

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**RICE LAKE PROFESSIONAL FIRE FIGHTERS ASSOCIATION
LOCAL 1793**

and

THE CITY OF RICE LAKE

Case 62
No. 56546
MA-10318

Appearances:

Mr. Michael Kunesh, State Representative IAFF, 4539 Kuchera Lane, Manitowoc, Wisconsin, on behalf of the labor organization.

Weld, Riley, Prenz & Ricci, S.C., Attorneys at Law, by **Richard J. Ricci**, on behalf of the municipal employer.

ARBITRATION AWARD

The Rice Lake Professional Firefighters Association, Local 1793, a labor organization, and the City of Rice Lake, a municipal employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Association made a request, in which the City concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance concerning transfers and shift assignments. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held on October 15, 1998, in Rice Lake, Wisconsin. The parties submitted written arguments by November 19, 1998.

STATEMENT OF THE ISSUE

The parties stipulated to the following statement of the issue:

Did the employer violate the collective bargaining agreement when Fire Chief Resac failed to seek a scheduling request from firefighter Scott Burns and assigned Burns to another platoon? If so, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE III: SENIORITY

Seniority according to the terms of this agreement shall consist of the accumulated paid service of the employees with the Rice Lake Fire Department. The employees earned seniority shall not be lost due to illness, authorized leaves of absence, military service, or temporary layoff.

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ARTICLE VII: WORK DAY AND WORK WEEK

The Fire Department is organized in two platoon (crew) system. One crew works one 24-hour day with the other crew working the next 24-hour day with a Kelly Day every six calendar days. Effective February 1, 1984, the work week consists of a 56 hour week. The work period for Fair Labor Standards Act purposes is twenty-four (24) days. Fire inspectors will either work a 24-hour day, 56 hour week OR an 8-hour day, 40 hour week. Employees working a 24-hour shift must eat their meals in the station.

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ARTICLE XVIII: SAVINGS CLAUSE

All wages, hours and conditions of employment in effect as of the date of this agreement and not changed herein shall remain in full force and effect unless changed by mutual agreement in writing.

ARTICLE XXIV: MANAGEMENT RIGHTS

The Employer shall have the right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, determine the level of employment in the department, transfer within the department and assign duties in the department and for just cause to suspend, demote, discharge, or take other disciplinary action against employees.

- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;
- E. To prescribe a uniform dress to be worn by designated employees;
- F. To take whatever actions may be necessary to carry out its mission in emergency situations.
- G. To take whatever action is necessary to comply with State and Federal law.

The employer agrees that none of the foregoing rights will be exercised in violation of Wisconsin Statutes 62.13 and that the inclusion of this clause does not constitute a waiver by either the employees or the Union of the provisions of either Wisconsin Statutes 62.13 or 111.70.

BACKGROUND

The Rice Lake Fire Department is organized into two platoons, A and B, staffed with a supervisory captain and several bargaining unit members (lieutenant, motor pump operator and fire fighter/EMT). The platoons alternate on a 24-hour schedule. This grievance concerns a fire fighter who was transferred, against his wishes, from the B platoon to the A platoon.

Prior to April 1998, the A and B platoons, respectively, consisted of the following personnel: Captain R. Miller, Lieutenant M. Dietz, MPO R. Reitan, MPO J. Zimmer, Firefighter B. Vesper and Firefighter M. Anderson; Captain S. Harrington, Lieutenant J. Turgeson, MPO D. Nivarel, MPO J. Cich, Firefighter J. Jasicki and Firefighter S. Burns. Harrington also serves as the department's training officer.

In April 1998, the City promoted Nivarel to a supervisory position outside the unit, creating a vacancy for an MPO on B platoon. As the senior MPO on the A shift, Reitan was offered the B shift vacancy, which he accepted. With a vacancy for an MPO now on the A shift, the opportunity then arose for MPO Cich to transfer from the B shift, which he declined. The City thereafter promoted the senior firefighter, Jasicki, to the A shift MPO vacancy, thus creating a firefighter vacancy on the B shift. The city offered to Vesper, the most senior firefighter, the opportunity to transfer to the B shift; he declined.

The next most senior firefighter, Anderson, then moved from the A shift to the B shift, in order to maximize his ability to select vacation days. The city then unilaterally transferred Burns, the least senior firefighter, from the B shift to the A shift, and hired a new firefighter whom it assigned to the B shift.

Thus, prior to April 1998, the platoons were as follows:

A	B
Capt. R. Miller	Capt. S. Harrington
LT. M. Dietz	Lt. J. Turgeson
MPO R. Reitan	MPO D. Nivarel
MPO J. Zimmer	MPO J. Cich
FF B. Vesper	FF J. Jasicki
FF M. Anderson	FF S. Burns

After May 1998, the platoons were as follows:

Miller	Harrington
Dietz	Turgeson
Zimmer	Reitan
Jasicki	Cich
Vesper	Anderson
Burns	Putnam

On May 11, 1998, the Association submitted to the Chair of the City's Personnel and Negotiating Committee a formal written grievance which read in part as follows:

This grievance is about having choice of crews in the event of crew changes. With the hiring of a new member, the members of the two crews have to move to properly fill in the positions. In this move the Chief has asked all of the senior people in each position which crew they would prefer to work on except for Scott Burns who is senior to the new Fire Fighter. Scott has been notified by a letter in his station mailbox as to which crew he will be working with. Local 1793 feels Scott should have been given a choice of crews.

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Local 1793 contends that any senior man on crews has the right to choose which crew to work on when switches are being made.

POSITIONS OF THE PARTIES

In support of its argument that the grievance should be sustained, the Association asserts and avers as follows:

The collective bargaining agreement clearly provides that no working condition in place and not changed shall remain in full force. There has been a working condition here that prior Fire Chiefs have discussed with senior fire fighters whether they had a platoon preference, which was not done in the current instance. Here, the Chief talked to each senior firefighter except the grievant, asking how scheduling would affect their lives; each preference was honored. This continuation of a long standing policy was extended to everyone senior in a position except Burns, who had seniority over firefighter Putnam and by position of Senior Second Private. Although platoon re-alignments made in mid-year have not occurred often, when they have, the senior fire fighter in each position was asked for platoon preference. The Chief's own testimony supports that this is a long standing practice; denying this grievance would deviate from this policy. The long standing practice of soliciting the input of each senior fire fighter holding a position should be continued, and the grievance sustained.

In support of its argument that the grievance should be denied, the City asserts and avers as follows:

The transfer of the grievant was consistent with the employer's well-established management rights, made explicit in the collective bargaining agreement. The parties have agreed that the employer has the right to transfer employees to an alternate shift, and to otherwise direct and assign. The Chief's right to determine shift assignments to ensure trained and competent staff is clear, as was the legitimate justification: to give the grievant the experience of working with another platoon, and to assign a new hire to the shift with the Department's training officer.

For the Association to prevail, it must establish that there are asserted or implied restrictions within the collective bargaining agreement, or a binding past practice affecting ambiguous language, which require the employer to seek, on a seniority basis, shift preferences. The Association cannot meet this test.

The collective bargaining agreement does not restrict the employer's right to transfer the grievant. The seniority language provides how seniority is earned; it does not create any entitlement or seniority-based right, nor allow shift selection on its basis. The work week language defines how the unit is organized, and places no restrictions on transfers. That the Chief reassigned some more senior fire fighters consistent with their preferences was entirely within his discretion, and did not create a contractual right for the grievant.

The Association has not established any past practice which restricts the employer's authority to transfer the grievant. That the Chief has in the past asked about preferences or input shows that he is a nice guy who cares about his employees; it does not rise to the level of an unequivocal, clearly enunciated and firmly established practice accepted by both parties, such as is necessary to establish an enforceable past practice.

The Association's remedy is beyond the scope of the arbitrator's authority, in that it requests that all shift transfers be made voluntary. The employer has the express contractual right to transfer and to reassign; for the arbitrator to sustain the grievance would be to improperly amend the collective bargaining agreement beyond rightful authority.

DISCUSSION

The Association contends the parties "have and have had a long standing practice" whereby management solicits and honors employee preferences in platoon assignments. Consistent with that purported past practice, it asserts, the grievance should be sustained and senior personnel be given the "right to choose" which crew to work on "when switches are being made."

In support of its past practice argument, the Association cites testimony that such opportunities have been given to unit personnel, as far back as twenty years ago. The Association further notes that, in the transactions before me, personnel other than the grievant were indeed offered the opportunity of accepting or declining transfer.

The Association's past practice argument, however, falls on two accounts. The first is that the evidence does not satisfy the accepted standard for establishing past practice. As the employer correctly notes, a past practice is not established as binding on both parties unless it is unequivocal, clearly enunciated and acted upon, readily

ascertainable and accepted by both parties. 1/ The fact that a different Fire Chief may have offered personnel the right to accept or decline a transfer twenty years ago, or even that this Fire Chief made such an offer in the current round of transactions, does not meet that test.

1/ CELANESE CORPORATION OF AMERICA (Justin, 1954), 24 LA 168, 172.

Such evidence especially fails in light of clear and unambiguous language in the collective bargaining agreement which explicitly authorizes management to take the very act which the Association complains of. As the employer correctly notes, among the management rights which the collective bargaining agreement recognizes are those of transferring employes within the department, directing employes in their duties, and determining the means and personnel to conduct its operations.

This collective bargaining agreement has a savings clause which explicitly preserves the wages, hours and conditions of employment unless changed by mutual written agreement. The Association contends this provides another justification for its grievance.

It does not. The reference to "hours" in this phrase is to the hours of work for all unit personnel; it is not to the specific platoon that one individual is assigned to. And the phrase "conditions of employment" is not so broad as to include "the condition of the Fire Chief consulting with personnel as to their shift preference," especially given the explicit management rights to transfer and assign.

To preserve and improve employe morale, it is always a good idea for management to consult with employes on matters with a direct impact on their personal lives, such as their shift assignment. The Fire Chief did just that for almost all affected personnel, allowing some to shift and others to remain on their platoons. Ultimately, however, he determined that it was necessary to assign the new recruit to the platoon headed by the department's training officer, B platoon. This was certainly a legitimate management decision. In order to make such assignment, however, he had to create an opening on B platoon. The least senior member of B platoon was the grievant, who was involuntarily moved to the A platoon. This action was contrary to the grievant's wishes, but it was not contrary to the collective bargaining agreement.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 15th day of January, 1999.

Stuart Levitan /s/

Stuart Levitan, Arbitrator

