BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 796, AFSCME, AFL-CIO	Case 199 No. 48440
and	MA-7601
CITY OF OSHKOSH	

Appearances:

Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ms. Lynn A. Lorenson, Assistant City Attorney, City of Oshkosh, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear a grievance involving call-in procedures for maintenance mechanics. A hearing was held on February 22, 1993, in Oshkosh, Wisconsin, where the parties were given the opportunity to present their evidence and arguments. The Union presented oral argument in lieu of a brief, and the City filed its brief by March 22, 1993, and the Union replied by March 30, 1993.

ISSUE:

The Arbitrator will address the following issue:

> Did the City violate the Working Conditions Agreement when Plant Foreman Tom Kruzick pushed a circuit breaker reset button at one of the City's lift stations in response to an alarm at the lift station on July 25, 1992? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE XII

CALL IN PAY

In the event employees are called for work after their normal work days have been completed they shall received a minimum payment of two (2) hours pay at the rate of time and one half (1 1/2) their rate of pay. The employer may change the employees shift upon giving 24 hour notice, except in case of emergency, at which time the 24 hour notice shall be waivered.

In the event employees are called in to work on an approved vacation day, they shall receive a minimum payment of two (2) hours pay at twice their rate of pay for all work performed.

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:

This is a class action grievance concerning the City's failure to call in a mechanic on overtime on a Saturday when an alarm came in to the wastewater treatment plant indicating a power failure at a lift station, and the City's action in having a supervisor reset a circuit breaker at the lift station.

Bargaining unit member Ray Raube was the maintenance mechanic who was checking lift stations on overtime on Saturday, July 25, 1992. His job includes checking and repairing equipment such as pumps, general maintenance of equipment, and related tasks. He routinely works on lift stations and repairs various pumps. On July 25th, he made a scheduled check of all seven lift stations in about an hour an a half, found everything normal, notified the operator at the main plant that all was ok, and went home. A little later that morning, an alarm came in to the wastewater treatment plant indicating a power failure at the Shorewood lift station.

Charles Schumacher, a maintenance mechanic, was filling in as a liquids operator at the treatment plant when the alarm came on the control panel, and he asked Plant Foreman Tom Kruzick what to do next. The regular procedure for a power failure is to call Wisconsin Public Service Corporation to check for power lost to the lift station. A mechanic is to be called when the wet well high level alarm (or a second alarm) comes on. Schumacher called WPS, which indicated there were no power failures and said that the City would be billed if WPS sent someone out to the lift station. Kruzick told Schumacher to wait for the second alarm, as the wet well alarm would eventually go off if there were no power at the lift station.

Kruzick mentioned the Shorewood alarm to Plant Superintended Charles Isham who agreed to wait for the wet well alarm to verify a true power failure. Many alarms are considered nuisance alarms, with no problem being found to warrant the alarm. In rainy or stormy weather, supervisors are more likely to call out mechanics when alarms come in, because conditions are right for a true alarm. However, the weather was clear on July 25th.

Kruzick told Isham he would check the lift station on his way home. Kruzick left the treatment plant and took a cellular phone with him to call back to the plant. When he arrived at the Shorewood lift station, he opened up the control panel and turned a switch to "Hand" to see if the pumps would work, but they did not. Kruzick then pressed a reset button for each pump, but nothing happened. He asked Schumacher over the phone where the circuit breaker was located. He then went to the back of the panel where the main line comes in, opened it up with his keys, and pushed a circuit breaker. He felt it engage, and power was restored to the panel. Schumacher told him by phone that the board was clear at the treatment plant, and Kruzick said to call him if it happened again. He estimated that he was there about three minutes.

At first, Kruzick had assumed that there was a power outage and that it would be WPS's problem or a false alarm. Once Kruzick pushed the reset buttons on the pumps and got no response, he knew that the alarm was not a false alarm. However, if there were no power at the panel which has a backup generator, there was no need to pull pumps out because one still needed to know why there was no power. If the power had not been restored when Kruzick switched the breaker, he would have called WPS to ask for service, and if a second alarm came in, he would have called for a mechanic with a backup generator. Kruzick

knew that if he did not feel resistance when he pushed the breaker, the problem would lie with WPS. The box containing the circuit breaker belongs to the City; the power coming into the box is provided by WPS. Kruzick is not qualified to pull a breaker out and test it.

The following Monday, a wastewater electrician changed the breaker. No one knows why the circuit breaker tripped, and it is an unusual problem.

Isham has checked lift stations and plant troubles many times to diagnose problems and see who should be called. Isham has never pushed the main switch like Kruzick did, and could not recall another incident where a main tripped. Isham has reset pumps and pushed circuit breakers to diagnose problems. He has never used tools to repair or correct a problem. In a response to the grievance, Isham noted that Kruzick accidentally restored power to the lift station and Raube was not needed to be called in because no emergency repairs were required.

THE PARTIES' POSITIONS:

The Union contends that the City violated the working conditions agreement when it went beyond assessment of a problem and took remedial action at the lift station. The ability to receive call-in overtime is a benefit under the maintenance of standards clause. Maintenance mechanics are responsible for maintaining lift stations, and are required to work and be on call specifically to remedy problems at lift stations. Supervisory personnel are non-working supervisors.

The Union submits that once Kruzick determined that the alarm was not a nuisance alarm, he knew that remedial action was needed and should have called in a bargaining unit employee. For example, the Union notes that Kruzick felt he was not qualified to fix the breaker, but if a supervisor had electrical experience, could he then pull apart the box and correct the problem while he was assessing the problem? In this case, the supervisor reached beyond the point of assessing the problem and took remedial action. There is no mutual agreement to allow the City to take such remedial action at lift stations.

The Union asks for three hours of pay to be given to Raube for the failure to call him in to fix the lift station problem.

The City argues that the actions taken by Kruzick were proper in this situation, as part of his duties require him to diagnose problems with equipment and systems. Both Kruzick and Isham have responded to alarms at the plant and at lift stations, and in determining the type of problem, both have flipped switches, pushed reset buttons and taken various actions. Isham clearly indicated that once a problem is diagnosed, the repair is completed by the appropriate bargaining unit personnel.

The City asserts that Kruzick's actions fall out side any definition of repair work. When he opened the first panel and pressed reset buttons, he determined that no power was reaching the panel, which would likely indicate that either the problem was with the connection of the power line to the City's equipment, or the problem was with WPS lines. If the problem were the former, he might need an electrician and WPS personnel. In order to determine the source of the problem, Kruzick opened the back panel and pushed the circuit breaker which restored power to the station.

The City notes that the Union contends that once Kruzick pushed the reset buttons in the first panel and found no power, he should have stopped his investigation and called in a mechanic. However, the City contends that the distinction drawn by the Union between two different reset buttons is a hollow

one, and there is no difference between pushing one reset button in an attempt to find the source of a problem and pushing another reset button during the same attempt, where no repair work was done.

Supervisors are the appropriate people to diagnose problems and determine who should perform repair work. While diagnosis may arguably cross into repair at some point, it did not occur in this case, the City concludes.

In reply, the Union asserts that if Kruzick's actions were in any way remedial, the grievance should be sustained. The City does not disagree with the standard of diagnostic versus remedial action. Kruzick remedied the problem that existed at the lift station after he knew that the alarm was not a false alarm. Kruzick's actions were more than diagnostic in nature.

DISCUSSION:

The framework for the analysis of this case has been established the prior arbitration awards involving these same parties. In Case 84, Arbitrator Richard McLaughlin reviewed the maintenance of benefits clause of the parties' contract and stated:

> To establish a violation of Article XXVI, proof of three elements is necessary. The first is that the disputed change must affect a "benefit or condition of employment." The second is that the benefit or condition of employment must be "mandatorily bargainable." The third is that the change must have been made without mutual agreement with the Union.

Arbitrator McLaughlin further noted that the assignment of available work opportunities to unit employees constitutes a benefit or condition of employment, and found that the assignment of available overtime to bargaining unit members can be characterized as either a benefit or as a condition of employment or both. Arbitrator McLaughlin then found that the assignment of available weekend overtime to bargaining unit personnel constitutes a mandatory subject of bargaining, thus meeting the second element. In that case, the Arbitrator found that the City violated Article XXVI by using temporary employees on regular time rather than bargaining unit employees on overtime for weekend work.

A year later, Arbitrator Marshall Gratz issued an award in Case 111, where the question before him was whether Isham (then a plant foreman) violated the contract when he instructed a solids plant operator to perform certain repair work instead of calling in a maintenance mechanic. Arbitrator Gratz found that where the work in question was assigned to another classification of bargaining unit employees rather than to non-unit personnel, the exclusivity of the mechanics' claim to the work in question was less clear cut than in the McLaughlin case. Arbitrator Gratz concluded that it was within the City's reserved management rights to assign the work to an operator working at straight time rather than to the mechanic on overtime because it fell within the scope of the duties of both jobs.

Two years later, in October of 1990, Arbitrator Gratz ruled in a case involving the same parties in Case 139. The dispute centered on whether foremen or supervisors could remove manhole covers in response to sewer problem calls outside the bargaining unit sewer crews' normal work hours. The City acknowledged that if remedial work were to be performed, bargaining unit personnel must be called in to perform it, but that it retained the right to have non-unit personnel remove manhole covers to assess the problem and determine what remedial work was called for. In denying the grievance, Arbitrator Gratz concluded that ". . . 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 employees (and by how many bargaining employees using what equipment) to remedy the problem prompting the sewer problem call in the first place. 1/

1/ Arbitrator Gratz also noted that the Union bears the burden of proving that a change in a mandatory subject condition of employment or benefit has been made, or that the City, by its words or course of conduct, exhibited an understanding that bargaining unit employees were to be called in any time a manhole cover was to be removed in response to a sewer problem call outside normal work hours. In this case, the Union believes that it has met its burden of proof by showing that City's procedures call for the call-in of a mechanic in power failure to lift stations, per Union Exhibit #13. However, the procedure only calls for the call-in of a mechanic when the wet well high level alarm comes on. This alarm had not come in yet when Kruzick took the action of flipping the circuit breaker.

The first issue is whether there is a change of a benefit or condition of employment. In line with the prior McLaughlin Award, the assignment of available work opportunities to bargaining unit employees constitutes a benefit or condition of employment. The second prong is met, in that the assignment of available weekend overtime to bargaining unit personnel is a mandatory subject of bargaining (see McLaughlin Award). And the third prong is met by the lack of mutual consent.

However, there must be a "change" of a benefit or condition of employment for Article XXVI to be triggered. The Union claims that the change is that a supervisor, Kruzick, took remedial action at the lift station. The City labels Kruzick's action diagnostic in nature.

Accordingly, the real issue in this dispute centers on whether Kruzick's action in resetting a circuit breaker at the lift station was remedial or diagnostic. And the real problem is that it is both. The act itself was diagnostic -- the result was remedial.

The Union attempts to draw a fine line between remedial and diagnostic actions, but the line may become blurred on occasion. For example, both Kruzick and Isham have pushed reset buttons on the pumps in the past. If the act of pushing the reset button cleared the main board at the plant, it could have been both diagnostic and remedial, since the result would have remedied the problem, even if unintentionally.

The Union makes an appealing argument that once Kruzick was at the lift station and had already hit the reset buttons, he knew that the alarm was not a nuisance alarm and should have called in bargaining unit personnel. However, Kruzick was not certain whether he needed to call in WPS first, because the circuit breaker was the link between the City and WPS. If he did not feel resistance when he pushed the breaker, the problem would lie with WPS. If Kruzick had not restored power when he reset the breaker, he would have called WPS and asked for service, and if repairs were needed on the breaker, he would have had to call an electrician. Kruzick was well aware that if the second alarm went off, he would have to call a mechanic with a backup generator. Thus, Kruzick was still in the process of diagnosing the problem to find who should remedy it when he accidentally remedied the problem by hitting the circuit breaker. Kruzick had no apparent intention of remedying the problem and had no knowledge that his actions would have such an affect. He was still trying to figure out the source of the alarm and power loss when he restored power. This situation is similar to that in the Gratz Award involving the lifting of manhole covers, where the action taken is very closely associated with the management function of determining what work needs to be done and who should do it and with what equipment.

In conclusion, Kruzick's actions on July 25th do not violate the parties' labor contract. This, however, is a close case, and this Award should not be read broader than the limited circumstances under which it arose.

AWARD

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Dated at Madison, Wisconsin this 28th day of April, 1993.

By _____
Karen J. Mawhinney, Arbitrator

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