BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between CITY OF OSHKOSH and OSHKOSH CITY EMPLOYEE UNION LOCAL 796, AFSCME, AFL-CIO	Class action grievance dated 2-19-90 Case 139 No. 43875 MA-6094

Appearances:

Mr. Gregory N. Spring, Staff Representative, AFSCME Council 40, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of the Union.

Mr. Warren P. Kraft, Assistant City Attorney, PO Box 1130, Oshkosh, Wisconsin 54902, appearing on behalf of the City.

ARBITRATION AWARD

The above-noted City and Union requested the Wisconsin Employment Relations Commission (herein WERC) to designate the undersigned as Arbitrator to hear and determine a dispute concerning the above-noted grievance arising under the parties' 1989-90 Working Conditions Agreement (herein Agreement). The WERC so designated the undersigned by letter dated May 2, 1990.

Following one postponement, the parties presented their evidence and arguments to the Arbitrator at an evidentiary hearing held at City Hall, Oshkosh, Wisconsin on September 5, 1990. The hearing was neither transcribed nor tape recorded. The parties' summations were presented orally at the conclusion of the testimony, marking the close of the hearing.

STIPULATED ISSUES

At the hearing, the parties agreed that the following constituted the issues for determination by the Arbitrator in this matter:

> 1. Did the City violate the Working Conditions Agreement when it allowed non-unit employes to remove manhole covers as was done on February 16, 1990?

2. If so, what is the appropriate remedy?

PERTINENT PORTIONS OF THE AGREEMENT

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

Overtime: All work performed outside the normal work day and/or work week shall be compensated for at the rate of time and one-half (1 1/2) the employees [sic] regular rate of pay. Employees shall receive twice their regular rate of pay for all work performed on Easter Sunday. The principal [sic] of seniority may apply on a rotating basis, within a division and the specific classification to perform overtime work. . . .

. . .

ARTICLE XII

CALL IN PAY

In the event employees are called for work after their normal work days have been completed they shall receive a minimum payment of two (2) hours pay at the rate of time and one half (1 1/2) their rate of pay. . . .

. . .

ARTICLE XXVI

MAINTENANCE OF BENEFITS

> The City will not change any benefit or condition of employment, which is mandatorily bargainable except by mutual agreement with the Union.

BACKGROUND

The grievance giving rise to this proceeding asserts, "On 2-16-90 foreman went out and removed manhole covers," thereby allegedly violating Agreement Arts. XXVI and XI such that the City should "have all management personnel stop performing bargaining unit work, and make any and all employees whole for any loss of benefit or overtime. The City's responses were as follows:

> [Street Superintendent level:] ". . . it is the Foreman's duty and obligation to access [sic] sewer problems and determine the course of action to be taken to correct those problems. Therefore there was no violation of the contract. Grievance is denied.
>
> [Director of Public Works level:] It is the foreman's responsibility to assess all sewer related problems, and determine the course of action necessary to correct the problems There are times when it is necessary to remove a manhole cover to properly assess a sewer problem. It is my opinion that removal of that cover is part of the problem-assessment, and because problem-assessment is part of a foreman's duty, I must deny this grievance.
>
> [City Manager level:] This is in response to the grievance in which you allege a contract violation by supervisors removing manhole covers. It is my determination that it is management's right and responsibility to analyze the problem to determine the proper work crew and equipment to be sent to correct the problem. I am aware of no case where management has actually done the work required to correct the problem. In view of the above, I am denying your grievance.

The February 16, 1990 incident giving rise to this grievance and referred to in ISSUE 1, above, involved a non-bargaining unit employer Street Foreman William Tollard, responding to a sewer problem call at 5:30 PM, i.e., outside the bargaining unit sewer crew's normal work hours, by removing manhole covers (herein covers) in the process of determining whether the City was responsible for remedying the problem the caller was experiencing. As the grievance and answers above make clear, it is those basic facts which constitute the context in which this dispute has

arisen.

At the hearing, after the parties had settled upon the statement of issues, above, the Union learned to its apparent surprise that on February 16, 1990, Tollard had determined that the City was responsible for the sewer problem involved so that he called in one or more bargaining unit personnel to remedy the problem he found. As noted below, however, it is undisputed that there have been a number of similar instances since February 16, 1990 in which either the Street Superintendent or the Street Department Foreman removed covers in response to sewer problem calls outside the bargaining unit sewer crew's normal work hours without calling in any bargaining unit employe to work at the site involved. It is the Arbitrator's understanding and judgment, based on the grievance, answers, hearing evidence and arguments, and the circumstances in which the issues were framed by the parties, that the propriety of the cover removals in those instances after February 16, 1990 are also at issue herein. Indeed, because it is in those instances that employes lost call in work opportunities that they claim to be entitled to under Art. XXVI, those instances appear to be the appropriate central focus of this dispute. Nevertheless, as noted above, the February 16 incident serves as the factual basis of the dispute to the extent that it limits the scope of this proceeding to instances in which non-unit Street Department personnel have removed covers in response to sewer problem calls outside the bargaining unit sewer crew's normal work hours.

The evidence establishes that removal of a cover requires use of a pick or special cover removal tool and sometimes of a sledge hammer and shovel, as well. A typical response to a sewer problem call involves removing and replacing two or three covers and takes at least 30 minutes if the responsibility for remedying the problem does not lie with the City, and substantially longer if it is determined that the City is responsible and that some remedial work needs to be performed at that time. The City does not claim that it has the right to assign non-unit Street Department supervisory personnel to perform the work of remedying the problem. Rather, the City claims that it has the right to have non-unit personnel remove covers for the purpose of assessing the problem and determining what, if any, remedial work by the City is called for in the circumstances by how many City employes and using what equipment.

Both parties presented evidence regarding past practice. The Union's witnesses included the individuals who would have been the first called for sewer related call-ins over the past ten years. Those Union witnesses testified that they had been told by management personnel when hired that responding to sewer problem calls outside their normal work hours was a part of their job duties. The also testified that under Street Superintendent Kenneth Robl, who was succeeded in November of 1989, they had often been called in to perform sewer checks in circumstances that made it clear that no non-unit personnel had preceded them to the site to check the problem; and that in many instances the employes found that there was no further action on the City's part that needed to be taken, other than informing the caller to that effect. They testified that the Superintendent or Foreman sometimes joined them at the site to oversee their work, but that to their knowledge no non-unit employe had ever removed covers in response to a sewer problem

call outside work hours prior to February 16, 1990. Union witnesses testified, however, that since Robl retired, all of their sewer call-ins have involved remedial work, and none have involved merely checking to find that the City is not responsible for remedying the problem. Furthermore, they asserted, there have been a number of occasions since February 16, 1990, in which they were called in in response to sewer problem calls and in which it was evident that the Street Foreman or Street Superintendent had removed covers at the problem site prior to their being called in.

City witnesses testified that a number of classifications of City personnel routinely or at least occasionally remove covers as a part of their job, during and outside the normal work hours of the bargaining unit sewer crew members. Robl, who was Street Superintendent for over 30 years, testified that surveying and inspecting sewers to determine priorities for work to be scheduled had always been a part of his job and was expressly included in the most recent description created by the City perhaps 5-7 years ago. Robl testified that he carried the tools to remove covers with him in his car at all times and that he had directed his Street Foremen to do the same. Robl stated that he "typically" and "in most cases" called in bargaining unit personnel to check out sewer problems in response to sewer problem calls he received outside normal working hours. He also stated that on occasion he and other non-unit personnel had responded to such calls by going to the site, removing covers to assess problems, and then either calling in bargaining unit employes to remedy a problem that was the City's responsibility or not calling in bargaining unit personnel, as the circumstances dictated.

City Engineer and Public Works Director Gerald Konrad testified about two specific instances in 1985 and 1988 when he and Robl responded to sewer problem calls received by them outside of normal work hours, removed covers, and assessed the problems involved before calling in bargaining unit personnel. Konrad stated that he recalled other similar instances when Robl had removed covers in response to off hours sewer problem calls before (and sometimes without ever) calling in bargaining unit employes, as well.

The City also presented testimony from William Rasmussen and William Tollard, who respectively assumed the positions of Street Superintendent and Street Foreman in early November, 1989. Rasmussen, who was one of two Street Foremen for the three years preceding November, 1989, stated that he removed covers from time to time as Street Foreman, including in response to a few sewer problem calls that he received during that time. Rasmussen admitted that he had never been sent by Robl to respond to a sewer problem call outside of normal work hours, but he stated that he was sure that Superintendent Robl and the other Street Foreman had removed covers and assessed sewer problems outside of normal work hours in response to sewer problem calls on several occasions. He explained that those two were better known to the citizens and hence they rather than he received most of the calls when they were available.

Tollard described numerous instances in which he had removed covers as an Engineering Department Engineering Aide (in a different bargaining unit represented by a different union) prior to becoming Street Foreman in November of 1989. Those instances included routine and

nonroutine manhole and sewer construction inspections and assisting the sewer crew in locating and remedying problems with newly installed sewer mains, both during and outside normal work hours.

Tollard and Rasmussen acknowledged that since they assumed their current positions in November of 1989, they had never called upon bargaining unit personnel to respond to sewer problem calls outside work hours until they had first made an on-site assessment and concluded that the City was responsible for remedying the problem. Tollard estimated that there had been 10 occasions on which he, as Street Foreman, had removed covers and inspected a site in response to a sewer problem call outside normal working hours, determined that there was no City responsibility for remedying the problem, and decided not to call in bargaining unit personnel. Tollard also specifically described three instances prior to February 16, 1990 but after he became Street Foreman in November, 1989, on each of which he called in bargaining unit employes in circumstances that the employes involved would have had reason to know that Tollard had removed covers before calling them in.

POSITION OF THE UNION

By permitting its Street Foreman or other non-unit employes of the City to remove manhole covers in response to sewer problem calls, the City violated Art. XXVI and a signed grievance settlement agreement.

Arbitrator Richard McLaughlin's May 7, 1987 award involving the same parties and contract established that to prove an Art. XXVI violation,, the Union must show that there has been a change in a benefit or condition of employment; that the changed benefit or condition of employment was a mandatory subject of bargaining; and that the Union did not consent to the change.

The evidence shows that before November of 1989, bargaining unit sewer crew employes were routinely called to open manholes in response to sewer problem calls outside their regular working hours, without a prior on-site determination being made by a non-unit employe as to whether the problem was the City's responsibility to remedy or not. After November of 1989, the new Superintendent and Foreman changed that arrangement by removing covers themselves in response to outside-normal-work-hours sewer problem calls, thereby limiting the instances in which unit employes were called in such cases to those in which the problem was determined to be the City's responsibility.

Because under Art. XII bargaining unit employes receive two hours minimum call-in pay each time they respond to a call-in, the change has reduced a benefit previously enjoyed and changed a condition of employment of which they were apprised when they were hired and under which they were previously working. The change has therefore affected both wages and other conditions of employment in such a way as to be mandatorily bargainable.

The Union grieved the change once it became clear what the new Superintendent and Foreman were doing. The evidence does not establish that the Union knew the Street Superintendent or Street Foreman had removed covers before calling the crew in. Even if the Union could somehow be charged with knowledge of three similar instances from November 1989 to the February 19, 1990 filing of the instant grievance, those few instances would not be sufficient.to extinguish the longstanding contrary practice. Because the crew was called in in each of the three instances there would have been no monetary impact on any employe to pursue through a grievance. In the circumstances, the Union's response was prompt, and it would clearly be inappropriate to conclude that the Union consented to the change.

For those reasons, the Union has proven the necessary elements regarding a violation of Art. XXVI. The Union does not dispute the City's claim that a variety of City employes other than members of the instant bargaining unit have occasion to open manhole covers as a part of their jobs. The instant grievance only addresses situations in which the City has taken away call-in work opportunities of a type that were routinely enjoyed by bargaining unit personnel, to wit, removal of covers to inspect sewers in response to citizen calls outside the sewer crew's normal work hours. If there were occasional instances prior to November, 1989 when the Street Superintendent or Street Foremen performed such work, it was not something which the bargaining unit employes or the Union had any way of knowing, and the City has not shown that the Union is chargable with knowledge of any such instance. For a practice to be binding there must be mutuality, and that element is lacking as regards the City's claim of a longstanding practice supporting what its Foreman did on February 16, 1990.

In addition, the City is violating an undisputed (though undated) written grievance settlement agreement which the testimony indicates was signed by authorized City and Union representatives somewhere between 1.5 and 3 years ago. That agreement expressly states,

> . . . Street Supervisors and Foreman are designated as "non-working." This means that as a general policy they are not authorized to assist or replace bargaining unit employees by performing bargaining unit work. Any violation to this policy would be subject to the grievance procedure.

The removal of manhole covers to inspect sewers in response to outside-normal-work-hours sewer problem calls is obviously "work." It is work that was routinely performed by bargaining unit employes prior to November of 1989. As such, it is bargaining unit work. It is not de minimis work given the testimony that it normally takes at least 30 minutes to remove the covers necessary to do a sewer check even where it turns out that the problem is not the City's responsibility. The fact that the work can sometimes involve only a determination that there is nothing the City can or should do at the time the inspection is made does not make it "non-work;" otherwise, the City could have management personnel remove tons of dirt to expose a suspect

sewer main and call in the crew only if some problem for which the City is responsible is found. By allowing the Street Superintendent and Street Foreman to replace bargaining unit employes by performing the above-noted bargaining unit work as they have done since November of 1989 violates the above-quoted grievance settlement agreement.

By way of remedy, the Arbitrator should order the City to cease and desist from allowing employes outside the bargaining unit to remove manhole covers generally or at least should order the City to cease and desist from allowing non-unit employes to remove manhole covers as was done on February 16, 1990.

In addition, the Arbitrator should order the City to make whole the employe(s) adversely affected by each instance on and after February 16, 1990 on which non-unit employes removed manhole covers in situations similar to that on February 16, 1990.

POSITION OF THE CITY

The Union has failed to prove that a change has been made. The evidence shows a mixed history as regards whether bargaining unit crew members or nonbargaining unit personnel performed the work in question. The evidence shows that a wide variety of City personnel outside the instant bargaining unit routinely remove covers as a part of their job, during and outside of regular hours. Thus, if the grievance is viewed as a claim to an exclusive right to perform all manhole cover removals during and outside normal work hours, the evidence overwhelmingly negates such a claim. Viewing the grievance as a claim to the right to remove covers in response to every sewer problem call that comes in, the evidence again clearly negates such a claim. For, Robl testified that he frequently assessed sewer conditions based on the information he received over the phone without anyone from the City making making an on-site inspection. Robl further testified that when an on-site check was needed, he called in a bargaining unit sewer crew member in most cases but that he occasionally went out himself, removed covers and inspected the sewer involved, calling in bargaining unit personnel only if there was something the City was responsible for doing about the problem. Konrad corroborated Robl's testimony in that regard by describing two specific instances in which he and Robl removed covers to assess sewer problems in response to calls outside of normal work hours, and by recalling that there were other such situations, as well.

At most, therefore, the evidence shows that when Rasmussen took over for Robl he stopped calling in bargaining unit personnel until after a supervisor had assessed the problem. However, since Robl and other non-unit employes had done outside-normal-work-hours checks on their own on some occasions in the past (sometimes calling in bargaining unit employes and sometimes finding that that was not necessary), the Union has failed to show that the Rasmussen changed a uniform practice supporting the Union's position. For that reason, the Union has not proven a change in a benefit or condition of employment which the employes had always previously enjoyed.

Even if there was a change, the Union has failed to show that it did not consent to it. On the contrary, the evidence clearly shows that on at least three occasions from November 1989 until the filing of the instant grievance, bargaining unit employes were called in to work on sites in circumstances that put them on notice that the Street Superintendent or Street Foreman had previously opened the manhole covers to inspect the sewer and assess the situation before calling in bargaining unit personnel. The Union's failure to grieve any of those instances constitutes acquiescence and consent to the propriety of actions of the same sort as the Union is claiming in this proceeding are improper.

The grievance settlement agreement cited by the Union arose out of materially different circumstances that both parties agree was work that is exclusively to be done by bargaining unit personnel. As noted, removal of manhole covers to determine the cause of sewer back-ups outside of normal work hours is work that has historically been done by non-unit as well as bargaining unit employes, such that it does not fall within the meaning of "bargaining unit work" as that term is used in the grievance settlement agreement.

If an Agreement violation is found to have been committed the City does not oppose the make whole relief requested by the Union, but the Union's request for a cease and desist order should be denied as vague and overbroad.

DISCUSSION

The evidence establishes that for many years prior to November, 1989, while Kenneth Robl was Street Superintendent, he "typically" and "in most cases" called in bargaining unit members to remove covers in response to sewer problem calls arising outside normal working hours, without any nonunit employe doing so first. However, there were also occasions on which Robl and other non-unit employes removed covers themselves before (and in some cases without ever) calling in bargaining unit employes. Robl estimated that he sent bargaining unit employes to sites in response to sewer problem calls 30 to 40 times per year and went to the site himself and removed covers in response to perhaps 12 sewer problems calls per year, but those estimates combined occurrences during and outside the crew's normal work hours. Hence, the most that can be said about the pattern of Robl's responses to sewer problem calls outside working hours was that he assessed many without sending anyone to the site at all, and that when someone went to the site to remove covers and assess the problems it was "typically" and "in most cases" bargaining unit employes on call-in, rather than Robl or other non-unit personnel. This was confirmed by Rasmussen's testimony that Robl received almost all of the sewer problem calls and never once had called on Rassmussen to check a sewer in response to a sewer problem call outside of normal work hours in the three years he served under him as a Street Foreman.

It is not determinative of the outcome in this case whether the bargaining unit members knew or did not know of the occasions when non-unit employes removed covers before and/or

without calling in bargaining unit employes to work at the site involved. Rather, the question is whether the practice of calling in bargaining unit employes anytime covers are removed in response to a sewer problem call outside of the bargaining unit sewer crew's work hours is sufficiently longstanding, uniform and unequivocal to be the mutually understood way such work was to be done to the exclusion of having the Street Superintendent or Street Foreman remove covers before (or without) calling in bargaining unit employes to work at the site involved.

The Union is correct when it contends that a past practice requires satisfactory proof of mutuality, but the Union is wrong when it seeks to place the burden on the City to prove a mutual understanding between the parties that covers could be removed by non-unit as well as unit personnel in response to sewer problem calls outside normal work hours. For, it is the Union that bears the burden of proving that a change in a mandatory subject condition of employment or benefit has been made. Thus, it is the Union that must show in this case that the City, by its words or course of conduct, exhibited an understanding that bargaining unit employes were to be called in any time a cover was to be removed in response to a sewer problem call outside normal work hours.

The testimony of the Union witnesses that they were aware of no instance in which a non-unit employe had removed a cover in response to a sewer problem call outside normal work hours is only marginally indicative of the City's course of conduct since Robl stated that in some instances after he removed covers he found no need to call in bargaining unit personnel and that in cases where he removed covers and called in employes, the employes would not necessarily have known that he had removed covers at the site involved. Similarly, the fact that Robl made it clear to the sewer crew employes upon hire and thereafter that the City considered call ins in response to sewer problem calls to be a part of their job is also only marginally supportive of the Union's case herein it is undisputed that bargaining unit employes are to be called in where City work is performed to correct the sewer problem involved.

Conversely, the fact that Robl insisted over the years that the sewer problem calls be routed through him and not routed directly to bargaining unit personnel does not conclusively support the City's position herein because there were numerous occasions on which Robl assessed the situation based only on the telephone information and no one from the City went to the site or removed any covers. Moreover, the fact that a variety of non-unit employes remove covers routinely or occasionally as a part of their jobs, is by no means controlling in the City's favor because bargaining unit employes do not lose previously-enjoyed call-in work opportunities by reason of the continuation of those cover removals by non-unit employes.

Of greater significance, in the Arbitrator's opinion, is the fact that it is clearly a management function to determine what work, if any, shall be performed by bargaining unit personnel in order to remedy sewer problems determined to be the City's responsibility. Removal of a cover to make such a determination is very closely related to the making of the determination itself. The closeness of the relationship of cover removal to that management function leads the

Arbitrator to conclude that the extent to which Robl and other non-unit employes have removed covers prior to November 1989 in response to sewer problem calls--limited though it was--is sufficient to defeat the Union's contention that the parties had been operating on a mutual understanding that covers could only be removed in such circumstances by bargaining unit personnel.

In other words, the practice regarding resort to call-ins of bargaining unit employes in response to sewer problem calls outside normal work hours was a mixed one, with Robl making a determination whether to call in bargaining unit people to assess the problem, or to make an assessment of the problem himself without anyone visiting the site, or to make an initial assessment of the problem himself at the site after removing covers himself. For that reason, unlike the uniform practice that was proven by the Union in the McLaughlin award cited by the Union, the evidence here shows that the practice relied on by the Union in the instance case was not sufficiently uniform to indicate that it was mutually understood by both parties to be the way such calls were always to be responded to.

Therefore, while Rassmussen and his Foremen have changed the mix in a way that has reduced call-in work opportunities for the bargaining unit, they did not, by so doing, change an Art. XXVI benefit or condition of employment because there had never been a practice to the effect that cover removals in repsonse to sewer problem calls after normal work hours would exclusively be handled by calling in bargaining unit personnel.

Similarly, Rasmussen's and Tollard's removals of covers in response to sewer problem calls did not constitute the performance of bargaining unit work, since the evidence shows that Robl had historically decided in some cases to assign the cover removal work to bargaining unit employes and in other cases to do it himself. The grievance settlement agreement to the effect that "as a general policy," Street Department supervisors were "not authorized to assist or replace bargaining unit employes by performing bargaining unit work" was not violated since the work in question has not historically been the exclusive province of bargaining unit personnel. Especially so where, as here, the removal of covers is so closely associated with the management function of determining what work, if any, needs to be done by bargaining unit employes (and by how many bargaining employes using what equipment) to remedy the problem prompting the sewer problem call in the first place.

For the foregoing reasonst then, the Union has not shown that the City violated either the Agreement or the grievance settlement agreement by allowing non-unit personnel to remove manhole covers in response to sewer problem calls outside the bargaining unit sewer crew's normal work hours.

It should be noted, however, as the City has acknowledged, that if remedial work is to be performed bargaining unit personnel must be called in to perform it.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The City did not violate the Working Conditions Agreement or the abovenoted grievance settlement agreement when it allowed non-unit employes to remove manhole covers in response to sewer problem calls outside the normal work hours of the bargaining unit sewer crew without calling in bargaining unit employes to work at the site involved.

2. No consideration of remedy is necessary or appropriate in the circumstances, and the grievance dated March 19, 1990, is denied.

Dated at Shorewood, Wisconsin this 3rd day of October, 1990.

By Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator