BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 2150, AFL-CIO**

and

**CITY OF KAUKAUNA (UTILITY COMMISSION)**

Case 98
No. 57400
MA-10609

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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Naomi E. Soldon**, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of IBEW Local 2150, joined by **Attorney William H. Ramsey**, on the brief.

Davis & Kuelthau, S.C., by **Attorney Edward J. Williams**, P.O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of the City of Kaukauna, joined by **Attorney Alysia C. Hopper**, on the brief.

## ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, International Brotherhood of Electrical Workers Local No. 2150 (hereinafter referred to as the Union) and the City of Kaukauna (Utility Commission) (hereinafter referred to as the City or the Employer) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff as arbitrator of a dispute over the reassignment of duties previously performed by Paul Hennes. The undersigned was so designated. A hearing was held on September 29, 1999, at the Utility Commission offices in Kaukauna, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the undersigned on November 24, 1999, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

## ISSUE

The issues before the arbitrator are:

1. Does the arbitrator have jurisdiction over the Union's June 4, 1999 grievance?

2. If so, did the Employer violate the collective bargaining agreement by reassigning Hydro rounds previously performed by the grievant to other employes?

3. If so, what is the appropriate remedy?

## PERTINENT CONTRACT LANGUAGE

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ARTICLE III

GRIEVANCE PROCEDURE

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A. Grievances to be processed within the grievance procedure shall involve only matters of interpretation, application or enforcement of the terms of the Agreement and, as such, only those items may be processed under the grievance procedure.

B. The grievance process must be initiated by either party within ten (10) days of the alleged incident or within ten (10) days of the aggrieved and the Business

Manager being aware of such incident. This provision shall not be utilized to delay the filing of grievances on the part of either party. Any grievance not reported or filed within the time limits set forth above shall be invalid.

Step 1. The aggrieved party and his authorized representative shall present the grievance orally to the employee's immediate management supervisor in the instance of a Union grievance or a Union Unit Officer or Steward in the instance of a management grievance and the parties shall attempt to resolve the matter. The supervisors may consult with the Utility General Manager. If the matter is not resolved in ten (10) work days at this level it shall be processed as set forth in Step 2.

Step 2. The grievance shall be submitted in writing to the Utility General Manager in the instance of a Union Grievance or the Union Business Manager in the instance of management grievance. The appropriate Manager shall consider the grievance and give his response in writing within ten (10) work days. If the matter is not resolved at this level it may be processed as set forth in Step 3.

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## ARTICLE XI

## RIGHTS OF EMPLOYER

It is agreed that unless otherwise provided or limited by this agreement, the rights, function and authority to manage all operations and functions are vested in the employer and include, but are not limited to the following:

a. To establish and administer reasonable rules and regulations essential to the accomplishment of the Commission on services. All such rules shall be furnished in writing to the Union ten (10) days prior to their effective date. The Union shall have the opportunity to object in writing in that time. If no written objection is submitted, the rules shall become effective. If a written objection is submitted, the parties shall meet within ten (10) days to discuss the objection. However, no rules primarily relating to wages, hours and conditions of employment may be implemented unless mutually agreed upon, or unless determined to be reasonable by a grievance arbitrator. Any rules established shall not conflict with applicable State or Federal laws.

b. To manage and otherwise supervise all employees subject to this Agreement.

c. To hire, promote, transfer, assign, and retain employees and to discipline or dismiss for just cause.

d. To lay off due to lack of work within any occupational group according to seniority.

e. To maintain the efficiency and economy of the Utility operation entrusted to the administration.

f. To determine the methods, means and personnel by which such operations are to be conducted.

g. To take whatever action may be necessary to carry out the objectives of the Utility.

h. To exercise discretion in the operation of the Utility, the budget, organization, assignment of personnel and the technology of work performance.

i. To sub-contract when deemed necessary for effective Utility operations. No employee shall be laid off due to subcontracting of work normally performed within his departmental group.

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EXHIBIT "A"

WAGE SCHEDULE BY OCCUPATIONAL GROUP

| BASE WAGE SCHEDULE | EFFECTIVE | | | |
|---|---|---|---|---|
| | 1-1-97 | 7-1-97 | 1-1-98 | 1-1-99 |
| . . . | | | | |
| OPERATING DEPARTMENT | | | | |
| System Operator | 21.55 | 21.77 | 22.53 | 23.32 |
| System and Operations Technician | 21.55 | 21.77 | 22.53 | 23.32 |
| Relief System Operator (while operating) | 21.55 | 21.77 | 22.53 | 23.32 |
| (while plant maintenance) | 19.89 | 20.09 | 20.79 | 21.52 |
| Apprentice Operator (according to scale) | | | | |

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## BACKGROUND

The City is a municipal corporation providing general governmental services to the people of Kaukauna, Wisconsin. Among the services provided is the operation of a water and electrical utility. The Union is the exclusive bargaining representative for the Utility's non-exempt employes including Systems Operators. In 1993, the grievant, Paul Hennes, transferred into a newly created position of Relief System Operator (RSO). Because of the salary structure for his apprenticeship in the position, Hennes took a 12% pay cut and did not return to 100% of rate for two years. Initially, Hennes' duties included making rounds of the Water Department, the Substation and the Power Plant. Water Department rounds and Substation rounds each took approximately five hours per week. Power Plant rounds, commonly referred to as Hydro rounds, took three days. These rounds had been performed by other employes, but when the new RSO position was created, the Utility concentrated responsibility for the rounds in that position. The job description for Hennes' position in 1993 stated that "when not performing as a System Operator this employee will perform normal scheduled rounds of all Utility facilities and all departments and assist as needed in other departments of the Utility as needs may dictate." It then listed the following as illustrative examples of the work to be performed:

As listed in the job description for the System Operator.

Perform power plant rounds and inspections.

Perform substation rounds and inspections.

Perform water department rounds and inspections.

Retrieve single phase meters from the field for testing.

Test single phase meters.

Rake trash racks as assigned.

Perform other utility duties as required.

Hennes performed all of the rounds from 1993 until the Spring of 1995, when the Utility reassigned the Water Department rounds to other bargaining unit employes. In the Fall of 1995, the Utility reassigned the Substation rounds. These transfers were made because employes in those departments wanted the work reserved to their departments. No grievance was filed over either transfer of work from his position. The following summer, the Hydro

rounds were reassigned. The grievant protested this to his then-supervisor, Carl Verhagen, and Verhagen agreed to restore the rounds. The grievant continued to perform Hydro rounds until 1998, although they were reduced from three days per week to two days per week.

In January of 1998, the Utility decided to rotate the Hydro rounds among the grievant and two other plant maintenance employes. Its stated reason for doing so was a desire to have the maintenance employes retain their familiarity with all of the equipment. The change was effective on January 12th. The grievant told his supervisor that he would probably take some action to protest the change. On February 3rd, he sent a letter to Union Business Agent Ron Nyhouse, advising him of the change and protesting that he took the job, and the pay cut, in 1993 because the mix of duties was very attractive. The grievant asked the Union to pursue the matter. This letter was copied to the Utility's General Manager, Peter Prast.

In early March, Nyhouse spoke by telephone with Peter Prast about the grievant's complaint. Shortly thereafter Prast met with the grievant to personally discuss the matter. The grievant wrote to Prast on March 18th, proposing a monetary settlement to compensate him for the loss of the rounds and for the wage cut he took when he initially accepted the RSO position. Prast, Nyhouse, Union President Mark Damro and the grievant continued to have informal discussions after the March 18th letter, until Prast sent a formal reply on April 24th. In his letter, Prast told the grievant that the reduction in wages in 1993 and 1994 should not have come as a surprise to him, and that his pay rate had been equitable when compared with other maintenance personnel. He declined to make any monetary settlement, and advised the grievant that the change in duties was designed to improve operations and efficiency and would not be changed.

On June 4th, the grievant submitted a written grievance protesting the removal of the Hydro rounds. Six days later, Prast denied the grievance, noting that it was not discussed at Step 1 of the grievance procedure, and was untimely. The matter was not resolved at the lower stages of the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

## ARGUMENTS OF THE PARTIES

### The Position of the Employer on Timeliness

The Employer takes the position that the grievance is clearly untimely and must be held not to be arbitrable. The contract requires that the grievance process be initiated within ten days of the incident or the Business Manager's knowledge of the incident, and if it is not the grievance becomes "invalid." The Utility removed the Water Department rounds and the Substation rounds in 1995. One third of the Hydro rounds were eliminated in 1996. If the Union wished to assert that these rounds were the exclusive province of the grievant, it should

have done so then. It did not do so, and thus lost the right to make that assertion. Even if a grievance over the general question was not rendered invalid five years ago, the rotation of Hydro rounds was effective on January 12, 1998. No grievance was submitted until June 4th. A delay of over five months simply cannot be reconciled with a ten-day limit for submitting grievances, and the arbitrator should not re-write the contract to allow this obviously stale complaint to proceed.

**The Position of the Union on Timeliness**

The Union argues that the grievance is timely, and that the arbitrator must proceed to the merits. This is not a case of anyone sitting silently on their rights for months and then suddenly filing a grievance. The Utility knew, even before it implemented its change in the rotation of Hydro rounds, that the grievant objected. He stated his complaints in writing to the Union and the Utility at the beginning of February. Thereafter, discussions were on-going between the Utility, the grievant and the Union on almost a continuous basis until it became clear that there would be no agreement. In fact, Utility General Manager Peter Prast wrote the grievant in late April, responding to his proposal to settle the matter. Obviously Prast knew there was a grievance pending, since he was replying to a complaint about a contract violation and a demand for a remedy.

The contract requires merely that the "grievance process must be initiated" within ten days. Clearly this was accomplished by the grievant's prompt verbal complaints and his follow-up letter of February 3rd. While the matter was not subsequently put on a fast track through the grievance procedure, that is because the parties were actively trying to resolve the issue. Union President Mark Damro testified credibly that the parties had always treated settlement discussions as an extension of the time limits, and that the Utility had never insisted, before June 10th, that time was of the essence in moving grievances through the formal steps. The Union was entitled to rely on the past practice of the parties, and the Utility should not be permitted to deviate from that practice without any prior notice that it planned to do so. Thus, the arbitrator must reach the merits.

**The Position of the Union on the Merits**

The Union takes the position that the Utility violated the collective bargaining agreement when it stopped assigning Hydro rounds exclusively to the RSO. The collective bargaining agreement recognizes the RSO as a composite classification encompassing the jobs of Systems Operator and plant maintenance, and makes provision for distinct rates of pay, depending upon which duties he is performing. The contract assumes that this position will perform the duties of both jobs. The grievant relied upon this assumption, as well as on the

job posting's specific promise that Hydro rounds would be part of his duties, when he took a pay cut to transfer into the job in 1993. The Utility cannot simply change the premises upon which the Union bargained its contract and the grievant claimed his job.

The Utility claims that it has the right to determine the duties that an employe will perform, and this is true to a limited extent. The Utility has made minor changes in the past, such as when it removed the Water Department and Substation rounds, and the Union has not challenged those changes. This right must be exercised within reasonable limits, and the Utility cannot claim the right to unilaterally alter the fundamental character of a job. This is particularly true where, as here, the parties have traditionally negotiated over the major aspects of job descriptions. The rotation system eliminates two-thirds of his Hydro rounds, leaving him with less than a day a week on average. This is one-quarter of the original schedule of rounds for the RSO in 1993. The Utility cannot credibly contend, and the arbitrator cannot reasonably conclude, that the Union ever contemplated allowing the Employer an unfettered right to make such drastic changes in the content of a negotiated position. For these reasons, the arbitrator should sustain the grievance, and order that the work be returned to the grievant.

**The Position of the Employer on the Merits**

The Employer takes the position that the grievance is wholly without merit and should be denied. The grievant's job description states that "when not performing as a System Operator this employe will perform normal scheduled rounds of all Utility facilities and all departments and assist as needed in other departments of the Utility as needs may dictate." There is no question that the grievant has performed rounds since taking the job, and that he continues to do Hydro rounds. The job description does not promise him that a certain percentage of time will be spent on rounds. This is a relief position and it is designed to be flexible, so as to meet the needs of the Utility. Not only has he continued to perform his duties per the original job description, the grievant himself admitted at the hearing that he had suffered no loss of pay, nor any reduction in hours. As there has been no substantial change in his duties and no loss of any kind, the grievant cannot make out a plausible basis for any grievance.

Even if the arbitrator concluded that there had been more than a de minimis change in the grievant's duties, the Employer notes that the collective bargaining agreement expressly reserves the Utility's right to "determine the methods, means and personnel" used to conduct operations, to "transfer and assign" employes, and to maintain "efficiency and economy." The arbitrator cannot ignore these clear provisions, since to do so would be to exceed his jurisdiction. The rights to create job descriptions and to assign and reassign tasks are clearly encompassed in the Management Rights provision. Utility General Manager Peter Prast

testified that he had never negotiated with the Union over job descriptions, though he has discussed them in the context of bargaining wage rates. Nor has the Union ever filed a grievance over any job description in the past.

The Employer points to the removal of the Water Department and Substation rounds as evidence that it possesses the right to reassign tasks from one job to another. Precisely the same principle was involved in those decisions, and the same employe was affected. Yet there was no grievance. Indeed, those removals were made because other bargaining unit employes insisted that the work be transferred from the grievant to their departments. The rotation here was likewise initiated for the good of both the Utility and other bargaining unit employes. The change was made in order to keep the two plant maintenance employes familiar with the plant's equipment. The Employer acted in good faith, and in accordance with both the clear language of the contract and the past practice. In so doing, it did no harm to the grievant. For these reasons, the arbitrator should deny the grievance in its entirety.

## DISCUSSION

### Procedural Arbitrability

Questions of procedural arbitrability present threshold issues for the arbitrator. Arbitration is simply the final step of the grievance procedure, not a separate forum for airing complaints. Thus the arbitrator's jurisdiction extends only to those grievances which have properly been advanced to the final step under the terms of the grievance procedure. In this case, the Employer argues that the grievance is untimely because it was not submitted to the General Manager until after the stated time limit in the collective bargaining agreement. This argument is not persuasive.

Addressing first the claim that the overall issue of the RSO's exclusive right to performing rounds was settled in 1995, the arbitrator would simply reiterate what he said in his preliminary bench ruling on arbitrability. The rotation system for Hydro rounds introduced in 1998 is a distinct event from the removal of the Water Department rounds and the Substation rounds in 1995. While the fact that those duties were removed from the grievant's position without protest by him or the Union may bode ill for the Union's prospects on the merits, it does not deprive the grievant of the right to raise the issue of the Hydro rounds.

Turning to the specific facts of this grievance, the grievance procedure requires the grievant or the Union to initiate the grievance process within ten days of the incident giving rise to the grievance or the aggrieved and the Business Manager becoming aware of the incident. No precise method of initiating the process is specified. The parties have ten days to discuss the grievance after the process is initiated, after which the grievance must be presented in writing to the Utility General Manager. The Grievant was told in January of 1998 that the

Utility was no longer going to give the Hydro rounds exclusively to the Relief System Operator. He testified that he complained to his supervisor, though he did not specify the precise date. Even if his complaint to his supervisor did not serve to initiate the grievance process, it appears that the first notice to the Business Manager would have been when the grievant sent his February 3rd letter to Nyhouse. That letter was also copied to Prast. While the letter does not say, in so many words, "I am filing a grievance," it clearly raises an issue related to the "interpretation, application or enforcement of the terms of the Agreement," which is the definition of a grievance. Thus the initial filing of the grievance was timely. Assuming for the sake of argument that the letter does not constitute a written grievance, the question then becomes whether the grievance thereafter became untimely because it was not submitted on an official grievance form until June 4th.

Testimony that there were discussions between Prast and the Grievant and Nyhouse about the grievant's complaints after the February 3rd letter is uncontroverted. Prast testified that he had a discussion with the Grievant in early March. Prast also testified that he had several conversations with Nyhouse about the Grievant's situation between March 18th and April 24th. The grievant then wrote a letter to Prast on March 18th after which Prast testified that he had several conversations with Nyhouse about the Grievant's letter. After the discussions ended, Prast gave a written response on April 24 and the grievance was not pursued further by the Grievant until June 4th. The testimony shows no more discussions after April 24th.

The Employer argues that the grievance became invalid either 10 days after February 3rd or 10 days after April 24th. In Article III of the parties' collective bargaining agreement, the last paragraph after Step 3 states "Time limits specified in Steps 1, 2 and 3 of the Grievance Procedure may be extended by mutual agreement" (emphasis supplied). In this case, both parties have been lax in complying with the contractual time limits when they are discussing a grievance. Mark Damro testified that the parties routinely ignored the timelines of the grievance procedure while trying to informally resolve issues, and Prast himself testified to an instance where he did not comply with the time requirements for an answer because the parties had been in discussions about the underlying grievance.

In situations where the employer and the union mutually extend the time limits by discussing the grievance, they are each entitled, within reason, to rely on that informal approach. While either party may elect to stand on its contractual rights to prompt grievance processing, it must first provide clear notice of its intent to demand strict adherence to the contractual timelines. See Elkouri & Elkouri, How Arbitration Works, 5th ed. p. 277-78 (citing a line of arbitral authority for the same proposition). Here, there is sufficient evidence to conclude that the on-going discussion between January and April constituted a mutual extension of the timelines in accordance with the practice of the parties. I further conclude that the informal approach to grievance processing at this work place would require clear notice

before either party could stand on its right to demand strict adherence to the grievance procedure. For these reasons, I find that the grievance is timely and is properly before the arbitrator.

**The Merits**

The question on the merits is whether the Employer may unilaterally reassign a portion of the grievant's duties to employes in a different job description. The issue is not whether the receiving employes may object to performing the work. Those employes have not filed grievances and apparently do not object to performing Hydro rounds in a rotation with the grievant. The issue is whether the grievant may insist on retaining the sole right to do the rounds. Central to the Union's claim that he may is its belief that the Utility has negotiated the content of the job descriptions with the Union, and these are therefore bilateral agreements. In fact, it appears that the bargaining is somewhat more nuanced than that, as reflected by the testimony of Union Business Manager Timothy Driscoll:

. . .

> MS. SOLDON: Do you recall discussing the job description for the relief system operator in 1993?
>
> A I don't-- I don't recall that being at the bargaining table. I recall meetings in the summer sometime and talking about the job, not at the-- at the bargaining table, but negotiating or talking, negotiating during the summer about what these people would do, at what percentage they would come in, and what they would be paid.
>
> Q Did you reach an agreement on that description?
>
> A We reached this piece of paper with a wage associated with it and a percentage.
>
> Q When you say, "this piece of paper," are you referring to the '93--
>
> A I'm sorry. It happens to be opened in front of me.
>
> Q The job description for 1993 for the relief system operator?
>
> Q Yes.

> Q Okay. Is it your understanding that the job descriptions are-- are something that's negotiated with management or something that management has rights?
>
> . . .
>
> THE WITNESS: I guess I would have to -- Can I explain?
>
> THE ARBITRATOR: Please do.
>
> THE WITNESS: I think the way the Union looks at the negotiation of job descriptions is that we do not very often tell the Employer that we won't agree to some sentence or some phrase in the job description. What we do with the job description is by dealing with the wage and the percentage that the person starts at. The feeling is that if there is something in the job description that is more or less desirable by the Union, it would be compensated for in the wages.
>
> The problem we have is, that after we've negotiated the wage for a-- for a job description, if we feel that the job description has been changed by the Employer, then-- then the wage would be inappropriate. So that, therefore, we feel we've negotiated the whole package. You might say that this is the wage paid for these duties. And that's where we think that we were at.
>
> [Transcript, pages 103-105]

While Driscoll subsequently recalled that there had been discussions at the bargaining table itself because of an objection by an electrician to the RSO retrieving single phase meters, the substance of his description is unaffected by that correction. The Union's basic approach to bargaining over new job descriptions is to assess the value of the job and bargain a wage, and that is what it did in the case of the RSO. The importance of this distinction is that it recognizes that job duties are flexible within a job description, with the focus being on whether the employe is appropriately compensated for the job as a whole. Clearly the Employer has the right to make some reallocation of duties, since it entirely removed the rounds at the Water Department and the Substation, without any protest from the Union or the grievant. Thus the question becomes whether the reallocation of duties so substantially changes the job that it no longer matches the compensation that was bargained. I find that the changes are not so significant as to override the Employer's right to assign duties or to draw the negotiated pay rate into question.

The grievant is still performing the duties listed on his job description, including the Hydro rounds. He is simply doing the rounds less often. He concedes that his pay has not been affected, and his hours of work have not been affected. He does not contend that his work is harder or more complicated, only that it is less to his liking. In short, he does not

enjoy his job as much as he used to. Absent some unusual contract provision not in evidence in this case, that may be grounds for posting to another job, but it is not grounds for a grievance. In making this observation, I do not intend to make light of the important principles raised in this case. Employers find themselves increasingly in need of more flexible workers as technology drives changes in many operations. At the same time, the gradual alteration of jobs over time is a serious issue for Unions, which as Driscoll testified, bargain wage rates based on the existing bundle of duties at the time of negotiations, and which also have to be alert to issues such as de-skilling and the slow transfer of bargaining unit work to other bargaining units or non-unit positions. None of those issues are raised by the grievant's complaint. The apportionment of duties within his job has surely changed, but the job itself remains as it was described in 1995. 1/

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***1/ In considering this case, I have given no weight whatsoever to the grievant's complaint that he took a temporary pay cut to claim this job. While it is clear that he considers this an important equitable factor, the logic of his position is that his rights are somehow greater than they would be if he had received an increase in pay when he posted for the position. Outside of discipline cases, grievances are seldom driven by such individualized circumstances. The job was not designed with him in mind, and if there is any basis for a grievance, it must be found in the contract language equally applicable to all employes.***

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On the basis of the foregoing, and the record as a whole, I have made the following

## AWARD

1. The arbitrator does have jurisdiction over the Union's June 4, 1999 grievance.

2. The Employer did not violate the collective bargaining agreement by reassigning Hydro rounds previously performed by the grievant to other employes.

3. The grievance is denied.

Dated at Racine, Wisconsin, this 1st day of March, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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