BEFORE THE ARBITRATOR

In the Matter of the

Arbitration of a Dispute Between

THE CITY OF HUDSON

and

GENERAL TEAMSTERS UNION LOCAL 662

Case 33
No. 54985
MA-9853

Appearances:

Mr. Stephen L. Weld, Attorney at Law, Weld, Riley, Prenn & Ricci, S.C., 4330 Golf Terrace, Suite 205, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the Employer.

Mr. Frederick C. Miner, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

ARBITRATION AWARD

On March 3, 1997, the Wisconsin Employment Relations Commission received a request from Teamsters General Union Local 662 to appoint a member of its staff to hear and decide a dispute pending between the Union and the City of Hudson. The Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. An evidentiary hearing was conducted on June 19, 1997 in Hudson, Wisconsin. The proceedings were not transcribed. Briefs were submitted and exchanged by August 4, 1997.

This arbitration addresses the elimination of a bargaining unit position.

BACKGROUND AND FACTS

The facts underlying this arbitration are not meaningfully in dispute. On or about January 31, 1997, Parks Maintenance worker Ron Sundt retired. The City determined not to replace Mr. Sundt but rather to spread his work and the various tasks of his job among existing employes and among part-time seasonal employes. The bargaining unit went from 21 to 20 employes. There has been no person on layoff during the pendency of these proceedings.

The City has traditionally hired part-time/seasonal employes. The heaviest use of these employes is from May to early September (i.e. warm weather) annually. Seasonal employes perform the same basic tasks as do bargaining unit employes. Those various employes maintain City equipment and the City's parks (mowing, trimming) and buildings, including painting, electrical work, plumbing. Aside from the number of hours worked, a central difference between bargaining unit employes and seasonal employes is that the latter lack Commercial Driver's Licenses and cannot operate heavier equipment.

A witness for the City (Roeglin) testified that seasonal employes do more rink flooding now than they have previously. A Union witness (Esanbock) testified that they do approximately the same amount. Both Roeglin and Esanbock indicated that during the spring of 1997, flooding caused some additional repair work to be necessary at the city park, which increased hours worked at the park.

Part-time seasonal employes are scheduled in three-four week blocks schedules as needed, not to exceed 40 hours. Typically, they are scheduled in eight hour day segments. This work has never been posted to bargaining unit members. The work is supervised by Roeglin. Esanbock receives 50 cents per hour lead pay to oversee seasonal employee work.

The Union submitted an exhibit comparing part-time hours in February through the first week of June for the years 1995, 1996, and 1997. What the Union exhibit demonstrates is that there were 755.5 hours worked in 1995, 932.5 hours worked in 1996, and 1745 hours worked in the same period of 1997. An examination of the time period beginning February 1 and running through approximately April 11-14 reveals the following: in 1995 there were 108.5 hours worked, in 1996 there were 58.5 hours worked and in 1997 there were 442 hours worked.

An examination of hours worked, by employe, by pay period leads to the obvious conclusion that employes were scheduled in blocks exceeding four hours. A two-week pay period would include 80 regular hours for a full-time employe. Numerous part-timers report hours well in excess of 40 hours per pay period for the period February through June of 1997. One part time employe (Barnes) who worked very few hours in the period February through May of 1995, and very few hours February through May of 1996 reported a substantial number of hours on an ongoing basis for the entire period February through June of 1997. Barnes worked the following hours:

Pay Period	*Number of Hours Worked*
February 1-14, 1997	77.5 hours
February 15-28, 1997	54 hours
March 1-14, 1997	53 hours
March 15-28, 1997	22 hours
March 29-April 11, 1997	59.5 hours
April 12-25, 1997	75.5 hours

I believe a reasonable conclusion drawn from the hours of work of part-timers data is that effective 1997 part-time hours rose substantially, and this is particularly true of the period February 1 through April 12 or so.

It was the Union's view that the Employer was substituting part-time employes for the retired bargaining unit employe. This matter was grieved on January 21, 1997. The grievance alleges a violation of Article 2, Section 2 and provides as follows: "A full-time position is not being filled. The City plans to use part-time help to do the work that this position was doing."

The grievance was denied by memo dated January 28, 1997, which provided as follows:

> This is in reply to the grievance dated 1/21/97 which was filed with the City of Hudson. You have alleged that Article 2, Section 2, of the current (1/1/97-12/31/97) labor agreement between General Teamsters Union Local 662 and the City of Hudson has been violated.
>
> After review of Article 2, Section 2 of the current labor agreement and the nature of the grievance filed, there is no contract violation and your grievance is denied for the following reasons: 1. There are currently no employes on "laidoff" status. 2. The use of seasonal, part-time employes to perform Park Department duties throughout a 12-month period is defined as a past practice as detailed in Article 7, "Maintenance of Standards and Management Rights", Section 2.
>
> Dan Roeglin /s/

The denial was appealed on January 28, 1997. The appeal was denied by a letter from Brian D. Gramentz, City Administrator, dated February 12, 1997 which provided as follows:

In response to the appeal to the Finance Committee the grievance filed January 21, 1997, the Committee has reviewed the contract and facts in this case, and finds no violation of the collective bargaining agreement.

The City has elected to eliminate, or not fill, the full-time position of Parks Maintenance Worker left vacant upon the retirement of Ron Sundt, and is under no contractual obligation to fill the vacancy. The collective bargaining agreement only requires the posting of a position that the City elects to fill. The City has elected to reassign to other bargaining unit members work formerly performed by Mr. Sundt such as equipment maintenance and snow plowing, which, in the past, has not been performed by seasonal, part-time employes. However, the work performed by Mr. Sundt, which has also been performed by the City's seasonal employes shall in the future be assigned to seasonal employes.

The Management Rights clause in Article 7 specifically grants the City the right to "schedule" and "assign" employes in positions within the City, to "determine the kinds and amounts of services performed as pertains to City operations; and the number and kind of personnel to perform such services" and to "determine the methods, means and personnel by which City operations are to be conducted." Nothing in the collective bargaining agreement restricts the City's management rights.

Your reference to Article 2, Section 2 regarding the use of the term "laidoff" pertains to a person who is "laidoff" from employment due to reduced funding or lack of work, and who has the potential to be rehired when funding or workload increases. It is our understanding that in this situation, Mr. Sundt "retired" of his own accord. He was not "laid off" by the City.

The City will continue to utilize seasonal, part-time workers for ten (10) months of the year in the Parks Department, as we have in past years. The regular, full-time duties previously performed by Mr. Sundt will be reassigned to bargaining unit members.

Your grievance is hereby denied.

The City submitted an exhibit that identified the number of employes who worked as part-time seasonals. There is no increase in the number of employes so hired during the time frame 1994 through 1997.

It was the testimony of Mr. Esanbock that during the course of the grievance procedure meeting before the City Council Bob Pollak, Teamster Business Agent, advised the Council that another contractual provision had been violated.

ISSUE

The parties were unable to stipulate the issue. I believe the issue to be:

Did the Employer violate the Collective Bargaining Agreement when it assigned the duties and tasks of a retired employe to existing bargaining unit employes, and increased the hours of seasonal employes? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 2

CONDITIONS OF EMPLOYMENT - PROBATIONARY PERIOD

. . .

Section 2. Any employee hired as a part-time worker, in accordance with Section 1 of Article 1, shall not become a seniority employee under these provisions, where it has been agreed by Employer and Union that he/she was hired for part-time work. Part-time employees shall be given first opportunity to become regular employees and be placed at the bottom of the seniority board, if they meet qualifications, and shall accumulate seniority from the date of regular employment. It is agreed that part-time employees will not perform Bargaining Unit work while regular full time employees are laid off.

. . .

ARTICLE 7

MAINTENANCE OF STANDARDS AND MANAGEMENT RIGHTS

Section 1. The Employer agrees that all conditions of employment relating to wages, hours and working conditions shall be maintained at not less than the highest standards in effect in the Employer's unit at the time of the signing of this Agreement. Conditions of employment shall be improved wherever specific

provisions for improvement are made elsewhere in this Agreement. This shall

not apply to inadvertent or bona fide errors made by the Employer if corrected within ninety (90) days of notification by Union to Employer.

Section 2. Nothing shall be deemed a past practice unless it meets each of the following tests:

1. Consistently followed (over a reasonable period of time);

2. Generally known by the parties hereto; and

3. Must not be in opposition to the terms and conditions in this Agreement.

MANAGEMENT RIGHTS

Section 1. Except as expressly modified by other provisions of the contract, the City possesses the sole right to operate the City and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the City;

B. To hire, promote, transfer, schedule and assign (including overtime assignments) employees in positions within the City;

. . .

I. To determine the kinds and amounts of services to be performed as pertains to City operations; and the number and kind of personnel to perform such services;

. . .

L. To establish reasonable work rules and schedules of work.

. . .

ARTICLE 10 - SENIORITY

. . .

Section 7. All job openings shall be posted at least five (5) working days. It is agreed that when employees bid on a job, it shall be for at least a one (1) year duration unless otherwise agreed to between the Union and the Employer. The senior employee who bids on the job opening, and whom the Employer determines to meet minimum qualifications to fill the position, shall be given a thirty (30) day qualifying period. If the Employer determines that no employee who bids on a job is qualified to fill the opening, the Employer may hire a new employee from outside the bargaining unit. . .

. . .

All job openings to be posted would be those that would operate on a regular basis of at least four (4) hours per day in any classification. It is recognized that some jobs would operate less than four (4) hours per day; however, those jobs need not be posted, but rather any employee may exercise his/her seniority upon request to work on the job, providing it is in the same classification and providing he/she does not have full time work on his/her regular paid job. It is also understood that some jobs operate full time part of the year and less than four (4) hours other times during the year.

If such job should become open at a time when it is not operating at least four (4) hours a day, said job will not have to be posted until it is in operation four (4) hours a day.

. . .

POSITIONS OF THE PARTIES

It is the position of the Union that the Employer failed and refused to post an opening to replace a retiring employe, instead transferring the work to temporary part-time employes outside the bargaining unit. The Union contends that it is uncontested that bargaining unit work formerly performed by a bargaining unit member has been transferred in its entirety to non-unit employes.

The Union notes that in the early portion of 1995, and consistent with prior practice, the Employer employed temporary, part-time employes to perform a total of 755.5 hours of work. In 1996, the Employer employed temporary part-time employes to perform a total of 932.5 hours of work during that same time frame. However, in 1997, following the retirement of a bargaining unit employe, the Employer employed temporary, part-time employes to perform a staggering total of 1745 hours of work during the same time frame.

The Union notes that had the retired bargaining unit employe been employed between February 1 and June 6, 1997, and taken no vacation or holidays, he would have worked a total of 720 hours during that period. The increase in hours worked by temporary, part-time employes between 1997 and 1996 for the same time period is 813 hours, and the increase between 1997 and 1995 a total of 989.5 hours. The Union notes that in 1995, in a four-week period between February and May there were no temporary part-time employes employed, and in eight weeks, there was only one. Similarly, in 1996, during the same eight weeks there were no temporary part-time employes working. In contrast, in 1997, in every week between February and May at least one temporary part-time employe worked, and in the four weeks in which only one part-time employe worked, that employe worked at least 25 hours each week. The Union concludes that bargaining unit employes hours have been transferred directly to temporary, part-time non-bargaining unit employes.

The Union contends that Article 10 of the parties' Agreement provides clearly that "All job openings shall be posted", and that the senior qualified employe shall be awarded the position. Section 7 of the Article specifies that "All job openings to be posted would be those that would operate on a regular basis of at least four (4) hours per day in any classification." Because the position vacated by the retiring bargaining unit member is a position which operates on a regular basis of at least four (4) hours per day, Article 10 dictates that the position must be posted for bidding among bargaining unit members by seniority.

The Union contends that its construction of this provision does not undermine the Employer's historic practice of utilizing temporary, part-time employes as needed to satisfy the change in demands placed on the Park Department. The Union does not here contest the Employer's right to hire non-bargaining unit personnel to perform bargaining unit tasks in the manner and to the extent that it has for over a decade. However, even in combination with its authority under Article 7 to direct Parks Department operations, the Employer's past practice does not provide such broad and unfettered discretion as to enable it to completely replace a bargaining unit member with a non-bargaining unit employe merely to avoid its obligations under the Agreement. If it were otherwise, the Employer could refuse to replace every employe who retires, voluntarily quits, or is terminated, by attrition, completely eliminating the bargaining unit. The Union cites authority for its position.

The Union believes that Article 2, Section 2 of the Agreement has also been violated. The Union contends that a bargaining unit member has been effectively "laid off" because there is no bargaining unit member actively at work in a bargaining unit position. The work has been transferred wholesale to temporary, part-time employes.

The Union contends that the Employer's effort to limit the analysis to Article 2 of the Agreement is inappropriate in that lengthy discussion in the grievance procedure addressed

Articles 7 and 10. The Union contends that the Employer was clearly on notice of the Union's reliance on multiple provisions of the Agreement.

It is the position of the City that the Employer has not violated Article 2, Section 2 of the Agreement. The City contends that this section does not require it to fill a vacant position. Ron Sundt is not on layoff, he retired. Therefore, Article 2, Section 2 of the Agreement does not apply and the grievance must be denied.

The City contends that absent any contractual mandate, the Employer acted within its prerogative in not filling the position vacated by Ron Sundt. In the Employer's view the Union asserts that the City is required to fill the full-time Parks Maintenance Worker position formerly filled by Ron Sundt. However, there is no provision in the Agreement which requires that a vacant bargaining unit position be filled. The City cites arbitral authority in favor of the proposition that it possesses the management right to determine whether a job vacancy exists, and whether it will be filled.

The City contends that nothing in Article 10, Section 7 can be interpreted to require that positions be filled. That section simply establishes the procedure to fill positions, and to fill those positions which the City elects to fill. Implicit in the Employer's contention is that it possesses the discretion to fill or not to fill vacant positions.

The City points to the Management Rights provision of the Agreement to "assign employes"; "to determine the kind and amounts of services performed as pertains to City operations"; and "the number and kind of personnel to perform such services"; and "to determine the methods, means and personnel by which City operations are to be conducted." It concludes that it possesses the authority to refrain from filling the position vacated by Sundt and to reassign the duties he performed to others.

The City contends that it did not violate the Agreement when it transferred the work of the Parks Maintenance Worker position to part-time/seasonal employes. Essentially, the Union contends that the duties performed by former Parks Maintenance Worker Sundt constitute bargaining unit work, and those duties cannot be transferred out of the bargaining unit. The Employer contends that there is no contractual provision leading to that conclusion. The Employer cites arbitral authority for the proposition that it is free to transfer bargaining unit work from the unit absent evidence of discrimination, union animus, or bad faith, or explicit language restricting such transfer. The Employer notes that there is no language in the Agreement which prohibits or limits its right to assign those previously performed tasks to part-time/seasonal employes.

The City notes that it has a long-standing, undisputed practice of hiring part-time/seasonal employes to supplement the work performed by bargaining unit members in the Parks and

Recreation Department. That practice clearly meets the contractual criteria for establishing a past practice set forth in Article 7, Section 2. The Employer notes that it did not add to the number of part time employes when it elected not to fill the vacated position, but rather increased the number of hours worked by part-time/seasonal employes.

DISCUSSION

A review of the number of hours made available to part-time/seasonal temporary employes indicates to me that what the Employer has done is to replace the regular full-time employe, Sundt, with a number of part-time employes. The gross hours worked by those employes constitute all previous hours worked plus the hours that would normally have been worked by Sundt. I believe the Union is accurate in its contention that the Employer has replaced Sundt with part-time employes.

The parties point to, and claim support from, a number of contractual provisions. None of these provisions may be read in a vacuum. This Award necessarily seeks to reconcile and harmonize the various provisions of the Agreement.

The contractual provision which most specifically addresses the number of bargaining unit positions which must exist is Section 1, (I) of the Management Rights clause. The provision reserves to the City the authority to set the ". . .number and kind of personnel to perform such services. . ." On its face, the clause appears to grant the City the authority to determine the number of employes and to exercise discretion as to what kind of employes perform the work. Authority found in the Management Rights clause is subject to other contractual provisions. However, the words used in the Management Rights clause must be construed to have meaning.

Article 2, Section 2, explicitly restricts the City's use of part-time employes. The City is not permitted to have part-time employes perform bargaining unit work under layoff situations. I do not believe that situation is present here, nor do I believe that Article 2, Section 2 was violated. The work in question is the work formerly performed by Sundt. Sundt retired. No one was on layoff. The Union seeks to characterize the vacant position of Sundt as essentially a layoff. I disagree with that characterization. To me, a layoff has a traditional connotation of an employe of the employer who is without work for operational or financial reasons, and who may be awaiting recall to a potential job. No such person exists in this scenario. Layoffs are normally employer initiated. The Article does not address the circumstance where there is a reduced workforce brought about by employe retirement.

Article 7, Section 1 contains a Maintenance of Standards clause. The language speaks in very broad terms, maintaining "all conditions of employment relating to wages, hours and working conditions. . ." There is no further definition to the Article. If read as a control on the number of bargaining unit positions that must exist regardless of the availability of work or

revenue the clause is enormously consequential. The size of the workforce may rise or fall as a consequence of workload and/or revenue. The interaction between Article 7, Section 1 and those phenomena is unclear to me. I am not prepared to read Article 7, Section 1 to set an absolute floor on the size of the bargaining unit. Article 7, Section 1 is too general to contravene the more explicit language found in the Managements Rights clause.

Article 7, Section 2 provides a definition of past practice as regards these parties. I agree with the Employer's contention that its historic use of temporary/part-time employes is compatible with, and perhaps defined by, past practices language. However, I do not believe that a definition of past practice language is a contractual justification for the dramatic increase in temporary/part-time hours used here to replace a former bargaining unit position.

The Union expresses a concern that if the City's position prevails, it would be free to dissipate the entire bargaining unit through attrition. I am not presented with that issue in this dispute. However, I would note that the practice claimed by the City is limited to 10 months of the year.

Article 10, Section 7 requires "All job openings shall be posted at least five (5) working days." The Section goes on to provide that senior employes who satisfy minimum qualifications "shall be given a thirty (30) day qualifying period." The words used are terms of command. The Section goes on to define job openings. It provides: "All openings to be posted would be those that would operate on a regular basis of at least four (4) hours per day in any classification." I believe that definition is intended to modify and intended to define the job openings described in the first paragraph of Article 10, Section 7.

I believe that Article 10, Section 7 requires the Employer to post "job openings". The question which arises is whether or not the work left behind by the retirement of Sundt constitutes a job opening within the meaning of Article 10, Section 7. I conclude that it does not. To read this provision as guaranteeing that the position vacated by a departing employe must be posted and filled seriously erodes the authority seemingly conferred by the Management Rights clause.

If Article 10, Section 7 is read as a procedural mandate to be followed upon a city decision to create a job opening, it breathes life into both Article 7 and Article 10.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 18th day of December, 1997.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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