BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL NO. 75

and

CITY OF GREEN BAY

Case 293
No. 57656
MA-10711

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C. by **Attorney John J. Brennan**, appearing on behalf of the Union.

Mr. Lanny M. Schimmel, Assistant City Attorney, appearing on behalf of the City.

ARBITRATION AWARD

Teamsters Local No. 75, hereinafter referred to as the Union, and the City of Green Bay, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the collective bargaining agreement. The undersigned was so designated. Hearing was held in Green Bay, Wisconsin, on November 4, 1999. The hearing was transcribed and the parties filed post-hearing briefs. The parties reserved the right to file reply briefs. The Union chose not to file one and the City filed a reply brief which was sent to the Union on February 17, 2000.

BACKGROUND

On September 17, 1998, the grievant was a street sweeper operator in the City's Public Works Department. Leo Werner was also employed as a street sweeper operator and due to a

work-related injury was in the Alternative Duty Program. The grievant has more seniority than Werner. In making the job assignments for September 17, 1998, the grievant was assigned to the Sanitation Section and Werner was assigned to street sweeping duties because his injury prevented him from being assigned to the Sanitation Section. The grievant filed a grievance alleging that the Alternative Duty Program does not take precedence over seniority and as the more senior employe, the grievant should have been assigned to the street sweeper. The grievance was denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the City violate the collective bargaining agreement by allowing a less senior employe on alternative duty to work in his classification while a more senior employe in the same classification was assigned to sanitation for the day?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 23

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ALTERNATIVE DUTY PROGRAM

DEFINITION:

For the purposes of this program, light duty shall be defined as any assignment in which the employee is not required to meet all physical demands of his/her job or perform all essential functions which are normally a part of his/her job as outlined in a City position description. Participation in the light duty program shall not cause the employee to sacrifice wages and/or sick time that would not have been sacrificed otherwise.

QUALIFICATION:

Subject to the priorities listed in C(1)(b) of this program, an employee shall qualify for light duty when a physician indicated on an "Attending Physician's Return to Work Recommendations Record" that the employee is not capable of performing at full capacity.

(A) PURPOSE

To define the requirements for assignment to alternative duty when an employee has returned to work with temporary physical limitations following a work-related or off-duty injury or illness. Work-related incidents will have priority in placement within the Alternative Duty Program.

(B) ORGANIZATIONS AFFECTED

This policy applies to all City of Green Bay regular full-time and regular part-time employees.

(C) POLICY

(1) Responsibilities:

(a) Safety Office

1) Employees will be encouraged to return to work as soon as possible following a disability.

2) Employees will furnish written doctor's statements indicating return-to-work dates and work restrictions, if any.

3) Employee's physician will be contacted as necessary to explain the City's willingness to place employees on alternative work duty and to further determine the physical restrictions of the employee.

4) If doctors place restrictions on employees, they will be asked to specify a certain period or to establish review date on which restrictions will be reconsidered.

5) Follow-up will be completed for all employees with work restrictions to determine if restrictions are to continue or to determine when the employee is able to return to unrestricted activity.

6) The Safety Office will work in cooperation with the Personnel Office and involved department head to place the employee in a temporary position in keeping with their restrictions.

7) The City reserves the right to schedule an exam with a medical practitioner of our choice.

(b) Personnel Office

1) The Personnel Office and Involved Department Head will be responsible for placing temporarily disabled employees on jobs in keeping with the restrictions imposed by the physician and are also responsible for any discussion with labor unions that may be necessary.

a) The Personnel Director will redesign the job description to accommodate work parameters and may negotiate same with Union.

2) Subject to the appropriate City bargaining agreement, employees will be placed on alternative duty in the following order of consideration:

a) Placing the employee on his/her regular job.

b) Transfer to a different job in the same section.

c) Any position within the employee's collective bargaining agreement.

3) The Personnel Office will refer all questions on work restrictions to the Safety office for discussion and resolution.

4) Employees temporarily placed on alternative duty will receive regular full rate compensation.

(c) Department/Division Involved

1) Department Heads will work in cooperation with the Personnel Office in placing temporarily disabled employees on jobs in keeping with their restrictions.

2) Close follow-up will be undertaken by supervisory personnel to ensure:

a) employees are working within assigned restrictions.

b) that the period of alternative duty does not exceed that required by the physician.

(d) Employee

1) Employees are expected to comply with requirements of Safety and Personnel Offices with respect to reporting requirements and physician visits. It is also expected that the employee will comply with physician's restrictions, advice and orders.

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ARTICLE 28

HOURS OF WORK

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Call-In Procedure and Premium:

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After going through the above call-in procedure and personnel needs are still not met, the master seniority list is to be used for further calling. Employees who normally operate given equipment within a category shall be given the first opportunity for call-in or daily work assignments on that equipment.

. . .

CITY'S MEMORANDUM

WHEN WILL STREET SECTION EMPLOYEES BE ASSIGNED BACK INTO SANITATION SECTION

January 24, 1995

From time to time, it becomes necessary to temporarily assign Street Section employees to work in the Sanitation Section. This may happen when the Sanitation Section is short employees due to approved leaves or when extra crews are needed to assist the regular collection crews.

If this happens during the period of time when seasonal employees are employed in the Department of Public Works, they are assigned first into the Sanitation Section ahead of any other Street Section employees. This is outlined in the labor agreement from lines 156 – 160.

After all seasonal employees have been assigned back into the Sanitation Section or during the year when seasonal employees are not available, it has been common practice to assign the least senior Street Section laborers who are traditionally the youngest employees of the Section. After all available laborers have been assigned to the Sanitation Section and additional employees are still needed, they are assigned by using inverse seniority from the Street Section's overall seniority list. This is not outlined in the labor agreement but has been past practice. The only two (2) exceptions from this practice are due to employees working on priority jobs or daily assignments within a given classification if it is essential that assignment is completed that day.

The exception pertaining to priority jobs has been discussed many times with the union during meetings to set up these programs. The jobs or assignments which have priority are listed below. All postings for these jobs indicate this will be your priority job when assigned.

1. Hot mix patching
2. Joint sealing
3. Loose leaf collection
4. Gradall operator and crew
5. Tub grinder
6. Patch truck
7. Overseeing workfare crew

UNION'S POSITION

The Union contends that under the call-in language of the contract, it states that "[E]mployees who normally operate given equipment within a category shall be given the first opportunity for call-in or daily work assignments on that equipment" and the City ignored this language in the instant case, so the grievance must be sustained. It points out that the equipment assignment to a less senior employe and sending a more senior equipment operator to sanitation is unprecedented and this is a case of first impression. It refers to the City's policy dated January 24, 1995, which lists only two exceptions, neither of which is applicable here, and argues that the City must respect classification seniority and must move individuals from street to sanitation by inverse seniority. It contends that the City cannot take an individual out of his classification out of seniority and send him to sanitation involuntarily and assign a less senior person to run his equipment. It argues that because the City determined to run the street sweeper, the grievant should have been assigned to it or the sweeper should not have run at all. The Union observes that the Alternative Duty Program arose out of the City's desire to employ individuals who are injured to avoid paying worker's compensation but the

Union never agreed to sacrifice any of its seniority language or practices through the use of the Alternative Duty Program. It notes the Union protected itself by requiring the City to meet and discuss any situation where contractual rights might be compromised.

The Union alleges that the City could have put Werner in some other type of work and it has placed individuals into sanitation by inverse seniority according to binding past practice and this is the first time it has attempted to ignore inverse seniority to fill sanitation positions. The Union submits that it is irrelevant whether the grievant would have ended up in sanitation even if Werner did not run the street sweeper as the point is that it could not run the sweeper with a junior employe and it is unimportant that alternative duty employes have been bypassed for sanitation because the policy allows for exceptions to the seniority rule. The Union insists the City is seeking the Arbitrator to assist it in establishing a new right to ignore seniority where it has never been allowed to do so in the past. It claims this is contrary to the contract language, the Alternative Duty Program and longstanding practice and it asks that the grievance be sustained.

CITY'S POSITION

The City contends that the Union has failed to cite any contractual provision or accepted past practice which the City has violated. It points out that at the hearing neither the grievant nor the Union's business representative could point out any provision of the contract requiring strict adherence to inverse seniority in moving alternative duty employes into sanitation. The City contends that the memo dated January 24, 1995, does not apply to employes placed in the Alternative Duty Program and such employes may be skipped when assignments to sanitation are made. It argues that because alternative duty employes have routinely and consistently been excepted from being assigned to sanitation, the Union has failed to prove the City violated an accepted past practice; thus, the grievance must be denied.

The City contends that the contract language and past practice in similar cases supports its actions. It points to the language of the Alternative Duty Program which provides that employes in the program will be placed in his/her regular job, when possible. It maintains that the City acted in accord with this language in assigning Werner in his normal position of street sweeper operator and because of his medical restrictions, he was skipped over for sanitation. It claims this language of preferred placement while on alternative duty would be without full meaning unless the City can place the employe in their normal job and skip over them if medical restrictions prevent them from performing the job they would otherwise be assigned. It insists that all words must be given effect. The City observes that the failure to place Werner in his normal job would risk a grievance from Werner that his rights under this language had been violated. The City alleges that the Union's position lacks any foundation in the contract or past practice and ignores the clear mandate of the alternative duty provisions.

The City claims that there has been a past practice of skipping alternative duty employes if they are unable to perform sanitation duties. The City admits that there are no past situations similar to the instant case, so it is a matter of first impression. The City believes that the past practice most closely matching the instant situation is controlling and alternative duty employes can be skipped just as they are now skipped when they cannot do their normal duties or sanitation duties. It argues that this procedure logically applies when all the facts are the same except the alternative duty employe can perform his normal job duties. In each case, the employe cannot perform sanitation duties but the contract's preference for placing an employe in his regular job is given full effect. It insists that this avoids the absurd and illogical consequences which result under the Union's suggested procedure which is to place the alternative duty employe in a make-work job. It submits that this is an affront to the alternative duty employe and the City as a person perfectly capable of doing his or her normal job cannot do it but must squander a full day's work out of his or her usual capacity. It contends this result is absurd. It states that according to the Union's theory, Werner should not have been allowed to operate the sweeper on September 17, 1998, but taken off the machine and put in a make-work job and still the grievant would be assigned to sanitation. It maintains that neither the contract nor the parties' practice contemplate this absurdity. It opines that the procedure suggested by the Union benefits no one and places the City in an absurd position. The City submits that its actions were eminently reasonable and the most equitable response to the circumstances and the grievance should be denied.

UNION'S REPLY

The Union chose not to make a reply.

CITY'S REPLY

The City contends that the Union failed to cite any contractual language in support of its grievance. It notes that the Union cited language from the call-in procedure but there is no reference to seniority and as the title implies, this language only applies to situations where an employe is asked to work at a time he/she is not normally scheduled. It refers to the absence of any proof that the September 17, 1998 assignments were not normally scheduled work for the grievant and Werner. The City argues that the Union failed to demonstrate a binding past practice of assigning employes to sanitation by inverse seniority. It takes the position that the Union makes contradictory claims stating that the only exceptions to the policy are employes working priority jobs or daily assignments that must be completed that day while admitting that alternative duty workers were bypassed for sanitation. The City maintains that the only difference between the practice of skipping alternative duty employes for sanitation and the instant case is that Werner was able to perform his normal duties.

The City disputes the Union's unsupported claim that the Alternative Duty Program arose of the City's desire to avoid paying worker's compensation to injured employes. It states that the program was bargained and mutually accepted by both parties. It also takes issue with the Union's allegation that the Union protected itself by requiring the City and Union to meet to discuss any situation where contractual rights might be compromised. It asserts that the plain language of the contract, as well as testimony at the hearing, belies this inaccurate assumption. It refers to the contract which provides that any accommodations for persons on alternative duty "may" be negotiated with the Union, noting that "may" does not mean "must" or "shall," so the plain language does not require such a negotiation. It seeks denial of the grievance for the reasons stated in its initial brief, as well as its reply brief.

DISCUSSION

The parties rely on different theories to support their respective positions.

The Union relies on the call-in procedure of the contract; however, the undersigned finds that this section is not applicable to the case at hand. The Union also relies on the City's Memorandum of January 24, 1995, which spells out the procedure for assigning Street Section employes to sanitation. The undersigned finds this memo is applicable to the facts at hand. The City relies on the Alternative Duty Program language of the contract to skip over a more senior employe in his regular assignment who is then assigned to sanitation. Although the Union argued that the City was the moving force behind the Alternative Duty Program language, it is irrelevant as both parties agreed to the language and it appears that both parties benefit from the existence of the Alternative Duty Program. The issue presented is whether the Alternative Duty Program allows the City to assign injured employes to perform a task which a healthy employe would normally be assigned by reason of greater seniority.

The City claims that there is no contract language or past practice contrary to its position. The City's memo of January 24, 1995, states that if additional employes are needed in sanitation, they are assigned by using inverse seniority (Exhibit 8). It further states, "This is not outlined in the labor agreement but has been past practice." In STEELWORKERS V. WARRIOR NAVIGATION CO., 363 U.S. 574, 46 LRRM 2416 (1960), Justice Douglas stated:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it.

The City's memo states the procedure is a past practice and the Supreme Court has held that a past practice is as binding as the language of the agreement; therefore, the past practice is binding on the City. The memo states that assignments to sanitation will be by inverse seniority with only two exceptions. It does not list an exception for alternative duty personnel. A review of the language of the Alternative Duty Program reveals that the City will attempt to place the injured employe in his regular job, however Section C (1)(b)2) provides that this is subject to the collective bargaining agreement. As noted above, the past practice requires assignment to sanitation by inverse seniority. It is true that employes on alternative duty may be skipped from being sent to sanitation when they are physically excluded by injury from performing sanitation duties. Also, Street Section employes not assigned their normal duties or within one of the two exceptions are placed in the "melting pot" and may be assigned to sanitation even though a less senior employe is not assigned to sanitation. In the instant case, the City contends that even though the senior employe could be assigned his normal duties, he may be sent to the "melting pot" and a junior employe on alternative duty can be assigned the senior employe's assignment. That is what happened in this case and has not happened before so this is a case of first impression.

The City is attacking seniority rights by displacing senior employes in their regular job with a junior employe on alternative duty. The evidence that a more senior employe has never been displaced by a junior employe who then performs the senior's assignment while the senior goes to sanitation indicates a practice that senior employes are not bumped from their regular assignment to accommodate an alternative duty junior employe who could perform this regular assignment but not sanitation. The prevailing status quo is that the City did not displace a senior employe on his regular assignment with a junior employe on alternative duty and the City recognized this by the past practice. In other words, an alternative duty employe cannot be skipped so that a senior employe is placed in the "melting pot" but junior employes in the "melting pot" may be skipped and senior employes in the "melting pot" may be assigned to sanitation. (Tr. 28-30, 39, 44)

The City argues that it is illogical and absurd that an alternative duty employe can be skipped from going into sanitation and a more senior employe in the "melting pot" assigned to sanitation, but the City cannot skip a more senior employe in his regular job and assign the alternative duty employe to perform his regular job and instead must have the employe do a make-work job. The City's arguments are appropriate for negotiations or to an interest arbitrator but under past practice, it lacks the right to assign the alternative duty employe to perform his regular job which would be performed by the more senior employe who is then sent to sanitation. It must be concluded that the City does not have the right to give the junior employe on alternative duty what amounts to super-seniority to in effect bump a senior healthy employe from his regular assignment so the senior can go to sanitation and the junior perform the senior employe's regular assignment. If the City wants the Union to give up the seniority rights of employes, it must be done at the bargaining table.

Only senior employes in the "melting pot" may be assigned to sanitation while junior employes in the Alternative Duty Program may be skipped, but these junior employes cannot be skipped such that a senior in a regular assignment is placed in the "melting pot" and sent to sanitation.

Based on the above and foregoing, the record as a whole and the arguments of counsel, the undersigned makes the following

AWARD

The City violated the collective bargaining agreement by allowing a less senior employe on alternative duty to work in his classification while a more senior employe in the same classification was assigned to sanitation for the day, and therefore, the grievance is sustained.

Dated at Madison, Wisconsin, this 3rd day of March, 2000.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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