

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 569-A, AFSCME, AFL-CIO

and

CITY OF MAUSTON

Case 46  
No. 53638  
MA-9404

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,  
appearing on behalf of the Union.

Mr. Peter L. Albrecht, Godfrey & Kahn, S.C., Attorneys at Law, appearing on behalf of  
the City.

ARBITRATION AWARD

The Union and the City named above jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned arbitrator to resolve a dispute involving the transfer of Bob Guist. A hearing was held on June 4, 1996, in Mauston, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by January 23, 1997.

ISSUE:

The parties ask:

Did the Employer violate the collective bargaining agreement when it transferred Bob Guist from the Water Division to the Street Division? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE II - MANAGEMENT RIGHTS

Section 1 - Management Rights: Except as expressly and precisely provided in this Agreement, the management of the City and the direction of the working force shall remain vested exclusively in the City. Such management and direction shall include all rights inherent in the authority of the City, including

among others, rights to hire, recall, transfer, promote and to relieve employees from duty because of lack of work or for any other reason.

. . .

#### ARTICLE VI - SENIORITY

. . .

Section 3 - New Job or Job Vacancies: Whenever a new job is to be filled or a vacancy occurs, it shall be posted for a period of seven (7) calendar days on the bulletin board of the department. The posting shall contain the title of the position, duties, and wage rates. Each employee interested in applying for the job shall sign the posting. The most senior qualified applicant shall be selected to fill the vacancy.

. . .

#### ARTICLE XII - OVERTIME AND CALL-IN

. . .

Section 2 - Call in: . . . Call-in shall be by seniority within a division before employees of other divisions or departments are contacted and then shall be by seniority and based on qualification to perform the work.

#### BACKGROUND:

This grievance is brought as a class action and complains of a transfer of an employee from the Water Division to the Street Division, both divisions within the Public Works Department. The employee transferred was Robert Guist, who started working for the City in April of 1978.

The Public Works Department is made up of three divisions -- the Water, Streets and Sewer. As of January 31, 1995, there were six employees in the Street Division, two in the Water Division and one in the Sewer Division. As of February 1, 1995, after the transfer of Guist, there were seven employees in the Street Division, one in the Water Division and one in the Sewer Division. The City laid off an employee, Harlan Bader, in November of 1994 from the Street Division for lack of work and department-wide budgetary reasons. Bader was less senior than any employee in the Public Works Department.

Most of the opportunity for overtime happens in the winter for snow removal jobs. Street Division employees are called in before the Water or Sewer Division employees. After all the Street Division employees have been called, then employees in other divisions are called in by seniority for overtime. Before Guist was transferred to the Street Division, David Bosgraaf would have been called in for overtime before Guist, once the list in the Street Division had been exhausted. John Nicksic in the Sewer Division would have been called next, since he also had

more seniority than Guist. Guist would have been the last person in the Department to be called for overtime.

Bosgraaf had been an employee since June of 1977 and worked in the Water Division of the Public Works Department since he started. He is also the Vice-President of the Union. Bosgraaf has more seniority than Guist. Bosgraaf is called an operator, Guist is a laborer, and the operator position pays about a dollar an hour more than the laborer position.

Before the City transferred Guist, Bosgraaf and his supervisors got into it over the call ins for overtime. According to Bosgraaf, the City Crew Foreman, Lee Anderson, told Bosgraaf that the Public Works Director, Pat Geisendorfer, did not want to call Bosgraaf and Nicksic in for overtime because he wanted them there during the normal work shift. Bosgraaf told Anderson that it made no difference whether Anderson or Geisendorfer wanted them called or not because the City would have to follow seniority. Shortly after that conversation, Guist was called in for snow removal, and Bosgraaf told Anderson that he was going to file a grievance because the City violated the seniority provision in the labor contract. According to Bosgraaf, Anderson said that if Bosgraaf filed a grievance, Guist would be transferred to the Street Division and Bosgraaf would not be called in before Guist. Bosgraaf filed the grievance anyway.

On January 17, 1995, the City Administrator, Devin Willi, sent a memorandum to Guist stating:

This is to inform you that effective February 1, 1995, you will be transferred from the Water Division of the Public Works Department to the Street Division of the Public Works Department.

The authority for the City of Mauston to transfer employees is granted under Section 1 of Article II of the collective bargaining agreement between the City of Mauston and the Mauston City Employees Union.

Your new classification will be Laborer-Street Division. This transfer will not effect your wages or benefits in any way.

If you have any questions, please contact Pat Geisendorfer or myself.

The City did not post a position for the Street Division. Willi stated that the job was not posted because there was no new position within the bargaining unit, and it was simply a transfer between divisions within the Department.

Guist originally started working with the City by working on the CETA crew, when he worked painting signs and street signs. Then he was absorbed into regular City employment and

worked at the Water Division. He and Bosgraaf have worked together at the Water Utility for more than 15 years, with Bosgraaf serving as the lead operator. Most of the time, the two worked together, although they would occasionally work alone. Both of them would also work in the Street Division occasionally.

After Guist was transferred to the Street Division, Bosgraaf was still aware of what Guist was doing, since it's a small group of employees working out of the same building. Bosgraaf was aware if Guist was changing water meters or reading meters or working on paperwork in the Water Division. Anderson gives the orders for the day, and when Bosgraaf arrives about a half an hour later, Anderson usually tells him who is working on what so that he could reach someone if necessary.

Bosgraaf estimated that Guist has spent 85 to 90 percent of his time performing work for the Water Division after he was transferred to the Street Division, as opposed to 95 percent of his time in Water before the transfer. Guist still changes meters, tests meters, reads meters, works on water service or water mains. When he hauls gravel or sand, he is considered to be working for the Street Division.

Willi has been the City Administrator since August of 1994. He stated that when Guist was transferred, the City was doing some long range planning and Geisendorfer felt some shifts within the Department would be appropriate. In April of 1995, Geisendorfer came to the Public Works Committee of the Common Council to talk about having the meter system automated. Currently, the meters still have to be read and the numbers written down, but the City plans on going to a completely automated system where readings will come on line in a computer when a disc is put into it. Once the change is made, the amount of labor involved in meter readings will be reduced. The City wanted to spread the cost out over a couple of years and needed to upgrade its computer system at the same time.

Willi said that this plan to have meters read automatically was a major consideration in switching personnel between divisions, because once the change was completed, there would be less work to do in the Water Division. However, the change over went slower than the City anticipated. The City had to buy new computer hardware and software and had not yet been trained on it. The Public Works Committee decided to spread the costs out over two budget cycles.

Part of Guist's work in the Water Division is to put the hardware in for the new system to change over the meters. Willi reviewed Guist's time cards and estimated that before the transfer, Guist worked almost exclusively in the Water Division. After the transfer, he worked between 50 and 60 percent of the time in the Water Division. Also, starting in 1995, the time cards had a different coding system. Before 1995, employees wrote down their duties on their time cards.

## THE PARTIES' POSITIONS:

### The Union:

The Union argues that Guist was not truly transferred out of the Water Division, since Guist still works the majority of his hours in the Water Division. Bosgraaf estimated that Guist worked in the Water Division about 95 percent of the time, and Willi calculated that Guist worked in the Water Division about 60 percent of the time. However, Willi overstated the hours worked outside the Water Division because he included all of Guist's paid time off as having been worked outside the Water Division, instead of comparing the number of hours worked in the Water Division as a percentage of all hours worked.

The Union has calculated his hours as follows: Guist receives four weeks of vacation and ten paid holidays. Therefore, each year, 240 hours are paid time off and should not be considered non-water hours. The proper calculation – the percent of work in the Water Division to total time worked – shows that Guist is still spending 65.7 percent or 2/3 of his time in the Water Division. It is difficult to assess how much Guist worked in the Water Division before his transfer, but Bosgraaf's estimate is around 85 percent. The Union concludes that while the City may be using Guist a bit more outside the Water Division after the transfer, it is clear that he is still primarily a Water Division employee and no transfer has occurred.

While the City asserts that it has the right to unilaterally transfer an employee, that right eviscerates seniority provisions of the labor agreement, and arbitrators traditionally give greater weight to arguments based on specific contract language as opposed to arguments based on general statements of rights. Arbitrators also avoid contract interpretations that render provisions in the contract as surplusage. The "right" referred to by the City is the general statement of management rights. On the other hand, there are specific contract provisions at issue here.

Employees obtain positions pursuant to Article VI, Section 3, which calls for a posting period when a new job is to be filled or a vacancy occurs. Although the City has argued that no vacancies existed at the time, it ignores the fact that employees obtain their positions pursuant to a posting. If the employer has the right to unilaterally transfer employees after they have exercised their seniority rights to obtain those positions, the right of employees to exercise their rights to post for them, with the most senior qualified applicant to be selected, is a hollow right. After all, the Union asks, what good is it to obtain a position by seniority if one has no way to maintain that position?

The Union acknowledges that an employee does not have an unfettered right to maintain a position forever. There are layoff provisions in the labor agreement, and if the City felt that there was no longer work for the Water Division Laborer position, it could lay off the employee, subject to Article VI, Section 4 and the bumping rights available. If the City had posted the vacant position in the Street Department instead of transferring Guist into it, more senior employees

would have had the chance to bid on the position, and the City's action has denied

them that opportunity. Where the City created a position without posting it and eliminated a position without affording the employee any rights, the City violated the contract. The act of transferring an employee inherently undermines the job posting provisions of the contract.

The Union submits that the transfer was motivated by a desire to undermine rights under the labor contract. When Bosgraaf complained to Anderson that he was not called in for snow removal when Guist was, Anderson told him that if he filed a grievance, Guist would be transferred to the Street Department. Bosgraaf filed the grievance and Guist was transferred. While there may be a legitimate interest in having Bosgraaf and Nicksic work their regular shifts during the normal business day, that interest does not supersede the rights employees have under the agreement.

The transfer infringed on the rights of other employees, the Union argues, noting that by moving Guist out of Water, the City moved Guist ahead of Bosgraaf and Nicksic for overtime work in the Street Department. Guist now gets called ahead of Bosgraaf and Nicksic for overtime, even though he has less seniority than they have.

The City has argued that it has the absolute right to assign employees to work anywhere with the Department of Public Works in any division on a work needed basis. Of course the City can make such assignments and transfer employees temporarily to fill in as needed. This transfer was not just a temporary work assignment – it was a permanent transfer with a new position created in one division and a position eliminated in another division. While the City may have had legitimate business reasons for this, it was premature at best and retaliatory at worst. The truth maybe lies somewhere in-between? The City does not believe that the posting procedure applies when it keeps the same body count in the bargaining unit. But the posting procedure applies to any new position, and it can hardly be argued that the additional position in the Street Division was not a new position.

#### The City:

The City submits that a legitimate transfer did indeed occur. Guist's transfer was motivated by an anticipated decline in work in the Water Division. A substantial portion of his job was reading meters, and the City was anticipating converting to an automated meter reading system which would reduce the man hours in the Water Division. The conversion to automated meter reading proceeded more slowly than anticipated, and therefore, even after Guist was transferred to the Street Division, there was work that needed to be done in the Water Division. While the Union makes much ado about Guist working 50 to 60 percent of his time in the Water Division after his transfer, it is much ado about nothing. Those figures simply underscore the evidence that the transition to automated meter reading went more slowly than anticipated and

there was still work which needed to be done in the Water Division after Guist was transferred. At the time the City made its decision to transfer Guist, it did not anticipate that such a great amount of work would remain in the Water Division.

Whether or not the Union thinks the situation could have been handled differently, the issue is whether the bargaining agreement has been violated. Under the express terms of that agreement, the City has the absolute right to assign employees to work anywhere within the Department of Public Works in any division on a work needed-employee available basis. Even Bosgraaf recognized this and admitted that it makes no difference what he does, as long as he gets paid for it. The manner in which the City employed Guist after the transfer did not violate the labor contract. The issue is not whether the City had the right to continue to use Guist in the Water Division after the transfer, but whether it had the right to transfer him in the first place.

The City points out that the contract language giving it the right to transfer employees is clear and unambiguous and need not be further defined or expounded upon, as the Union has suggested. The fact that this right is in the management rights clause does not lessen the right, unless limited by specific language elsewhere in the contract. There is no other language that limits the City's right to transfer employees. If the Union wanted the posting procedure to apply to transfers, it should have negotiated such language into the job posting provisions, as this Union has done with other collective bargaining agreements. The posting only applies for filling a new job or a vacancy. No new job was created, no vacancy existed, and the number of employees in the department remained the same before and after the transfer. The Union's position would lead to the absurd result that the City never would be able to transfer employees.

The City objects to the Union's inference that the transfer was done for improper or retaliatory reasons. The Union asserted that the transfer was in retaliation for Bosgraaf's complaint that he was not called in for overtime snow removal work. Employees in the Street Division are the first to be called in for snow removal, and if additional employees are needed, call-in is done by seniority within the Department. Bosgraaf has been called in frequently for snow removal overtime, and he earns about \$1.00/hour more than Guist. From a financial standpoint, it makes more sense to have Guist perform the overtime rather than Bosgraaf. If Bosgraaf believed that Guist's transfer was in retaliation for his having filed a grievance, he could have filed a prohibited practice.

#### The Union's Reply:

The Union states that the City has misstated the Union's claim. The Union has not claimed that the City has no right to transfer, but that it does not have an unfettered right to transfer, and that no true transfer has actually taken place. The City admits that the anticipated changes in work in the Water Department did not take place. Thus, at the time the transfer took place, no real change in Guist's work took place and no real transfer took place.

The Union also contends that the City overstates its right to assign employees to work anywhere within the Department of Public Works, in any division on a work-needed-employee-available basis. The right to assign employees to work as needed does not give the City the right to permanently assign employees to work outside their normal assignments. The City could not regularly assign Bosgraaf to work in the Street Division while Street Division Operator Torkelson is regularly assigned to operate the Water plant. That would elevate the City's right to assign employees to a status superior to the seniority rights of employees specifically spelled out in the labor contract. In the same token, the City's transfer of Guist to the Street Division is an effort to elevate the transfer rights of the City above the seniority rights of Guist and Bosgraaf. The violation of the labor contract does not occur when the City assigns Guist occasional work in the Street Division, but occurs when Guist's status is changed through this transfer process so that Bosgraaf's rights to obtain overtime work are diminished. Also the contract is violated when the City creates a position in the Street Department without posting it and when it eliminates a position in the Water Division without invoking the layoff provisions of the contract. The Union does not question the City's right to assign employees to work in different divisions occasionally. And if the City posts for a vacant position in the Street Department and no one posts for it, the City could transfer the least senior qualified employee in the Department to the Street Division.

Finally, the Union finds the City's claim that it is not sincere about its claim of retaliation because it did not file a prohibited practice charge to be amazing.

#### DISCUSSION:

An employer may not violate one section of the contract to carry out its rights under another section of the contract, as Arbitrator Montgomery noted in Allegheny Ludlum Steel Corp., (1956) 26 LA 546, 549:

Although the right of transfer rests with the Company generally, it should not in good conscience be permitted to invoke one provision of the contract to support its action and at the same time violate another clause, particularly where the facts do not justify its use of the first provision. National Carbon Co., 23 LA 263 and South Western Bell, 23 LA 609.

In this case, there was no need to use the first provision – the right to transfer. And there was a violation of another clause of the contract – the job posting procedure. There certainly was no need to hurry to put someone in the Street Division or remove someone from the Water Division, given the fact that the City had not received all the equipment it needed or the training on new computer equipment.

The fact that Guist continued to work at least more than 50 percent of the time in the Water Division shows the lack of the need for the transfer into the Street Division. The parties disagree



on how much Guist worked in the Water Division after his transfer, but by anybody's figures, he worked the majority of his time at his old job in Water. To show that this transfer was made in good faith, the City should at least be able to show that he was not needed in the Water Division at least half of the time or more than half of the time.

The posting procedure would have been the proper method to use because the City was creating a new position – it was adding a position in the Street Division, albeit taking away one in the Water Division. However, there were seven positions instead of six in the Street Department under the City's actions, and the position should have been posted as a new position, as shown in the organizational table of the DPW.

The lack of good faith and fair dealing, implied in every contract, is evident from the timing of events in this case. Bader was laid off from the Street Division – for lack of work – in November of 1994. Guist was transferred to the Street Division in January of 1995, less than three months after the City claimed it had a lack of work in the Street Division, enough to cause a layoff. Geisendorfer came to the Public Works Committee of the Common Council in April of 1995 to discuss having a meter system automated, which would reduce the work in the Water Division – that is three or four months after Guist was transferred out of the Water Division, presumably due to the lessening work load in the Water Division. By the hearing in this matter in June of 1996, Guist was still spending most of his time working in the Water Division.

The timing shows that the City did not have enough work in the Street Division at that time or it would not have laid off Bader three months before the transfer. The timing shows that the City did not have its plans ready to reduce the work in the Water Division, as the City plans were not in place to have a meter system automated at the time of the transfer. The City had plenty of time to reorganize the DPW and post the new position in the Street Division, and allow Guist to either post for it or bump less senior employees in the bargaining unit when he was no longer needed in the Water Division. The fact is, the City still needed him in the Water Division.

Job posting procedures are essential elements of a collective bargaining agreement and should not be bypassed, even where the City intended to keep the same number of employees. The City does not know who would want to have the Street Division position until it posts it. The bargaining unit covers all regular full-time and part-time employees of the City and includes several different positions. Bosgraaf or Nicksic or someone in another part of the City may have wanted a position in the Street Division, and may have had preference under the contract for it. The City might eventually end up with having to transfer someone, but it does not know that until it posts the position.

Accordingly, I find that the transfer violated the collective bargaining agreement for at least two reasons. First, it violates the job posting provision, and secondly, it lacks a rational basis and does not show good faith or fair dealing.

While the City believes it had a rational basis or legitimate business reason for the transfer, it was at best premature and at worst retaliatory. In any event, the grievance should be sustained because of the failure to post the position. To remedy the contract violation, the City will be ordered to make affected employees whole for their losses of overtime that Guist obtained ahead of them by virtue of the transfer to the Street Department, as well as to undo the transfer and post the position.

#### AWARD

The grievance is sustained.

The City is ordered to transfer Bob Guist from the Street Division to the Water Division, and to post the position for the Street Division, or to lay off Guist from the Water Division and allow him to bump a less senior bargaining unit member in accordance with Article VI, Section 4. The City is also to make whole any employee or employees affected by the transfer by paying to that employee or employees back pay for overtime lost by Guist's transfer. The Arbitrator will retain jurisdiction until June 6, 1997, solely for the purpose of resolving any disputes over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin this 21st day of March, 1997.

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator