

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 26
 INTERNATIONAL BROTHERHOOD OF : No. 44015
 TEAMSTERS, CHAUFFEURS AND HELPERS : MA-6150
 LOCAL 43 :
 :
 and :
 :
 CITY OF LAKE GENEVA :
 :

Appearances:

Mr. Charles G. Schwanke, President, Teamsters Local 43, appearing on behalf of the Union.
Mr. Gordon E. Ellis, Business Administrator, City of Lake Geneva, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above are parties to a 1990-1991 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Union and the City jointly requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Richard McLernon. The undersigned was appointed and held a hearing on June 27, 1990, in Lake Geneva, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. The parties made oral arguments at the conclusion of the hearing, and the record was closed.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

Did the Employer violate the employee's seniority rights under Article 8 of the existing agreement? If so, what is the remedy?

CONTRACT PROVISIONS:

ARTICLE 2. MANAGEMENT RIGHTS

- 2.01 The Employer possesses the sole right to operate the Department and all management rights to repose in it with the understanding that such rights of management will not be used for the purpose of discrimination against any employee or contrary to this Agreement. These rights include, but are not limited to, the following:
- A.To direct all operations of the Department;
 - B.To establish reasonable work rules and schedules of work;
 - C.To create, combine, modify and eliminate positions within the Department;
 - D.To hire, promote, transfer, schedule and assign employees in positions within the Department;

. . .

ARTICLE 8. SENIORITY

- 8.01 Seniority is defined as the length of continuous service of a full-time employee within his department since his date of last hire.
- 8.02 Except as otherwise provided, in all matters involving increase or decrease of forces, layoffs, or promotions, seniority shall be given primary consideration. Skill, ability and efficiency shall be taken into consideration only where they substantially outweigh considerations of seniority.
- . . .
- 8.05 All employees presently employed shall remain in the section for which they now work unless transferred by job posting procedures. Employees may be assigned work in other departments on a temporary basis but shall not be subject to seniority bumping.

BACKGROUND:

The Union represents employees in the street department, wastewater treatment plant, parking meter division and the cemetery. Grievant Richard McLernon has worked for the City for 20 years in the street department as an equipment operator and a working foreman. On February 12, 1990, McLernon was transferred to the cemetery, and Ron Zink was transferred to the street department. On March 15, 1990, McLernon filed a grievance alleging a violation of Article 8.02 and requesting a return to the street department.

In 1988, all employees of the street department (except McLernon) signed a petition asking that McLernon be removed from the position of working foreman, and gave the petition to the former business administrator, Bob Swanson. The matter was brought to the attention of the personnel committee on June 1, 1988, and the Street/Parks Superintendent, Robert McLernon (Richard's brother) stated that the problem was due to employees' resentment of a fellow worker being in charge. Superintendent McLernon was told to get the matter straightened out, and if another complaint was received, the personnel committee would remove Richard McLernon as acting foreman.

Gordon Ellis became the Business Administrator in May of 1989, and acts as the personnel manager and labor negotiator. Shortly after Ellis started working for the City, an employee in the street department came to Ellis reporting an incident where he claimed that McLernon used obscene language with him while supervising his work. On July 5, 1989, Ellis sent a letter to McLernon criticizing his use of vulgar language, noting that neither McLernon nor the other employee was performing the role of a working foreman at the time of the incident, noting that both employees were asked to get along with each other, and advising that the letter would be put in his personnel file.

On October 29, 1989, Ellis found out that McLernon had filled out a time card showing "dentist" for eight hours on October 27, or the fifth day of the time card. According to Ellis, employees in the street department told him that McLernon went hunting with his brother in Iowa. Ellis decided to dock McLernon's pay for that day. On November 1, 1989, Ellis sent a letter to McLernon telling him to have his dentist provide a statement that he was in the dentist's office for eight hours on October 27 in order to claim sick leave. Also, on November 1, Ellis sent a letter to McLernon informing him that his absence on October 27 would be charged as absence without pay, and to report to his office on November 6 for an investigation.

Ellis sent a letter to Robert McLernon, also on November 1, 1989, advising him that the City would not condone the misuse of sick leave by employees, and that he should not demonstrate favoritism toward any individual. Ellis testified that he had talked with Robert, who said he was on vacation and his brother Richard had joined him in Iowa.

On November 6, 1989, Ellis met with McLernon, Mayor Condos and the Union steward Lynn Allen, and wrote the following incident report:

Incident Review:

On October 27th, Richard McLernon claimed to be at the dentist for eight hours. Upon further review of this situation, I have determined this was not true. Mr. McLernon, with full knowledge, submitted a fraudulent time card. This was similar to an act of employee theft. Had his action escaped attention he would have wrongfully profitted by his actions.

Previous to this incident, Mr. McLernon had received an earlier written reprimand concerning unacceptable behavior. At that time he had been informed that his actions could have resulted in his immediate termination. However, it was decided at this time to provide him with a writtem reprimand and to warn him that any future violation would lead to his being fired. He was notified that a follow-up review would be held in the future to determine if he had changed or improved in behavior.

Mr. McLernon has verbally apologized and admitted that he only was at Dr. White's office for 45 minutes and then left for Iowa to go hunting.

Decision:

Mr. Richard McLernon is hereby suspended without pay for two days. This suspension will take effect this Thursday, November 9, 1989. Mr. McLernon is to provide the Personnel Committee with an acceptable signed letter of apology before he will be allowed to return to work after the suspension period. Failure to submit this letter on or before Monday, November 13, 1989 at 8:30 A.M. will be taken to be an act of

resignation by Richard McLernon. The previous "docking of pay" on Friday, November 3rd will stand. Hopefully Mr. McLernon will in the future weigh the gains of any particular deception against the consequences.

On November 9, 1989, McLernon sent a letter of apology for his actions to the personnel committee.

On December 30, 1989, two employees who worked at the cemetery were involved in an incident. According to Ellis, Lance Melancon and Ronald Zink lived together and worked together at the cemetery. Ellis prepared an incident report which notes that Melancon was suspended without pay for one week and Zink was reprimanded. 1/

On February 5, 1990, Ellis met with the City Council and recommended that McLernon be transferred to the cemetery and that Zink be transferred to the street department. The next day, Ellis sent the following letter to McLernon and Zink:

At a closed meeting of the City Council on February 5, 1990 and during previous discussions with the Cemetery Board chairman, the overall plan for managing staff and how supervisors should relate to their subordinates was discussed. It was unanimously determined that the City's organizational structure should reflect the overall staffing needs the City is attempting to address. This structure should also determine the interpersonal relations that are to exist formally among the personnel performing these jobs.

During these discussions the following organizational and staffing changes were collectively decided:
Effective February 12, 1990, the following management decision will be implemented:

- .Richard McLernon will assume the duties of Cemetery foreman. He will retain the same date of hire, longevity standing and 15 (cents) per hour increase for working foreman's pay.
- .Ron Zink will be transferred to the Street department and maintain his original date of hire with all benefits (longevity and seniority) with no reduction in wages. Future salary increases will be those negotiated for all other employees of the same classification at the same average rate of pay (same as everyone else).

If there are any clarification or questions concerning this directive, please contact me.

On February 9, 1990, Ellis sent the following letter to McLernon:

My decision to transfer you into the position of leadman at the Cemetery was done with some reluctance. My original thinking was employee centered. I was interested in helping to eliminate frustration on the part of all employees within the Street Department by attempting to reduce tension between people who somehow just could not "get along" with each other. There also was concern about respect...for a person who has provided the City with over 20 years of service.

Richard, you are a hard worker, possess several skills and experience gained from on the job. However, to be a good leadman you not only need to be a good worker but a good leader. In other words, you need to be thoughtful and help promote employee satisfaction, but at the same time recognize the need for productive output from others.

About six months ago you were called to my office and we discussed your need to get along with other workers. Since then you were called back to my office for submitting a fraudulent time card. A review of your work during the same period reveals that you have maintained a high quality and quantity of work. However, your attitude towards others within the

1/ The December 30, 1989, incident involving Melancon and Zink is not reported in detail here because it is largely irrelevant to the instant grievance, except to the extent that the City subsequently decided to transfer Zink out of the cemetery to the street department while transferring McLernon to the cemetery.

department has not improved. This conclusion has been reached through a series of discussions with your co-workers.

I still have some concern on whether you are the best suited individual for the position of leadman at the Cemetery.

My discussions with you concerning this transfer have led me to believe you might become a negative leader who would attempt to use only fear over the heads of other employees to get them to perform. Although this might get results for awhile, sooner or later employees would "revolt", slow down or simply request to be transferred. Dictatorial leadership seldom lasts over long periods of time. In this type of situation, I would terminate the leadman rather than the subordinate.

I also believe you may have either a "chip-on-your-shoulder" or perhaps an attitude problem. I do not know if it was intentional but when we discussed this transfer, it seemed as though you felt you would be doing the City a favor by accepting the transfer. I think you should feel thankful for the opportunity. In addition others have indicated you have expressed a desire to "get even" with various workers.

Your transfer to the Cemetery still remains effective for February 12, 1990. I strongly suggest that you continue to work on your interpersonal skills and forget about any vengeances you may have toward others if you wish to succeed in this new position.

Should things not work out in the position of leadman, I seriously doubt if I would allow you to return to the Street Department. Remember, I previously indicated that the ability to get along was an important duty in your old position...therefore, I would be opposed to your return to the Street Department.

Also it should be clarified that you are a leadman at the cemetery and not a working foreman. Your salary will be \$9.70 base pay plus \$.20 longevity pay plus \$.15 for leadman for a total of \$10.05 per hour. This is in accordance with Article 7 of your current union contract. My previous use of the "working foreman" language was a misunderstanding of the exact title of the cemetery position.

Ellis heard from another employee that McLernon wanted to come back to the street department. On March 8, 1990, Ellis sent the following letter to McLernon:

Under the Management Rights clause of the existing contract there are several relevant portions that relate to your original transfer from the Street Department to the cemetery. They include:

Article 2. MANAGEMENT RIGHTS

2.01 The Employer possesses the sole right to operate the Department and all management rights to repose in it with the understanding that such rights of management will not be used for the purpose of discrimination against any employee or contrary to this Agreement. These rights include, but are not limited to, the following:

- A.To direct all operations of the Department;
- B.To establish reasonable work rules and schedules of work;...
- D.To hire, promote, transfer, schedule and assign employees in positions within the Department;
- E.To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- F.To relieve employees from their duties;
- G.To maintain efficiency of Department operations;...
- J.To change existing methods fo facilities;...

M.To determine the methods, means and personnel by which
Department operations are to be
conducted;...

It is also important to recognize that Article 10 Job Posting
deals with vacancies in permanent positions and does
not deal with reassignments. This transfer was not the
result of a vacancy. If you review my letter to you of
February 9, 1990, I believe it indicates clearly that
the transfer decision was based upon the Management
Rights clause which allows the City (not employees) to
determine the means and personnel for its operations.

Given the underlying facts involved in your conduct/performance in the Street Department, the City has numerous additional legal and corrective action options it can and will exercise to achieve and maintain efficient operations within the City. The City can and has reassigned you (involuntarily or otherwise) to the cemetery. The decision is firm and final.

Poor health or other personal problems that employees bring with them to the job may cause employees to find fault with their jobs or with others around them. Their expressed complaints thus may not accurately represent the real cause of their dissatisfactions. Your previous job assignment and your current assignment require the same physical demands. Physical health and personal problems cannot be resolved by merely changing jobs. If you have a health problem or are unable to perform your job satisfactorily for some other personal reason Richard, then lets deal with it directly.

Based upon our discussion on Wednesday, March 7 it sounds as if you are not complaining about your health but you are concerned about how close you are to retirement. I disagree with your suggestion that someone younger who would stay longer should be learning the necessary skills at the cemetery. If I were to think or act along this line of reasoning I would be guilty of age discrimination.

Finally, when looking at Article 10, Job Posting, it is clear that the thirty (30) day probationary period was not intended to apply to this situation since the transfer action was a permanent move to separate the employee from the root of the problem. A temporary assignment was not envisioned and this is not a situation where a cooling off period would correct the organizational deficiencies. Naturally, an employer is free to take whatever operational efficiency action they feel is appropriate, up to and including termination. The assignment to the cemetery was a "last chance" agreement prior to taking more drastic measures. In the event that the transfer to the cemetery does not work out, I would then have to analyze the remaining options up to and including termination.

On March 15, 1990, McLernon filed a grievance alleging a violation of Article 8.02 and asking to go back to the street department. The City denied the grievance and it was processed to arbitration. There is no procedural question before the Arbitrator.

THE PARTIES' POSITIONS:

The Union asserts that the Grievant was not given the right to exercise his seniority and stay in the department that he desired. The Union contends that seniority has prevailed in the posting of jobs in the past, but that management has changed. The Union agreed that there may be times that employees may be transferred, but that in this case, the City had no right to transfer the Grievant and to state that it would not accept him back into the street department, as that would violate the labor contract.

The City asserts that the contract language is clear. Under Section 8.02, seniority is given primary consideration in matters of increase or decrease of forces, layoffs, or promotions. The transfer does not involve any of those matters. The City retains the ability to run its organization wisely and make decisions which have an impact on morale and efficiency. The situation with the Grievant had been allowed to exist in the past, and there was clearly a case of nepotism in the street department. The City submits that there is evidence of favoritism being shown where 100 percent of the employees in the department expressed their concern through a petition. Management has the right to make transfers to improve productivity, and it acted wisely and harmoniously with each of the employees involved in the transfer.

DISCUSSION:

It is a well-recognized principle that arbitrators should read a labor agreement as a whole document. While the City correctly notes that Article 2, Management Rights, gives it the right to transfer employees, the Arbitrator must read Article 2 in conjunction with Article 8, specifically Section 8.05, which states: "All employees presently employed shall remain in the section for which they now work unless transferred by job posting procedures." (Emphasis added.) Further, where one section of the contract appears to conflict with another section, arbitrators may resolve that conflict by another well-recognized principle that general contract language must give way to

specific language to the contrary. 2/

While the City retains the general right to transfer under Article 2.01(D), it has agreed to the language of Article 8.05. Thus, the general language of Article 2 is restricted by the specific language of Article 8.05. Article 8.05 clearly allows Grievant Richard McLernon to remain in his section, unless transferred by job posting procedures. The parties agree that the transfer was not accomplished by job posting procedures. The intent of Article 8.05 is to prevent against involuntary transfers, the very thing that triggered this grievance. While the City notes that there was no vacancy to post for at the cemetery, it must follow the terms of the contract in transferring employees. Its general right to transfer has been diminished by Article 8. Therefore, I find that the City violated Article 8.05 by transferring McLernon involuntarily.

Ellis testified that he considered the transfer to be a "disciplinary transfer." However, McLernon had already been disciplined -- suspended without pay for two days -- for the incident with the time card. To subject him to further discipline is double jeopardy. McLernon accepted the discipline and followed the City's orders to write an apology. Discipline cannot be imposed time after time without a new incident giving rise for it. There is no evidence that McLernon engaged in conduct after October 27, 1989, which would warrant a disciplinary transfer in addition to the discipline he previously received.

While the City may have a problem with nepotism in the street department which McLernon's brother supervises, it cannot evade the terms of the labor contract by transferring him for either real or perceived nepotism. The Arbitrator can appreciate the City's dilemma with a nepotism problem, but nepotism involves two family members. The City has not shown that it has disciplined one brother, the supervisor who has the power to extend favors, while disciplining the other brother under him receiving favors.

It is not a proper function for the Arbitrator to solve the City's problem with morale in the street department. While the City's solution to a morale problem may have been reasonable and logical, the Arbitrator's authority is limited to interpreting the contract. Article 8.05 is clear on its face. It says: "All employees presently employed shall remain in the section for which they now work unless transferred by job posting procedures." Where the City transferred McLernon without job posting procedures, it violated the labor agreement. The appropriate remedy is for the City to immediately put Richard McLernon back in the street department. While McLernon claims to have lost some overtime by the virtue of the transfer, I find that there is no need for the City to pay out any overtime, as the amount would be speculative.

AWARD

The City violated the labor agreement, specifically, Article 8.05, in transferring Richard McLernon to the cemetery. The City is ordered to immediately place McLernon in the street department.

Dated at Madison, Wisconsin this 11th day of July, 1990.

By _____
Karen J. Mawhinney, Arbitrator

2/ See Bristol Steel & Iron Works, 73 LA 573, at 578 (Nicholas, Jr., 1979).