

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between :
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OSHKOSH CITY EMPLOYEES UNION, :
LOCAL 796, AFL-CIO : Case 134
 : No. 43203
and : MA-5919
 :
CITY OF OSHKOSH :
 :
- - - - -

Appearances:
Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40,
AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901,
appearing on behalf of Oshkosh City Employees Union, Local 796,
AFSCME, AFL-CIO, referred to below as the Union.
Mr. John W. Pence, City Attorney, and Mr. Warren P. Kraft, Assistant City
Attorney, City Hall, 215 Church Avenue, P.O. Box 1130, Oshkosh,
Wisconsin 54902-1130, appearing on behalf of the City of Oshkosh,
Wisconsin, referred to below as the Employer or as the City.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding, and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Keith Vienola, Pete Hathaway and Warren Schneider. The parties consolidated the three grievances, and the Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was conducted in Oshkosh, Wisconsin, on February 20, 1990. The hearing was not transcribed, and the parties filed briefs by April 9, 1990.

ISSUES

The parties stipulated the following issues for decision:

- Is Keith Vienola entitled to out-of-class pay for work he performed in 1988 during the absence of Bob Baier?
- Is Pete Hathaway entitled to out-of-class pay for work he performed in 1988 during the absence of Bob Baier?
- Is Warren Schneider entitled to out-of-class pay for work he performed in 1988 during the absence of Joseph Schaefer?
- If so, what is the appropriate remedy? 1/

RELEVANT CONTRACT PROVISIONS

ARTICLE I

MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this agreement, the City reserves and retains solely and exclusively, all of its Common Law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Union.

. . .

ARTICLE XI

PAY POLICY

Employees shall be compensated within the pay ranges set forth in the classification and pay plan of the

1/ The parties jointly requested that I retain jurisdiction over the matter for thirty days if I determined a remedy was appropriate.

employer and in accordance with the rules for administration included therein. Attached as an appendix to this agreement are the job classification and pay schedules.

The employer shall determine the table of organization or position count; that is, the number of employees to be assigned to any job classification and the job classifications needed to operate the employer's facilities. The unions shall be notified in advance of any change to be made in the table of organization.

. . .

Temporary Assignments - Employees assigned to do work in a lower rated job classification shall be paid at their job classification rate. Employees assigned to do work in a higher rated classification for a period in excess of ten working days shall be paid for all such time in the higher classification at the rate that corresponds to the step at which he would normally be paid.

. . .

BACKGROUND

Each of the three grievances posed here was filed on June 2, 1988. The grievance form for the Vienola grievance states the following under the heading "(Circumstances of Facts): **(Briefly, what happened)**":

The Supt. was asked if the employee would be paid for performing the duties of the const crw II while he was off on extended sick leave. He denied the request even though the employee was performing the extra duties of the higher classification.

The form states the Employer's denial of out-of-class pay violated "past practice an(d) Article XXVI."

The grievance form for the Hathaway grievance states the following under the heading "(Circumstances of Facts): **(Briefly, what happened)**":

Employee was told to go with the const crw while the const crewman II was on extended sick leave. When the Supt. was asked to pay the employee for performing duties of a higher classification he denied request even though he was performing work not included in his job description.

The form states the Employer's denial of out-of-class pay violated "past practice an(d) Article XXVI."

The grievance form for the Schneider grievance states the following under the heading "(Circumstances of Facts): **(Briefly, what happened)**":

Employee has been performing the duties of a sewer maint man while that employee was on extended sick leave. When the Supt. was asked to pay the employee the higher rate he denied the request.

The form states the Employer's denial of out-of-class pay violated "past practice and Article XXVI."

The grievances were separately processed through the grievance procedure. The City Manager, William D. Frueh, answered the grievances collectively for the Employer in a letter to the Union's President dated June 28, 1988. That letter reads thus:

This is in response to the grievances of Vienola, Hathaway and Schneider presented to me on June 24, 1988. It is my understanding that the above employees were either performing duties within their job classific-ations or temporarily filling in for employees who were still on the payroll but on paid leave status. While there have been some very limited exceptions, in the vast majority of areas, employees who work in a temporary capacity at a higher or lower level are kept at their permanent rate. There is no specific contract language covering these incidents. In view of this fact, I feel the proper forum for this

request is the bargaining table. In view of the above, the grievances are denied.

The Union submitted the three grievances to arbitration, and the parties mutually agreed to consolidate them for hearing purposes. The parties also agreed to hold the processing of the grievances in abeyance so that the issue of out-of-class pay could be addressed in then-ongoing negotiations for a successor to the 1987-88 collective bargaining agreement. The parties did agree, during those negotiations, to the second sentence of the "Temporary Assignments" provision of Article XI, which is set forth above. The parties could not, however, resolve the consolidated grievances.

The parties stipulated the following facts at the February 20, 1990, hearing:

1. During the period of time in question, Bob Baier was a Construction Crewman II (Range 9 of the 1988 collective bargaining agreement).
2. Keith Vienola, during the time in question, was a Construction Crewman I (Range 7 of the 1988 collective bargaining agreement).
3. Pete Hathaway, during the time in question, was an Equipment Operator I (Range 2 of the 1988 collective bargaining agreement).
4. Joseph Schaefer, during the time in question, was a Sewer Maintenance Man (Range 6 of the 1988 collective bargaining agreement).
5. Warren Schneider, during the time in question, was an Equipment Operator II (Range 5 of the 1988 collective bargaining agreement).

The parties also stipulated that the Union plays no role in the creation or amendment of the City's Table of Organization.

The Vienola And Hathaway Grievances

The Vienola and Hathaway grievances arise from work they performed due to the absence of Bob Baier from work in April, May and June of 1988. Baier missed work during that period to undergo and recuperate from surgery to his foot. Baier was absent from work continuously from Thursday, April 28 through Friday, June 10, 1988. He worked half-days continuously from Monday, June 13 through Friday, June 24, 1988.

Bill Rasmussen is presently employed by the City as its Superintendent of Streets. Throughout the period of Baier's absence, Rasmussen served as the Street Foreman. As Street Foreman, Rasmussen served as the direct supervisor of the Construction Crew. The Construction Crew consisted of two employees -- Baier and Vienola. Baier was then classified as a Construction Crewman II and Vienola was then classified as a Construction Crewman I.

The Job Description for the Construction Crewman I reads thus:

NATURE OF WORK

This is work of moderate skill in performing a variety of duties related to street construction and maintenance.

An employee in this class is responsible for assisting a superior in performing tasks involving the application of manual skills and dexterity in public work construction operations. Emphasis is placed on concrete and masonry type skills. The employee generally works with a skilled superior although he may work alone or with laborer subordinates on occasion. Assignments are given by a superior and reviewed in progress and upon completion.

EXAMPLES OF DUTIES

Pours and finishes concrete; repairs sewers, and repairs or replaces sewer pipe; covers and raises manholes and catch basins and helps build them; repairs or replaces parking meter posts; steams catch basins; plows snow; operates air compressors, concrete saws, tractors, and dump trucks; acts as construction leadman in special conditions; assists in snow plowing and

removal; does related work as required.

DESIRABLE KNOWLEDGES, ABILITIES AND SKILLS

Knowledge of masonry work and of equipment operation.

Ability to follow written and oral instructions.

Ability to perform manual labor tasks.

Ability to effectively supervise fellow employees.

REQUIRED EDUCATION AND EXPERIENCE

Eighth grade education.

Two years of experience in public works maintenance work.

The Job Description for Construction Crewman II reads thus:

NATURE OF WORK

This is skilled work in specialized street and sewer construction activities and includes supervisory responsibilities.

An employee in this class is responsible for performing and supervising special construction tasks related to street and sewer construction and maintenance. Emphasis on concrete and masonry skills and knowledge of related construction practices. An employee in this class supervises lower level employees who assist him, although the number of employees supervised will vary according to the nature of the task being performed. Work is performed with a minimum of supervision, although work assignments are made and work reviewed upon completion by the street superintendent.

EXAMPLES OF WORK

Performs skilled and supervisory work in curb and sidewalk and street and sewer repairs; erects forms, pours, and finishes concrete; relays and repairs streets and sidewalks and sewers; drives truck to and from jobs; repairs and maintains other structures; performs skilled work in the laying and repair of new sewers, manholes, and catch basins; cuts and fits pipe, caulks joints and installs clamps; does general masonry work; assists in snow plowing and removal; does related work as required.

DESIRABLE KNOWLEDGES, ABILITIES, AND SKILLS

Thorough knowledge of masonry work.

Thorough knowledge of related equipment operations and maintenance.

Ability to effectively supervise work crew on projects.

Ability to follow written and oral instruction.

REQUIRED EDUCATION AND EXPERIENCE

Eighth grade education.

Two years of public works masonry work experience.

Rasmussen would assign the Construction Crews to a specific project at the start of each work day. Baier and Vienola typically worked as a team, with Baier building the necessary concrete forms and Hathaway doing the mixing of the concrete. Baier and Vienola testified that the basic difference between their positions centered on the responsibility for making on-site decisions. Such decisions were Baier's responsibility. For example, Baier would calculate the extent of concrete work to be performed; calculate the amount of concrete needed; order the concrete; set the grade; build the forms; and assume responsibility for the end product. Vienola would assist Baier as directed.

Both Vienola and Baier acknowledged that Vienola would fill in for Baier when Baier was absent due to vacation, illness, or holiday. The City did not pay Vienola the Construction Crewman II rate when he filled in for Baier on

these occasions. Baier testified that he has never taken a vacation for longer than two work weeks. It is also undisputed that Baier and Vienola would sometimes work at separate jobsites, and would perform whatever duties were required at those sites.

Hathaway is presently classified as the Construction Crewman I. At the time of Baier's absence, Hathaway was classified as Equipment Operator I. The Job Description for Equipment Operator I reads thus:

NATURE OF WORK

This is skilled work in the operation of light duty automotive equipment.

Work involves responsibility for the safe and efficient operation of light duty automotive equipment with moderately complex operating requirements. Operation of assigned equipment is normally a full time or predominate task although other work may be performed. Assignments are usually received in the form of specific orders to pick up and deliver materials or personnel, accomplish a particular task, or drive according to an established route. Work may be performed without direct supervision after instructions are received and is reviewed through observation, conferences, and results obtained.

EXAMPLES OF WORK

Operates trucks up to five cubic yards in transporting men, equipment, materials, and supplies to and from job and other locations; works with equipment in the collection of waste materials, leaves, weeds, and other debris; operates snow plows, small end loaders, small tractors, mixer and dryer, air compressor, leaf picker, mower, and medium roller, and related light equipment and tools used in the maintenance of city streets and other property; cleans drains and catch basins; assists in street repairs, including cement and asphalt work; makes minor repairs; checks tires, oil, and fuel; assists in snow removal and sanding operations and other manual labor; occasionally operates automotive equipment of medium and heavy weight in emerg.; may supervise laborers.

DESIRABLE KNOWLEDGES, ABILITIES, AND SKILLS

Knowledge of automotive equipment operation.
Ability to make minor adjustments and emergency repairs.
Ability to perform laboring tasks.

REQUIRED EDUCATION AND EXPERIENCE

Eighth grade education.
One year of experience in motor vehicle operation.

While classified as an Equipment Operator I, Hathaway would sometimes work with the Construction Crew. Vienola and Baier testified that when an Equipment Operator I assisted them, the Equipment Operator I would not perform any skilled work, such as finishing concrete, but would perform as a laborer. Vienola testified that on the day before Baier's absence due to the foot surgery, he took Hathaway along to show him the work of the Construction Crew. Hathaway testified that prior to Baier's absence he did not pour or finish concrete, and did not operate the concrete saw. He stated that he performed all these functions during Baier's absence. In addition to this, Hathaway stated he did sewer pipe work and replaced parking meter posts during Baier's absence. He had not performed such work prior to that time. He stated he could see no difference between the duties he performed during Baier's absence and the duties he presently performs as the Construction Crewman I.

Rasmussen assigned Hathaway to work on the Construction Crew in Baier's absence, and Hathaway relied on Vienola to direct him on the job site. It is undisputed that no work was saved for Baier's return from surgery, and that the work of the Construction Crew continued throughout his absence.

Rasmussen testified that the Employer often assigned employees in the

classification of Equipment Operator I, II or III to assist the Construction Crew, and did not pay such employees a higher rate of pay to do so. He also testified that he could see "very little" difference in duties between the classifications of Equipment Operator I and Construction Crewman I, and that the Equipment Operator I classification was expected to do more than just unskilled work. Rasmussen noted that a pay difference and a "little work difference" distinguished the classification of Construction Crewman II from Construction Crewman I. The distinction between the classifications, Rasmussen stated, was that the Employer paid the Construction Crewman II a premium paid for being in charge.

The Schneider Grievance

Joseph Schaefer is employed by the City as its Sewer Maintenance Man. The Job Description for that position reads thus:

NATURE OF WORK

This is skilled work in the operation of medium-heavy duty automotive maintenance equipment.

Work involves responsibility for the safe and efficient operation of a Vac-All, and heavy duty snow removal equipment. Operation of assigned equipment is normally a full-time or predominate task although other work may be performed. Supervision is exercised over equipment operators I and II, as well as laborers. Assignments are usually received in the form of orders to accomplish a specified task. Work is performed independently within established policies, procedures and standard equipment operation techniques, and is reviewed by a superior during progress and upon completion.

EXAMPLES OF WORK

Operates a Vac-All for the majority of the work year maintaining the entire sewer system of the city; doing such tasks as flushing and checking sanitary sewers, cleaning catch basins, in emergency situations operates water pumps at known trouble spots; when necessary is responsible to operate snow plows for the city; makes minor mechanical repairs on equipment; works with and directs a helper in performing manual labor tasks; assigns work according to priority to sewer cleaning crews; does related work as required.

DESIRABLE KNOWLEDGES, ABILITIES, AND SKILLS

Thorough knowledge of sewer system, maintenance methods, and equipment operation.

Skill in operating specialized maintenance equipment.

Ability to make minor adjustments and repairs.

REQUIRED EDUCATION AND EXPERIENCE

Eighth grade education.

Three years experience in operation of medium to heavy duty and other specialized motor driven equipment in maintenance work.

The Sewer Crew is composed of four employees: the Sewer Maintenance Man and three employees from the Equipment Operator II classification. The Job Description for Equipment Operator II reads thus:

NATURE OF WORK

This is skilled work in the operation of medium duty automotive maintenance and construction equipment.

Work involves responsibility for the safe and efficient operation of equipment such as flushers, oil distributors, tandem trucks, and large front end loaders, which entail manipulative skill to operate. Operation of assigned equipment is normally a full-time or predominate task although other work is performed.

Assignments are usually received in the form of orders to accomplish a specified job. Work is performed independently without established practices, procedures, and operating techniques and is reviewed by a superior during progress, usually, and upon completion.

EXAMPLES OF WORK

Operates heavy duty trucks; sewer eductor; sweeper; flusher; heavy roller; storage tank heater; road oiler; overhead loader; . . . sander; water pumps; oil heater; Vac-All; air compressor; makes minor adjustments and repairs to equipment; assists in snow removal and sanding operations; builds and repairs sewer manholes; does miscellaneous street work; operates other types of light duty equipment; operates light duty equipment in emergency situations; performs related tasks as assigned.

DESIRABLE KNOWLEDGES, ABILITIES, AND SKILLS

Thorough knowledge of automotive equipment operation.
Ability to make minor adjustments and repairs.
Ability to perform labor tasks.

REQUIRED EDUCATION AND EXPERIENCE

Eighth grade education.
Two years of experience in operating motorized construction or maintenance equipment.

The Sewer Crew works in two man teams. One team typically operates the Jetter machine while the other team, composed of Schaefer and Schneider, typically operates the Vac-All machine.

Schaefer is responsible for assuring that all of the City's sewer system receives routine maintenance. Schaefer does so by establishing a basic route which will be followed in the absence of problems with a specific sewer line. Schaefer prioritizes the Sewer Crew's work, and determines the machinery necessary to perform that work. Schaefer is responsible for responding to citizen complaints regarding flow through the sewer lines. Schaefer and Schneider testified that Crew members classified as Equipment Operator II do not make any work assignments. Schaefer felt the key distinction between his duties and the other Crew members' was his role in dealing with the public and in deciding the Crew's work priorities.

Schaefer injured his back in January of 1988, and was on Worker's Compensation for much of February of 1988. Schneider was, at the time of Schaefer's injury, performing snow removal duties. Schaefer reinjured his back and returned to Worker's Compensation status in May of 1988. He was on Worker's Compensation status continuously from Monday, May 2 through Friday, May 27, 1988. He returned to that status for two days in the middle of the following work week.

Schneider testified that his Foreman assigned him to take over for Schaefer during the May absence. Schneider stated that he did assume Schaefer's duties, including assigning and prioritizing the work of other Crew members and responding to citizen complaints. Schneider could only recall one incident in which he was summoned by a citizen to restore the flow in a sewer line. Schaefer testified that he did not leave Schneider any instructions when he went on to Worker's Compensation status, and did not consult with Schneider during that absence. Schneider and Schaefer each stated that the work of the Sewer Crew was performed throughout Schaefer's absence, and that no work was saved for Schaefer's return.

Rasmussen, Schneider and Schaefer each testified that Schneider has filled in for Schaefer during periods of vacation and holiday without receiving out-of-class pay for doing so.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

After a review of the facts, the Union asserts that the Employer has based its denial of out-of-class pay for all three grievants on three reasons

which the Union summarizes thus:

First, the Employer has argued that it was not the practice to pay such employees for working out of class . . . The Employer's second argument is that since the table of organization provides for a specific number of employees assigned to a given classification, employees cannot receive out-of-class pay in situations involving temporary absences . . . Finally, the Employer argues that the employees are not entitled to out-of-class pay because the duties they were performing are contained in their current job descriptions . . .

The Union contends that the "first Employer argument is not valid," because the parties "have agreed that the newly negotiated contract provision regarding out-of-class pay shall apply to the instant dispute." Since that language is clear and unambiguous, and since that language precludes consideration of past practice under prior agreements, it follows, according to the Union, that the Employer's first argument must be dismissed.

The Employer's second line of argument must also be dismissed, the Union asserts, since the "second paragraph of Article XI gives the Employer total control in determining the table of organization." Because the Employer "could manipulate the table to contain only the lowest paying jobs, assign employees the duties of higher classifications and then refuse to pay them additional money because there was no vacancy in the higher classification," it follows, according to the Union, that accepting the Employer's second line of argument would eviscerate the contract.

While acknowledging that "the Employer's third line of argument is potentially valid," the Union contends that it "is totally unsupported by the evidence." The Union argues that the facts establish that each grievant performed the work of the higher rated classification, while the incumbents in those classifications were absent from work. Nor can the similarity in job descriptions be relied upon here, according to the Union, since "(t)he standard of determining whether out-of-class pay is warranted must rely upon the observation of the work actually being performed not on a job description." Since the facts establish that each grievant performing all of the duties of a higher classification, it follows, the Union concludes, that each grievance must be granted. As the remedy appropriate to the Employer's violation of Article XI, the Union "requests that the arbitrator sustain . . . the grievances and make . . . the employees whole for any and all losses."

THE EMPLOYER'S POSITION

After a review of the facts, the Employer notes that "a comparison of the job descriptions for construction crewman I . . . and for construction crewman II . . . could lead a person to conclude that crewman II is a supervisor over a crewman I." This conclusion would, however, be inaccurate, according to the Employer, because the two classifications do "essentially the same work" and because the Construction Crewman I is expected "to effectively supervise fellow employees." Beyond this, the Employer notes that the construction crew members often work at separate sites. Noting that the Construction Crewman I fills in for the Construction Crewman II during the latter's absences due to vacations and holidays, and does not receive out-of-class pay for doing so, the Employer concludes that Vienola's grievance must be denied.

For similar reasons, the Employer contends that the Hathaway grievance must be denied. The Employer summarizes those reasons thus:

(B)oth the job descriptions and the existing practice give rise to the reasonable expectation that Hathaway, when assigned to the construction crew, would perform construction crewman I activities.

Since Hathaway filled in for the Construction Crewman I during the latter's absences due to holidays and vacations, and since "there is no difference between filling in for someone on sick leave or for someone on vacation," it follows, according to the Employer, that the Hathaway grievance must be denied.

The Employer applies a similar analysis to the Schneider grievance:

The sewer maintenance man's job description is more specific as to the examples of work expected to be performed, but the past practice of the parties . . . indicates that Schneider performed essentially the same type of work whether he assisted Schaefer or he supervised another equipment operator assigned during Schaefer's absence. Hence, for virtually the identical

reasons to deny the grievances of . . . (Vienola) and Hathaway, Schneider's grievance should likewise be denied.

The Employer contends the same contractual analysis underlies each grievance. Since past practice supports the Employer's right to assign the grievants the duties at issue here without making out-of-class payments, it follows, according to the Employer, that Article XXVI of the 1987-88 agreement is irrelevant to this grievance. It also follows, the Employer argues, that the provisions of the 1989-90 agreement cannot be given retroactive effect "without an express statement to that effect" from the parties. Since the Employer has reserved sufficient authority under Article I to make the work assignments questioned here, it follows, the Employer concludes, that the Union has not proven any violation of the labor contract.

DISCUSSION

The issues for decision are stipulated, and the parties' arguments establish that the grievances are governed by similar considerations. A threshold ambiguity is, however, presented in the parties' conflicting views of the governing analysis. The ambiguity is that each grievance arose under the 1987-88 agreement, but was held in abeyance pending negotiations on a successor agreement, and has been litigated during the term of the 1989-90 agreement. At hearing, the parties agreed that the grievants' entitlement to out-of-class pay was not affected by which agreement was in force. The retroactive effect of the 1989-90 agreement is, however, questioned in the Employer's brief.

This ambiguity does not, however, raise a dispositive point on this record. The "retroactivity" of Article XI does not affect the underlying issue of the grievants' entitlement to out-of-class pay. The parties' agreement at hearing reflects this.

The ultimate basis of the entitlement disputed here is the wage rate appendix to the parties' collective bargaining agreements. The parties jointly submitted the 1988 wage rate appendix which establishes that the parties have placed a higher dollar value on the work performed by the Construction Crewman II (Range 9) than by the Construction Crewman I (Range 7); a higher dollar value on the work performed by the Construction Crewman I than by an Equipment Operator I (Range 2); and a higher dollar value on the work performed by the Sewer Maintenance Man (Range 6) than by an Equipment Operator II (Range 5). The pay ranges and the dollar values of the steps in those ranges change in the parties 1989-90 agreement: Construction Crewman II is placed at Range 10; Construction Crewman I is placed at Range 8; Equipment Operator I is placed at Range 3; Sewer Maintenance Man is placed at Range 7; and Equipment Operator II is placed at Range 6. Thus, while the specific "higher dollar value" of the various classifications noted above has changed, the fundamental "higher dollar value" of the various classifications has not.

The entitlement to out-of-class pay, then, focuses on whether the grievants performed the work of the higher valued classification sufficiently to warrant the bargained rate for that higher classification. The second sentence of Article XI, Temporary Assignments, of the 1989-90 contract specifically addresses this point, but was not contained in the 1987-88 contract. The absence of this sentence does not, as noted above, affect the underlying issue posed here. The Employer could not, without violating the wage appendix of the 1987-88 agreement, assign the duties of a higher rated classification to an employee placed in a lower classification to avoid paying the higher rate. The Employer acknowledges this, but disputes whether the grievants can be considered to have worked out-of-class at all given the nature of their classifications, their supervision and the parties' past practice.

The wage appendix defines the pay differential which makes a classification of work meaningful. Arbitrator Daugherty, in Wilson Jones Co., 51 LA 35, 37 (1968), aptly stated the general analysis appropriate to determining when an employee can be said to have worked out of class:

In all such cases the critical questions are (a) What are the key or core elements of the jobs involved which distinguish one job from the other(s) and justify the wage rate differentials between (among) them agreed to by the parties, and (b) did the aggrieved employee(s) perform actual work that "invaded" said core elements?

Daugherty also addressed the governing considerations when the work of the questioned classifications overlap:

In many such cases there are substantial areas of overlap in the operations specified for two or more jobs. That is, an employee in one job is authorized to do some of the work that another employee in another

classification is also permitted to do. But in such case an employee in one job cannot properly be said to have taken over the work in another job until and unless he has been required to perform operations that the parties have agreed are key and relatively exclusive to the latter classification. 2/

Due to the facts posed here, the Daugherty analysis serves only to preface the issues. As the job descriptions establish, the differences between the classifications at issue here are slight. For example, a Construction Crewman II performs "skilled" work requiring "Thorough knowledge of masonry work" while a Construction Crewman I performs "work of moderate skill" requiring "Knowledge of masonry work . . .". Similar such minor variations can be noted in the remaining classifications. Ultimately, the core difference between the Crewman II and Crewman I and between the Sewer Maintenance Man and the Equipment Operator II can be distilled to the point made by Rasmussen -- the higher rated classifications are paid a premium for being in charge of the job. The core difference between the Crewman I and the Equipment Operator I is that the Crewman I is expected to routinely function as half of the two-man Construction Crew, while the Equipment Operator I is expected to periodically assist the Construction Crew as directed.

The reason that the Daugherty analysis serves only to preface the dispute here is the parties' past practice. In this case, the parties in effect agree on the core duties defining the various classifications, and on the fact that the work performed by Vienola, Hathaway and Schneider "invaded" those core duties. The difference between the parties focuses on the Employer's view that through their job descriptions and past practice, Vienola, Hathaway and Schneider can reasonably be expected to perform the higher rated work without receiving out-of-class pay.

The Employer has persuasively demonstrated that each of the grievants has performed the work of the higher rated classifications on a short-term basis without receiving out-of-class pay. Prior to the grievances posed here, Vienola filled in for Baier, Hathaway filled in for Vienola and Schneider filled in for Schaefer when the higher-rated employee missed work due to illness, holiday or vacation.

It does not follow from this, however, that the Employer can assign the work of the higher rated employee to the grievants on an indefinite basis. Such a conclusion extends the practice beyond its demonstrated scope. Baier noted that he has never taken a vacation of greater than two work weeks, and there is no evidence to indicate any of the "filling in" noted above extended beyond a day-to-day basis of less than ten working days total. That the job descriptions are similar, and assume overlap between the classifications, cannot be read to permit the Employer to indefinitely assign the grievants work outside of their classification without rendering the bargained pay differentials between the classifications meaningless.

The parties addressed this difficulty in the 1989-90 contract by providing that out-of-class work would be paid at the higher rate if performed for a period "in excess of ten working days." This agreement eliminates the difficulty of defining, for short-term fill-ins, when a lower rated classification has "invaded" the work of a higher rated classification. This language, in effect, defined and codified the practice proven in this case.

The absence of this provision in the 1987-88 contract does not establish the existence of an unlimited right of the Employer to indefinitely assign employees of a lower rated classification to the work of a higher rated classification. As noted above, doing so would destroy the integrity of the wage differentials bargained by the parties and codified in the wage appendix. In the absence of the ten day proviso of Article XI of the 1989-90 agreement, the appropriate analysis is to determine the point in time at which an employee can no longer be said to be filling in for a higher rated employee, but has fully assumed the duties of that employee's position.

In this case, Baier was continuously absent, on a full-time basis, for thirty-one work days during payroll periods 9, 10, 11 and 12. Schaefer was continuously absent, on a full-time basis, for twenty work days during payroll periods 9, 10 and 11. 3/ In Baier's case, Vienola effectively assumed the duties of Construction Crewman II, while Hathaway effectively assumed the duties of Construction Crewman I. In Schaefer's case, Schneider effectively assumed the duties of Sewer Maintenance Man. In neither case did the Employer

2/ Ibid.

3/ The dates of Baier's and Schaefer's absence are stated in the BACKGROUND section above. I have referred to the payroll period here so that if I have not correctly translated the payroll records (Joint Exhibits 21 and 22) to the calendar (Joint Exhibit 20) the date and extent of the absences will be clear.

save work for Baier or Schaefer. Rather, the work of the Construction Crew and the work of the Sewer Crew proceeded as it would have if Baier and Schaefer had not been absent. Both assignments extended a full work month, and it is impossible to characterize such an assignment as a short term fill-in. Rather, the grievants had fully assumed the duties of a higher rated employee's position. It follows that even in the absence of the ten day proviso of Article XI of the 1989-90 contract, the grievants were entitled to the pay of the higher rated classification.

The Award entered below generally states a make-whole order, and the retention of jurisdiction requested by the parties. It is necessary, however, to comment on the nature of the remedy ordered in light of the evidence. The evidence establishes the Construction Crewman II receives a premium over the Construction Crewman I, and the Sewer Maintenance Man receives a premium over the Equipment Operator II because the higher rated classifications are "in charge" of the work. The evidence further shows that neither lower rated classification can be considered to be "in charge" of work during short-term fill in assignments. Because the twenty and thirty-one day periods Schaefer and Baier missed can not be characterized as a short-term fill-in, it follows that Schneider and Vienola are entitled to the pay of the higher classification. Similar considerations apply to Hathaway, since the Construction Crewman I is paid a premium over an Equipment Operator I for routinely functioning as one-half of the Construction Crew. Because the evidence shows Hathaway assumed the duties of the Construction Crewman I over a period of time which can not be dismissed as a short-term fill-in, he too is entitled to out-of-class pay.

The entitlement is, however, limited by the parties' past practice for short-term fill-ins. Thus, Vienola and Hathaway are not entitled to out-of-class pay for the two weeks Baier worked on a half-time basis. There is no evidence in the record to prove Vienola was "in charge" of work during this period, or that Hathaway was continuously performing the duties of the Construction Crewman I. Similarly, Schneider's entitlement is limited to the period of Schaefer's continuous absence. It is difficult to interpret the pay-roll records entered here, but it appears Schaefer returned to work on Tuesday of the second week of pay-roll period 11, and then missed Wednesday and Thursday before returning to work for part of Friday. The record is sufficiently sketchy on this point that the remedy entered below limits the make whole period to Baier's and Schaefer's continuous days of absence. In the absence of more detailed evidence than is apparent on the face of the pay-roll records, the non-continuous days of absence must be considered a short-term fill-in.

AWARD

Keith Vienola is entitled to out-of-class pay for work he performed in 1988 during the absence of Bob Baier.

Pete Hathaway is entitled to out-of-class pay for work he performed in 1988 during the absence of Bob Baier.

Warren Schneider is entitled to out-of-class pay for work he performed in 1988 during the absence of Joseph Schaefer.

As the remedy appropriate to the Employer's violation of the parties' collective bargaining agreement, the Employer shall make Keith Vienola whole by paying him the difference between the wages and benefits paid him during the period of time he filled-in for Bob Baier on a full-time and continuous basis, and the wages and benefits he would have been paid at the Construction Crewman II rate. The Employer shall make Pete Hathaway whole by paying him the difference between the wages and benefits paid him during the period of time he filled in for Keith Vienola on a full-time and continuous basis, and the wages and benefits he would have been paid at the Construction Crewman I rate. The Employer shall make Warren Schneider whole by paying him the difference between the wages and benefits paid him during the period of time he filled in for Joseph Schaefer on a full-time and continuous basis, and the wages and benefits he would have been paid at the Sewer Maintenance Man rate.

I will relinquish jurisdiction over this matter on June 20, 1990, unless, prior to that date, I am advised of a valid reason not to.

Dated at Madison, Wisconsin, this 21st day of May, 1990.

By _____
Richard B. McLaughlin, Arbitrator