator agrees with the Union's framing of the issue.

STIPULATED FACTS:

The parties agreed to the following stipulations of fact:

1. Lynette Stern has longer length of service within the bargaining unit than Linda Wirta.

2. Immediately prior to the week in question, Linda Wirta was a laid-off part-time ramp cashier and Lynette Stern was a full-time ramp cashier.

3. During the week at issue in this grievance, Linda Wirta worked full-time for the City of Appleton.

4. During that week, Linda Wirta was paid at the rate of a ramp cashier while performing work of informing customers of the operation of the "Dynameter."

5. The Grievant worked 11.5 hours during the week in question, at the applicable ramp cashier rate.

CONTRACT PROVISIONS:

ARTICLE 1 - RECOGNITION

The Employer shall recognize General Drivers and Dairy Employees Local Union #563 as the authorized representative and exclusive bargaining agent for all regular full-time and regular part-time employees of the Parking Division of the City of Appleton Parking and Transit Commission, excluding confidential, supervisory, managerial, craft and professional employees.

. . .

ARTICLE 3 - TEMPORARY AND PART-TIME EMPLOYEES

All temporary employees who are employed eight hundred (800) or more hours in a twelve (12) month period shall be considered permanent employees after such time with no further probationary period required. This provision shall not be used to circumvent the hiring of new employees for permanent positions.

Temporary employees who are hired on a regular basis prior to working 800 hours in a twelve month period shall be required to serve the full probationary period provided for in Article 2, regardless of the number of hours they worked as a temporary employee.

Part-time employees are defined as those employees who are regularly scheduled to work less than 30 hours per week.

Except as modified elsewhere in this Agreement, part-time employees shall not receive any fringe benefits of this Agreement.

. . .

ARTICLE 24 - SENIORITY

A. Unless otherwise modified elsewhere in this Agreement, seniority rights shall prevail for the purposes of promotion and lay-off. Seniority for all employees shall prevail on the following basis:

1. Full-time Ramp Cashiers

2. Part-time Ramp Cashiers

3. Parking Meter Technician

Seniority lists of employees shall be posted in a conspicuous place. Any disagreement concerning an employee's seniority shall be subject to the grievance procedure.

B. Seniority for permanent employees shall be determined by the length of service of the employee and shall commence on the latest date of employment as a permanent employee plus such additional time as it is required or granted for vacations, leave of absences, illness or accidents. All full-time employees shall be considered to have more seniority than any part-time employee. If an employee attains permanent full-time status and is later reduced to part-time, that employee shall be considered to have more seniority for all purposes than any other part-time employee. An employee's seniority is nullified if:

1. The employee is laid off and not re-employed within two (2) years from the date of layoff;

2. The employee fails to return to duty when recalled from layoff as herein provided;

3. The employee leaves the Employer of the employee's own volition;

4. The employee is discharged for just cause and not subsequently reinstated.

C. A seniority list of all employees covered by this Agreement shall be furnished by the Employer to the Union upon request.

D. In laying off employees because of reduction in forces, the employees shortest in length of service in the bargaining unit shall be laid off first, provided those retained are capable of carrying on the Employer's usual operation.

E. When reducing the number of employees in a given classification, the least senior employee in that classification shall be reduced to the next lower classification within the Division, if qualified to perform the work. Such employee shall demonstrate his/her ability to perform the work within thirty (30) days. If unable to do so, he/she will be reclassified to the next lower classification. For purposes of this paragraph, full-time and part-time cashiers shall be considered to be in the same Division.

F. In re-employing those who have been laid off because of a reduction in forces, the employees on the seniority list having the greatest length of service in the bargaining unit shall be called back first, provided they are qualified to perform the available work.

. . .

BACKGROUND:

The Grievant, Lynette Stern, has been employed by the City of Appleton since June of 1982. She has always been a parking ramp cashier in the City's parking division, working part-time for the first two and a half years and then full-time up until the end of July of 1988 when this grievance arose.

In the summer of 1988, the City installed a machine called a "Dynameter" in its Soldier's Square parking ramp. The Dynameter is a computer-operated parking meter that allows ramp customers to enter a stall number and pay their money, and then customers may leave the ramp without paying a cashier. It was the first and only such machine in the City, and its operation resulted in the lay-off of two cashiers. Wally Potaczek, the supervisor of parking, determined the two part-time cashiers would be laid off and one full-time cashier would be cut back to part-time. Potaczek told the Grievant in the spring of 1988 that her cashier job at the Mid-Town ramp would eventually become part-time, although he did not know when that would happen.

Sometime during May of 1988, Potaczek asked the Grievant whether she would continue to work full-time for one more week to introduce the Dynameter to customers, allowing her one extra week of full-time work before going to part-time work. Potaczek asked her if she preferred to work mornings or afternoons, and while they arranged no specific hours, it was the Grievant's understanding that she would work her regular job for two days and on the other days, she would be introducing the Dynameter to customers.

Paul DeBraal, a parking meter technician, saw a list of employes' names -- including his own and the Grievant's -- in the office of Soldier's Square ramp sometime in July of 1988. When he asked Potaczek about the purpose of the list, Potaczek told him that the people on the list were possibly available to explain the Dynameter to the public. The list was Potaczek's own record of who was available for the week the Dynameter was going into operation, but it was not posted and had no hours or schedule.

After meeting with the manufacturer of the Dynameter, and after interviewing employes about explaining the operation of the machine to the public, Potaczek no longer considered the Grievant for such work, because either Potaczek or the manufacturer, or perhaps both, determined that the Grievant did not promote the machine well to the public. The parties agree that in her regular job, the Grievant has to be courteous to the public and has never been disciplined regarding her treatment of customers. The Grievant admitted that she did not like a machine that was taking over her job but that she would have been nice to her customers.

The Grievant did not perform the work of introducing the Dynameter to the public in the first week of August of 1988. A laid-off part-time ramp cashier, Linda Wirta, worked full-time that week, for a total of 38.5 hours, while the Grievant work 11.5 hours. Other employes used at the Soldier's Square ramp introducing the Dynameter to customers included Barbara Kaweich, an assessment clerk in the Department of Public Works (who worked 24 hours); Beverly Koester, a receptionist in the DPW (19.5 hours); and Melissa Johnson, a seasonal engineering aide (1.5 hours). All those who performed the work in question were paid their regular rates of pay while introducing the Dynameter to the public at Soldier's Square ramp.

THE PARTIES' POSITIONS:

The Union:

The Union argues that under the seniority clause, Article 24, of the labor agreement, the Grievant was improperly laid off at a time when a junior ramp cashier, Wirta, was recalled. The Grievant had longer service with the City than Wirta, and was also a full-time employe. Under Article 24, full-time ramp cashiers have more seniority than part-timers, and the Grievant was to be retained longer and recalled first in case of a reduction of work. Moreover, the Union points to Section E of Article 24, which gives the senior employe the right to bump into a lower classification, if qualified, and a 30-day period to prove the ability to perform the work.

The Union further points to the parties' side agreement revised on June 24, 1988, which obligates the City to maximize hours for the Grievant and other full-time cashiers. While the introduction of the Dynameter caused a reduction in the available work, there was work available during the first week

of August to introduce the machine to the public. The Dynameter performed the duties of the cashier, such as calculating and receiving parking fees. Thus, the Union submits that the employes' work in explaining the operation of the Dynameter was within the scope of the parking ramp cashier position.

The Union contends that the City may not evade seniority rights by claiming that the available work is outside the work of the bargaining unit. However, even if the work were to be considered outside the parking ramp cashier position, the Grievant still had the seniority to perform the work over Wirta.

There is no basis for the City's claim that the Grievant was not qualified, the Union submits, since all of the people assigned to the work had no previous experience with this assignment and all had to be trained to use the Dynameter first. Moreover, the City's belief that the Grievant would not project herself well to the public is unsubstantiated, particularly where the Grievant has been required to work with the public on her regular job as ramp cashier.

The Union argues that the City's decision to withhold the work from the Grievant amounts to a disciplinary suspension of a week, while the City points to no misconduct on the part of the Grievant. Such a disciplinary action would violate the just cause provision of Article 11.

Also, the Union submits that the City violated Article 1, the recognition clause, as well as the seniority clause, by removing the work from the bargaining unit. In addition to assigning a junior employe to the Dynameter work, the City also assigned employes outside the bargaining unit and a temporary employe, and that assignment violated the recognition clause. The work associated with the Dynameter involved the parking division, the new equipment was to perform the work of ramp cashiers, and the parking supervisor over saw the installation and introduction of the machine. Additionally, the Union points out that Potaczek's initial list of available employes contained bargaining unit employes. Potaczek initially offered the work to the Grievant, who accepted it. Then the largest assignment of the work went to Wirta, the junior laid-off employe in the unit. The fact that a technological change occurred did not alter the City's obligation to maintain work within the bargaining unit, the Union contends.

The Union asks that the grievance be sustained and the Grievant made whole for her losses.

The City:

The City argues that it assigned the work in dispute as a one-time project to temporary employes, and therefore, the work in dispute is not bargaining unit work. The work created by the installation of the Dynameter consisted of a one-week project requiring an explanation of the operation of the new machine to ramp customers. Since this was the first Dynameter put into operation, the City points out that this type of work had never been performed by bargaining unit members in the past. Thus, the City asserts that it was not assigning to temporary employes work which was normally performed by full-time union employes.

Moreover, the city notes that the Union does not represent temporary employes, and the record will not show that temporary employes were used in order to circumvent Article 3's provisions, since the work was a one-time project. Additionally, the City was not subcontracting Union work, and thus not violating Article 32. To support its position that the work was being done by temporary staffing on a one-time basis, the City notes that the four employes who staffed the ramp during the time in question received their normal rate of pay, regardless of the cashiers' prevailing rate of pay.

The City contends that any remedy is speculative at best, because the Grievant would not have received all the available hours when she also had her regular job to perform.

Turning to Article 24, the seniority clause of the contract, the City claims that the failure to assign the Grievant the work in question to the one-time project did not constitute a layoff, given the fact that the Grievant had already been notified that she was being reduced to part-time employment. Since the project did not consist of normal union work, the seniority clause did not give the Grievant greater rights to added hours than a temporary employe. Finally, the City adds that it acted reasonably in assigning the new work to others, given the Grievant's attitude toward the Dynameter which was reducing her employment from full-time to part-time. The City reasons that it would take little imagination to see that the Grievant would have trouble being positive about the new machine in discussing it with ramp users.

Therefore, the City asks that the grievance be dismissed.

DISCUSSION:

The first issue to be addressed is the City's defense that it assigned temporary employes to a one-time project that was not traditional bargaining unit work. While the work of explaining the operation of the Dynameter to parking ramp customers had not been performed by bargaining unit members in the past, it does not follow that such work is not bargaining unit work where there was no Dynameter in the City in the past.

The Dynameter caused a reduction of the available work to the bargaining unit and a resulting layoff of two cashiers, which was accomplished by laying off two part-time cashiers and partially laying off the Grievant. The question here is whether the one-time project of a week's worth of time spent introducing and explaining the machine to ramp customers was bargaining unit work.

The City's job descriptions (see City Exhibits 3 and 4) of the parking ramp cashier and the parking meter technician do not contain any duties regarding the Dynameter. These job descriptions were dated January 1983, well before the City bought the Dynameter and installed it in Soldier's Square Ramp. Additionally, the job descriptions themselves clearly state that examples of work do not list all the duties performed in positions of a particular class. The job descriptions do not purport to define the limits of bargaining unit work, and do not show that the work of introducing a machine such as the Dynameter would not be bargaining unit work.

The job of introducing the Dynameter took place in a parking ramp, the same location of the bargaining unit work. While the work may have been unique in that it was needed for a very short period of time, it was not very different from the work that cashiers normally perform in dealing with the public regarding metered time spent parking and receiving payment for it. When Potaczek looked for available personnel to introduce the Dynameter, he listed all of the ramp cashiers, as well as other City employes. It was logical to look first to the ramp cashiers and members of the bargaining unit who already worked in the City's ramps and knew something about their operations.

The Arbitrator finds that the work in dispute -- the one-week project of introducing the Dynameter to the public -- is bargaining unit work. Ramp cashiers take money from parking customers after calculating time spent in the ramps. In the week set aside to introduce the Dynameter to the public, employes were to explain how to operate a machine that takes money from customers and calculates time spent in the ramp. The work as done in the same location and during the same hours normally worked by ramp cashiers. All of the ramp cashiers were being considered at one point to help out with the project. DeBraal, a bargaining unit member, will perform maintenance on the Dynameter, as well as other equipment.

The Grievant, who was being partially laid off due to the lack of available hours for ramp cashiers, would have the right to available bargaining unit work over and above both employes outside of the bargaining unit and those within the bargaining unit but with lesser seniority. Under Article 24 of the parties' contract, Section A calls for seniority to prevail on the following basis: (1) full-time ramp cashiers; (2) part-time ramp cashiers; and (3) parking meter technician. Section B States in part: "If an employee attains permanent full-time status and is later reduced to part-time, that employee shall be considered to have more seniority for <u>all purposes</u> than any other part-time employee." (Emphasis added.) By including Section B within

the seniority clause of Article 24 which states that ". . . seniority rights shall prevail for the purposes of promotion and lay-off . . .," the parties anticipated the situation where an employe could be partially laid off but retain seniority over others who had not attained full-time status.

It is undisputed that the Grievant had more seniority than Wirta, who was a laid-off part-time ramp cashier, but who was called up to work 38.5 hours during the week at issue. No only did the Grievant have more seniority than Wirta by virtue of having been a full-time cashier, but also the Grievant had longer length of service within the bargaining unit than Wirta. Thus, the City violated Article 24 when it partially laid-off the Grievant while assigning bargaining unit work to Wirta who had lesser seniority. Additionally, the Grievant should have been given the bargaining unit work ahead of those outside of the bargaining unit, such as the assessment clerk who worked 24 hours, the receptionist who worked 19.5 hours, and the seasonal engineering aide who worked 1.5 hours, when the Grievant was on a partial lay off during the time that some bargaining unit work was available. Under Section B of Article 24, the phrase "all purposes" gives the Grievant the right to the bargaining unit work ahead of others. The seniority clause is intended to allow senior employes to remain on the job if work is available. Section F of Article 24, states: "In re-employing those who have been laid off because of a reduction in forces, the employes on the seniority list having the greatest length of service in the bargaining unit shall be called back first, provided they are qualified to perform the available work." The City was calling back a laid-off ramp cashier, Wirta, but Wirta has less seniority than the Grievant. If the City could show that the Grievant was not qualified to perform the work, it could have ignored her seniority.

The City argues that it acted reasonably, given the Grievant's attitude toward the Dynameter, a machine that was reducing her work. It would appear from Potaczek's testimony that the manufacturer of the Dynameter had some influence in the City's choice of assigning the work to other personnel. Potaczek stated that once people were "okayed" by the manufacturer, they would be scheduled to perform the work in question. The only evidence in the record that the Grievant could not do the work in question was Potaczek's statement that from observing interviews and talking with the manufacturer, it was felt that the Grievant did not promote the machine well to the public. However, the Grievant testified that she would not have given negative information to her customers and that she would have been nice to her customers "because that was my job." The Grievant deals with the public regularly on her job as ramp cashier, and the City's speculation that she would not promote the machine well to the public cannot overcome its obligation to administer its labor contract in accordance with the rights of the bargaining unit members.

Because the work of introducing the Dynameter to the public is within the scope of bargaining unit work, and where the City partially laid off the Grievant while assigning such work to a part-time ramp cashier with less seniority than the Grievant as well as to others outside the bargaining unit, the City violated Article 24. It is unnecessary to determine whether the recognition clause was also violated. The matter of remedy remains as an issue in dispute between the parties.

The Union asks that the Grievant receive the difference in pay between the 11.5 hours actually worked by the Grievant the first week of August 1988, and the 38.5 hours worked by Wirta. The Union believes that if the Grievant had been assigned the work in the first place, she would have worked at both her regular job and then at Soldier's Square introducing the Dynameter, for a total of 38.5 hours. The City contends that any remedy is speculative at best, because the Grievant would not have received all the available hours when she also had her regular job to perform. The City believes that any remedy should be the difference between the 11.5 hours actually worked and 25 hours, which is a full-time schedule under the parties' contract.

The Union's request for 27 hours at the Grievant's regular rate of pay is reasonable. Joint Exhibit 2 shows that there were 45 hours of work given to people outside the bargaining unit -- to the assessment clerk, the receptionist, and the seasonal engineering aide -- as well as 38.5 hours to Wirta, for a total of 83.5 hours. It is impossible for either the City or the Union to say with

certainty how many of the 83.5 hours the Grievant would have actually worked had she been properly given the work of introducing the Dynameter in the first place. However, where the City prevented the Grievant from performing the work and the Union's suggested remedy is well within the bounds of reasonableness, I find that appropriate remedy is for the City to reimburse the Grievant for 27 hours at her regular rate of pay.

For the foregoing reasons, it is my decision and

AWARD

1. The grievance is sustained.

2. The City is ordered to reimburse the Grievant, Lynette Stern, for 27 hours at the Grievant's regular rate of pay.

Dated at Madison, Wisconsin this 17th day of November, 1989.

By _____
Karen J. Mawhinney, Arbitrator