BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION #563

and

CITY OF APPLETON

Case 394 No. 58332 MA-10915

Appearances:

Attorney James P. Walsh, City Attorney, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin 54911-4799, appearing on behalf of the City of Appleton.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Attorney William H. Ramsey and Attorney Naomi E. Soldon, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union #563.

ARBITRATION AWARD

Teamsters Local Union #563, hereinafter Union, and City of Appleton, hereinafter City, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on December 20, 1999, requested that the Commission appoint either a staff member or a Commissioner to serve as Arbitrator. The Commission appointed Paul A. Hahn as arbitrator on December 23, 1999. The hearing was held on March 2, 2000. The hearing took place in the Mayor's conference room, City of Appleton, Wisconsin. The hearing was transcribed. The parties were given the opportunity and filed post hearing briefs. The Union brief was received on May 16, 2000 and the City brief was received on June 5, 2000. The parties were given the opportunity and filed reply briefs which were received on July 3, 2000 (City) and July 11, 2000 (Union). The record was closed on July 11, 2000.

ISSUE

Union

Whether the City of Appleton violated the collective bargaining agreement when it assigned Bill Nooyen and Jim Banker to start work at other than their regularly scheduled starting time in May and April of 1999 and did not pay them call-time pay for each shift worked or weekend premium pay; if so, what is the appropriate remedy?

City

Did the City violate the Collective Bargaining Agreement when it did not pay call-in time pay on a daily basis to employes who had been transferred to the Sanitation Division and were engaged in performing work within the Sanitation Division work assignments? If so, what should the appropriate remedy be, if any?

Arbitrator

Whether the City of Appleton violated the collective bargaining agreement when it assigned Bill Nooyen and Jim Banker to work a Sanitation Division shift rather than their regularly scheduled Street Department shift in May and April of 1999 and did not pay them call-in time pay for each shift worked and weekend premium pay; if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – RECOGNITION

The Employer shall recognize Teamsters Local Union #563 as the authorized representative and exclusive bargaining agent for the employees of the Street, Sanitation, Maintenance, Traffic, and Water Divisions of the Department of Public Works, who are employed in the Municipal Services Building exclusive of Supervisors, Professional and Managerial, Foremen, Superintendents, confidential employees and other Clerical personnel.

. .

ARTICLE 5 - COMPENSATION

. . .

- B. Employees called for emergency work shall receive three (3) hours pay at their regular rate in addition to the pay for actual hours worked provided, however, the employee shall receive no less than four (4) hours straight time pay.
- C. Employees required to start work at other than their regularly scheduled starting time, shall receive two (2) hours straight time pay in addition to the pay for the actual hours worked provided, however, the employee shall receive (sic) no less than four (4) hours of straight time pay.

. . .

ARTICLE 6 - OVERTIME AND PREMIUM PAY

- A. One and one-half (1 ½) times the base pay exclusive of night premium shall be paid as follows:
 - 1) For all hours worked in excess of eight (8) hours per day, Monday through Friday.
 - 2) For all hours worked on Saturday.

. . .

ARTICLE 10 - JOB POSTING

. . .

- E. Temporary vacancies shall be handled as follows:
 - 1) Posted on the bulletin board within the Division for five (5) working days.
 - 2) Held by the temporary replacement until the regular employee returns to work.
 - 3) Temporary replacement reinstated back in job formerly held.
 - 4) This section shall not be used to circumvent the procedures as set forth in Section "A" of this Article.

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ARTICLE 15 - ARBITRATION

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Section B

The arbitrator shall conduct hearings and receive testimony relating to the grievance and shall submit findings and decision. The decision of the arbitrator shall be final and binding on the Employer, the Union and the employee.

. . .

Section D

It is understood that the arbitrator shall not have the authority to change, alter, or modify any of the terms or provisions of this Agreement.

. . .

Exhibit B

Hours of Work

. . .

SANITATION DIVISION

Automated Front End Loaders

<u>Automated Sideloaders</u>

4:30 AM until route completed

Sweeper Operators

11:00 PM to 7:30 AM (Summer hours)

Operator 1

7:00 AM to 3:30 PM

Yard Waste Site

12:00 Noon to 8:00 PM (Summer hours) 9:00 AM to 5:00 PM (Saturday & Sunday)

Laborers

7:00 AM to 3:30 PM

STREET DIVISION

All Classifications 7:00 AM to 3:30 PM

STATEMENT OF THE CASE

These two grievances involve Teamsters Local Union #563, affiliated with the International Brotherhood of Teamsters and the City of Appleton as set forth in Article 1 – Recognition. (Jt. 1) The Union alleges that the City violated the parties' collective bargaining agreement when the City refused to pay the two Grievants call-in pay and weekend overtime while they were working in the Sanitation Department. (Jt. 2 and Jt. 3)

The City operates a Department of Public Works. Within that Department are several divisions including the Sanitation Division and Street Division. Within the Sanitation Division employes are assigned to Yard Waste Sites. (Ex. B, Jt. 1) The Grievants were laborers within the Street Division. During the spring of 1999 the City made a decision that it needed temporary labor help within the Sanitation Division at the Yard Waste Sites for the period of April to May when summer seasonal employes would arrive to staff the Yard Waste Sites. To that end, the City posted for these temporary Yard Waste Site Attendant jobs in the Sanitation Division on March 5, 1999. The posting stated that it was for a Yard Waste Site Attendant position and that it was a temporary vacancy starting April 5 through sometime in May until the "summer help" arrived. (Jt. 17) One employe signed the posting. The City determined that it needed more Yard Waste Site employes, and the City then transferred or assigned the two Grievants to the Sanitation Division to work as Yard Waste Site Attendants for the period set forth in the job posting.

The two Grievants, working as Yard Waste Site Attendants, worked the Yard Waste Site hours set forth in Exhibit B of the labor agreement, which hours were different from their normal laborer shift hours in the Street Division, their permanent job classification. (Ex. B, Jt. 1) Under Article 5 of the collective bargaining agreement, Sub. C, employes required to start work at other than their regularly scheduled time receive two hours call-in pay in addition to the pay for the actual hours worked. Further, under Article 6 - Overtime Premium Pay, employes that work on Saturday and Sunday receive time and one-half and double time. (Jt. 1) However, Yard Waste Site Attendants, who are regularly scheduled to work Saturday and Sunday, by agreement between the parties, do not receive overtime for the first eight hours worked on Saturday and Sunday. (Jt. 12)

When the Grievants were transferred or assigned to the Sanitation Division, Yard Waste Site Attendant classification, the City paid a call-in time for their last shift worked in the Street Department and paid a call-in time for the last Sanitation Division shift when the two

Grievants were returned to the Street Division. Grievances were filed because the Grievants and the Union took the position that because the hours of the Grievants were changed from their regular hours in the Street Division to the shift hours in the Sanitation Division, Yard Waste Site classification, the labor agreement and the practice of the parties required that they receive call-in pay for each day they worked as a Yard Waste Site Attendant, as well as receiving overtime on Saturday and Sunday.

The City denied the grievances on the basis that once the Grievants were assigned to the Yard Waste Site Attendant position, the Grievants worked the hours of that position and therefore did not have their shift hours changed each day, which would require payment of call-in time. Further, payment of weekend overtime, the City argued, was not justified as the agreement between the Union and the City did not require overtime to be paid on Saturday and Sunday for Yard Waste Site Attendants for the first eight hours of work.

The grievances were denied by Sandra Neisen, the City's Human Resources Director, in a letter dated December 9, 1999 to Reggie Konop, Business Representative of the Union, and in memorandums to the individual Grievants from Wendy Lodholz, Public Works foreman, dated April 27, 1999. (Jt. 13, 15 and 16)

For the designated Yard Waste Attendants, the first eight hours of work on Saturday and Sunday shall be paid at straight time. The Site Attendant is paid one two-hour call time when changing his shift to the site hours, and one two-hour call time when he is back on his regular shift and no longer working in the Yard Waste Site.

The Union appealed the grievances to arbitration. At the arbitration hearing on March 2, 2000 no issue was raised as to the arbitrability of the grievances. Hearing in this matter was held by the Arbitrator on March 2, 2000 in the City of Appleton in the Mayor's conference room at City Hall. The hearing concluded at 12:43 p.m.

POSITIONS OF THE PARTIES

Union Position

The Union submits that the City did not have any contractual authority or by practice under the labor agreement to involuntarily transfer the two Grievants to the Sanitation Division working as Yard Waste Site Attendants. Therefore it is the position of the Union that when the Grievants worked the shift hours as Yard Waste Site Attendants they were working different

shift hours than their normally assigned Street Division shift hours and therefore by contract and agreement between the parties they should have been paid a call-in of two hours for each of the shifts worked as a Yard Site Attendant as well as overtime for hours Grievants worked on Saturday and Sunday. The Union points out that the contractual call-in language has remained the same over the history of the parties' labor agreements except that the call-in pay was modified from four to the current two hours.

A key argument for the Union position is that a 1982 arbitration award should control the Arbitrator's decision in this case. The Union, citing Elkouri & Elkouri, submits that when the factual circumstances of a current arbitration are the same as a prior arbitration, the earlier award should be controlling. In that award, the Union submits, with the same call-in pay language, employes within the Street Division were assigned to different shift hours within the Street Division both during the week and on the weekend. The arbitrator in the 1982 decision interpreted the labor agreement to require that when scheduled shift hours are changed the City is obligated to pay the call-in. The Union points out that this decision was confirmed by the City in agreements between the City and the Union subsequent to the arbitration award, noting that the only exception is for the Street Sweeper. This decision, the Union submits, supports its argument that the language of the labor agreement is unambiguous that whenever the shift hours of an employe are changed, the two hour call-in pay must be paid.

The Union submits that other than the Street Sweeper exception, the parties have always agreed on a case-by-case basis to waive call-in pay for various work situations. The Union submits that the instances of involuntarily transferring employes from one division to another without negotiating with the Union involve fact situations not on point with the fact situation in this particular case. The Union notes that in the spring of 1999, the Union and the City did negotiate creating three permanent positions in the Sanitation Department and that the City should have negotiated with the Union regarding the transfer of the two Grievants to the Yard Waste Site Attendant position. The Union concludes its argument by its final reemphasized point that the City had no authority to transfer the two Grievants to the Sanitation Division, Yard Waste Site classification. Since the City could not transfer the Grievants, they remained Street Division employes and the contractual language clearly required Grievants to receive call-in and weekend premium pay each time they worked a Yard Waste Site shift.

The Union requests that the Arbitrator sustain the grievances and make the Grievants whole for the losses they incurred as a result of the City's violation of the agreement.

City Position

The City takes the position that there is no language in the parties' collective bargaining agreement regarding the transfer of employes between Divisions. However, the City points out that an agreement between the Union and the City allows the City, when necessary, to

transfer labor between Divisions as long as all available employes in the Division are working on the normal job duties of the Division before a laborer from another Division is transferred to the Division needing a laborer.

It is the position of the City that the Grievants were properly transferred or assigned to the Sanitation Division Yard Waste Site Attendant position and that once assigned to that position the Grievants worked the hours of that position as set forth in Exhibit B of the collective bargaining agreement. Since the Grievants were properly assigned to the Yard Waste Site Attendant position as a temporary position and since the Grievants worked the regular hours of the Yard Waste Site Division they were not eligible for call-in pay each day that they worked the Yard Waste Site hours. The Grievants, the City submits, were only eligible for call-in pay the first shift they worked the Yard Waste Site hours, as a change in hours from their normal Street Division hours, and call-in pay when they were changed from the Yard Waste Site shift hours back to their normal Street Division shift hours.

The City argues that agreements between the City and the Union are unambiguous and must be considered as part of the collective bargaining agreement permitting the City to pay the Grievants as they were paid. The City further submits that the arbitration decision cited by the Union is inapposite in this particular case since that decision concerned a change of shift hours within the Street Division, and did not involve a transfer from one Division to another. Therefore, the fact situation of the cited arbitration was different from the fact situation before this Arbitrator. The City submits that this case clearly involves the Sanitation Division and the assignment of employes from the Street Division to the Sanitation Division, resulting in a change of hours; it was not a change of hours within one particular division.

Finally, the City summarizes its position by stating that once Grievants were temporarily transferred, following an attempt through posting to get volunteers to transfer to necessary jobs in the Sanitation Division, Yard Waste Site Attendant classification, the Grievants worked the scheduled Yard Waste Site hours pursuant to the labor agreement and therefore, were only eligible to be paid pursuant to those scheduled hours. Having rightfully transferred the Grievants to the Sanitation Division, the Grievants became subject to the rules of the Sanitation Division and therefore based on the clear language of the City's agreements with the Union and the specific facts present in this case, the City requests that the grievances be denied.

DISCUSSION

This is a contract interpretation case. The Union, on behalf of the two Grievants, has alleged that the City violated the parties' labor agreement when it did not pay two hours of call-in pay to the Grievants for each shift when the Grievants were assigned on a temporary basis from the Street Division to the Sanitation Division. Instead, the City paid call-in to the

Grievants only for the first shift they were assigned to Sanitation and the first shift they were assigned back to the Street Division. The Grievants further allege a failure by the City to pay weekend overtime. Saturday and Sunday schedules are not scheduled hours for the Street Division but are for the Yard Waste Sites in Sanitation.

The original grievances did not allege that the City had violated the agreement by unilaterally assigning the Grievants to the Sanitation Division. (In this decision, I use transfer and assign interchangeably). The grievances only alleged a failure to properly pay the two hour call-in premium and Saturday and Sunday overtime. (Jt. 2 & 3) At the arbitration hearing, the Union alleged a contract violation for transferring the Grievants without bargaining with the Union. Therefore, this dispute presents in reality two issues: whether the City had the right to transfer the Grievants on a temporary basis to the Sanitation Division and whether the City wrongly refused to pay the Grievants a call-in premium for each shift worked in the Sanitation Division and wrongly refused to pay Saturday and Sunday overtime.

There is no dispute discernable from the record that in the summer the City, within the Sanitation Division, operates Yard Waste Sites and staffs them with summer employes. (Tr. 51) Those employes are usually not available when the City needs them to operate the Yard Waste Sites in late Spring. Therefore the City posted the Yard Site Laborer position under Article 10 to fill what the City considered were temporary vacancies until the summer employes were available. (Jt. 17) (Tr.31) The posting made clear that these Yard Waste Site Attendant positions were temporary vacancies; the posting also set forth the hours of work. (Jt. 1 & 17) Only one employe signed the posting. The City then determined it needed two more temporary employes and assigned the two Grievants. (Tr. 32, 34-35) The labor agreement is clear that the Yard Waste Site Attendant position is within the Sanitation Division. (Jt. 1) It is also true that the Yard Waste Site Attendant is a laborer position or laborer work within the job descriptions used by the City. (Jt. 21) There was no dispute at hearing that the two Grievants are laborers and that they were the least senior laborers in the Street Division when the City assigned them to the Yard Waste Site Attendant position. (Tr. 34 & 35)

The Union argued at hearing and in its post hearing briefs that the transfer of the two Grievants needed to be bargained; the labor agreement did not allow this unilateral assignment by the City. The Union offered no evidence of a legal or contractual basis to support its position. The City had earlier bargained or agreed with the Union to create three new permanent positions within the Sanitation Division. (Jt. 13) This involved a permanent transfer of three laborer positions from the Street Division to Sanitation. Any issue of whether the City had to bargain over the transfer of permanent positions is not before me. But in this case there can be no dispute that the assignment of the Grievants was on a temporary basis; this was not the transfer of permanent laborer positions from Streets to Sanitation.

The Union is correct that the labor agreement between the parties does not contain specific language that would allow the transfer or assignment of Grievants to the Sanitation Division, but nor is there specific language that prevents the City from making temporary assignments. The agreement does not contain a management rights clause which often in labor agreements addresses the rights of an employer to assign employes. Management, however, has reserved rights to act and one of those reserved rights is the ability to have the work done and to have that work done by its employes. I find that the City in this case properly exercised this long held arbitral theory of reserved rights by assigning the Grievants temporarily to the Yard Waste Site Attendant position in the Sanitation Division. I further find that the City did not violate any implied obligation toward the Grievants or the Union. 1/

1/ Please see the discussion of Reserved Rights in Elkouri & Elkouri, Fifth Edition (1997), Chapter 13, commencing at page 655.

The City first tried to fill the needed Attendant positions by posting. Failing to get enough employes by posting, the City assigned the two Grievants by seniority. The Union argument that the City should have created more permanent positions within the Sanitation Division does not make sense as the Yard Waste Attendant is only a summer job, not justifying more permanent positions if the City has a current work force available to do the work. Nor, I assume, would the Union be interested in having the work subcontracted from outside the Department of Public Works until the summer employes arrived. It is also readily apparent from the Grievants' grievances that they were not concerned about being transferred; they were grieving only the failure to receive call-in and weekend premium pay. (Jt. 2 & 3) Lastly, a work assignment policy and an agreement entered into by the parties for staffing the Yard Waste Attendant positions requires that laborers not be borrowed from the Street Division until all laborers available in Sanitation were working Sanitation duties. If that requirement is met, as it evidently was in this case, the least senior full time laborers from Street Division will be assigned to Sanitation and then by inverse seniority, assigned back to the Street Division when the summer Yard Waste Site employes comes on board. (Jt. 12 & 24) Again there was no allegation or evidence presented that the City did not follow these procedures. Management, in the absence of restrictions, which are not present in this case, normally has the right to transfer employes to a different job. 2/ This supporting case law, under the facts of this case, leads me to find that the City had the right to temporarily assign the Grievants to the Sanitation Division as Yard Waste Site Attendants.

^{2/} Please see the discussion of Temporary Assignments in <u>Elkouri & Elkouri</u>, Fifth Edition (1997), Chapter 13, pages 777-779.

The shift hours of the Street Division, to which the Grievants are permanently assigned, are 7:00 a.m. to 3:30 p.m.; the Sanitation Division Yard Waste Site Attendant works a shift of 12:00 noon to 8:00 p.m. (summer hours) and 9:00 a.m. to 5:00 p.m. (Saturday and Sunday). (Jt. 1 & 24) Yard Waste Site Attendants receive straight time pay for the first eight hours of work on Saturday and Sunday, whereas Street employes would receive time and one-half for all Saturday work and double time for Sunday work. (Jt. 24 & 1)

The Union argues and supports with appropriate case sites that on its face subsection C of Article 5 requires two hours straight time pay whenever employes are required to start work at other than their regularly scheduled starting time. (Jt. 1) Documents were further introduced to support that a change of shift hours within a Division results in call-in premium pay of two hours. (Jt. 8 & 10) 3/ The Union's position is that since every day the Grievants worked in Sanitation at the Yard Waste Sites was a change in their normal Street Division shift hours, they should receive call-in premium and over time on Saturday and Sunday. The City argues that once the Grievants were permanently assigned on a temporary basis to Sanitation/Yard Waste Site that resulted in a permanent change in shift hours which only results in two changes in shift hours, the first when the Grievants worked their first shift as Yard Waste Site Attendants and the last shift before they went back to their regular Street Division positions or their first shift in the Street Division. I find that the City has the better argument.

3/ I note that both of these documents prepared by the City and sent to Union representatives on how call-in pay is to be administered refer to the payment being paid to employes in the Street Division, later extending the payment to the other Divisions. The City clearly discussed this payment in terms of a change of shift hours within a Division.

I believe and so find that the call-in language of Article 5 of the labor agreement requires call-in pay when an employe's shift is changed such as the snowplowing situation testified to by Union witness and steward Reusch. (Tr. 15) I also find that the language that call-in pay must be paid to an employe when required to start work at other than their "regularly scheduled starting time" applies to the hours of the Department's Division to which the employe is assigned. As Union witness Krause testified, once the Municipal Services Division (which had been a labor pool) was eliminated, the employes when assigned to a division and worked under the rules of the division in which they were transferred. (Tr. 59 & 60) In this case, once the Grievants were assigned to the Sanitation Division and the Yard Waste Site job, they were subject to the Yard Waste Site Attendant schedule of hours and did not retain their schedule of hours in the Street Division.

An arbitrator is required, particularly in the absence of specific language, to rule in a manner that is most logical to the work situation, the overall contract language and the relationship of the parties. I find that it makes more common sense that once an employe is permanently assigned, even on a temporary basis to another Division within the Department of Public Works, the employe assumes the new Division's work hours schedule for the duration of the temporary assignment. To find otherwise creates a benefit that clearly was not negotiated and could not have been contemplated by the City. 4/

4/ The Common Law of the Workplace, Theodore J. St. Antoine editor. Bureau of National Affairs, Inc., 1998, pg. 71, section 2.12.

Both parties to this dispute offered testimony and exhibits where the parties have agreed to modification or waiver of the call-in requirements, but I find that those instances occurred within a Division, not in this situation of permanent temporary assignment to another Division. (Tr. 39 & 40) And when I use the word permanent, I only mean that the Grievants were permanently assigned to Sanitation until the summer employes for Yard Waste Site Attendant were employed; in other words, the Grievants were not on a daily basis moving back and forth between Street and Sanitation, assigned one day to the former and the next day to the latter; such a scenario would require a different result than I reach under the facts before me in this case.

The Union gives great weight and emphasis in its argument that a previous arbitration (Jt. 5) should control the result in this case. I do not agree. In that case the City had changed the shift hours within the Street Division, and the arbitrator ruled that in so doing the employes deserved and were awarded the premium pay of call-in. (Jt. 5) That decision involved a different set of facts than is present in this case where there were two divisions involved, Street and Sanitation. The Grievants in this case had their shift hours changed twice; the first time they worked a shift under their new hours assigned as employes within the Sanitation Division and then once again when they returned to the Street Division and its work schedule. I therefore find that the City did not violate the collective bargaining agreement in the manner it paid the two Grievants in this case call-in pay. And I find that the City was not liable to pay the Grievants Saturday and Sunday premium pay for the first eight hours worked on those days while assigned to Sanitation as Yard Waste Site Attendants.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The City did not violate the collective bargaining agreement when it did not pay call-in pay on a daily basis or Saturday and Sunday overtime to the Grievants who had been temporarily transferred to the Sanitation Division and were working the schedule of hours of the Yard Waste Site Attendant positions. The grievances are denied.

Dated at Madison, Wisconsin this 8th day of August, 2000.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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