BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 366, AFSCME, AFL-CIO,
DISTRICT COUNCIL 48

and

MILWAUKEE METROPOLITAN
SEWERAGE DISTRICT

Case 286
No. 52526
MA-9012

Appearances:

Podell, Ugent, Haney & Delery, S.C., Attorneys at Law, by Mr. Alvin R. Ugent, on behalf of Local 366, AFSCME, AFL-CIO.

Mr. Donald L. Schriefer, Senior Staff Attorney, on behalf of the Milwaukee Metropolitan Sewerage District.

ARBITRATION AWARD

Local 366, AFSCME, AFL-CIO, District Council 48, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Milwaukee Metropolitan Sewerage District, hereinafter the Employer, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The Employer subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on December 20, 1995, in Milwaukee, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by February 13, 1996. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues and agreed that the Arbitrator would frame the issues to be decided.

1/ The parties mutually waived the time limit in the Agreement for the issuance of an award.

The Union would state the issues as follows:

> *Whether the Employer violated the labor agreement by forcing the grievants to take training and perform the job of Centrifuge Operator, against their wishes?*

The Employer would state the issues as being:

> *Did the Employer violate the labor agreement when it temporarily assigned the grievant to the Centrifuge Operator position? If so, what remedy?*

The Arbitrator frames the issue to be decided as follows:

> *Did the Employer violate the parties' Labor Agreement when it assigned the Grievants to the position of Centrifuge Operator for purposes of training and to perform fill-in work? If so, what is the appropriate remedy?*

CONTRACT PROVISIONS

The following provisions of the parties' 1992-1995 Agreement are cited:

PART II

A. RECOGNITION.

1. The District hereby recognizes the Union as the exclusive collective bargaining agent for the appropriate certified bargaining units. . .The Union recognizes its responsibility to cooperate with the District to assure maximum services at minimum cost to the public consonant with its obligations to the employes it represents.

. . .

C. MANAGEMENT RIGHTS.

1. Except as otherwise specifically provided herein, the management of the plant and direction of the work force, including but not limited to the right of hire, the right to discipline or discharge for proper cause, the right to decide employee

qualifications, the right to lay off for lack of work or other reasons, the right to discontinue jobs, the right to make reasonable work rules and regulations governing conduct and safety, the right to determine the methods, processes and means of operation are vested exclusively in the employer. The employer in exercising these functions will not discriminate against any employee because of his or her membership in the Union. . .

. . .

PART III

B. FINAL AND BINDING ARBITRATION.

Arbitration may be resorted to only when issues arise between the parties hereto with reference to interpretation, application or enforcement of provisions of this Agreement, except, however, that the following subjects shall not be submitted nor subject to either advisory or binding arbitration:

. . .

The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator shall have no authority to grant wage increases or wage decreases.

The arbitrator shall expressly confine himself/herself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him/her or to submit observations or declarations of opinion which are not directly essential in reaching the determination.

. . .

SCHEDULE A

. . .

Q. MISCELLANEOUS PAY PROVISIONS.

1. Temporary Assignments. The District reserves the right to temporarily assign employees to another classification or position. Employees temporarily assigned shall receive either the first year wage rate of the position in which assigned or his/her permanent assignment rate, whichever is greater.

. . .

SECTION II

A. Unless otherwise provided and for other than entrance positions, the District, when filling a regular full-time position with a regular appointment, shall select among qualified applicants according to the following procedure:

. . .

11. If the employee is interested and at the discretion of management, an employee may be assigned for training to another classification or job. During such training, the employee will be paid at the wage rate of the employee's regular assignment.

. . .

BACKGROUND

The Employer maintains and operates a number of integrated sewerage treatment facilities in the Milwaukee metropolitan area. The Union is the exclusive collective bargaining representative for the employes in a number of bargaining units, including the bargaining unit containing the Grievants' classification, Field Technician.

At the time this grievance arose in 1994, both Grievants, Brian Champagne and George Rogers, held the position of Field Technician and had been in that position since 1988 and 1985, respectively. Both were employed at the Employer's South Shore facility. The Field Technicians contact farmers in the area to sell them liquified sludge from South Shore as fertilizer, do the preliminary work, monitor application of the sludge samples to be sent to a lab for an analysis of nutrient needs, soil acidity, etc., and take well water samples. There is less work for the Field Technicians during the winter and early spring months, and during that time they fill out paperwork from the Department of Natural Resources, review the prior year's applications, and take well water samples from the customer farms and some of their neighbors.

In 1993, the Employer eliminated the second shift Centrifuge Treatment Plant Operator

(TPO) position and a number of Special Utility positions (which provided relief on the centrifuge) and the remaining Special Utility Operator was assigned elsewhere. In February of 1994, the Operations Manager at South Shore sent the Employer's Human Resources Manager the following memorandum:

> February 11, 1994
>
> TO: Jim Johnson, Acting Manager - Human Resources
>
> FROM: Joe Grinker, Operations Manager - South Shore
>
> CC: H. Dedinsky, P. Schlecht
>
> SUBJECT: Temporary Assignment of Local 366 Personnel
>
> The purpose of this memo is to bring to your attention an upcoming anticipated retirement and the impact it will cause with respect to the needs for centrifuge thickening of sludge (s).
>
> Mr. Gordon Ceskowske (first shift centrifuge TPO) has verbally stated that he intends to retire abut (sic) mid-1994. Until he formally makes that decision, all we can do as Management is anticipate it to occur and review its impact on continued operations. His vacancy should be filled with John Mueller in a straight-forward move.
>
> The concern we have, is that since the second shift position in the centrifuge was eliminated, not all coverage for continued operation was accomplished with overtime by the only two operators available. John Mueller was used for more than 300 hours during the last nine months of 1993 as a centrifuge TPO to cover vacations and periods where the other two TPO's were unavailable or turned down overtime.
>
> With the elimination of the lagoons in December, 1993, the need for centrifuge operation will increase because the past option of pumping digested sludge to the lagoon, when necessary, is no longer available.
>
> In 1995, it is my intention to request a new special utility position to provide vacation coverage for both the centrifuge TPO and the yet-to-be negotiated plate and frame (P/F) press TPO's. No final

decision on exactly how and when the P/F press TPO positions will be filled is likely before the success of the WEPCO, polymer thickened filter cake agreement is known.

Vacation requests, this summer, by either Reed Schultz (third shift C/F TPO) or John Mueller after Mr. Ceskowske's retirement, will result in one (1) operator to cover any centrifuge thickening needs. We propose to temporarily assign the field techs to the centrifuge building for training between March 1 and the beginning of the spring Agri-Life season. The training will not be continuous, but coordinated to allow essential off-season duties for Agri-Life to be carried out.

The justification for training all three (3) field techs for centrifuge operation is, that it will provide the greatest flexibility for coverage until some of the uncertainties of associated solids handling alternatives are determined. The uncertainties that could ultimately result in a significant change in the need to process more solids at South Shore than is occurring presently, include:

- Unknown fate of inline solids generation and method of handling
- Success of Jones Island's drying and dewatering startup
- The Milorganite inventory buildup and its marketability - in conjunction with the WEPCO project.

Illness or injury to either of the two (2) trained C/F TPO's or a relatively quick decision to process more solids at South Shore for one of the above reasons could leave us in a high risk situation with regard to centrifuge thickening needs.

Please review this request and advise Local 366 officials in advance of this temporary classification change. It is essential that John Mueller is informed that training the field techs for backup C/F operation in no way affects his move to the vacancy that will result when Gordon Ceskowske retires.

In March of 1994, the Grievants were first assigned to plate and frame and then assigned to the centrifuge operation. Both Grievants indicated to management that they did not wish to be assigned to, or trained for, the Centrifuge Operator position, but were placed in the assignment

regardless of their wishes.

The training in the Centrifuge Operator position spanned several months, but was not continuous during that time. The Grievants alternated doing their Field Technician work in the fields and being trained on the centrifuge; working a week in the one job and the next week on the other, and were also assigned on the centrifuge if it was raining and they could not work in the field. There was always the Centrifuge Operator, or a management person (Engineer), present when they were assigned to the centrifuge. In August of 1994, the Grievants filled in on the centrifuge for two weeks and there was an Engineer present with them every day. The Grievants have not been assigned to the centrifuge since that time. The Grievants received their Field Technician pay rate during the period they were assigned to the centrifuge operation, which rate is higher than that of Centrifuge TPO.

The Union filed a grievance on behalf of Champagne and Rogers on March 17, 1994 regarding their being assigned to the centrifuge against their wishes and also alleging that management was performing Field Technician work in their absence. The grievance was denied by the Employer on the basis of its claimed right to temporarily assign employes to another classification. The Employer responded to the claim of management doing unit work by noting there were no claimed specific instances and by stating that it seemed the Grievants wanted assurances it would not occur. Management continued to assert its claimed right to temporarily assign employes at all of the steps of the grievance procedure. The parties were unable to resolve their dispute, and proceeded to arbitrate the grievance before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the Employer assigned the Grievants to a different classification and required them to receive training against their will, rather than temporarily assigning them to the position for fill-in purposes, as the Employer now claims. The Union asserts that Section II, A, 11 of the Agreement controls in this situation and was violated by the Employer's actions. Both Grievants were working as Field Technicians and were not interested in becoming Centrifuge Operators, nor were they interested in having training for that classification. Instead, they were involuntarily forced to take the training and work as Centrifuge Operators in violation of the Agreement.

The Union asserts that the Employer is now arguing that it never intended to reassign the Grievants to new jobs, but instead was making "temporary assignments" for "fill-in purposes". That argument is, at best, a weak attempt to explain the Employer's attempt to get around the Agreement. The temporary assignment language in the Agreement only applies to "temporary assignments", which was not the situation in this case. Neither of the Grievants had ever worked as Centrifuge Operators before the time they were assigned to the job and both testified that the

Centrifuge Operator job required a great deal of training. After both had been assigned to the Centrifuge Operator position for several months, neither yet felt that they were qualified to do the job. Grievant Champagne testified that he was never told that the assignment was temporary, nor was he ever given a date when he would be off of that job. The Field Technician job has never been considered a seasonal or part-time job. If there was no work for a Field Technician, the person or persons in that job would be subject to lay off pursuant to the layoff language in the Agreement, and the temporary assignment language would not apply.

The Union cites the testimony of Union President Salvatore Serio, who has been employed by the Employer for 24 years, that the Grievants could not be considered "fill-in" employes because fill-in work is done by the job of Special Utility. The person in the Special Utility position is already trained to fill in and knows the job. Serio also testified that temporary assignments are to jobs that the employe is already able to perform or to jobs that require very little training. The Union also asserts that the Special Utility job has "relief responsibilities", while Field Technician has no relief responsibilities listed in the job description for that position.

The Union concludes that if there was not enough work for the Field Technicians, employes in that job would be subject to lay off, not temporary assignment, in which case the employe could exercise his/her bumping rights. The language of Section II, A, subsection 11 of the Agreement, protects the interests of both parties in that the employe has to be interested in the new job, and management is able to exercise its discretion as to whether it will provide that training. The Employer is now attempting to exercise absolute discretion and take away any right of the employe to refuse the work assignment. The temporary assignment language of the Agreement upon which the Employer relies does not apply in this case, as temporary assignments are only to jobs that employes are already trained to perform, or to jobs that require little training. The Union requests that the grievance be sustained, and that the Employer be ordered to make the Grievants whole for any loss of income, wages and/or other benefits.

Employer

The Employer takes the position that it did not violate the Agreement, but merely exercised its right under the Agreement to temporarily assign the Grievants to the Centrifuge Operator classification. The Employer asserts that the parties' Agreement recognizes that efficiency of operations is of importance to a public sector enterprise and that the Union expressly acknowledges this in the recognition clause, which states, in relevant part:

> The Union recognizes its responsibility to cooperate with the District to assure maximum services at minimum cost to the public consonant with its obligations to the employees it represents.

Schedule A, Subsection Q, 1, Temporary Assignments, facilitates efficiency and states, in relevant part:

> The District reserves the right to temporarily assign employees to another classification or position. Employees temporarily assigned shall receive either the first year wage rate of the position in which assigned or his/her permanent assignment rate, whichever is greater.

This provision expressly authorizes the Employer to temporarily assign an employe to another classification with no limitations relevant to this case.

In this case, the temporary assignment of the Grievants lasted at a maximum of three and a half months, and was contemplated as a temporary assignment from the outset. The purpose of the temporary assignment was to ensure that Centrifuge Operator coverage was available during a period in mid-1994 when the possibility of certain contingencies occurring, alone or in combination, could have left the Employer understaffed with respect to Centrifuge Operators. The Grievants are Field Technicians and perform work that is seasonal in nature in that there are busy and slack periods. They were temporarily assigned to the Centrifuge Operator classification coincidental with a slack period during which they could be spared. The Grievants received their higher Field Technician rate during the period they were temporarily assigned in accord with the "Temporary Assignments" provision, which is the only condition that provision imposes. The temporary assignment was logical from an efficiency standpoint, was plainly temporary, which fact was communicated from the outset, and the Grievants continued to receive their higher regular wage rates during the assignment. The instant grievance is contrary to the Union's responsibility for cooperating with the Employer to ensure efficient operations and is contradicted by the plain language of the temporary assignments provision.

The Employer asserts that the Union's reliance upon Section II, A, Subsection 11 is misplaced. That provision is irrelevant and is one of 12 subsections that address the procedure for filling regular, full-time positions with permanent employes, and has nothing to do with temporary assignments. Subsection 11 merely provides an alternative method for filling a regular, full-time position with a regular appointment, and only would come into play if no qualified bargaining unit employe applied for the position and there was an unqualified employe interested in the job. It provides an alternative to recruiting from the outside where an available employe wishes to move permanently into the position and the District is agreeable to the placement. The Union takes the language of Subsection 11 out of context and asserts that because the Grievants in this case were not "interested" in being trained as Centrifuge Operators, they could not be temporarily assigned to the position. However, neither Grievant was selected as a "regular appointment" to fill a "regular, full-time position", the only circumstances to which Section II, A, paragraphs 1-12 relate. Only if the Grievants were being selected to fill the Centrifuge Operator classification on a permanent basis, would their interest in the position be required. In this case, the Grievants were only being temporarily assigned to another classification. The "Temporary Assignment" provision does not limit the authority to temporarily assign employes to another classification only if they are

interested. The value of that provision would be seriously undercut, and the Employer's ability to provide coverage in emergencies or to respond to exigent circumstances would be severely hampered, if its authority was limited to only those instances where the employe was interested in the assignment. If the parties intended that employe interest would have any relevance in the context of temporary assignments, they would have expressly referenced such in that provision.

The Employer also asserts that the Union did not raise the issue of the Field Technician job description during the processing of the grievance, but only raised that point at the hearing. While the Field Technician job description indicates "none" in the section captioned "relief responsibilities", that reference in the job descriptions is to indicate whether employes in a given classification have relief responsibilities for any specific positions as a regular, recurrent, integral part of their standard job duties, i.e., as a function covered by the wage rate for their classification. If no relief responsibilities are indicated in the job description, this does not imply that employes in that classification are somehow exempt from being temporarily assigned out of their classification pursuant to the Temporary Assignments provision in the Agreement. To create such an exemption, the job description would have to indicate that incumbents could not be temporarily assigned to another classification, but the job descriptions, including the Field Technician job description does not so indicate. The temporary assignments provision allows the Employer to assign an employe out of his/her existing classification, on a temporary basis, regardless of the particular job duties of that classification. When an employe is temporarily assigned to another classification, it is the job description for that classification which applies during the period of the temporary assignment.

With regard to the allegation that management personnel were performing the Grievants' work during the period of the temporary assignment, the Employer asserts that issue was initially raised in the grievance, but was resolved when the Grievants could only cite instances that occurred long before their temporary assignment, and which had already been resolved by the parties. There were no specific instances cited that occurred during the period of the temporary assignment, and the Union dropped that allegation from the grievance in their appeal from the Employer's second step and third step responses to the grievance. While the Union attempted to resurrect the issue at the arbitration, Grievant Champagne could only cite an instance where the Field Technician Supervisor, Tony Gell, "dipped into the operational storage tanks." It appeared that Champagne was again referring to an instance that had already been grieved and resolved by the parties the year before. Further, Gell testified that the District's DNR permit requires him to go out with a Field Technician for monthly samplings, and that management officials will occasionally check the sludge quality to see whether it appears suitable for field application. That does not constitute unit work and is unrelated to "priority" sampling performed by Field Technicians. Grievant Rogers testified that he thought that Gell had done some paperwork while he and Champagne were temporarily assigned to the Centrifuge Operator position, stating he believed he had seen Gell's handwriting on the documents, but also testified that much of the work is computerized and not handwritten. Gell testified that the only work he did with respect to DNR permits during that period was his own reporting work. Thus, the Union's claims that Gell did

unit work during this period are ambiguous, unspecific as to time and place and lack any supporting documentation, and are denied by Gell. As indicated during the grievance steps, the main fear of the Grievants were that management might do unit work during the period of the temporary assignment and that did not occur.

DISCUSSION

The evidence indicates that, contrary to the Union's claim, the assignment of the Grievants to the Centrifuge Operator classification was intended from the outset to be temporary. Grinker's memorandum of February 11, 1994 proposing the assignment of Field Technicians to the centrifuge operation for training indicated it would be "between March 1 and the beginning of the spring Agri-Life season", and that such training would not be continuous. The evidence indicates that is, in fact, what occurred. Although Champagne testified that he was not given a date when the assignment to the centrifuge would end, the Employer's responses during the processing of the grievance, beginning with its March 23, 1994 response, was that they were temporarily assigned pursuant to Schedule A, Subsection Q, 1, of the Agreement. Neither Champagne nor Rogers was assigned to the centrifuge for either training or work after August of 1994. Thus, the assignment of the Grievants to the Centrifuge Operator position was temporary in nature.

The Union asserts that the assignment of the Grievants to the Centrifuge Operator classification violated Section II, A, 11, of the Agreement, and was not a "temporary assignment" authorized by Schedule A, Subsection Q, 1, since employes have only been temporarily assigned in the past to jobs they were already able to perform or which required very little training to perform, unlike this situation. There are two problems with the Union's argument. First, Section II, A, of the Agreement, and its subsections, apply to "filling a regular full-time position with a regular appointment" and provide procedures for filling a "regular full-time position". It was not demonstrated that there was a regular full-time position open or that the Employer was filling such a position on a permanent basis, or trying to train the Grievants for that purpose. Therefore, Section II, A, including subsection 11, which requires employe interest in the training, has no application in this situation. Secondly, Schedule A, Subsection Q, 1, of the Agreement, contains no express limitation requiring that the Employer only temporarily assign an employe to a job he is already able to perform or which he can perform with little training. The Union's interpretation creates a restriction that is not expressed in the wording of the provision and which would not allow the Employer to take steps in advance to meet a possible temporary contingency, i.e., it would not permit the Employer to temporarily assign an employe to another classification for training purposes so that the employe would be able to perform the job on a temporary basis when and if the contingency arose. The Union also argues that Subsection Q, 1, did not authorize the Employer's actions since those actions were not consistent with the past practice regarding temporary assignments. Union President Salvatore Serio's testimony was that temporary assignments have been for "long-term positions", e.g., where the employe regularly holding the position is out for an extended period of time and an employe is temporarily assigned to the position for that period of time, and that being assigned for a day or a half-day at a time is "out of

the ordinary". Serio also testified that "Generally, when you're temporarily assigned on a position, it's something you should be able to learn within a relatively short period of time." That testimony is not sufficient to establish the existence of a mutually-intended, binding practice restricting the Employer's right to make a temporary assignment for training purposes or to preclude such assignments on a short-term, non-continuous basis. Even if a practice is established, where, as here, the alleged practice involves basic management functions (direction of the work force, assignment of work), arbitrators have frequently recognized wide management authority in those areas, including the right to make changes in the manner it exercises that authority, as long as those changes do not violate employes' rights under the written agreement. 2/

It appears that much of the dissatisfaction with the Employer's actions is due to the fact that the contingency, for which the Employer was attempting to prepare, was created in part by the Employer's earlier decisions to eliminate the second shift Centrifuge Operator position and two Special Utility positions. The Grievants' and the Union's frustration over their being involuntarily assigned to the centrifuge operation to meet the staffing shortfall the Employer helped create is understandable. However, mistakes are made and the unexpected sometimes happens, and management is not precluded from exercising its right to cover temporary staffing needs pursuant to Section Q, 1 of the Agreement, because it failed to accurately predict those staffing needs or other factors that affect its operations. There has not been a showing that the Employer was acting in bad faith or was in some fashion attempting to avoid filling a regular full-time position that existed at the time. It must also be remembered that the Grievants were only assigned to actually work, as opposed to train, in the Centrifuge Operator position for the two weeks in August of 1994 and were not required to provide relief in that position on a regular or continuous basis.

To the extent the Union maintains the allegation that management performed the Grievant's work while they were temporarily assigned to the centrifuge operation, the evidence was not sufficient to support a finding in that regard.

For the foregoing reasons, it is concluded that the Employer did not violate the parties' Agreement when it temporarily assigned the Grievants to the Centrifuge Operator position for training purposes and for the two weeks in August that they were assigned to fill-in in that position.

Based on the above, the evidence, and the arguments of the parties, the undersigned makes and issues the following

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2/ See, Elkouri and Elkouri, How Arbitration Works, (Fourth Ed.), pp. 440-446, and the discussion therein.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 26th day of July, 1996.

By David E. Shaw /s/
David E. Shaw, Arbitrator