BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 97, AFSCME, AFL-CIO	:	Case 104 No. 47587 MA-7316
and	:	
THE CITY OF WAUKESHA	:	

Appearances:

Mr. Victor Musial and Ms. Christine Bishofberger, Staff Representatives, Wisconsin Council 40, appearing on behalf of the Union.

Congdon, Ward & Walden, S.C., Attorneys at Law, by Mr. James Ward, appearing on behalf of the City.

ARBITRATION AWARD

Local 97, AFSCME, AFL-CIO, hereinafter referred to as the Union, and the City of Waukesha, 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 an 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 Waukesha, Wisconsin on December 10, 1992. The hearing was transcribed, and the parties filed briefs and reply briefs, the last of which were exchanged on August 17, 1993.

BACKGROUND

The facts underlying the grievance are somewhat confusing and involve three separate incidents. The first incident occurred sometime in the fall of 1989. Troy Martinez and Ed Artymiuk, waste water treatment plant employes, were instructed to repair a leak in the heating lines going to the digestor. 1/ This job involved removing insulation from a pipe in the building and removal of this pipe and a connecting pipe in an underground trench outside the building that was housed in aluminum with some insulation material. 2/ After the pipe was removed, it was replaced by stainless steel and

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1/ Tr. 27-28.

2/ Tr. 28, 46, 47.

the repair job was completed. 3/ Neither the insulation inside the building nor the insulation in the trench was checked to determine if it contained asbestos. 4/

The second incident occurred in 1990, when employes were told to remove gas pipes, exhaust pipes and cooling water pipes from a room from which a gas engine had been removed. 5/ The employes thought the pipes might contain asbestos and the supervisor told the employes that the engine exhaust pipe was gypsum and not asbestos. 6/ The employes were still concerned that some of the pipes contained asbestos and questioned the work order and did not remove any pipes. 7/ On November 6, 1990, samples were taken by DILHR indicating asbestos on pipe wrap, but none on the Engine Room exhaust. 8/ A copy of this report was sent to Alan Cramer, the Union Steward. 9/ In 1991, the City hired an outside contractor to remove the asbestos. 10/

The third incident involves the removal of the scrap pile in April or May, 1992. 11/ One item tested on November 6, 1990 was insulation from the scrap pile which was found to contain asbestos. 12/ Three employes loaded up the scrap pile of metal including pipes and took them to Waukesha Scrap Iron. 13/ The Union filed a grievance dated July 24, 1991 which was presented to the City on July 31, 1991 alleging a violation of Article 5.01 related to exposure to asbestos. 14/ When the City did not respond, the Union president, by a letter dated August 20, 1991, indicated that it would appeal to arbitration if no response was

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3/ Tr. 28, 47.

4/ Tr. 28, 33.

5/ Tr. 16.

6/ Tr. 11, 74.

7/ Tr. 25, 34, 51.

8/ Ex. 4.

9/ Id., Tr. 11.

10/ Ex. 16.

11/ Tr. 55.

12/ Ex. 4.

13/ Tr. 54, 55.

14/ Ex. 2.

received by August 28, 1991. 15/ On September 3, 1991, the Union informed the City it would proceed to arbitration on the asbestos exposure grievance. 16/ On June 11, 1992, the Union filed a request for grievance arbitration. 17/

ISSUES

The parties were unable to agree on a statement of the issues. The Union stated the issue as follows:

> Did the Employer violate the collective bargaining agreement when it assigned waste water treatment employes to remove asbestos without the proper safety equipment?
>
> If so, what is the appropriate remedy?

The City stated the issues as follows:

> Did the Employer violate the collective bargaining agreement when it assigned three waste water treatment employes to remove material from pipes in the old waste water treatment plant in late 1990?
>
> Did the Union satisfy the procedural requirements by timely filing a grievance and by timely making the appeal to an arbitrator?

The undersigned frames the issues as follows:

1. Is the grievance timely filed and timely appealed to arbitration?

2. If so, did the City violate the parties' collective bargaining agreement by assigning but not requiring waste water treatment employes to remove pipes which upon testing were found to have wrappings containing asbestos?

3. If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

15/ Ex. 6.

16/ Ex. 7.

17/ Ex. 3.

ARTICLE 5 - COOPERATION

5.01 Cooperation: The Employer and the Union agree that they will cooperate in every way possible to promote harmony, efficiency and safety among all employees. The City and the employees agree to comply with all applicable State and/or Federal safety regulations.

. . .

ARTICLE 6 - GRIEVANCE PROCEDURE

6.01 Definition: A grievance is a claim or dispute raised by a City employee concerning the interpretation or application of this Agreement.

6.02 Time Limit: To be processed, a grievance shall be presented in writing to the Personnel Committee within thirty (30) working days after the time the employee affected knows or should know the facts causing the grievance.

6.03 Steps in Procedure: Grievances should be processed as follows:

> Step 1 Any employee who has a grievance shall first discuss the matter with the Union Steward and then with the Superintendent. They shall attempt to settle the grievance among themselves. If it cannot be settled, the Superintendent shall answer the grievance within five (5) working days of its being discussed.
>
> Step 2 If such grievance is not settled to the satisfaction of the aggrieved employee or the Steward, the grievance shall then be reduced to writing and presented for discussion by the Union Grievance Committee to the Director of Public Works within ten (10) working days of the Supervisor's answer. The Director of Public Works will hear the grievance within ten (10) working days and will answer the grievance in writing within ten (10) working days of it's (sic) being heard. In the event

that the tenth (10th) working day falls on a holiday, the time in which the Director of Public Works must respond will automatically be extended to the next business day.

Step 3 If such grievance is not settled to the satisfaction of the aggrieved employee or the Grievance Committee, it shall be appealed in writing to the Personnel Committee, through the Personnel Director, within ten (10) working days of the Director of Public Works' answer. The Personnel Committee shall hold a hearing on the grievance within ten (10) working days of the appeal by the Grievance Committee. The Personnel Committee shall notify the Union in writing within fifteen (15) working days following the hearing, of it's (sic) decision in the case, together with the reasons for the decision.

6.04 Arbitration: If agreement is not reached as set forth in Section 6.03 above, the Union may appeal the matter to arbitration by filing notice of such appeal with the City within twenty-one (21) working days following receipt of the Personnel Committee's answer to the grievance. If the parties are unable to reach an agreement upon the arbitrator within ten (10) working days following the receipt of the notice of appeal, either party may request the WERC to appoint an arbitrator.

Union's Position

The Union contends that the City acted in bad faith when it assigned employes to potentially hazardous duties. It submits that the parties agreed to Article 5 to ensure a safe working environment and a commitment to comply with applicable state and/or federal laws. It argues that the City abused its authority by directing employes to work without verifying whether or not they were handling asbestos. The Union asserts that the employes were told that the material was not asbestos even though the Superintendent didn't know what material was surrounding the pipes. It claims that this indicates a willful attempt to deceive employes as to the safety of the work. It maintains that only when the Union was able to prove the presence of asbestos did the City cease ordering employes to work with it and the City did not abide by the contract or by state and federal law.

The Union argues that under state law, the City is obligated to furnish a place free of hazards likely to cause death or serious physical harm and the right to know what hazards they may be exposed to and how to work safely with these. It notes that asbestos exposure has been linked with a number of illnesses and symptoms may not appear for decades. It insists the City was obligated to make a reasonable effort to protect the health and safety of its employes and it failed to do so.

The Union alleges that the City is estopped from raising timeliness at the arbitration hearing. It submits that the City did not make any timeliness objection until the arbitration hearing. It cites arbitral authorities which conclude that the failure to raise timeliness during the lower steps of the grievance procedure constitute a waiver of this defense. It concludes that timeliness has been waived and the City has violated the agreement and its conduct is inexcusable. It asks that the City be ordered to provide yearly physicals, maintain documentation of exposure and cease and desist its practices.

City's Position

The City contends that the collective bargaining agreement does not address the issues raised by the Union because the incident described by the Union occurred in 1990 and the only contract admitted into evidence became effective January 1, 1991. The City argues that there was no proof of what the agreement consisted of prior to January 1, 1991. It asserts that the grievance must be dismissed for lack of any contractual duty or responsibility. It maintains that the proper forum is a Worker's Compensation hearing and since 1989, the City has not been aware of any Worker's Compensation claim related to asbestos.

The City claims that the Union has not satisfied the procedural requirements in filing the grievance. It points out that the alleged incidents occurred prior to January 1, 1991, and the grievance is dated July 24, 1991 and is not timely. It also notes that the appeal to arbitration is even more untimely and was not received until June 16, 1992, well beyond the 21 days required by the agreement.

The City insists that it did not violate the agreement when it assigned employes to remove material from pipes in 1989 and 1990. It asserts the Superintendent was unaware of the composition of the pipe wrap material but was led to believe it did not contain asbestos. The pipe wrap removed in 1990 did not contain asbestos and once the Superintendent was aware that other wrap contained asbestos, no employes were assigned to remove it but an outside contractor did so.

The 1989 incident, according to the City, was of limited scope, and no sampling or testing of the material was done. It also notes that much of the work was done outside and the material was damp or rotten. It contends that the removal was exempt from the requirements of CFR 1926.58 and there has been no solid proof that the material contained asbestos. It asks that the grievance be dismissed.

Union's Reply

The Union submits that the record was incomplete and asks that the 1989-1990 agreement be entered into the record. With respect to timeliness, the Union reiterates that no objection was made until the hearing. It also argues that the grievance is a continuous violation and the request to arbitrate was unable to be processed sooner because the contract was in hiatus. It notes that when the Union proceeded under the new agreement, the City cried foul.

With respect to the merits, the Union contends that the City's argument that the Superintendent didn't know the

composition of the material and was led to believe it was not asbestos cannot excuse his assertion to employes that the material was not asbestos and his threat to discipline if employes did not remove it. The Union claims that the City is responsible for providing a hazard-free work environment and it woefully neglected its duty. It submits that the testimony of the two employes bears out their suspicions that they handled asbestos. It asserts that employes were needlessly exposed to asbestos and the effects of this will not be known for many years and for this reason, the grievance must be sustained.

City's Reply

The City argues that the evidence was closed in this case and the 1989-90 agreement should be disregarded. The City maintains that it did not act in bad faith and as soon as it became aware that there was asbestos in the pipe wrap, it hired an outside contractor to remove it. It points out that no order was issued by DILHR concerning the pipe wrap. It submits that in 1990 no asbestos was removed by employes. It submits that prior to the DILHR report in 1990, it had no reason to act and the 1989 removal could have involved asbestos but there is no proof that any material removed contained asbestos. The City asserts the Union's reference to the "Employee's Right to Know Law" is not applicable to the City. The City also insists that the reference to Sec. 101.055, Stats., is not pertinent as that statute provides for inspections and orders to be issued if there is a violation and no such order was issued in this matter. The City emphasizes that the letter of December 10, 1990 did not even require the City to take any precautionary steps. The City claims that it made every effort to protect the health and safety of its employes and nothing else has been proved. The City also states that it is not estopped from raising timeliness at the arbitration hearing. The City asks that the grievance be dismissed.

DISCUSSION

The Union has asked that the 1988-1990 collective bargaining agreement be entered into the record and the City has objected to including that contract into the record. The undersigned finds that the request to include additional evidence with the filing of the reply brief is too late to be included in the record, and therefore, it will not be received.

The City has also objected to the grievance on procedural grounds. The City has claimed that the grievance is not timely and the request for arbitration was not filed within the contractual timelines. The Union contends that the grievance is continuous and that timeliness raised for the first time at the arbitration hearing constitutes a waiver of this defense.

Sec. 6.02 of the parties' agreement provides that grievances

shall be presented in writing within thirty (30) working days after the time the employe affected knows or should know the facts causing the grievance. The grievance was filed on or about July 24, 1991, and references a letter dated December 10, 1990, confirming the presence of asbestos. 18/ Union Steward Alan Cramer testified that an original grievance was filed in December and in January, he had several meetings with Rodney Vanden Noven and Mr. Wisniewski. 19/ The parties attempted to reach an agreement but failed to do so. 20/ The original grievance was lost so a second grievance was filed. 21/ Mr. Vanden Noven testified that he participated in a Step 2 hearing in August, 1991. 22/ The third step grievance was filed in July, 1991 and a letter dated August 20, 1991 indicates that no meeting was scheduled. 23/ Therefore, the undersigned credits the testimony of Cramer and finds that the grievance was timely filed. The City asserts that the appeal to arbitration was not timely. Sec. 6.04 provides that the Union may appeal the matter to arbitration by filing notice of such appeal with the City within 21 working days. 24/ By a letter dated September 3, 1991, the Union notified the City's Personnel Director that it was proceeding to Step 4. 25/ It would appear that the Union filed the notice of appeal to arbitration in a timely manner. The City points out that the request to the Commission to appoint an arbitrator is dated June 11, 1992. Sec. 6.04 of the agreement provides that if the parties cannot reach agreement on an arbitrator after receipt of the notice of appeal, either party may request the Wisconsin Employment Relations Commission to appoint an arbitrator. (Emphasis added). 26/ There are no time limits and no burden on either party, so if the City wanted prompt action, it could have contacted the Commission. It did not, and it cannot complain that the request to the Commission was not timely. Thus, it is concluded that the grievance is timely in all respects.

18/ Ex. 2.

19/ Tr. 19.

20/ Tr. 20.

21/ Id.

22/ Tr. 61.

23/ Exs. 2, 6.

24/ Ex. 1.

25/ Ex. 7.

26/ Ex. 1.

Turning to the merits of the instant case, the three incidents will be examined individually.

With respect to the 1989 removal of heating lines to the digester, the insulation on the pipe was never checked for asbestos. 27/ It appears that the same insulation was used outside when the new pipe was covered and this was never checked for the presence of asbestos. In short, the evidence with respect to the 1989 work fails to establish the presence of asbestos. Without such evidence, it would be mere conjecture and speculation to conclude that the employes were exposed to asbestos. It is possible that this insulation contained asbestos but the Union has the burden of proof and it failed to carry that burden by any proof that asbestos was present. Thus, the allegations of a violation in the 1989 removal have not been established.

Turning to the 1990 removal of pipes after the removal of the Waukesha engine, the evidence is not clear, but Cramer did not remove any pipes in 1990. 28/ Troy Martinez testified that he removed no pipes in 1990. 29/ Edward Artymiuk indicated that in 1990, he could not be sure that any material except the engine room exhaust pipes were removed. 30/ A five-foot section of cooling pipe may have been removed. 31/ Again, the proof here fails to establish that the employes removed anything in 1990. In 1990, the pipes were tested by the Industrial Hygienist for DILHR who found asbestos on pipes but not on the Engine Room exhaust. 32/ No order was given to the City as was done by this same Industrial Hygienist in 1983. 33/ The City had a subcontractor come in and remove the asbestos in 1991. 34/ The evidence fails to establish that any employes removed any asbestos in 1990, and if they did, such removal was exempt from CFR 1926.58. 35/ Thus, it is concluded that the City did not violate the contract in 1990.

27/ Tr. 28-29, 33.

28/ Tr. 15.

29/ Tr. 33-34.

30/ Tr. 48-50.

31/ Tr. 50.

32/ Ex. 4.

33/ Ex. 9.

34/ Tr. 76.

35/ Ex. 4.

The last incident occurred in 1992 and involves the hauling of the scrap pile to Waukesha Scrap Iron. 36/ In 1990, the Industrial Hygienist from DILHR found asbestos in the Cooling Water insulation from the scrap pile. 37/ Since that time, the City hired a contractor to remove all the asbestos. Additionally, the evidence failed to establish that this insulation was still present in the scrap pile some two and a half years later. It again would be pure speculation to conclude that the employes were improperly exposed to asbestos from the scrap pile based on the evidence in the record. Thus, it is concluded that the evidence fails to establish any violation of the contract by the City in the scrap pile removal in 1992.

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

36/ Tr. 54.

37/ Ex. 4.

AWARD

1. The grievance was timely filed and timely appealed to arbitration.

2. The City did not violate the parties' collective bargaining agreement when it assigned waste water treatment employes to remove pipes which upon testing were found to contain asbestos wrappings because the evidence failed to prove that said employes ever removed said pipes, and the evidence failed to show the presence of any asbestos on pipes that employes did remove in 1989, 1990 and 1992, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin this 1st day of September, 1993.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator