

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
CITY OF БЕЛОIT :
and : Case 80
: No. 42237
: MA-5620
LOCAL 643, AMERICAN FEDERATION OF :
STATE, COUNTY AND MUNICIPAL :
EMPLOYEES, AFL-CIO :
- - - - -

Appearances:

Mr. Daniel T. Kelley, City Attorney, City of Beloit, City Hall, 416 College Avenue, P.O. Box 328, Beloit, Wisconsin 53511, appeared on behalf of the City.
Mr. Thomas J. Larson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1722 St. Lawrence Avenue, Beloit, Wisconsin 53511, appeared on behalf of the Union.

ARBITRATION AWARD

On May 17, 1989, Local 643, American Federation of State, County and Municipal Employees, AFL-CIO filed a request with the Wisconsin Employment Relations Commission to provide an Arbitrator to issue a final and binding award on a grievance pending with the City of Beloit. Following jurisdictional concurrence from the Employer, the Commission, on June 27, 1989 appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on August 15, 1989, in Beloit, Wisconsin. Post-hearing briefs were submitted and exchanged by October 12, 1989.

This award addresses Paul Cannon's permanent assignment to a Relief Refuse Collector position.

BACKGROUND AND FACTS

Paul Cannon, the Grievant, has been employed by the City of Beloit since October 22, 1984. He was initially hired as a laborer and assigned to the Waste Water Treatment Plant. As a junior employe Mr. Cannon has been subject to regular seasonal layoff. He was placed on economic layoff December 31, 1984 and recalled to the Parks Department April 15, 1985. On December 6, 1985 he was again laid off and was recalled to the Parks Department on April 7, 1986. Cannon was laid off on November 8, 1986 and recalled, as a Special Equipment Operator, on April 13, 1987. The 1987 collective bargaining agreement had deleted the laborer classification and included laborer functions within the Special Equipment Operator classification. The Grievant was placed on economic layoff once again, beginning October 30, 1987. Cannon was recalled to the Parks Department March 7, 1988.

On August 29, 1988 the Grievant was hit by a car while riding his bicycle in a non-work related accident, and remained off work until January 23, 1989.

In anticipation of a return to work, on January 6, 1989 Cannon met with Dale Matthews, the Assistant Director of Public Works. Mr. Cannon had a physician's release which contained a "no prolonged stair climbing" restriction. Matthews indicated that his (Cannon's) regular work, grass cutting and lawn maintenance, was over and would not be available until Spring. Matthews further indicated that he anticipated a garbage job posting, a treatment plant job, and a cemetery job. Cannon indicated that he would not take a garbage job.

The men met again on January 12. At that time Cannon indicated that he did not want to work at the waste water plant. Cannon also expressed reservations about his physical ability to do the garbage truck job and his ability to secure a required chauffeurs license. Matthews advised Cannon that there was no Special Equipment Operator work available in the Parks and that since there were jobs available he (Cannon) could not be placed in layoff status. Matthews indicated that Cannon would have to sign for an available job or he would no longer be a City employe.

Matthews provided Cannon with the chauffeur's exam study booklet published by the Wisconsin Department of Transportation. Cannon took and passed the chauffeur's exam on January 19, 1989. On January 23 Cannon returned to work as a Refuse Collector - Sideloader.

On February 7, Cannon returned to Matthews with a Doctor's slip from a Dr. Tuftee, which indicated "please switch jobs so patient does not lift over 75 pounds and in which he does less climbing in and out of trucks". Cannon indicated that his leg still bothered him. Matthews asked if he felt he could occasionally drive a sideloader and Cannon said he felt he could if it was only now and then. Matthews assigned Cannon to snow shoveling and directed him to sign a posting for Relief Driver. Cannon did sign the posting and was transferred from snow shoveling to Relief Refuse Collector effective February 27, 1989.

Sometime in early April Cannon dropped a t.v. on his leg while on the job. He missed approximately two weeks of work and returned to work on April 17 with an unrestricted release from a Dr. Hibble. According to Cannon the release was for his left leg, the one injured by the t.v. Hibble did not look at his right leg, which suffered the prior injury. The City appears to have read Hibble's release as a complete release.

Cannon has worked as a Relief Refuse Collector since his return in that capacity.

During the Winter months, the City operates an ice skating pavilion at Telfer Park. As a part of the operation of that facility there is ongoing maintenance and custodial work performed. It was the testimony of Dale Matthews that during the Winter of 1989 such work was performed by Rolly Barrett, a seasonal employe. According to Matthews the same work was performed by Martin Wessels, a seasonal employe, during the Winters of 1987 and 1988.

Pam West, a member of the bargaining unit, testified that she has worked at Telfer Park during the Winter each year since approximately 1985. According to West, she regularly worked with two other bargaining unit employes, Debbie Wofford and Loraine Burton. The three performed general maintenance work on a regular basis each Monday, Wednesday and Friday.

It was West's testimony that she did not work at Telfer Park during the warm weather months; only during the cold weather. She testified that in 1989 she was off work in August through September 26 due to a back injury. She was released to return to work and did so at Telfer on September 26. Sometime in October Rolly Barrett began work at Telfer as a temporary employe. On November 28 Matthews called West in and advised her that she had five days to have her return to work restrictions dropped or she would be sent home. Her doctor refused to remove the restrictions and she was sent home.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the collective bargaining agreement by permanently assigning the Grievant to work as a relief refuse collector?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

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. Executive and supervisory personnel shall be defined as department heads or division heads and those personnel in a position to hire or discharge, or effectively recommend discipline for another employee.
- 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.

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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.

. . .

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 V
WORK WEEK, OVERTIME, AND WAGE

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- 5.09 . . .
- The City shall have the right to assign employees out of their regular classification. The employee so assigned shall receive his/her own rate of pay or the

next higher rate of pay in the classification to which he/she is temporarily assigned, whichever is greater.

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ARTICLE X
SENIORITY - JOB POSTINGS

10.01 The principle of seniority is recognized. If it becomes necessary to reduce employee personnel, the last person hired shall be the first persons laid off and the last person laid off shall be the first person rehired, providing that the remaining personnel are capable of performing the required work. An employee so affected by the layoff shall receive written notice two (2) weeks in advance of such layoff. A copy of such notice shall be sent to the Union President.

Employees who are laid off shall be placed on a recall list for a period of twenty-four (24) months. While on a recall roster they shall not gain seniority. If there is a recall, employees who are still on the recall list shall be recalled in the inverse order of their layoff provided they are qualified and can demonstrate their ability to do the job to which they are recalled.

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.

Employees who are eligible for recall shall be given fourteen (14) calendar days' notice of recall and notice of recall shall be sent to the employee by certified or registered mail with a copy to the Union, provided that the employee must notify the City Personnel Office of his intention to return within three (3) days after receiving notice of recall. The City shall be deemed to have fulfilled its obligations by mailing the recall notice by registered mail, return receipt requested, to the last mailing address provided by the employee. Should any employee fail to return upon recall he/she shall be deemed to have waived his/her right to recall and his/her seniority shall be terminated.

The City further agrees to pay the premium for health/dental insurance coverage for the first three (3) months during the period an employee is laid off.

- 10.02 Whenever a new job or vacancy occurs the City will notify the Union in writing within fifteen (15) working days if they do not intend to fill the vacancy. If it is to be filled, it shall be posted for three (3) working days of the date of the City's announcement on bulletin boards or near time clocks, stating the department where such job is located, so that all employees covered by this agreement may see such notice. Subsequent job vacancies from the original posting will be posted for two (2) working days. Any regular employees interested in the open job shall sign their names in the space provided in the job opening notice. The employee bidding with the longest service will have preference providing the employee is capable of performing the required duties efficiently. Abilities, aptitude and work records of employees will also be taken into account. If the vacancy is not to be filled, the City will give an approximate date that it thinks the job will be posted. Employees will be permitted to transfer laterally within the same pay range by way of the posting procedure once within a twelve (12) month period. This does not preclude employees from moving to a higher or lower classification by the posting procedure. Probationary and seasonal employees are not eligible to sign job postings, but may indicate their interest in the position by advising their supervisor or the Personnel Office.
- 10.03 An employee who is absent during the whole period of a job posting shall be permitted to apply for this position if it is unfilled at the time said employee returns to work. If the department is notified that an absent employee is interested in the position, the position will be held open for a reasonable length of time.
- 10.04 An employee may be reduced to a lower classification if such employee proves to be unwilling or incapable of performing the duties of the higher classification.
- 10.05 An employee who quits or is discharged for just cause, shall lose all prior seniority rights. An employee who is laid off for twenty-four (24) months shall lose all prior seniority rights.
- 10.06 An employee who is absent without leave or notice to the employer for three consecutive work days shall forfeit all seniority and be terminated. Factors beyond the employees control which make it impossible for him or her to give notice or return to work may be considered as mitigating circumstances.

POSITIONS OF THE PARTIES

The Union believes the City violated Sections 10.01 and 1.02 of the Agreement by retaining seasonal employees while in effect laying the Grievant off as a Special Equipment Operator. The Union acknowledges the right of the City under Section 5.09 to temporarily assign an employee outside his regular classification. However, Cannon was required to take a Refuse Collector position on a permanent basis.

The City points out that Section 4.02 allows it to use seasonal employees and that the City did not violate its Section 4.02 rights. When Cannon was injured, the City accommodated him and assigned him per Section 2.01 of the

Agreement. When the City posted the Sideloader Refuse Collector position and no one signed for it, the City was free to assign the job to Cannon under Section 5.09.

The Grievant obtained his chauffeurs license and has no physical limitations. It is the view of the City that it is not obligated to assign Mr. Cannon to work which regularly leads to a layoff. This Employer bears the substantial costs of unemployment compensation directly and has an interest in avoiding those costs.

DISCUSSION

The City claims rights to employ seasonal workers under Section 4.02 of the labor agreement. The City certainly has those rights subject to the other provisions of the Agreement regulating their use. Under Section 4.02 there is limited contractual coverage of seasonal employes. The City claims a right to assign under the Management Rights Clause, which again is true and subject to other provisions of the Agreement.

The City contends that Cannon was placed on the Sideloader Refuse Collector position under Article 5.09. I don't believe that the temporary assignment to the Sideloader is the issue in this proceeding. Rather, it is the permanent assignment to the Relief Refuse Collector, and how Article X applies to that assignment.

It is the Union's view that Cannon was not interested in the Relief Refuse Collector position, but was forced to sign the posting under the threat that he would otherwise be terminated. It is the Union's view that under Section 10.04 Cannon was unwilling to perform the duties of the higher classification and so should be reduced to the lower classification. Section 10.04 does create a certain right to be reduced in classification. However, the contract uses the terms "may be reduced". Use of the term "may" implies the exercise of some degree of discretion. It would at least seem that one appropriate consideration in the exercise of this discretion is the existence of a position or work in the lower classification to warrant the reduction in classification.

That brings me to the Union's central claim, that is, the City retained a seasonal employe, Rolly Barrett, while denying Special Equipment Operator status to Cannon. In support of this contention the Union points to Articles 1.02 and 10.01. Both of these articles restrict the right of the City to employ non-bargaining unit employes to "perform work normally (historically) performed by bargaining unit members".

The testimony relative to who performs the Winter maintenance/custodial work at the Telfer Park pavilion differed in its emphasis. One thing did appear certain: both seasonal and bargaining unit employes have performed Winter work at Telfer Park. Seasonal workers have performed some of that work for at least three years. Bargaining unit members have performed some of that work for several years. The testimony supporting these conclusions was far more persuasive than the testimony to the contrary.

I believe that this relationship has consequences for the definition of what constitutes work historically or normally performed by the bargaining unit. The City cannot claim that it is free to use seasonal employes to perform the work that has annually been performed by people in the bargaining unit. That would run head on into the restriction clearly set forth in Article 10.01. To the extent the City has utilized a seasonal employe at Telfer Park during the Winter season, for a period of three years, the Union cannot claim that as work it has historically or normally performed.

The parties did not introduce the time records of the employes performing Winter work at Telfer Park. However, from the testimony I believe that some balance, or equilibrium was achieved between seasonal and regular bargaining unit employe hours. These seasonal employes and the regular bargaining unit employes appear to have worked side by side for a number of years.

Neither party is now free to disavow knowledge of the existence of this working relationship. The City assigned its regular workers to perform this work, has records of their performance and has actual knowledge of this fact. Similarly the testimony demonstrated that bargaining unit members, including Pam West, whom the record indicates was active in the Union 1/ worked along

1/ Note the following direct testimony of Pam West. Tr. at page 9.

QHave you previously held any offices in the Local 643
AFSCME?

AYes, I have.

QWhat offices were that?

side these seasonal workers during Winter seasons when bargaining unit members within the disputed classification were on layoff. I believe the Union was on notice of the use of seasonal employes at Telfer Park.

Without more precise evidence relative to actual hours worked I don't feel comfortable providing a more quantitative definition of the balance or equilibrium that I understand to exist. However, I do believe that it is possible to define a ratio of bargaining unit hours worked measured against seasonal hours worked for the Winter months period.

Both sides offered testimony that its respective worker(s) (bargaining unit and seasonal) worked at Telfer for each of the last three Winter seasons. Therefore, the base years for the formula will be the Winter seasons 1987-88, 1988-89 and 1989-90. I believe the cold weather season should begin to run October 1 and should continue through the month of March. The work in question is the custodial, maintenance and cleaning of Telfer Park (Pavilion) during the period in question. Nothing in the record suggests that the work performed by the seasonal employes and that work performed by the bargaining unit employes were somehow different in kind. Matthews described the work performed by Barrett as "janitorial work" (Tr. p. 184). West described the work she and her colleagues performed as "general maintenance, cleaning the restrooms, the showers, locker rooms, washing windows, vacuuming" (Tr. p. 211).

The Union is elsewhere claiming that Barrett replaced West in the Winter of 1989-90. In order to avoid comment on the merits of that dispute, I would end the base year for purposes of computation of the ratio on the last day West was on the payroll in 1989-90.

What I am directing the parties to do is to determine the bargaining unit hours and the seasonal employe hours worked at Telfer Park performing the work described for the approximately 2-1/2 season period and compare those hours. The relationship between those hours will form a ratio that reflects the balance struck by the parties. Neither party is free to unilaterally alter that relationship.

The purpose of going through this exercise is to determine whether or not there was Special Equipment Operator work available to Mr. Cannon upon his return. If the City has filled proportionately more of those hours than it has historically with seasonal employes it has, in my view, violated the third paragraph of Article 10.1. If not, it has acted within its right.

AWARD

The award is to proceed in accordance with the foregoing.

JURISDICTION

I will retain jurisdiction for purposes of resolving any disputes that may arise.

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

By _____
William C. Houlihan, Arbitrator

AI have held the office of steward, vice-president, chief steward and president. And I've also been on the bargaining committee.

QOkay. Were you on the bargaining committee during the time of the negotiations for the 87-88 collective bargaining agreement?

AYes, I was.