BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
SUPERIOR CITY EMPLOYEES UNION LOCAL 244, AFSCME, AFL-CIO	:	Case 118 No. 50865 MA-8411
and	:	
CITY OF SUPERIOR (DEPARTMENT OF PUBLIC WORKS)	:	

Appearances:

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Thomas N. Hayden, City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

The Employer and Union above are parties to a 1991-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve the pay classification grievance of George Gotelaere.

The undersigned was appointed and held a hearing on July 20, 1994 in Superior, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. By agreement of the parties, the record was kept open to permit telephone testimony of the grievant, then in hospital. Said testimony was received by telephone on August 23, 1994. No transcript was made, both parties filed briefs, and the record was closed on September 30, 1994.

Stipulated Issues:

Did the Employer violate the collective bargaining agreement and past practice when the City denied the grievant a new permanent classification for 1994?

The parties stipulated that if the answer to the above is in the affirmative, the Employer is to make the grievant whole for any and all lost wages and benefits and that the grievant is to be given the permanent classification of Heavy Equipment Operator effective January 1, 1994.

Relevant Contractual Provisions:

ARTICLE 5 - CLASSIFICATION

. . .

> 5.03 Regular seasonal, part-time and full-time employee will be fully classified for the entire year and will not receive less per hour when working in lower classifications. When working in higher classifications than his/her permanent or yearly rate, he/she will receive the pay attached to the higher classification. The exception to the requirements mentioned herein is stated in 5.06 below.
>
> 5.04 The permanent classification is based upon the one in which the employee spent the majority of his/her total manhours during the preceding calendar year.
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> 5.05 All employees hired after July 1, 1986, will not be covered by the permanent rate in 5.04. They shall be covered by the yearly rate in 5.03.
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> . . .

Discussion:

The facts are undisputed. The grievant is a long serving employe who has been employed by the City for 25 years. During 1993 he performed work in three classifications. He worked for 872.5 hours as a Heavy Equipment Operator; he worked for 697 hours as a Medium Equipment Operator; and he worked approximately 556 hours as a Light Equipment Operator. His "permanent status" for 1993 was Class 3501, which equates to Medium Equipment Operator. Under the terms of the parties' agreement, since the grievant was hired before 1986, he was paid at the contractual rates applicable to Class 3501 for the 556 hours he worked at a lower rate as well as the 697 hours actually worked at that rate.

For 1994, when the City calculated the permanent classification of employes subject to Article 5.03 of the collective bargaining agreement's terms, the Department placed the grievant at Class 3501 again. The grievant filed the grievance which lead to this proceeding, contending that the majority of his time was spent in Class 3601 and that should be his permanent rate for 1994.

Employe Bill Ross testified that a similar event had occurred to him in 1988. At that time, Ross testified, his classification for the following year was set at Class 8H (using a numbering system since modified in the parties' agreement). Ross testified that using the same calculation as the grievant used in his case, he had worked three different jobs, and the largest single amount of work was in the higher classification 9H. Ross stated that he did not file a grievance over this because he did not have to; he stated that he had convinced the office clerk in the department

and other people "in management" that they should recalculate the numbers in the way he had argued. Ross also testified that he had been a supervisor during the 1970's, and as a result of his knowledge that another employe had lost his classification as a Bulldozer Operator because of spending a good deal of time helping out the Employer by working as a Carpenter, Ross was in the habit of marking assignments to a lower job with an A on his time sheet whenever he was involuntarily assigned to a lower job, as opposed to bumping into it. The grievant also had marked his time cards in the same fashion. Ross also testified that there are other employes who may not have gotten the benefit of this interpretation of this language because they did not check on it or follow it up.

DPW Director Jeff Vito testified that in the City's view the majority of the grievant's hours were at the 3501 rate, not the 3601 rate, because "majority" means more than half.

In his testimony by telephone, the grievant testified that he "spent" the majority of his time at Class 3601, and that this is distinct from his being paid at the 3501 rate for work performed both in that classification and at classification 3401.

The Union contends that the rate of pay for work performed does not reflect the majority of time "spent" performing various work, and that the distinction is important because of the words used in Article 5.04. The Union points to the use of the word "spent" as indicating that the fact that the grievant was paid at the 3501 rate for more than half of his hours in 1993 does not disqualify him from the benefit of the language, because he spent more time at the 3601 rate than at any other rate. The Union further notes that in Bill Ross's case, the City agreed to the same argument and paid him accordingly.

The City contends that a majority means more than one-half, and that the grievant was paid at the 3501 rate for 1,253 hours but at the 3601 rate for only 872.5 hours. The City argues that for this reason the majority of the grievant's hours were accrued at the 3501 rate, and therefore the grievant is correctly assessed that rate as his permanent classification for the following year.

Upon review of the record, I conclude that even acknowledging that the Union may well be correct in arguing that the term "spent" should be read as a separate concept from the term "paid", that would not change the result in this particular case. While the City has the common and usual meaning of language on its side in arguing that "majority" means more than half, the term "majority" has been used loosely in enough circumstances that there is some point to the Union's argument, particularly because Bill Ross was able to secure payment at the higher of two rates in

similar circumstances. But the value of Ross's example is diluted by his testimony that other employes may not have been so fortunate or so persuasive with management. This suggests that the single example given by the Union should be treated with caution as evidence of a past practice, because there is inherent in that testimony a suggestion that other employes may have encountered a different practice which simply was not testified to in detail. Furthermore, many arbitrators have held that one example does not constitute a practice.

But more persuasive is the fact that even if "spent" is held to mean what it says, the grievant's time was not spent, to a majority level, at the 3601 rate. To conclude that in light of this language the grievant should receive the 3601 rate for having worked this combination of hours, but should receive a lower rate if he had worked all of his non-3601 hours at the 3501 rate, strains logic. It is clear that this clause is an attempt by the parties to have an employe's permanent rate reflect a fair assessment of his previous year's assignments. If I were to grant the grievance based on the Union's argument, the result would be that an employe who divided his time between a high rate, a medium rate and a low rate could, in circumstances like this, be entitled to a higher permanent classification than if all of his time were divided merely between the high and the medium rate of pay. In the terms of this specific case, it would mean that the grievant was entitled to a higher rate of pay for working 556 hours in the "lower" classification 3401 than if those 556 hours had been worked in the "medium" classification 3501. This is so contrary to the apparent purpose of this language that I must find this to be the overriding concern.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 29th day of November, 1994.

By Christopher Honeyman /s/

Christopher Honeyman, Arbitrator