

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 LOCAL UNION 643, AFSCME, AFL-CIO :
 :
 and : Case 88
 : No. 42870
 : MA-5830
 CITY OF BELOIT :
 :

Appearances:

Mr. Thomas E. Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
 Mr. Daniel T. Kelley, City Attorney, City of Beloit, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1989-1990 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 a grievance concerning seasonal employees performing work with classified special equipment machinery. The undersigned was appointed and held a hearing on November 17, 1989, in Beloit, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript of the hearing was prepared only for the purposes of the Employer, both parties filed briefs, and the record was closed on January 8, 1990.

ISSUES:

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

Did the Employer violate the collective bargaining agreement by assigning seasonal employees to operate classified equipment (tree chopper)? If so, what is the appropriate remedy?

The City raises the following three issues to be decided:

1. Was the grievance timely filed in accordance with Section 12.02 of the contract?
2. In assigning seasonal employees to feed brush into the tree chopper, were the seasonal employees performing work normally and historically performed by seasonal employees?
3. Is feeding brush into the tree chopper operation of classified equipment?

CONTRACT PROVISIONS:

ARTICLE I
RECOGNITION

1.01 The City recognizes the Union as the exclusive bargaining agent for the regular full-time employees of the Department of Public Works, Beloit Transit System and Wastewater Treatment Plant of the City of Beloit, including employees of the golf course, cemeteries, street department, park and forestry departments, refuse collectors and bus drivers, but excluding employees in central stores, City swimming pools, recreational programs, wastewater treatment laboratory, clerical personnel, supervisory and executive personnel. Regular full-time employees shall be defined as those employees who work forty (40) hours or more per week.

. . .

1.02 City employees excluded from the bargaining unit shall not perform work normally performed by bargaining unit members. This provision shall not, however, preclude supervisors from instructing bargaining unit members or performing bargaining unit work in an emergency when qualified employees are not available, except Greenskeeper and the Working Supervisors in the cemetery, parks and Beloit Transit System.

ARTICLE II
MANAGEMENT RIGHTS

2.01 The union recognizes the Employer as having the right to:

1. Plan, direct and control the operation of the work force
2. Hire, lay-off, discipline or discharge for just cause
3. Establish and enforce reasonable rules of conduct
4. Introduce new or improved methods of operation
5. To subcontract work. The City agrees to provide written notice to the union sixty (60) days prior to the effective date of subcontracting the work if there is to be a reduction in personnel. The parties will meet to discuss the impact, however, impasse in such discussions shall not prevent the City from implementation of the decision.
6. Determine and uniformly enforce minimum standards of performance all of which shall be in compliance with and subject to provisions of this Agreement, and provided that nothing contained herein shall be used by management to discriminate against any employee or the Union.

. . . .

ARTICLE IV
EMPLOYMENT AND PROBATION

- 4.01 All employees shall be classed as (1) Seasonal; (2) Probationary; or (3) Regular.
- 4.02 The term of employment of a Seasonal employee while in that class shall not exceed six (6) months and the duties and responsibilities of such employees shall, so far as is practical, be of a seasonal nature. Seasonal employees shall be covered by this Agreement only to such other extent that they are specifically mentioned in the Agreement.

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ARTICLE X
SENIORITY - JOB POSTINGS

10.01

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The City shall not hire new employees in bargaining unit positions as long as there are still employees on the

recall list who are presently qualified to perform the work in the affected job classification and are willing to be recalled to said classification, further, the City will not hire any special status employees, i.e. seasonal, general relief or restitution program to perform any work historically performed by members of the bargaining unit.

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ARTICLE XII
GRIEVANCE PROCEDURE

12.01 Any difference of opinion, or misunderstanding in regard to the interpretation, application or enforcement of this Agreement or work rules which may arise between the City and the Union or any employee covered by this Agreement shall be handled as follows:

12.02 Step 1. The aggrieved employee, a steward, officer, or the Union Grievance Committee shall present the written grievance to the employee's supervisor within ten (10) working day of the alleged violation or knowledge thereof. The employee's supervisor shall attempt to resolve the matter and shall respond in writing to the employee and the Union within five (5) working days.

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1989 APPENDIX "A"
BELOIT CITY-LOCAL #643 LABOR AGREEMENT
(Effective January 1, 1989)

RANGE AND CLASSIFICATION

(Wages Omitted)

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RANGE III: Skilled Laborers and
Special Equipment Operators.
Special Equipment Machinery:
1)Air Hammer, 2)Loader, 3)Working
Truck, 4)Tar Machine, 5)Tractor
Mower, 6)Machine Painter,
7)Rotomist Sprayer, 8)Stump Remover,
9)Large Riding Wing-Type Mower,
10)Tree Chopper, 11)Backhoe,
12)Tree Witch

. . .

BACKGROUND:

This grievance arises from the City's use of seasonal employees to feed brush into a tree chopper.

The tree chopper is hauled to a work site behind a City truck, which is operated by a special equipment operator, or a regular employee who is a bargaining unit member. At a job site, the chopper is left attached to the truck and started up by the special equipment operator. The seasonal employees gather brush, limbs, and debris and feed such material into the chopper. Seasonal employees do not start the chopper, engage its gears, or maintain it.

The City has continuously used seasonal employees to assist in the feeding of the chopper since at least 1970. 1/

Up until the end of 1986, the parties had a laborers' classification in their collective bargaining agreements, which was eliminated in the 1987-1988 labor contract. Employees in that classification were reclassified to special equipment operators. In a memorandum submitted by Lee Davis, City Personnel Director, to Union Representative Tom Larsen, seasonal employees were allowed to perform certain tasks, including tree crew labor, which was listed as one of 22 items.

According to Reuben Knutson, Union president and a heavy equipment operator, the Union is concerned that there is a trend toward the increased use of seasonal employees while there is a loss of bargaining unit positions. Knutson believes that as long as the tree chopper is classified equipment, it belongs in the Union and the work of feeding it belongs to bargaining unit members. Knutson expressed the Union's concern that if seasonal employees are allowed to run the chopper, they would soon be allowed to run everything else that is classified equipment. Another employee, Al Laskowski, also expressed the Union's concern that safety is a factor in operating classified equipment, and that someone could get a sleeve caught and be dragged into the chopper.

Larry Draeving, the Parks Foreman and City Forester, supervises the tree crews and assigns them work. Draeving's understanding of the use of seasonal employees is that they are not to operate classified equipment, and therefore, they cannot start the chopper or maintain it, but that they can feed brush and limbs into the chopper. The Parks and Recreation Superintendent, Lee Fassett, also believes that seasonals are not operating the equipment by feeding the chopper, and that any use of controls on the machine is to be done by a special equipment operator.

THE PARTIES' POSITIONS:

The Union:

The Union notes that the City raised the issue of timeliness for the first time at the arbitration hearing, as shown by the answers to the steps of the grievance procedure. The Union considers the City's conduct to be a continuing violation of the collective bargaining agreement, and that the Union challenged the use of seasonal employees upon becoming aware of the issue. The Union was not aware that the City was using seasonal employees to operate the tree chopper until shortly before the grievance was filed.

The Union asserts that the tree chopper is a piece of equipment which has been classified as special equipment. In addition, the Union notes that it appears to be undisputed that seasonal employees are not to operate equipment classified as special equipment. The main issue is whether feeding material into the tree chopper is in fact operation of the tree chopper.

It is the Union's position that operation of the tree chopper includes the actual insertion of material into the chopper. Otherwise, a special equipment operator would be present only to start the chopper at the beginning of the day, which would be a nonsensical result. The chopper is an expensive piece of equipment that can be damaged if not operated properly. An employee feeding material into the chopper improperly could jam or damage the equipment. Also, a qualified operator must remain in close proximity to the equipment to monitor its operation. The Union concludes that since the feeding of material into the chopper is such an integral part of the operation of the machinery, this task should be performed by a qualified operator.

The Union does not claim that any bargaining unit members have been harmed as a result of the City's action, and asks only that the City be ordered to cease and desist from using seasonal employees to operate or feed the classified equipment.

The City:

The City argues that the grievance was not timely filed because it does not indicate any date of violation or knowledge of violation that occurred within ten days of the date of the filing of the grievance on July 20, 1989.

1/ At the arbitration hearing, Union members testified that a grievance over this same issue went to an arbitration hearing in 1973 before Arbitrator Philip Marshall, but that a settlement was reached before Marshall issued an award. However, after the hearing, the Union sent a letter to this Arbitrator indicating that a search of the records showed that the matter before Marshall was not related to seasonal workers and requested that an exhibit and all testimony relating to the 1973 case be stricken from the record in this case. The Arbitrator has honored that request.

The City submits that feeding of branches and limbs into the tree chopper is not exclusively bargaining unit work, pointing out that it has been traditionally performed by seasonal employees working with regular employees. Thus, as a past practice, the work has not been performed exclusively by bargaining unit members. The City states that work may be assigned out of the bargaining unit where there is no contract restriction and the employer acts in good faith.

The City maintains that it has balanced the legitimate interests of management and bargaining unit employees by having seasonal employees feed the tree chopper only and by having the regular employees operate the chopper and participate in feeding it. The City asserts that it did not hire seasonals to perform work exclusively performed by bargaining unit members.

Under past practice, the tree chopper work has not been performed exclusively by bargaining unit members. The City believes that the bargaining agreement is ambiguous and requires resorting to parole evidence to establish work performed historically, normally and exclusively by bargaining unit members. The practice of seasonal employees feeding brush into the tree chopper has continued for many years without being challenged by the Union, and the past practice is controlling. The City claims that seasonal employees' work by past practice has acquired contractual status. The labor agreement includes conditions and practices that have been applied historically, and not just the written provisions stated in it.

The City asserts that the Union's goal is work preservation, and that goal is not adversely affected by permitting seasonal employees to feed brush into the chopper. Finally, as a technical matter, the City submits that feeding brush into the chopper is not operation of the equipment. The City asks that the grievance be denied.

DISCUSSION:

While the City has raised the issue of the timeliness of the grievance, it has done so for the first time during the arbitration hearing. An objection to timeliness must be raised in a timely manner in order that the other party is not taken by surprise and has sufficient notice to rebut the argument. The Arbitrator finds that the City has waived the argument, where it has raised it for the first time during the hearing into the matter.

Turning to the merits, the Union asserts that the City does not dispute that seasonal employees are not to operate equipment classified as special equipment, and therefore, the main issue is whether feeding material into the tree chopper is operating the chopper. That appears to be a correct statement, according to the testimony of Draeving and Fassett, who took the position that seasonals are not operating the chopper by feeding brush into it.

Section 10.01 of the contract must be interpreted in conjunction with Appendix A, which lists the special equipment machinery, including the tree chopper. Section 10.01 states that the City will not hire seasonal employees ". . . to perform any work historically performed by members of the bargaining unit." In this case, seasonal employees have historically fed brush into the tree chopper, although the tree chopper is listed as special equipment machinery in the labor contract. While Appendix A lists the types of machinery which are considered to be special equipment, the contract does not clearly state that only special equipment operators will operate special equipment machinery. While the parties agree that seasonal employees cannot operate special equipment, this is an agreement that comes about through their own practice and interpretation of the contract. Therefore, to give effect to that understanding of the parties, it is consistent to give effect to the other practice of the parties concerning the operation of the tree chopper.

The contract is sufficiently ambiguous that the Arbitrator must look to the parties' past practice to arrive at the proper interpretation. Although the Union claims it was not aware that seasonal employees were feeding the chopper until shortly before it filed this grievance, such knowledge may be imputed to the Union where the practice existed openly for some 20 years. Draeving assigned work to the tree crew off and on between 1956 and 1970, and supervised the crew regularly since 1970. Moreover, the Union should have known of the practice, because special equipment operators worked alongside the seasonals with the tree chopper at all times. The seasonal employees were not allowed to start the machine, engage its gears, or shut it down, and the special equipment operators who worked with the seasonals were aware of the practice of seasonals feeding brush into the chopper. There is no reason why those regular employees could not have brought the matter to the attention of Union officers at an earlier time.

While Knutson expressed the Union's concern that there appears to be a trend toward the use of more seasonals while there are fewer bargaining unit positions than in the past, there is no evidence that the use of seasonals in connection with tree crews has led to this result. Knutson testified that there are about 17 positions which have not been filled in the last five years,

although the City filled four of the positions a short time ago. Yet the practice of seasonals feeding brush into the tree chopper goes back much farther than the past five years. Therefore, the Arbitrator cannot find that the City's use of seasonal employees has undermined the work of the bargaining unit.

The Union argues that to allow seasonals to feed the chopper would lead to a nonsensical result, such as having a special equipment operator present only to start the chopper at the beginning of the day. Yet it also asserts that a qualified equipment operator must remain in close proximity to the equipment to monitor its operation. The City has not attempted to assign the work in a manner that would have a special equipment operator on the scene only to start the chopper and then leave the seasonal employees alone. To the contrary, the seasonal employees do not work alone, and the special equipment operators also feed the brush into the chopper with the assistance of the seasonals.

By their conduct, the parties have interpreted the contract to mean that feeding brush or limbs into the tree chopper is neither work performed exclusively and historically by bargaining unit members nor is it to be considered operation of the tree chopper. The Arbitrator will not disturb that interpretation of the labor agreement without contract language which is clear on its face and needs no look at the past practice for an interpretation.

Accordingly, I conclude that while the grievance is timely, there is no violation of the collective bargaining agreement by the City's assignment of seasonal employees to assist in the feeding of brush into the tree chopper.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 20th day of February, 1990.

By _____
Karen J. Mawhinney, Arbitrator