BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
OCONOMOWOC CITY EMPLOYEES UNION, LOCAL 1747, WCCME, AFSCME, AFL-CIO	Case 55 No. 45762 MA-6738
and	
CITY OF OCONOMOWOC	

Appearances:

Mr. David White, Staff Representative, Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Ronald S. Stadler, appearing on behalf of the City.

ARBITRATION AWARD

The Oconomowoc City Employees Union, Local 1747, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Oconomowoc, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Oconomowoc, Wisconsin on July 25, 1991. The hearing was transcribed and the parties filed post-hearing briefs and the City submitted a reply brief which was exchanged on October 2, 1991 at which time the record was closed.

BACKGROUND

On December 11, 1990, the City repaired a water main break. Employes of the City's Electric Department, who are represented by the IBEW, were called out along with bargaining unit employes to effect the repair. Electric Department employes used their back hoe to dig out (trench) the area around the broken pipe so it could be replaced.

For many years there existed a Water and Light Commission which as a separate employer from the City had two departments, water and electric. All employes were represented by IBEW and since about 1965 these employes repaired the water main breaks. In the past two or three years, the City dissolved the Water and Light Commission and the water and electric employes became City employes. After a unit clarification proceeding the Electric Department employes were in a separate bargaining unit and still represented by IBEW and the Water Department employes were accreted to the Local 1747 bargaining unit which included the DPW employes.

After the December 11, 1990 repairs were made, a grievance was filed asserting that the overtime work performed by the Electric Department employes should have been assigned to the DPW employes. The grievance was denied and appealed to the instant arbitration.

ISSUE:

The parties stipulated to the following:

> Did the City violate the collective bargaining

agreement when it failed to offer overtime in the Water Utility to bargaining unit employes on December 11, 1990?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL LANGUAGE

ARTICLE II - MANAGEMENT RIGHTS

2.01 - Rights. The Union recognizes that, except as hereinafter provided, the City has the right to manage and direct the work force. Such rights include, but are not limited to, the following:

a. To determine the number of departments and the type of services to be provided;

b. To introduce, change or eliminate equipment, machinery or processes;

c. To hire, promote, lay off or transfer employees in accordance with the terms of this Agreement;

d. To discipline or discharge employees for just cause;

e. To establish reasonable rules and regulations, and to direct the job activities of employees;

. . .

ARTICLE VII - OVERTIME - CALL-IN PAY

. . .

7.03 - Overtime Scheduling. When overtime work becomes available, employees within the bargaining unit shall be given an opportunity to perform such work before non-bargaining unit employees are called in. Overtime shall be distributed on a departmental basis, with departments being defined as Department of Public Works, Parks and Recreation Department, Wastewater Treatment Plant, Water Utility (excluding Meter Readers), and Meter Readers. When overtime work becomes available in one of the departments noted above, the opportunity to work such overtime shall first be offered to the employees regularly assigned within that department. In the event that all employees within the department are already working or are unavailable to work, such overtime may then be offered or assigned to employees from other departments.

UNION'S POSITION

The Union contends that Section 7.03 of the parties' agreement is clear and unambiguous and requires the City to call in bargaining unit employes to

perform bargaining unit work before it utilizes non-unit employes. It submits that as the Water Department is in the bargaining unit, its work is bargaining unit work and its employes are bargaining unit employes as are the DPW employes. It points out that now no IBEW employes are in the Water Department and hence are not bargaining unit employes. The Union claims that under Section 7.03, the overtime to dig out water main breaks must first be offered to bargaining unit employes and the City violated this provision by calling in non-unit employes on December 11, 1990 without first having offered the work to bargaining unit employes. The Union recognizes that in the past the Electric Department employes dug out broken water mains but that occurred when the Water Department and Electric Department were under a single contract. It maintains that this is no longer true and because of a substantial change in circumstances, the City cannot rely on any practice to establish an exception of Section 7.03. The Union argues that the City's defense that the DPW employes were not trained in safety techniques is spurious because the City has assigned DPW employes to remove a fuel tank at Village Green Park, a gas tank at the Fire Department, to do trenching alongside the parks building and to install storm sewers using the back hoe formerly used by the Electric Department. The Union asks that the grievance be sustained and the DPW's back hoe operators be made whole for all losses as a result of the City's violation of the contract on December 11, 1990.

CITY'S POSITION

The City contends that bargaining unit members are not entitled to water main trenching because it is not bargaining unit work. It submits that trenching for the repair of water main breaks has always been done by Electric Department employes. It argues that the City has the right to determine what services will be provided by each department and the Union's assertion that a water main break must be Water Department work ignores the express provisions of Section 2.01. It notes that there is no contractual restriction on its right to assign work or to transfer work among bargaining units. The City maintains that neither the Water Department nor the DPW have been assigned water main trenching and although some digging assignments in the past were assigned to DPW Equipment Operators, water main break trenching has never been performed by them. The City insists that trenching has been assigned to the Electric Department because they have been properly trained to do the work considering soil conditions and the close proximity of other utilities; gas, electric and telephone.

The City claims that the evidence establishes that water main trenching is not bargaining unit work and the change of the Water Department employes from one unit to another does not alter this conclusion. The City contends that the Union cannot claim that it lost something it never had and cannot force the City to redetermine which department is going to do the trenching.

The City asserts that the clear and unequivocal past practice is that the Electric Department employes have performed trenching for water main repairs. It submits the evidence establishes that since 1976, 100% of the water main trenching work has been done by Electric Department employes and DPW employes have done none of it. The City insists that the past practice supports its position that this work is not bargaining unit work and thus, there is no violation of Section 7.03 as there was no bargaining unit work available on December 11, 1990. The City maintains that the Electric Department employes have the necessary skill and training to dig the water main trenches and the examples cited by the Union as digging work does not involve the same type of work or safety considerations. It asks that the Union's arguments be rejected and the grievance be denied.

DISCUSSION

Article 7.03 provides in part, that: "When overtime work becomes available, employes within the bargaining unit shall be given an opportunity to perform such work before non-bargaining unit employes are called in." The under-lying inference in this language is that the term "work" refers to work that is normally performed by that Department. This is made clear by the third sentence of Section 7.03 which states as follows: "When overtime work becomes available in one of the departments noted above, the opportunity to work such overtime shall first be offered to the employees regularly assigned within that department." This means that overtime work is first offered to employes in the department who are regularly assigned this work. The Union has asserted that as it represents employes in the Water Department, the work of these employes is bargaining unit work and that digging out water main breaks is work of the Water Department and must first be offered to the Water Department employes. There is an error in the Union's syllogism which makes its conclusion illogical. The error is the premise that digging out water main breaks is work that has been and is normally assigned to the Water Department. The evidence established that digging out the broken water mains has always been done by the Electric Department employes and not by the Water Department employes. When the Water and Electric Departments were in the "Utility," the digging was done by the Electric Department and not the Water Department. When the Water Department employes became part of the unit represented by the Union, they never brought with them the work of digging out of water main breaks as that work stayed with the Electric Department. Inasmuch as they never brought the work with them they had no claim to the work in the first instance. The evidence presented in this case confirms this because the Water Department employes are not asserting any loss of overtime due to the digging, rather it is the DPW or Street Department employes who are claiming the work. But for them to claim it, they must claim it through the Water Department which has never performed this work. In short, the work has always been assigned to the Electric Department and not to any bargaining unit employes, thus the bargaining unit employes cannot establish a claim to the overtime as this work was never regularly assigned to them. It therefore follows that the Union's claim cannot be established under Section 7.03 and there was no violation of the contract when the City assigned the overtime to the Electric Department employes on the December 11, 1990 water main break.

Based on the above and foregoing, the record as a whole and the arguments of the parties the undersigned issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 29th day of October, 1991.

By __________________________________
Lionel L. Crowley, Arbitrator