

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 LOCAL 366, AFSCME, AFL-CIO, :  
 DISTRICT COUNCIL 48 : Case 214  
 : No. 45507  
 and : MA-6621  
 :  
 MILWAUKEE METROPOLITAN :  
 SEWERAGE DISTRICT :  
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Appearances:

Podell, Ugent & Cross, Attorneys at Law, 611 North Broadway, Milwaukee, Wisconsin, by Mr. Alvin R. Ugent, on behalf of the Union.  
Patrick Halligan, Attorney at Law, Milwaukee Metropolitan Sewerage District, 260 West Seeboth Street, Milwaukee, Wisconsin, on behalf of the District.

ARBITRATION AWARD

Local 366, AFSCME, AFL-CIO, District Council 48, hereafter the Union, and the Milwaukee Metropolitan Sewerage District, hereafter the Employer or District, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the District, requested the Wisconsin Employment Relations Commission to appoint a staff member as single, impartial Arbitrator to resolve the instant grievance. Coleen A. Burns, a member of the Commission's staff, was so designated. Hearing was held on June 28, 1991 in Milwaukee, Wisconsin. The record was closed on July 26, 1991, upon receipt of the transcript.

ISSUE

The Union proposes the following statement of the issue:

Whether the work of exchanging the Filter House balance pan for the broken balance pan in the Acid House performed by a supervisor instead of a bargaining unit employe violated the contract?

If so, what is the remedy?

The Employer proposes the following issues:

1. Does changing a tray in an automatic self-calibrating scale constitute repair of the scale?
2. When no worker is deprived of any wages or economic opportunities, does isolated performance of a bargaining unit task by a supervisor constitute grounds for award?

As an alternative statement of the issue, is an isolated performance of a bargaining unit task a substantial breach of contract or a de minimis non-actionable event?

The undersigned adopts the following statement of the issue:

Did the District violate Part II, Section E(6) of the collective bargaining agreement when the District's supervisors changed the balance pans in the C.E.M. units?

RELEVANT CONTRACT PROVISIONS:

PART II

. . .

E. UNION SECURITY

. . .

6. Bargaining Unit Work. Non-bargaining unit individuals, such as supervisors or management personnel, shall not perform any work which is regularly assigned to members of the bargaining unit, except in cases of emergencies, instruction, testing of new or remodeled equipment, and experimentation.

BACKGROUND

On March 19, 1990, Chris Proeber, an Instrument Technician in the Employer's Maintenance Department, filed written Grievance #90-26. The basis for the grievance was "Supervisor Frances Taylor performing tech work on CEM meter". The grievance alleged that the supervisor's conduct violated Part II, Section E(6), of the contract and asked that "Alternate C.E.M. should be used until an instrument tech can be called to repair it as has been done in the past". Harold K. Stephens, the Employer's Maintenance Manager, responded to this grievance stating "Grievance resolved per the attached memo". The attached memo, dated April 23, 1990, was issued by Frank Stanaszek, the Employer's Instrument Supervisor, and was directed to the Employer's Operations Supervisors. The memo stated as follows:

In the event one of the C.E.M. units becomes inoperable an alternative unit should be used to analyze the samples. Replacing a weigh tray with another one will throw the unit out of calibration. If you feel you need one of the C.E.M. units repaired an instrument tech will be called into repair it, otherwise you can weigh the sample on an alternate unit.

On July 10, 1990, Proeber filed written Grievance #90-45 which stated "Up held Grievance #90-26 was violated. The work of Exchanging the Filter House balance pan for the broken balance pan in the Acid House. This work was performed by a Shift Supervisor". The grievance further stated "The instrument techs should be made totally whole. There should be award of 4 hours of call pay." The Step 2 Grievance Disposition Form on Grievance #90-45 was prepared by James Harper, the Employer's Property and Equipment Maintenance Supervisor, and stated "Grievance denied. The Shift Supervisors will be instructed to call maintenance personnel to change the pan on the C.E.M. unit in the future."

The Confidential Grievance Investigation Worksheet involving Grievance No. 90-45, prepared by the Employer, indicated, inter alia, that the Union had alleged a violation of Part II, E(6), of the contract; that a supervisor had performed bargaining unit work by exchanging a C.E.M. scale pan in an emergency

situation; that the bargaining unit employe was not harmed because the opportunity for overtime still exists; and that the Maintenance Manager had instructed supervisors to contact the maintenance department for changing of the pans.

On August 3, 1990, Proeber filed a Step 3 Grievance Appeal Form on Grievance #90-45 which stated, inter alia, that "No written answer received although we were told it was going to be upheld." On September 12, 1990, Maintenance Manager Harold K. Stephens, acting for Plant Superintendent Frank Munsey, prepared a Step 3 Grievance Disposition Form which stated, inter alia, that "Management will provide clear instructions to supervisors that they will not change C.E.M. pans."

On September 14, 1990, Proeber filed a Step 4 Grievance Appeal Form on Grievance #90-45 which stated, inter alia, that "Management did not address grievance in third step disposition form." On October 24, 1990, James Johnson, the Employer's Human Resources/Labor Relations Manager, issued a Grievance Disposition Form which contained the following:

Grievance denied. The grievant's testimony indicated that changing balance pans generally didn't require special tools or specialized knowledge, and generally, recalibration didn't require "opening up" the C.E.M. It was a matter of adjusting the zero setting. Harold Stephens testified that Maintenance had made an effort thru Frank Stanaszek's April 23, 1990 memo to advise Operations' personnel not to change C.E.M. pans. The supervisor who supposedly committed this infraction wasn't aware that he wasn't supposed to be replacing balance pans. Operations has now made it the Shift Operator's responsibility to replace balance pans. This should preclude incidents of this nature in the future. The supervisor's actions were not meant to displace any represented employee and were incidental to the problem he was attempting to resolve.

On October 23, 1990, Steven St. Louis, Instrument Technician in the Employer's Maintenance Department, filed written Grievance #90-63 which alleged that the Employer had violated Part II, E(6) and "all other specific and appropriate clauses" when, on "second shift of 10/20/90, the Dryer house Supervisor violated the contract & the upheld grievance 90-26, once again by exchanging the filter house balance pan for the broken balance pan on the C.E.M. unit in the Acid house." The grievance also stated "4 hrs of call in pay should be awarded & the Instrument Techs should be made totality whole." The Step Two Grievance Disposition Form on Grievance #90-63 prepared by James C. Harper, the Employer's Property and Equipment Maintenance Supervisor, stated that the issue involved "Whether an Instrument Tech should have been called in to exchange the balance pan on a C.E.M. scale" and further stated "Grievance denied. This instance constituted an emergency in the eyes of supervision. The supervisor directed employees present and available to take immediate corrective action to prevent additional damage to equipment. The work was minor and did not require the calling in of additional personnel."

On October 31, 1990, Grievance #90-63 was appealed to Step Three. On November 9, 1990, Franklin D. Munsey, Plant Superintendent, issued the Step Three Grievance Disposition Form on Grievance #90-63 which stated, inter alia:

Yes, the supervisor did bargaining unit work. This work is incidental as it involved taking a pan from a balance in one work area and giving it to an operator in another area. A memo had been sent to supervisors in one area to stop this practice. By oversight, the other area supervisors did not receive the memo. The oversight will be corrected.

In addition, 2 other followup actions will occur. Management will pursue putting extra scales in the workplace to reduce the need to change pans. Also, management will have a test done to resolve the issue regarding pan changing affecting accuracy. Management perceives that changing pans does not affect accuracy and does not require skills unique to the Instrument Technicians. This conclusion will be reviewed by some further test work on the significance of weight changes caused by pan changing.

Since the work was incidental, the remedy is to take corrective steps as noted above.

On November 13, 1990, Grievance #90-63 was appealed to Step 4 on the basis that "the Instrument Technicians have not been made totally whole in this matter." On December 10, 1990, the Employer's Human Resources/ Labor Relations Manager, James L. Johnson, issued the Step 4 Grievance Disposition Form on Grievance #90-63 which stated, inter alia:

Grievance denied. While the supervisor should have directed the operator to exchange or replace the balance pan, the actions of the supervisor had a de minimis impact on the bargaining unit or the grievant, in particular. Management has pursued putting extra scales in the workplace to reduce the need to change or exchange balance pans. Management has determined that exchanging balance pans on the C.E.M. has little or no impact upon the process results and is in the process of documenting this decision.

#### POSITIONS OF THE PARTIES

##### Union

The language of Part II, E., 6. of the parties' collective bargaining agreement is clear and unambiguous. Non-bargaining unit individuals such as supervisors or management personnel, shall not perform any work which is regularly assigned to members of the bargaining unit, except in cases of emergencies, instruction, testing of new or remodeled equipment, and experimentation. None of these exceptions are present here.

Grievances #90-45 and #90-63 involve the same issue as Grievance #90-26, i.e., management doing Instrument Tech bargaining unit work by replacing a balance pan. The grievances also involve the same section of the contract, i.e., Part II, E. 6. The memorandum resolving Grievance #90-26 states that "in the event one of the C.E.M. units becomes inoperable, an alternate unit should be used to analyze the samples. Replacing a weigh tray with another one will throw the unit out of calibration. If you feel you need one of the C.E.M. units repaired, an instrument tech will be called in to repair it, otherwise you can weigh the samples on an alternate unit."

In responding to Grievance #90-45, the shift supervisor referenced Grievance #90-26 and recognized that #90-26 was violated. Further admissions are contained in the Confidential Grievance Investigation Worksheet. The report, which is a report of management's investigation, states that "Investigation of the incident revealed that a Supervisor did perform bargaining unit work."

Although there is a contract exception for an emergency, the instant dispute does not involve an emergency situation. There are six C.E.M. units and, if one of them becomes inoperable, it is possible to use another unit. Moreover, prior to the installation of the C.E.M. units, they used centrifuge units. The centrifuge units are still there. The claim of emergency is rather foolish because one can easily switch over to one of the other units.

The last grievance disposition form involving Grievance #90-45 clearly recognizes that the operations personnel are not to change C.E.M. pans and alleges that the supervisor who committed the infraction did not know that he was not supposed to replace the balance pans. What happened to the emergency argument? If there were truly an emergency, management would have consistently responded that there had been an emergency and, additionally, management would have advised the Union that it would continue to have supervisors perform such work because management has an absolute contractual right to do so when there is an emergency.

The emergency argument is resurrected in Grievance #90-63. In responding to the grievance, management once again admits that supervisors did bargaining unit work; indicates that by oversight, not all of the supervisors knew that they were not supposed to do the bargaining unit work; and indicates that a memo will be sent to supervisors to stop this practice. At the next level, management states that, while the supervisor should have directed the Operator to exchange or replace the balance pan, the actions of the supervisor had a de minimis impact.

The emergency argument has been abandoned in favor of a de minimis impact argument. A de minimis impact exception does not appear in the contract. It is true that there are times when something is so unimportant and so trivial that it just doesn't amount to anything. In this case, the work in dispute is not de minimis. The work in dispute involves a significant amount of work time and involves more than an isolated incident. Moreover, if it is de minimis, why does management keep acknowledging that it should not be doing the work and promising not to do the work in the future.

This is not a case where an Operator has been assigned the work and the Union is objecting to the assignment. This is a case where a supervisor has done the work.

The evidence doesn't demonstrate that the work in dispute is Operator work. The evidence does, however, demonstrate that it is Instrument Technician work. The issue of whether the disputed work should be assigned to an Operator or to an Instrument Technician is not before the arbitrator. The issue before the arbitrator is whether or not a supervisor can do the work.

All of the grievance disposition forms recognize that the Instrument Technician will be called in to do the work in the future. Although the future has come and gone, management didn't call in the Instrument Technician. The Union requests that the arbitrator issue an order instructing management to cease and desist from assigning this work to a supervisor.

Management has recognized that the contract has been violated, but has not paid for the violation. Management keeps saying that they are going to stop doing what they are not supposed to do, but they continue to violate the contract.

Grievance #90-45 occurred on the second shift and Grievance #90-63 occurred on a weekend. In both instances, Instrument Technician's were off duty. Management could have used another machine until an Instrument Technician came on duty and was available to repair the machine. Management, however, decided not to wait and, instead, used supervisors to perform the Instrument Technician's work. To make the affected employees whole for the employer's contract violation, the employer should be ordered to pay four hours call-in pay to the employees who should have been called in. Call-in pay is provided on page 30 of the labor agreement. In addition to the four hours pay, the affected employees should also receive interest on their money.

## District

1990 was a period of technological change for the Employer. Employees were learning how to use the scales and there was some breakage. When there was serious breakage, Instrument Technicians were employed to do repair work.

At the same time, Operators were taught how to use the scales in ordinary operations such as reloading of trays, placing samples on trays, and weighing samples. In 1990, additional scales were acquired. As employees learned to use the new equipment, breakage diminished.

There were a number of grievances during this period of technological change and adjustment. Management was generous about the resolution of these grievances. Management established a division of labor in which true repair work would be done by what are called Technicians and other things such as reloading and weighing would be done by Operators.

During the period of adjustment and technological change, perhaps three or four times, some supervisors did some work on the scales which was a deviation from the bargaining unit work clause on page 7 of the contract, i.e., they removed a tray, put a new tray in and weighed a sample. However, had the supervisors not done that, an Operator on duty would have performed the work. Management would not have called in an Instrument Technician to do the work. The grievants in this case did not lose any wages or economic opportunities.

The Union's argument that an employee might have been called in from home is a highly theoretical and speculative argument. Speculation is not evidence. The District could have used another scale or had an Operator perform the work in dispute. There was no need to call anyone in.

The real quarrel isn't between the workers and management, its a quarrel between the Operators and the Technicians. The evidence demonstrates that changing trays is not repair work, it is careful cleaning work.

This is a classic case of a de minimis, isolated incident. The last such episode was in October of last year. The evidence demonstrates there has been none since. There has not been any substantial breach of contract. The grievance must be denied.

## DISCUSSION

As the Union argues, in responding to Grievance #90-45 and #90-63, the Employer has acknowledged that supervisors performed bargaining unit work when they changed balance pans in the C.E.M. unit. The question to be decided is whether the District's conduct is consistent with the provisions of Part II, Section E(6) of the collective bargaining agreement.

Part II, Section E(6), provides as follows:

Bargaining Unit Work. Non-bargaining unit individuals, such as supervisors or management personnel, shall not perform any work which is regularly assigned to members of the bargaining unit, except in cases of emergencies, instruction, testing of new or remodeled equipment, and experimentation.

The District does not argue, and the record does not establish, that the supervisors performed the work in dispute for the purpose of instruction, testing of new or remodeled equipment or experimentation. Rather, the District claims that the supervisors performed the work in an emergency situation.

The Confidential Grievance Investigation Worksheet attached to Grievance #90-45 states, in relevant part, that "On 8/6/90 Mike Wilson informed me that he had exchanged the scale pan under what he considered to be an emergency situation. The attached memo indicates that the maintenance manager had instructed supervisors to contact the maintenance department for changing of the pans." The Step Two response to Grievance #90-63 states, in relevant part, "This instance constituted an emergency in the eyes of supervision. The supervisor directed employees present and available to take immediate corrective action to prevent additional damage to equipment."

Kenneth Ceranski, an Instrument Technician, has been employed by the District for more than eleven years. Ceranski denies that the inability to use a C.E.M. unit is, in and of itself, an emergency. According to Ceranski, there are six other units located throughout the plant and it is possible to use one of the other units. The record does not demonstrate otherwise.

Neither the grievance documents, nor any other record evidence, establishes that there was any "emergency" other than a need to replace a balance pan in a C.E.M. unit. Given the availability of the other C.E.M. units, as well as Instrument Supervisor's Stanaszek's memo of April 23, 1990 which expressly recognizes that "In the event one of the C.E.M. units becomes inoperable an alternate unit should be used to analyze the samples.", the undersigned is not persuaded that the need to replace a balance pan in a C.E.M. unit, in and of itself, constitutes an emergency within the meaning of Part II, Section E(6).

The District argues that there has been no contract violation because the work performed by the supervisors was de minimis. The supervisors who changed the balance pans did not testify at hearing. While it is evident that the balance pans were changed, the record fails to establish the amount of time that the supervisors expended in changing the pans or the procedures used by the supervisors in changing the pans.

Ceranski's testimony establishes that when the samples are too heavy or there is debris in the C.E.M. unit, the plastic balance pan ignites. According to Ceranski, when a pan is changed by an Instrument Technician, the Technician normally removes the visible debris and opens the unit to determine if debris has fallen through. Ceranski stated that it is usually possible to clean the unit from the top side, but at times, it is necessary to clean the unit from the bottom. Ceranski further stated that after the debris is removed, the pan is replaced and precision weights are used to ensure that the machine is reading accurately. According to Ceranski, under the best of conditions, the process of cleaning the C.E.M. and replacing the pan takes about one-half hour. The record does not demonstrate otherwise.

As the Union argues, Part II, Section E(6), does not provide supervisors with a right to perform de minimis amounts of bargaining unit work. Assuming arguendo, that such an exception may be implied, the undersigned is not persuaded that the work in dispute is de minimis.

In resolving Grievance #90-26, the District recognized that the work in dispute, i.e., changing the balance pan in a C.E.M. unit is the work of the Instrument Technician. 1/ While James Thomson, the District's Instrumentation and Electrical Maintenance Supervisor, testified that it was his opinion that, if there were no complications, an Operator could perform the task of changing the balance pan, neither Thomson's testimony, nor the testimony of any other witness demonstrates that Operator's were regularly

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1/ Joint Exhibit #2, Stanaszek's memo of April 23, 1990.

assigned to perform the work in dispute. The testimony, however, does establish that the work in dispute has been regularly assigned to Instrument Technicians. The undersigned is persuaded that, as alleged in Grievances #90-45 and #90-63, the supervisors did change the balance pans in violation of Part II, Section E(6) of the collective bargaining agreement.

Grievance #90-45 does not specify when the supervisors performed the bargaining unit work, but does ask for four hours of call-in pay. The Confidential Grievance Investigation Worksheet on Grievance #90-45 does not expressly acknowledge that the work was performed outside of the Instrument Technician's normal work schedule, but does imply such a fact in that it states that "the employe was not harmed because the opportunity for overtime still exists".

Grievance #90-63 alleges that the work was performed during the second shift on October 20, 1990, which was a Saturday. The record does not demonstrate otherwise.

It may be, as the District argues, that the work can also be performed by other bargaining unit employes, such as the Operators. However, the record fails to demonstrate that, at the time that Grievance #90-45 and #90-63 were filed, that the work in dispute had been regularly assigned to Operators. Rather, the record demonstrates that, at the time the grievances were filed, the work of changing the balance pans in the C.E.M. units was work which was regularly assigned to Instrument Technicians.

Ceranski's testimony establishes that Instrument Technicians work Monday through Friday, 7:00 a.m. to 3:30 p.m. As the Union argues, when a balance pan breaks during a time period in which the Instrument Technicians are not working, the District has the choice to (1) leave the broken pan in the C.E.M. machine until an Instrument Technician is available to change the pan during the Instrument Technician's normal work shift or (2) call-in an Instrument Technician to replace the pan and to pay the Instrument Technician the call-in pay provided for in Schedule "A", Section J, of the collective bargaining agreement.

If as the Union argues, the work which is the subject of Grievances #90-45 and #90-63 was performed at a time when the Instrument Technicians were not working, than the appropriate make whole remedy is to provide the Instrument Technician who should have been called in to change the balance pans with the call-in pay provided for in Schedule "A", Section J, of the collective bargaining agreement. The Union's request for interest on any back pay owed is denied.

It is evident that, on two occasions following the resolution of Grievance #90-26, the District used supervisors to replace balance pans in C.E.M. units. The first occasion occurred prior to July 10, 1990 and the second occasion occurred in October, 1990. The hearing was held in June of 1991. In requesting a cease and desist order, the Union is asking the undersigned to order an exceptional remedy. The undersigned does not consider the District's conduct to be so frequent and flagrant as to warrant a cease and desist order.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The District violated Part II, Section E(6) of the collective bargaining agreement when the District's supervisors changed the balance pans in the C.E.M. units.
2. In remedy of this violation, the District is to immediately make whole any Instrument Technician who lost any wages, including call-in pay, as a result of the supervisors changing the balance pans in the C.E.M. units.

Dated at Madison, Wisconsin this 4th day of October, 1991.

By

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Coleen A. Burns, Arbitrator