

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

CITY OF BROOKFIELD PUBLIC EMPLOYEES
LOCAL 20, DISTRICT COUNCIL 40, AFSCME,
AFL-CIO (LIBRARY EMPLOYEES)

and

CITY OF BROOKFIELD

Case 90
No. 47565
MA-7310

Appearances:

Mr. Victor Musial, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, appearing on behalf
of the City.

ARBITRATION AWARD

City of Brookfield Public Employees Local 20, District Council 40, AFSCME, AFL-CIO (Library Employees), hereinafter referred to as the Union, and City of Brookfield, 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, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a staff member as impartial arbitrator to resolve the instant grievance. On July 14, 1992, the Commission designated Coleen A. Burns, a member of its staff as impartial arbitrator to resolve the instant dispute. Hearing was held on October 14, 1992, in Brookfield, Wisconsin. The hearing was transcribed, and the record was closed on December 14, 1992, upon receipt of post-hearing written arguments.

ISSUE:

The parties were unable to agree on a statement of the issues.

The Union frames the issues as follows:

Did the City violate 26.01 of the contract by failing to pay the higher rate to employees assigned to work in a higher classification?

If so, what is the appropriate remedy?

The City frames the issues as follows:

1. Is the grievance timely filed?
2. Did the City violate 26.01 of the contract by failing to pay the higher rate to the starred employees listed in Joint Exhibit 4?

If so, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Is the grievance timely filed?
2. If so, did the City violate Article XXVI of the parties' agreement by failing to pay the Technician I/Part-time A rate to Technician I/Part-time B employees who filled in for Debbie Bailey?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE XXVI - TEMPORARY ASSIGNMENTS

26.01. In the event an employee is temporarily assigned to a higher rated class, the employee shall receive the higher rate of pay for all time worked in the higher rated class. In the event that an employee is temporarily assigned to a lower rated class, the employee's regular rate of pay shall be continued.

BACKGROUND:

The parties' collective bargaining agreement lists the following classifications:

Technician I/Part-time A

Technician I/Part-time B

The Technician I/Part-time A is paid at a higher rate than the Technician I/Part-time B.

The job description for Technician I/Part-time A lists the following duties:

Job Description

Trains Technician I/Part Time B. Assists with routine circulation desk procedures. Does routine typing, filing and bibliographic verification. Prepares, repairs or reconditions library materials. Responsible for automated and manual interlibrary loan procedures, keeps numerical records, assists with programs and displays. Performs other related duties as required.

The job description for Technician I/Part-time B lists the following duties:

Job Description

Assists with routine circulation desk procedures, assists in preparing, repairing, or reconditions library materials, does routine typing or filing, does routine bibliographic checking and manual interlibrary loan procedures. Assists employees in higher classifications in the performance of duties.

Debbie Bailey, classified as a Technician I/Part-time A, took a leave of absence for an extended period of time. During her absence, a number of employees, classified as Technician I/Part-time B, worked the hours Bailey was scheduled to work. The hours worked took place between October 26, 1991, and May 2, 1992. On April 16, 1992, a grievance was filed alleging a violation of Article XXVI but did not name any grievant nor did it specify any date for the violation. The grievance was denied and appealed to the instant arbitration.

UNION'S POSITION:

The Union contends that the grievance is timely as it is a continuing violation of the contract, and the issue of timeliness was not raised by the City prior to the hearing. It asserts that the City's claim of surprise with respect to Union Exhibit 1 should be disregarded as the City was offered a continuance and declined the offer.

With respect to the merits, the Union argues that the City assigned several employees to perform work in a higher rated classification and they should be paid at the higher rate. It asserts that the City's contention, that the duties of the two positions are so similar that the higher rate of pay is unwarranted, must be rejected because although there is some overlap in duties, the positions are different and are paid at different rates. The Union notes that while it tried in negotiations to combine these two positions into one, it was unsuccessful so the City obviously felt there was a distinction in the two positions.

The Union states that the facts are clear that the City assigned Technician I/Part-time B employees to fill a Technician I/Part-time A position and, had the incumbent employee worked these hours, she would have been paid at the higher rate. To not pay the Technician I/Part-time B

employes the higher rate is a violation of the clear and unambiguous language of Section 26.01. It asks that the grievance be upheld and the affected employes be paid back pay and benefits.

CITY'S POSITION:

The City contends that the grievance should be denied. It asserts that the incidents occurring after December 31, 1991, should be excluded from consideration because they were not raised until the hearing and the City had no time to prepare for them.

The City further contends that the grievance was not timely filed. It submits that employes were asked to work additional hours on October 26, 1991, and no grievance was filed until April 16, 1992, some five months later. The City notes that the agreement does not contain a time limit on the presentation of grievances, but a five-month period does not meet the implied requirement of reasonableness for timely presenting the grievance. The City insists that the delay in filing the grievance was prejudicial because it could have avoided the dispute if it had been promptly notified. The City argues that, if the Union prevails, the award should not include damages caused by the delay in filing the grievance.

The City maintains that there is no violation of the agreement because the Technician I/Part-time B employes did not perform any duties unique to the Technician I/Part-time A classification. It submits that the evidence establishes that no Technician I/Part-time B employes were ever asked to perform the unique Technician I/Part-time A duties in that there was no training of other employes, and they didn't perform automated interlibrary loan procedures. It claims that Citti and Evans performed the exact same duties both before and after October 26, 1991. It states that the Technician I/Part-time B employes only performed Technician I/Part-time B duties, and thus, the City has no obligation to pay them at the Technician I/ Part-time A rate. It requests that the grievance be denied.

DISCUSSION:

Timeliness:

The City has raised the issue of timeliness with respect to the grievance. Article XIV of the parties' agreement contains no time limit on the filing of a grievance. Although the contract contains no express time limit, grievances must be filed within a reasonable period of time. 1/

1/ Elkouri & Elkouri, How Arbitration Works (BNA 4th Ed., 1985), at 193.

Without any limitation on the period of time for filing, many problems arise including the failure to obtain early settlement of grievances, the possibility of continuing liability, and problems with preparing cases after witnesses have drifted away and memories have dimmed due to the passage of time. 2/ Additionally, labor-management relations are not enhanced by the accumulation of stale grievances.

The Union has asserted that the alleged violation is of a continuing nature. Arbitrators have held that where a grievance involves a continuing violation of the agreement, it may be filed at any time. 3/ Here, each occurrence of the alleged assignment of a lower classed employe to perform the duties of a higher classed employe, without pay at the high rate, would give rise to a grievance over the alleged violation of Section 26.01. Thus, the grievance is of a continuing nature. Under a continuing grievance, the City's defense of timeliness would affect the remedy should a violation be found, but this defense does not bar the grievance from a determination of its merits. On the basis of the above discussion, the undersigned finds that the grievance is not time-barred but is arbitrable on the merits.

The City has also asserted that any alleged violations in 1992 should not be considered as these alleged violations were first brought to the City's attention at the hearing. The City was offered a continuance, 4/ but it declined the offer. The 1992 alleged violations go to the remedy and not to the underlying merits, so the City arguments on timeliness will only be considered in determining the appropriate remedy.

Merits:

Arbitrators have held the mere performance of some duties of the higher rated classification does not entitle the lower rated employe to the higher rated pay. Rather what is required is that the lower rated employe must perform the unique or core elements of the higher rated job. 5/ The issues in this case are: (1) What are the key or core elements of the higher rated

2/ Kennecott Copper Corp., 35 LA 412 (Ross, 1960).

3/ Elkouri & Elkouri, How Arbitration Works (BNA 4th Ed., 1985) at 197.

4/ Tr. 8.

5/ Wilson Jones Co., 51 LA 35 (Daugherty, 1968); Union Carbide Nuclear Co., 37 LA 411 (Seligson, 1961).

job of Technician I/Part-time A? and (2) Did the grievants actually perform these unique or core elements of the higher rated job?

A comparison of the job descriptions of the Technician I/Part-time A and Technician I/Part-time B reveals many similarities in responsibilities and duties. However, there are distinguishing factors between the two jobs as listed in the job descriptions, i.e., the Technician I/Part-time A trains the Technician I/Part-time B and is responsible for automated interlibrary loan procedures and keeps numerical records. Inasmuch as the parties agreed to different rates for these positions, the pay differential must be attributed to the difference in duties performed and these differences must, therefore, be the unique or core duties assigned.

The issue in this case comes down to whether the Technician I/Part-time B employes performed these core duties. The record fails to establish that any of them did the higher rated duties. Barbara Scalish, a Technician I/Part-time B, testified that normally her specific duties involved desk time only. 6/ When she filled the Technician I/Part-time A's hours, she did some processing and book repair. 7/ It should be noted that processing and book repairing fall within the Technician I/Part-time B job description. 8/ Additionally, other employes classed as Technician I/Part-time B repair library materials and do processing. 9/ The evidence establishes that Scalish did nothing different from what Millie Citti or Shirley Evans did. 10/ Scalish was not asked to train other employes or to do automated interlibrary loan procedures. 11/ Thus, Scalish simply performed some duties that she had not done before, but these duties were those of a Technician I/Part-time B. Performing different duties assigned to one's own classification does not result in pay for a higher classification.

6/ Tr. 12.

7/ Id.

8/ Employer Exhibit 2.

9/ Tr. 16. Millie Citti and Shirley Evans performed these duties prior to and after October 26, 1991, as part of their regular jobs as Technician I/Part-time B.

10/ Tr. 21.

11/ Tr. 24-25.

The evidence indicates that Scalish never performed the unique or core duties of a Technician I/Part-time A and thus, she was not entitled to higher pay under Section 26.01 of the agreement. The evidence failed to prove that anyone classified as a Technician I/Part-time B performed any duties outside their own job description. Consequently, the evidence failed to demonstrate that any Technician I/Part-time B was assigned work in a higher rated class.

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

AWARD

1. The grievance alleges a continuing violation of the contract and is therefore timely filed.

2. The City did not violate Article XXVI of the parties' agreement by its failure to pay the Technician I/Part-time A rate to Technician I/Part-time B employees who filled in for Debbie Bailey, as they did not perform the unique or core duties of the higher Technician I/Part-time A class.

3. The grievance is denied in all respects.

Dated at Madison, Wisconsin this 2nd day of March, 1993.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator