BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES LOCAL NO. 75

and

CITY OF GREEN BAY (DEPARTMENT OF PUBLIC WORKS)

Case 299
No. 58071
MA-10833

(*Schmechel Grievance*)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, for the Union.

Mr. Lanny M. Schimmel, Assistant City Attorney, City of Green Bay, 100 North Jefferson Street, Suite 200, Green Bay, Wisconsin 54301-5006, for the City.

ARBITRATION AWARD

Pursuant to a request by Drivers, Warehouse and Dairy Employees Local No. 75, herein "Union," and the subsequent concurrence by the City of Green Bay, herein "City," the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on November 9, 1999, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on February 2, 2000, at Green Bay, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on April 12, 2000.

After considering the entire record, I issue the following decision and Award.

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ISSUES

The Union frames the issues as follows:

1. Did the City violate established call-in procedures and/or safety policies in requiring the grievant to patch a hole on Velp Avenue on May 29, 1999 by himself?

2. If so, what is the appropriate remedy?

The City frames the issue in the following manner:

Did the City of Green Bay violate the collective bargaining agreement by requiring the grievant to patch a hole on Velp Avenue on May 29, 1999?

Having reviewed the entire record, the Arbitrator frames the issues as follows:

1. Did the City of Green Bay violate the collective bargaining agreement by requiring the Grievant to patch a hole on Velp Avenue on May 29, 1999?

2. If so, what is the appropriate remedy?

BACKGROUND

On Saturday, May 29, 1999, Jeff Schmechel ("Grievant"), a 28-year Department of Public Works ("DPW") employe, was working scheduled overtime filling in for an employe on vacation. His hours were noon to midnight.

At approximately 5:45 p.m., the Grievant received a call from the Green Bay Police Department that there was a blowout on Velp Avenue at the intersection of Buchanan Street. Upon receiving the call from the Police Department, the Grievant contacted his supervisor, Gary Lemerond, and they met at the site of the blowout. The Grievant was first instructed by Supervisor Lemerond to barricade the blowout. After reviewing the size of the blowout (large enough to close an entire lane), the traffic (light to medium) and lighting conditions (good), and discussing the matter with DPW Operations Superintendent David Damro on the telephone, Supervisor Lemerond instructed the Grievant to repair the blowout.

The Grievant protested, both because this was the work of laborers, not a custodian; and because he felt that it was unsafe to work alone on a primary highway without proper signage. The Grievant was concerned for his safety because this was similar to a situation in which a co-worker working on a primary artery lost his leg when he was hit.

The Grievant removed the blown-out concrete, a process that took approximately 15-20 minutes. He then returned to the DPW shop, retrieved "cold mix" to patch the blowout, returned to the scene, and completed the repairs. The patching took approximately 15 to 20 minutes. Once these repairs were complete, the curb lane was reopened to traffic. The entire job, including travel, took about an hour and 15 minutes.

A couple of years prior to this incident, Union Steward John Weid filed a grievance when he was working as a laborer. He filed the grievance because "cold patching is a primary responsibility and duty of laborers" and because "I believe I should have been afforded the opportunity to work this overtime prior to individuals other than laborers." Instead, the City allowed truck drivers, or other classifications, to perform the laborers' work. Two other laborers filed grievances identical to Weid's at the same time. These grievances were settled with payment to Weid and his two co-workers. As part of the settlement, the City agreed that "it's the laborers' job to patch." Superintendent Dave Damro took part in that settlement. He couldn't recall whether "emergencies" were discussed but did recall that "scheduled was discussed because that's what the overtime was involved with. It was scheduled overtime, not emergency overtime."

While custodians infrequently patch potholes, custodians have never been asked to patch or fix a blowout prior to the instant dispute.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 2

MANAGEMENT RIGHTS

. . .

> (B) The City shall have the right at all times during the existence of this contract, and subject to provisions herein, to conduct its affairs according to its best judgment and the orders of competent authority, including the power of establishing policy to hire all employes, to dismiss and discipline for just cause, to lay off subject to provisions in the contract, and to determine the methods, means and personnel by which City operations are to be conducted.

(C) The City agrees it will not use these rights to interfere with the employee's rights established by law or by this agreement.

ARTICLE 28

HOURS OF WORK

. . .

Call-In Procedure and Premium:

. . .

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.

. . .

In the event employees are called for emergency work, they shall receive a minimum of three (3) hours of pay at the prescribed rate of pay.

. . .

SIGN AND BARRICADE PROCEDURE

DEFINITIONS AND GENERAL CONSIDERATIONS

. . .

F. All signing and barricading associated with work on public right-of-way shall conform to the standards outlined in the latest edition of the following documents:

1. Part 6 of the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD).

2. Traffic Control Manual for Street Construction and Maintenance Operations in the City of Green Bay.

. . .

PROCEDURE

. . .

E. For emergencies during off hours, the Custodian shall place temporary traffic control under the following circumstances:

1. If the obstruction can be signed and barricaded safely with a minimal amount of traffic control devices.

. . .

3. For emergency bridge closures and larger obstructions, the Custodian is responsible for the installation of preliminary traffic control as instructed by the on-call Operations Division Supervisor. Personnel shall be called in as outlined in Section G below to place additional traffic control devices.

. . .

G. If Department of Public Works personnel are required to place, maintain or remove traffic control devices during off hours, the following procedures shall be followed:

1. The on-call Operations Division supervisor shall call in Signs and Marking Section personnel using the seniority principle.

. . .

POSITIONS OF THE PARTIES

Union's Position

The Union first argues that the City violated established safety policies by requiring the Grievant to patch the blowout on the date in question.

The Union next argues that the City did not assign the disputed overtime work to the proper classification (Street Section laborers).

For a remedy, the Union requests that the City be ordered to cease and desist from requiring custodians to repair emergency or other blow-ups and make the proper assignment of that work to the appropriate classification, and pay the appropriate employe within the appropriate classification for all hours which would have been worked had the assignment been properly made.

City's Position

The City initially argues that it properly directed the Grievant to repair the blowout after balancing competing safety interests with the short duration of the necessary repair work. In this regard, the City points out that the repair operation was of short duration, the Grievant was adequately protected from hazards, and the operation was consistent with mutually-accepted guidelines. The City also contends that the complicated signage suggested by the Union was unnecessary and not required under the parties' mutually-accepted standards for maintenance operations.

The City next maintains that the repair of the blowout was an "emergency" duty within the meaning of the "DEFINITION" section of the custodian's job description. The City also notes that the brief repair of the concrete blowout by the custodian was consistent with the "Custodian Guidelines for After Hours Calls". The City further points out that the repair of the blowout by the custodian fell within a mutually-accepted past practice which provided, pursuant to City memo, that custodians may be used to apply cold mix to potholes.

Finally, the City argues that the grievance settlement relied upon by the Union is distinguishable from the instant dispute because: the 1997 grievance, unlike the Grievant's grievance, was not an emergency situation; the 1997 grievance involved three workers working for three hours, or a total of nine hours of work, while the instant grievance involves a much smaller amount of time and only one employe; and the core issue involved in the 1997 grievance did not involve **whether** employes should be called in to work, but **which** employes should be called in. (Emphasis in the original). In other words, the City states that the Union challenged its action in the prior grievance because it believed the City offered the overtime to the wrong group of employes. In the instant dispute, the City claims that the Union grieves the City's failure to call in workers. Because the issues involved in these two grievances are different, the City concludes that the Union cannot rely on the 1997 grievance.

Based on the above, the City requests that the grievance be denied and the matter be dismissed.

DISCUSSION

At issue is whether the City of Green Bay violated the collective bargaining agreement when it required the Grievant to patch a hole on Velp Avenue on May 29, 1999. The Union argues that the City violated call-in procedures and/or safety policies by the action noted above while the City takes the opposite position.

Patching the Hole

The first question before the Arbitrator is whether the disputed work was appropriately performed by the Grievant or should have been assigned to laborers.

The record is clear that laborers normally patch blowouts. However, in the instant case, the City required the Grievant, a custodian, to patch the blowout. The City argues that it acted properly in the instant case because the operation was of short duration, it was an emergency situation and the Grievant was adequately protected from hazards. For the reasons discussed below, the Arbitrator agrees.

Situations arise in which there is a need for someone to perform specific work for a short period. Unions generally contend that management is obligated to assign that work to employes who carry it out regularly, even if that means resorting to overtime. Management, on the other hand, traditionally takes the position that it has the right to assign temporary work in whatever manner will enable it to be completed efficiently and expeditiously. The parties take similar positions herein.

Arbitrators generally agree with management. *Labor and Employment Arbitration*, Volume 1, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 24, Bargaining Unit Disputes, by Neil N. Bernstein, s. 24.05[4], 24-22 (2000). This is particularly true where there is an "emergency" situation, and the work is a *de minimis* departure from the contractual requirements. *Labor and Employment Arbitration*, supra, at 24-23.

Likewise, in Elkouri and Elkouri, *How Arbitration Works*, 5th Edition, p. 709 (1997), the authors state: "Management generally has been held to have considerably [sic] discretion in unusual situations to make temporary or emergency assignments of tasks across job or classification lines." In further discussion of "emergency" situations, Elkouri explains that "an employer was upheld in assigning an emergency job that arose on a non-workday to the only two employes scheduled to work on that day, despite the fact that the work did not fall within the duties of their job classifications." Elkouri added: "The arbitrator stated that management should have the right to meet unusual situations in this manner unless restricted from doing so by the agreement."

Applying the above standard herein, the record is clear that a custodian performed work normally done by laborers. However, in the instant case because the disputed work was a minimal amount (including travel not much more than an hour) and performed as a result of an emergency (a blowout on a major arterial during the Memorial Day weekend), the Arbitrator finds that the City acted appropriately.

The Arbitrator relies on the "Management Rights" clause, Article 2, to support the above conclusion. Said contractual provision states that the "City shall have the right at all times during the existence of this contract . . .to conduct its affairs according to its best judgment." The contract clause also provides that the City shall have the right "to determine the methods, means and personnel by which City operations are to be conducted." These management rights of the City are only limited by the "employee's rights established by law or by this agreement."

The Union does not persuasively argue, nor does the agreement provide, any express contractual restrictions on the City's right to <u>temporarily</u> assign work during an emergency situation as it did in the instant case. (Emphasis added) It is true that the parties' agreement provides that employes who normally operate a piece of equipment within a category shall be given the first opportunity for call-in on that equipment. However, there is no evidence in the record that any special equipment was used to patch the blowout. It is also true that the agreement provides that "in the event employees are called in for emergency work, they shall receive a minimum of three (3) hours of pay at the prescribed rate of pay." However, said contract provision does not require the City call in employes for emergency work as argued by the Union. It simply states that if employes are called in for emergency work they shall be guaranteed at least three (3) hours of pay at the appropriate rate.

The Arbitrator also rejects the Union's reliance on a past grievance settlement because it is distinguishable from the instant dispute. The most notable characteristic which distinguishes the 1997 grievance from the Schmelchel grievance is the complete lack of an emergency situation in the 1997 grievance. The prior grievance involved a pre-planned, scheduled operation to repair a number of potholes. Tr. at 83 and Union Exhibit Nos. 5, 6 and 7. The existence of the potholes that needed to be patched was obviously known. In settling the grievances, the parties agreed that patching work belongs to laborers. Tr. at 88. However, the parties never discussed what would happen in case of an "emergency." Tr. at 88. Schmechel's grievance, on the other hand, involved an unplanned, unexpected emergency situation. Based on same, the Arbitrator finds that the settlement terms of the prior grievance are irrelevant.

Another factor distinguishing the grievances is the size of the operation involved. The 1997 grievance involved three workers working for three hours, or a total of nine hours of work. Union Exhibit Nos. 5, 7 and 8. This grievance involved a total of 30 to 40 minutes of

patching work by one worker. As noted by the City, this "crucial fact not only distinguishes the two grievances, it also supports the conclusion" noted above "that the instant grievance involved an isolated, emergency situation, while the 1997 Grievance involved a planned, scheduled operation."

Finally, the core issue involved in the 1997 grievance did not involve **whether** employes should be called in to work, but **which** employes should be called in. (Emphasis in the original). The Union challenged the City's action because it believed the City should have offered the overtime to the laborers. In the instant grievance, the Union claims that the City had a duty to call in laborers to patch the blowout, a claim which the City disputes. Because the issues involved in these two grievances are different, the Union cannot rely on the 1997 grievance settlement in support of its instant claim.

The Union argues, however, that the patching work belongs to a laborer, not a custodian, citing their respective job descriptions. In support thereof, the Union first contends that the custodian's job description does not contain any duties which could reasonably reflect an intention to assign street repair work beyond the emergency set-up of barricades. A review of the custodian's job description, however, does not support the Union's contention. To the contrary, there are several references in the custodian's job description that relate to street repair work. For example, in the "DEFINITION" section of the aforesaid job description, reference is made to the performance of "**emergency duties** for the Department of Public Works." (Emphasis in the original) Joint Exhibit No. 5. Although "emergency" patching of blowouts is not specifically listed therein, said work easily fits within the general direction that custodians will perform "emergency" duties for the Department.

Other references in the custodian job description also support the proposition that the Grievant had a duty to perform such work under the circumstances contrary to the Union's assertion. For example, the "DUTIES, RESPONSIBILITIES, AND WORK PERFORMED" section of the job description refers to the following: "emergency set up of flashers" and "iron plates at unsafe locations or conditions"; "handle emergency phone and radio calls and **take proper actions to rectify complaint or problem** or call supervisor on call"; and "**pick up debris from streets in emergency situations** in after hour situations." (Emphasis in the original) Joint Exhibit No. 5. Finally, the "PHYSICAL REQUIREMENTS" section of the job description includes the following: "Strength and endurance to lift barricades, manhole and catch basin covers **and shoveling of sand, gravel and other similar material**." (Emphasis added)

The Union argues, contrary to the above, that pursuant to "CUSTODIAN GUIDELINES FOR AFTER HOURS CALLS" only in "small emergencies" is the custodian to take care of the problem himself. The Guidelines do provide that a custodian shall take

care of small emergencies while for major emergencies a custodian shall "call a Superintendent or Supervisor on call" for problems such as "Cave-ins on highways or streets." However, neither the "Small" nor the "Major" emergency sections contains language which rules out the use of a custodian to patch the blowout on an emergency basis as he did herein or requires the City to call in a laborer to patch the blowout. Therefore, the Arbitrator rejects this argument of the Union.

It is true, as pointed out by the Union, that the particular work performed by the Grievant in patching the blowout is a specific function of a laborer. However, nowhere in the laborer job description is the requirement that a laborer must respond to all emergency situations or that only laborers may patch a blowout in an emergency. On the other hand, the emergency response requirement is clearly a portion of the custodian's job duties. Based on the foregoing, the Arbitrator rejects said argument of the Union.

Based on all of the foregoing, and the record as a whole, the Arbitrator finds that the City acted properly by assigning the disputed work to the Grievant.

Safety Issues

A question remains whether the City adequately considered the safety of the Grievant when it ordered him to patch the blowout.

The Union first argues that it was important to get help for the Grievant because of significant safety concerns on a primary system. In this regard, the Union correctly points out that Velp Avenue is a highly utilized artery in Green Bay. While 35 miles per hour is the posted speed, 45 miles per hour is the recognized speed on Velp Avenue in the area where the Grievant was working. Tr. at 32. Velp Avenue, with no stop lights between Military and the access to I-43 (a distance over two miles) allows achievement of higher speeds. Tr. at 32, 44. In addition, there are many taverns west of where the work was being performed, as well as other businesses including a bait shop and fast food service. Tr. at 32.

In support of the above argument, the Union relies on a directive from the previous director of public works, Richard Hall, to get help if necessary to perform repairs on the primary system. Tr. at 33. However, there is no evidence in the record that said directive is in force under the current director of public works. In addition, the record is clear that the City did a careful balancing of safety interests and the exercise of common sense when it required the Grievant to patch the blowout on May 29th. In this regard, the record indicates that both Gary Lemerond, the supervisor on the site, and David Damro, DPW Operations Superintendent, considered whether "it was a safe situation or not," before ordering the Grievant to perform the work. Lemerond felt the traffic was minimal. Tr. at 66. Lighting

conditions were good, and the location of the blowout allowed for approaching traffic to view the site of the repair work for a long distance without obstruction. Tr. at 66-67. Damro asked Lemerond twice, whether in his opinion he had a safe situation there or not, and was told both times that "he felt it was safe." Tr. 81. An independent review of the site, as agreed to by the parties, Tr. 93, corroborates the City's assessment of the situation as a safe one for the Grievant to patch the blowout.

The Union next argues that a total of 700 feet should have been signed prior to the work on the road. Because of the limited duration of the necessary repairs, however, elaborate signage was not required. According to *Part VI, Standards and Guides for Traffic Controls for Street and Highway Construction, Maintenance, Utility, and Incident Management Operations*, the repair of the blowout met the definition of a "short duration" operation because it took substantially less than one hour to complete at the location in question. Joint Exhibit No. 8, p. 79 and Tr. at 20 and 40.

The above document has been accepted by both parties though the collective bargaining process as an appropriate guide in determining the set up of highway maintenance operations. Joint Exhibit No. 1, p. 31, lines 979-982. The guide states: ". . .it is generally held that simplified control procedures may be warranted for short-duration work." Joint Exhibit No. 8, p. 80. The guide adds that any shortcomings in the control procedures "may be offset by the use of other, more dominant services such as special lighting units on work vehicles." Joint Exhibit No. 8, p. 80. The guide also explains that:

. . .

> Emergencies and disasters may pose severe and unpredictable problems. The ability to install proper traffic control may be greatly reduced in an emergency, and any devices on hand may be used for the initial response as long as they do not themselves create unnecessary additional hazards. If the situation is prolonged, the standard procedures and devices set forth in this part of the MUTCD shall be used. . .
>
> (Joint Exhibit No. 8, p. 93)

. . .

Applying the above standard, the record indicates, contrary to the Union's assertions, that the Grievant's work site was adequately indicated to oncoming motorists at the work location by the arrow board on the vehicle which he was using, barricades placed near the work site by the Grievant, and the supervisor's vehicle, both of which physically blocked

oncoming vehicles from his work site. Tr. 64-66 and City Exhibit No. 1. If the Grievant thought additional barricades were necessary, he had more barricades in his truck that he could have put out. Tr. at 68.

Changing the above procedure as requested by the Union would have unnecessarily exposed the motoring public to a lane closure for a substantially longer period of time. Tr. at 72. Pursuant to the mutually-adopted Part VI standards, a fundamental principle of maintenance operations is that "traffic movement should be inhibited as little as practicable." Joint Exhibit No. 8, p. 13. The guide further points out regarding short duration activities: "There are hazards for the crew in setting up and taking down a traffic control zone. Also, as the work time is short, the time during which motorists are affected is significantly increased when additional devices are installed and removed." Joint Exhibit No. 8, p. 96.

Based on the above and the record as a whole, the Arbitrator finds that the City adequately considered the Grievant's safety during the brief repair of his blowout as well as other factors including the risks to the motoring public from a lane closure for a lengthy period of time. The Grievant made the repairs in question in a rapid, efficient and safe manner. His exposure to safety risk was of limited duration and further reduced by the vehicles and barricades which protected the work site. The agreement itself provides for "emergencies during off hours" that a custodian shall place temporary traffic control when "the obstruction can be signed and barricaded safely with a minimal amount of traffic control devices." The record supports a finding that the Grievant was able to sign and barricade and patch the blowout in a safe manner.

In reaching the above conclusion, the Arbitrator is not unmindful of the Grievant's testimony that he was particularly concerned for his safety given the fact that a co-worker working alone on a primary artery lost his leg when he was hit. Tr. at 28. If there was any persuasive evidence in the record that the Grievant's safety had been put in jeopardy by the City's decision to order him to do the work in question, the Arbitrator would have reached a different conclusion.

Based on all of the above, and the entire record, the Arbitrator finds that the City of Green Bay did not violate the collective bargaining agreement by requiring the Grievant to patch a hole on Velp Avenue on May 29, 1999, and it is my

AWARD

That Jeff Schmechel's grievance dated May 29, 1999, is hereby denied and the matter is dismissed.

Dated at Madison, Wisconsin this 6th day of June, 2000.

Dennis P. McGilligan /s/

Dennis P. McGilligan, Arbitrator

DPM/gjc
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