

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:
of a Dispute Between	:
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DISTRICT COUNCIL 48, AFSCME, AFL-CIO,	:Case 254
LOCAL 366	:No. 46956
	:MA-7111
and	:
	:
MILWAUKEE METROPOLITAN SEWERAGE	:
DISTRICT	:
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Appearances:

Podell, Ugent & Cross, S.C., 611 North Broadway, Milwaukee, Wisconsin 53202, by Mr. Alvin R. Ugent, for the Union.  
Mr. Donald L. Schriefer, Senior Staff Attorney, Milwaukee Metropolitan Sewerage District, 260 West Seeboth Street, P.O. Box 3049, Milwaukee, Wisconsin 53201-3049, for the District.

ARBITRATION AWARD

District Council 48, AFSCME, AFL-CIO, Local 366 (the Union) and Milwaukee Metropolitan Sewerage District (the District) are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on March 31, 1992, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Milwaukee, Wisconsin on August 26 and October 12, 1992. A transcript was taken, the last volume of which was received November 23, 1992. The parties filed briefs, the last of which was received September 8, 1993. On September 22, 1993, the parties informed the Arbitrator that they were satisfied with the state of the record.

ISSUE

Did the District have just cause to demote Grievant C.P. from Operator IV DH Rear to Operator III DH Rear and bar him from rebidding to the previous position until May 1, 1992?

If not, what is the appropriate remedy?

## BACKGROUND

The District operates a waste water treatment plant which processes sewerage. Grievant C.P. has been employed since April, 1990. He quickly progressed from an entry level position to the Operator IV Rear End position to which he was assigned May 21, 1991. 1/ On May 29 there was a malfunction which resulted in the dryer house being shut down. On the next night another problem caused a shutdown. After these two events, shift supervisor David Gatewood decided Grievant should undergo another week of training, June 3 through 8. Subsequently, Grievant resumed his work as Operator IV on the second shift. On July 14, there was a malfunction which ultimately resulted in fires in two dryers and a two-and-a-half day shutdown of the dryer house. On August 20, after investigation, the District issued Grievant a memo demoting him to Operator III and notifying him that he could not rebid to the position of Operator IV until May 1, 1992. 2/ In the memo, the District gave the following explanations for its action:

The safe and efficient operation of all equipment in the Dryer House/Filter House is our foremost concern. This is especially true where it concerns the operation of the dryers and their appurtenant equipment. The nature of this equipment in itself deems this operation as the most critical in the plant where the opportunity for a catastrophic emergency could arise.

To ensure that those opportunities for a catastrophic emergency are not allowed to occur, we need to ensure that the operators controlling those operations perform those duties necessary to ensure a safe and efficient workplace. When events dictate that these operational practices are not being met, it is our duty to identify them and take those steps necessary to eliminate or rectify the problem.

On several occasions (May 31, June 10, June 13, June 14), 3/ the dryers were run in a mode

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- 1/ All dates hereinafter refer to 1991, unless stated otherwise.
  - 2/ The District modified the original restrictive period which had been for a year from the date of the memo.
  - 3/ Above each of these June dates, the memo had the handwritten

conducive to a catastrophic occurrence happening. All indications are that the cause of those events was operator inefficiency. The May 31, 1991, date was addressed by assigning you to a retraining program as the Oper. IV DH Rear. The other occurrences were after you returned to your position as Oper. IV DH Rear, "C" Shift, from this retraining program.

All indications point out that additional retraining would not remedy the problem; that the problem lies not so much in the ability of your being able to operate the equipment, but in your ability to keep on top of the operational status of the equipment by proper inspection rounds and evaluation of the problem at hand.

[Hereafter follow four paragraphs describing the reassignment procedure.]

Grievant challenged that demotion, and the resulting unresolved grievance is the subject of this arbitration award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

**PART III**

**A. GRIEVANCE AND ARBITRATION PROCEDURE.**

. . .

3. Just Cause. Any employee in the bargaining unit who is reduced in status, suspended, removed, or discharged, shall have the right to file a grievance as to the just cause of such disciplinary action.

POSITIONS OF THE PARTIES

The Union

The Union argues that the supervisor was at the plant and was responsible for any mistakes made on July 14. Many factors which Grievant could not control, moisture and polymers in the material

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word, "July."

and the experience and co-operation of the other members of the crew, contributed to the problems. Finally, the Union points to several other instances when there have been fires or explosions, but no employe has been disciplined. The Union insists Grievant was demoted in order to shift blame after there were complaints from the public regarding the smoke from the plant. Finally, the Union asserts Grievant should be awarded interest on any backpay award.

### The District

The District emphasizes the gravity of the problems and dangers caused by the July 14 events. It notes that the only other time when the facility was closed for such a period of time was nearly 20 years ago when problems occurred during implementation of a new heating process. The District notes the extent of the economic cost of the events, but warns that the danger of explosion caused by the fire was even more grave. The District characterizes Grievant's attitude toward safety issues as "oblivious" and believes the fires were inevitable given his "casual" attitude toward dryer temperatures. The District discounts Grievant's explanations that problems were the consequence of the use of polymers in the filter cake, the inexperience of other shift members or Supervisor David Gatewood's negligence. As to interest on any backpay award, the District asserts that such interest is not provided for by contract.

In its reply brief, the District disputes the Union's contention that Grievant was a scapegoat for the negligence of the supervisor and further questions the reliability of Grievant's testimony.

### ADDITIONAL FACTS

The Operator IV DH [Dryer House] Rear is responsible for overseeing the dryer house operations that process the incoming wet material, the filter cake, turning it into finished dried pellets, Milorganite. The heat of the dryers is absolutely crucial; if there is too little heat, the filter cake will not dry properly, but if there is too much heat, fires can start, or in the worst case, the gasses and materials can explode. The Operator IV must adjust several elements to produce acceptable pellets and maintain a safe temperature: the total amount of filter cake available can be controlled by calling to the filter room; the amount of filter cake available to each of the ten dryers which is mixed with the already dried material in the dryers can be adjusted by an adjustment of the plow in front of the individual dryer; and the amount of heat that is delivered to the dryers can be adjusted. An adjustment to any of these elements or to any one of the ten dryers can require an adjustment

of the other elements. This interactive result occurs because the process is serpentine, that is, material coming out of one dryer is recycled into the succeeding dryers. Additionally, other elements, not under the direct control of the Operator IV can affect the heat, such as the moisture content of the filter cake arriving from the filter room or a mechanical breakdown of one of the conveyers or screws. Another factor not under the immediate control of the Operator IV is the occurrence of a "ball game." In a "ball game," the outsides of the overly large pellets dry hard, preventing the inside from drying and causing the temperatures of the dryers to soar.

In determining which adjustments need to be made, the Operator IV uses several indicators. He makes a visual and tactile inspection by holding in his hand some of the material exiting the rear of the dryers. He observes accumulated wet material on parts of the machinery. He reads the amp meter that shows how much electricity is being used to turn both the drum of the dryer and the conveyers delivering material to the dryer, and he monitors the temperature strip chart, which records the temperature of the gasses leaving the dryer.

On July 14, Grievant worked the second shift, starting at 2:30 p.m. At the start of the shift, the dryer house was running smoothly, but there was enough wetness in the material to cause concern to the Grievant. At approximately 5:00 p.m. a fire started in dryer no. 9. Grievant and Mike Gill attacked the fire.

When Shift Supervisor David Gatewood arrived at the dryer house, he assisted Gill while Grievant went to close the flue giving heat to the no. 9 dryer. The fire was extinguished, but the incline conveyer belt stopped and efforts were made to get it started. Next, inclines 3 and 4 stalled. At this point Gatewood directed that the plant should be stopped and the process should be started over. The dryers were then self-feeding, which means they were no longer receiving wet material. In this circumstance, the heat that would otherwise be consumed to dry the wet material is available to cause the temperature of the dryer to rise. The record is unclear at this point, but for whatever reason, the fireman did not receive a direction to cut all the heat on dryer no. 6. The gas heat had been taken out, but the waste heat was still going to the dryer. 4/ At this point dryer no. 6 started fire. The fires caused such a great quantity of smoke and gas leaving the smoke stack that the shape of the plumes was altered

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4/ The dryers receive heat from two sources: gas heat, and "waste heat" which is recycled from the work of the turbines at the utility. The District did not make any assertion that Grievant or anyone else negligently caused the delay in notifying the fireman.

and the District received telephone inquiries from the public, a television station and the fire department. Ultimately the fire was extinguished and the facility was shut down for two-and-a-half days. The economic cost included the loss of the material burned, the production lost during the shutdown, and the costs of returning the facility to production.

## DISCUSSION

### A. The Merits

The record clearly presents the picture of a serious problem on July 14. There was significant economic loss to the District, and the smoke emitted caused public dismay, dismay which could impact public acceptance of the facility. But much more important than either financial or public relations losses was the serious danger posed by the fire and potential explosion.

While the gravity of the situation must not in any way be minimized, it does not inevitably follow that the District has made its case that it had just cause to demote Grievant and bar him from rebidding for the position for nine-and-a-half months.

In approaching a discipline or demotion case, the arbitrator must first decide whether the grievant in fact committed the act or neglected a required action as alleged by the employer. In this case, however, the District does not make any specific allegation regarding Grievant's conduct. It does not claim that Grievant acted negligently on that afternoon. In fact, the August 20 memo (set forth above in the "ADDITIONAL FACTS" section, above) did not specify any error that he made, but only stated "operator inefficiency." In effect, the District is arguing that a problem occurred while Grievant was the bargaining unit member in charge of the dryer house and therefore he is responsible.

The generalized and unspecified nature of the District's complaints about Grievant was not changed by the evidence presented at hearing. Indeed, the evidence demonstrated the dryer house process is so multi-faceted that there can be no hard and fast rules such as "When event 'A' occurs you must do 'B'." Even the temperature strip charts which the District placed into evidence did not indicate any standard procedures which Grievant ignored. The strip charts and related testimony demonstrated that the temperatures reached July 14 were extremely dangerous. However, those high temperatures were more indicators that things that had already gone wrong than they were indicators that Grievant ignored, negligently or otherwise. Indeed, the highest and most dangerous temperatures were reached when the fires were occurring and as such were after-the-fact indicators.

There is no clear showing of exactly what elements contributed to the problems. Grievant believed that polymers had been added to the filter cake, making the processing more tricky than usual. The record, however, is insufficient to substantiate such a claim, but the undersigned credits the testimony that the incoming material was especially wet or sticky. Additional wetness occurs frequently, but is nonetheless a situation presenting more challenge to the Operator IV.

It is indeed possible that Grievant made errors in judgment that afternoon. The dryer house process, as described in the "ADDITIONAL FACTS" section, is complex, involving multiple interactions. The record is replete with testimony from both Union and District witnesses that the judgment required to make the necessary adjustments cannot be learned in a textbook and has to be learned over time and through experience. Michael Wegner, who has been an Operator IV DH Rear for approximately six years testified that it takes about a year "to figure out the ins and outs" of the job. The testimony of Operations Manager Richard Birner was that an operator's skill continues to increase over time. With additional experience, an operator becomes more sophisticated in recognizing subtle indications that can be discerned from such things as holding the material in the hand. Additional experience also increases an operator's skill at keeping the needs of all ten dryers in mind while making adjustments to a single dryer.

Against this background, the length of Grievant's experience becomes a crucial consideration: Grievant had worked by himself in that position approximately six weeks. Six weeks is a short time to be in a position demanding skill which takes approximately a year to acquire. An employe must act responsibly from the very first moment in a position, but acting responsibly is a different matter from being able to make all the judgment calls that only experience can teach. In this case, as noted above, the District does not charge that Grievant acted either irresponsibly or negligently.

In light of the lack of any specific allegations of either acts committed that Grievant should not have done, or acts that he should have done that he neglected to do and in light of Grievant's short tenure in the position, the undersigned concludes that the District did not have just cause to demote Grievant.

#### B. The Remedy

The Union requests interest on any backpay awarded. However, it does not point to any contractual provision for such interest, nor does the undersigned find any such provision. Likewise, the Union does not assert that any arbitrator interpreting the

parties' contract has awarded interest on backpay and the Union acknowledges that arbitrators generally have traditionally declined to award interest.

In support of its position, the Union cites cases issued by the Commission and the Wisconsin Courts in which pre-judgment interest was awarded. Those cases do not control the instant case for they interpret cases of statutory violations. In contrast, an arbitration proceeding is the forum for enforcing the parties' bilateral contract. Inasmuch as the undersigned is not convinced that the parties intended that remedies should include interest on backpay, she declines to order such interest in this case.

In light of the evidence, the arguments of the parties and the above discussion, it is the Arbitrator's

AWARD

1. The District did not have just cause to demote Grievant C.P. from Operator IV DH Rear to Operator III DH Rear and bar him from rebidding to the previous position until May 1, 1992.

2. The District shall reinstate Grievant to the Operator IV DH Rear and make him whole for all wages and benefits lost as a result of the District's contract violation.

Dated at Madison, Wisconsin this 21st day of December, 1993.

By Jane B. Buffett /s/  
Jane B. Buffett, Arbitrator