BEFORE THE ARBITRATOR

In the Matter of the Arbitration of Two Disputes Between	:	Case 99 No. 49104 MA-7820
CITY OF MANITOWOC EMPLOYEES, LOCAL 731, AFSCME, AFL-CIO	:	
and	:	Case 102 No. 49107 MA-7823
CITY OF MANITOWOC	:	

Appearances:

Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, WI 54221-0370, appearing on behalf of City of Manitowoc Employees, Local 731, AFSCME, AFL-CIO.

Patrick L. Willis, City Attorney, City of Manitowoc, 817 Franklin Street, P.O. Box 1597, Manitowoc, WI 54221-1597, appearing on behalf of City of Manitowoc.

ARBITRATION AWARD

City of Manitowoc Employees, Local 731, AFSCME, AFL-CIO, (hereinafter Union) and City of Manitowoc (hereinafter City or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved grievances by an impartial arbitrator appointed by the Wisconsin Employment Relations Commission from its staff. On April 16, 1993, the Union filed a request to initiate grievance arbitration of these two matters with the Commission. The Employer disputed the right of the Union to use the grievance procedure to obtain permanent reclassification of the employes involved in these two matters; nonetheless, the Employer concurred in the Union's request to initiate grievance arbitration, stating that it would submit to the arbitrator the question of whether the grievance procedure is the appropriate forum for the relief being sought in these grievances. The Commission appointed James W. Engmann, a member of its staff, as the impartial arbitrator in these matters.

Prior to hearing, the parties agreed to bifurcate the hearing process so that the arbitrator could first determine whether the collective bargaining agreement permits the Union to seek the permanent reclassification of a bargaining unit member through the grievance procedure. The parties also agreed that if the Arbitrator determines that the Union can seek such a remedy, a second hearing will be held on the merits of the grievances on July 27, 1993. If the Arbitrator determines that the Union cannot seek such a remedy, the parties agreed that the grievances will be

considered resolved. The parties also agreed to an expedited briefing schedule. Briefs were due postmarked on or before July 3, 1993, with reply briefs, if any, due postmarked on or before July 9, 1993. The arbitrator also agreed to expedite his decision in these matters, issuing said Award on or before July 16, 1993. The parties further agreed that said Award could be in summary form, with the parties allowed to request a complete decision at the conclusion of these proceedings.

A hearing was held on June 22, 1993, in Manitowoc, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. The hearing was not transcribed. The parties filed briefs which were received on July 6, 1993. No reply briefs were received as of July 12, 1993, the date this arbitrator began to write this Award. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF THE FACTS

The facts do not appear to be in dispute. Since at least 1977, permanent job reclassification requests initiated by the Union have been handled through contract negotiations. The parties have also negotiated reclassifications mid-term, generally when initiated by the City. The Union requested the permanent reclassifications now being sought in its bargaining proposals for the current 1992-94 collective bargaining agreement. In the course of collective bargaining, the Union dropped the reclassification requests. Within two months after signing that agreement on October 5, 1992, these grievances were filed. These grievances proceeded through the parties' grievance procedure without resolution. They are properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

AGREEMENT

> Whereas, in order to maintain general efficiency, to maintain existing harmonious relationship between the Employer and its employees, to promote the morale, well-being and security of said employees, to maintain a uniform minimum scale of wages, hours and working conditions among the employees and to facilitate a peaceful adjustment of all grievances and disputes which may arise:
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> Now, therefore, the parties hereto each

in consideration of the Agreements herein contained hereby agree as follows:

. . .

ARTICLE II MANAGEMENT RIGHTS

Except as otherwise provided in this agreement management of the various City departments listed above shall be as follows:

. . .

(c) To hire, promote, transfer, assign and retain employees consistent with this agreement.

. . .

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein.

ARTICLE III GRIEVANCE PROCEDURE

Section 1. Definition.

A grievance shall be defined as any dispute or misunderstanding which may arise between the Employer and employee(s) or between the Employer and the Union.

. . .

Section 3. Arbitration.

(b) Arbitration Examiner. The Wisconsin Employment Relations Commission (WERC) shall appoint an arbitrator from its staff and the decision of said arbitrator shall be final and binding on the parties.

. . .

ARTICLE VIII PAY POLICY

Section 1. Rates.

Employees shall be compensated at the rates specified in Addendum A & B of this Agreement.

. . .

Section 10. Work at Higher Classification.

When employees perform work at a higher classification, the employee shall be compensated at the higher rate for all time worked in said classification.

. . .

ARTICLE IX SENIORITY AND JOB POSTING

. . .

Section 2. Job Openings.

. . .

(j) New Situations. In the event a new situation arises (such as the creation of a new job classification) the parties hereby agree to immediately commence conditions applicable to meet the situation.

. . .

ADDENDUM B CITY HALL CLASSIFICATION AND WAGES

CLASSIFICATION	1992
. . .	
Clerk Typist II	($)8.41
Clerk Typist III.	9.48
. . .	
Secretary to Director of Public Works	10.61
Secretary to Police Chief	10.61
. . .	

Effective January 1, 1993 and January 1, 1994 the hourly wage rates shown on Addendum A and Addendum B will be adjusted to reflect increases in the Consumer Price Index. . . .

ISSUE

The parties stipulated to framing the issue as follows:

Does the Labor Agreement permit a party to seek the permanent reclassification of a bargaining unit member through the grievance process?

POSITION OF THE PARTIES

The Union argues as follows: The Union contends that the Employer violated the collective bargaining agreement every day that it does not classify positions according to the bargained classification with commensurate wage. The

Union bargained standard rates for those classifications. When the employe is assigned work which significantly changes the position, the Employer is obligated to recognize the impact of its assignment through reclassification of the position. The Employer's refusal to do so is arbitrable, as illustrated by the Union's argument and arbitral precedent. The language of the contract is clear. The arbitral precedent is clear. The issue is arbitrable.

The Employer argues as follows: It is the City's position that the Union is attempting to obtain through "rights" arbitration a benefit which is and has historically been treated by the parties as a subject for "interest" arbitration. The Union is attempting to secure through the grievance procedure a wage increase for the affected individuals which the Union was unwilling to pursue in contract negotiations or submit to interest arbitration. There is no language in the collective bargaining agreement which permits use of the grievance procedure of the parties for this purpose and the uniform practice of the parties in the past has been to deal with job reclassification wage increases through collective bargaining. The Union should not be permitted to secure an interest benefit through the grievance procedure which it was not willing to pursue in collective bargaining.

DISCUSSION

The City argues that these grievances are not arbitrable. The Union asserts that they are.

The law governing whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the Steelworkers Trilogy. 1/ Gleaning four guiding principles from the Steelworkers Trilogy, the U.S. Supreme Court in AT&T Technologies, Inc. v. Communication Workers of America 2/ said:

> The first principle gleans from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has

1/ Steelworkers v. American Manufacturing Co., 363 U.S. 546, 46 LRRM 2412 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

2/ 475 U.S. 643, 121 LRRM 3329 (1986).

not agreed so to submit." . . .

> The second rule, which follows inexorably from the first, is that the question of arbitrability--whether a collective bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. . . .
>
> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . .
>
> Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "(a)n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 3/

Starting with the second principle, it is clear that the City could have refused to proceed to arbitration on these grievances, citing its belief that it has not agreed to arbitrate grievances such as those involved in this matter. The Union then could have filed a complaint of prohibited practices with the Commission, alleging that the Employer has violated Sec. 111.70(3)(a)(5), Stats., 4/ by refusing to arbitrate a question as to the meaning

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3/ AT&T, supra, 121 LRRM at 3331-3332 (citations omitted).

4/ Section 111.70(3)(a), Stats., states that it is a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the

or application of the terms of the collective bargaining agreement. The Commission would have appointed a member of its staff to serve as hearing examiner to issue findings of fact, conclusions of law and order, which decision would have been appealable to the Commission and, ultimately, to the courts. This is the "judicial determination" mentioned in the second principle. If the examiner had determined that the grievances were arbitrable, the examiner would have ordered the Employer to submit them to the arbitrator.

Instead, in the interest of expediting a decision in this matter, facilitating a peaceful adjustment to this dispute and encouraging a harmonious relationship between the parties, the City agreed with the Union to give the authority to determine arbitrability to this arbitrator, a procedure permissible under the Steelworkers Trilogy. This arbitrator will proceed as he would if he had been appointed as a hearing examiner in this matter.

To summarize the remaining principles, this arbitrator has to determine whether the City has agreed to submit these grievances to arbitration, that, in making that decision, this arbitrator can not look at the merits of the cases, that this arbitrator is to presume arbitrability unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, and that this arbitrator should resolve any doubts in favor of coverage.

The parties have agreed to a definition of the word "grievance" as follows:

> A grievance shall be defined as any dispute or misunderstanding which may arise between the Employer and employee(s) or between the Employer and the Union.

This is a broad definition. But the City argues that this language cannot be interpreted as broadly as the Union suggests, that "interest" disputes are not subject to the grievance

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> parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

procedure, and that the Union is not seeking an interpretation of the agreement but, rather, is attempting to achieve a prospective alteration of the terms and conditions of employment.

The question of whether the dispute in these matters involves "interest" or "rights" is a finding of fact. "Boiled down to basic terms, the Union is simply attempting to renegotiate Addendum B through the grievance procedure," the City asserts (emphasis in brief). But the Union asserts that it is attempting to enforce Addendum B. On this record, this arbitrator does not have sufficient information to make a determination about this. And, indeed, under the Steelworkers Trilogy, this determination would get into the merits of the case, not something this arbitrator can do in determining arbitrability.

The City also argues that no contract provisions authorize the Union to seek a prospective permanent job reclassification through the grievance procedure; that Article VII, Section 10, demonstrates that if the parties had intended to authorize an employee to request and obtain a permanent perspective job reclassification in the middle of a contract term, the parties could have done so; and that Article IX, Section 2(j), is further evidence of the parties agreement that permanent job classifications will be dealt with through negotiations rather than through the grievance procedure.

However, the City cannot point to any language which limits the Union's right to access the grievance procedure. No where does the agreement state that the parties agree not to arbitrate reclassifications. On its face, nothing in the agreement bars these grievances from being arbitrated. Thus, it appears

that the City, by agreeing to arbitrate grievances, defined as any dispute or misunderstanding which may arise between the Employer and employee(s) or between the Employer and the Union, agreed to arbitrate this dispute.

But the stipulated issue before this arbitrator is more narrow than whether the grievances are arbitrable. The issue requires that this arbitrator determine whether the agreement permits the Union to seek permanent reclassification of a bargaining unit member through the grievance procedure.

The City argues that if these grievances are found to be arbitrable, it will be faced with a rash of grievances without well established standards to decide them. Yet, if it is found that these grievances are not arbitrable, the Union is foreclosed from arbitration when it believes that an employe has been classified incorrectly. Nothing in the agreement demands such a result.

And the agreement does not contain any language limiting the remedial power of the arbitrator. No where does the agreement state that the arbitrator cannot order permanent reclassification of an employe. Thus, nothing in this agreement limits the right of the Union to seek such a remedy.

This is not to imply that such a remedy will be granted in these cases. This decision is only to be read as holding that among the remedies available to an arbitrator to correct a violation of the agreement is the remedy of reclassification of an employe; therefore, the Union has a right to seek such a remedy through the grievance procedure. The criteria by which such a remedy may be used and the determination of whether such a remedy in proper here is left for a decision on the merits.

Indeed, if a violation of the agreement is found by this arbitrator, the arguments of the City which failed to convince this arbitrator that this matter is not arbitrable can be made to attempt to convince this arbitrator that reclassification is not an appropriate remedy in these cases . For example, the argument regarding past practice, which this arbitrator believes has no bearing on the arbitrability issue, may be important regarding remedy. In addition, if the City can prove that the reclassifications sought by the Union require a change in the agreement, the City's arguments as to that point may very well prevail.

In sum, this arbitrator cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted disputes; in other words, this arbitrator is not convinced that the agreement does not permit the Union to seek permanent reclassification of a

bargaining unit member through the grievance procedure.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator issues the following

AWARD

That the Labor Agreement does permit a party to seek the permanent reclassification of a bargaining unit member through the grievance process.

Dated at Madison, Wisconsin, this 15th day of July, 1993.

By James W. Engmann /s/
James W. Engmann, Arbitrator