BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS (IAFF), LOCAL 484, AFL-CIO

and

CITY OF STEVENS POINT

Case 109
No. 59116
MA-11180

Appearances:

Mr. Joseph Conway, Jr., District Vice-President, IAFF, appearing on behalf of the Union.

Ms. Therese Freiberg, Portage County Personnel Director, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Union and the City respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was transcribed, was held on October 20, 2000, in Stevens Point, Wisconsin. Afterwards, the parties filed briefs and the City filed a reply brief. The record was closed on December 12, 2000, when the Union notified the undersigned that it was not going to file a reply brief. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Did the Employer violate the collective bargaining agreement when it issued Directive #2000-102 Time/Shift Trades? If so, what is the remedy?

PERTINENT CONTRACT PROVISION

The parties' 1999-2000 collective bargaining agreement contained the following pertinent provision:

Article 20 – EXISTING RIGHTS

> The rights of all members of the Union and the City existing at the time of the execution of this contract shall no way be modified or abrogated and all privileges, benefits and rights enjoyed by the Union and the City which are not specifically mentioned or abridged in this agreement, are automatically a part of this agreement.

BACKGROUND

Among its many governmental functions, the City operates a fire department. The Union is the collective bargaining representative for most of the department's employees. The Union and the City have been parties to a series of collective bargaining agreements.

Bargaining unit employees have a number of ways to get time off from work. Specifically, they can get time off via vacations, holidays, compensatory time, sick leave and through trades. This case involves the last item just referenced (i.e. trades).

As the name implies, a trade is when one individual trades a shift/duty time with another and fills in for them. Trades are voluntary and are worked out by mutual agreement. Trades do not affect the total number of people working on a shift or leave the department short-staffed.

What happened here is that the Fire Chief issued a directive dealing with trades.

Prior to that directive, trades worked as follows. The individual wanting a trade would find a willing co-worker. The co-worker did not have to be of the same rank or classification. As an example, a paramedic did not have to get another paramedic as his/her replacement; anyone would do. Thus, employees traded across classification lines. After the two workers agreed to the trade, one of them would change the work schedule to reflect that "X" would be working on a particular day rather than "Y". One of the workers would then verbally inform the shift commander of the trade. Trades did not need approval from anyone in management. When a different name was written on the schedule, the trade was considered formalized. Under this trade system, no forms needed to be filled out to reflect/document the trade.

The record indicates that for the last 25 years, trades were almost always handled in the fashion just referenced. It happened on numerous occasions with the full knowledge of management. On two or three occasions though, a shift commander did not allow a trade to occur when the employees involved were in different classifications. The names of the employees involved and the dates these trades were denied are not contained in the record.

Prior to the directive involved here, management had never issued any written directives or policies dealing with trades. Additionally, the subject of trades was not addressed in contract negotiations or in labor/management meetings. Insofar as the record shows, no employee was ever disciplined for abusing trades, or had their trade "privileges" revoked because of a problem with a trade.

. . .

The record further indicates that the Fire Chief periodically issues directives covering a wide spectrum of work-related topics. For example, in 1998 and 1999, the Chief issued seven such directives. These directives dealt with the following topics: 1) paging procedures for EMS and Fire call-back; 2) use of Division Street warning flashers; 3) paramedic service; 4) engine response to the Village of Park Ridge; 5) reading of e-mail and station/electronic bulletin boards; 6) ambulance response to structure fires; and 7) fire department computers. None of these directives were grieved by the Union.

FACTS

On March 27, 2000, Fire Chief Peter Ugorek issued Directive #2000-102 (Time/Shift Trades). It provided thus:

> In accordance with Federal FLSA regulations, all agreements between individuals to trade work time must be approved by the employer. This requires the employer to be aware of the trade prior to the trade taking place.
>
> In order to provide for our mission and to facilitate scheduling of personnel, this Directive shall be adhered to.
>
> Trades are a privilege, designed to allow employees time off when other means are unavailable. An employee's trade privilege may be suspended or revoked if Departmental procedures are violated.

* A trade is defined as that time when one member voluntarily decides to trade work time with another member by their mutual consent.

* The Department does not assume any responsibility for compensating a member who voluntarily agrees to work for another. According to FLSA regulations, the extra hours worked during a trade shall not be used to determine payments for overtime or any other benefit.

* Trades shall be on a time-for-time basis only. No monetary payment shall be allowed.

* A *Request to Trade Time/Shift* form must be submitted and approved at least 48 hours in advance of the requested trade.

* A member may trade time only with a member capable of performing the same job functions as assigned to the requesting member on the day of the trade. The Shift Commander of the person requesting the trade shall ensure the equality of position capabilities prior to approving the trade.

* When members agree to trade, both members must sign a *Request to Trade Time/Shift* form. The form will then be given to the Shift Commander of the employee requesting the trade for approval. Once approved, the form will be forwarded to the Shift Commander of the affected shift. Failure to obtain prior approval will be grounds for suspension of trade privileges.

* Once a trade has been approved, the member who agrees to work another's shift is responsible for working the agreed upon tour of duty. Failure to report for duty at the agreed upon time will mean:

    1. The person asking for the trade is not properly relieved and cannot leave

    2. If traded time is at the beginning of a shift, the person that fails to report for duty is absent with leave (AWOL) and shall be subject to discipline for failure to report for duty.

* If a member who agrees to work for another member is unable to complete the trade due to illness, that member shall be charged a sick day. The member that requested the trade will still be required to repay the agreed upon trade time.

* Once a trade has been approved, the member originally scheduled to work is completely relieved of responsibility to report for duty on the traded day, but will be compensated as though he/she actually had worked the tour of duty.

* In an unforeseen (emergency) situation, Shift Commanders may give verbal permission for a trade on short notice. This should be an exception to the Directive and not common practice. A *Request to Trade Time/Shift* form must be completed and filed as soon as possible.

While this directive speaks for itself, its major components can be summarized thus: henceforth, when employees trade work time with a co-worker, they are to trade with someone who, in the words of the directive, is "capable of performing the same job functions." What this means is that a paramedic, for example, has to trade with another paramedic or someone who is a licensed paramedic, a MPO has to trade with another MPO, etc. The employees involved in the trade then have to complete a trade form. The trade must then be approved by the shift commander 48 hours in advance of the requested trade.

This directive changed the way trades had been handled in the department. It was not bargained with the Union, but instead was unilaterally implemented by Chief Ugorek.

Chief Ugorek subsequently retired. Stephen Koback is the Department's interim fire chief. He testified that Directive 2000-102 was issued for the following reasons: 1) to prevent potential problems with the scheduling of personnel; 2) to comply with federal mandates, specifically the Fair Labor Standards Act (FLSA); 3) to ensure public safety; 4) to ensure firefighter safety; 5) to maintain minimum staffing levels; and 6) to ensure having an adequate number of paramedics to staff the department's ambulances. With regard to the last reason, he averred that there were some instances where paramedics traded with non-paramedics and when this happened, the department had to shift employees around.

The Union filed a grievance which alleged that Directive #2000-102 violated the parties' collective bargaining agreement. The grievance was processed through the contractual grievance procedure and ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Union

The Union contends that the directive in question violates the collective bargaining agreement and therefore should not have been issued. It makes the following arguments to support this contention.

The Union views this case primarily as a past practice case. Consequently, it makes the arguments traditionally made in such cases, namely that a binding past practice exists which the Employer unilaterally changed. The Union contends that the parties' past practice covers trades and how they are done. According to the Union, the past practice was that employees could trade with whomever they wanted, and did not have to get the trade approved by management. The Union maintains this is how trades were handled on numerous occasions for the last 25 years. The Union avers that in almost every instance documented in the record, the trade which the employees worked out among themselves was not altered by management. As the Union sees it, this establishes that the trade practice worked well and did not have a negative impact on the operation of the fire department.

The Union argues this practice is entitled to contractual enforcement. To support this premise, the Union relies exclusively on Article 20 (the Existing Rights clause). According to the Union, the reference in that clause to "all privileges, benefits and rights" protects the aforementioned practice on trades. The Union contends that the City violated Article 20 when it unilaterally implemented the directive covering trades because that directive changed the existing practice.

Aside from the past practice/Existing Rights clause argument just noted, the Union also addresses the various arguments raised by the City. In the Union's view, all the City's arguments are not factually based, so they should not pass muster.

First, the Union responds to the City's contention that the directive in question was mandated by federal law (specifically, the Fair Labor Standards Act). The Union disputes that assertion. According to the Union, the FLSA does not mandate that cities implement directives covering trades. Additionally, the Union argues that the FLSA does not require: 1) the completion of a trade form; 2) 48 hours advance notice of a trade; 3) trading on a time-for-time basis; and 4) trading within a classification. The Union argues that since the FLSA does not require the foregoing, while the City's directive does, the directive contains requirements that are not contained in the law. That being so, the Union believes that the FLSA does not provide a basis to uphold the directive in question.

Second, the Union addresses the City's contention that the directive in question was needed to ensure the safety of the community and the department's firefighters. The Union disputes that assertion. In its view, the record evidence will not support a finding that the parties' past practice put the safety of either the community or the department's firefighters in peril. That being so, the Union maintains that the City's safety argument should fail.

Next, the Union addresses the City's contention that the directive in question was needed to ensure having an adequate number of paramedics to staff the department's ambulances. The Union disputes that assertion. For background purposes, the Union calls attention to the fact that when the City implemented the paramedic program several years ago, the parties bargained its impact. It avers that while many issues were addressed in those negotiations, the matter of shift trades for paramedics was not one of them. It submits that one of the items that was addressed in those negotiations, and agreed on, was how many paramedics were needed for minimum staffing (namely, 15). Building on that premise, the Union notes that the department's roster shows that 20 employees are currently paramedics, five above the minimum. The Union asserts that since the department is above the minimum required number of paramedics, the City's argument to limit trades between classifications that include paramedics is unreasonable and therefore should not pass muster.

Finally, the Union argues that the past practice that existed prior to the issuance of the directive in question did not infringe on the City's management rights to determine staffing levels or classifications. That being so, the Union avers that the City's reliance on its management rights is inappropriate here.

In order to rectify this contractual violation, the Union requests that the arbitrator rescind Directive #2000-102. In the Union's view, this will restore the parties to the *status quo* that existed prior to the Chief's unilateral implementation of same. The Union avers that if the City wants to address the subject of trades, the appropriate venue for doing so is the bargaining table.

City

The City contends that the directive in question did not violate the collective bargaining agreement. According to the City, the directive was compatible with, and did not conflict with, the collective bargaining agreement because there is no language in same which prohibits the regulation of shift trades. The City avers that since there is no contract language concerning same, the City could unilaterally issue a directive dealing with that topic. It elaborates on these points as follows.

The City argues at the outset that it did not violate Article 20 (the Existing Rights clause) as claimed by the Union. This argument is built on the premise that notwithstanding the Union's contention to the contrary, there was no past practice dealing with trades. While the City acknowledges in this regard that trades between employees occurred over the years, it asserts that those trades were not unrestricted as the Union maintains. According to the City, the shift commanders reviewed and approved all trades. Building on that premise, the City argues that notwithstanding the Union's contention to the contrary, there simply was no fixed and established practice dealing with unrestricted trades. That being so, the City believes there is no practice which can be contractually enforced via Article 20 (the Existing Rights clause). To support this contention, it cites the arbitration award issued by Arbitrator Karen Mawhinney in CITY OF KENOSHA for the proposition that a maintenance of standards clause does not freeze a trade policy for the duration of a labor agreement. The City argues that if the Union's position is adopted, and the alleged practice on unrestricted trades enforced, this "would lead to the absurd result of no management control over the qualifications of personnel that would be reporting for duty on any day."

Aside from the argument just noted, the City contends that the directive should also pass muster for the following reasons.

First, the City argues that it was entitled to develop and unilaterally implement a procedure for trades which prevented potential problems with the scheduling of personnel. To support this premise, it relies on the notion that determining staffing levels is a traditional management right. Building on that premise, the City reasons that this right (to determine staffing levels) is protected by Article 20 (the Existing Rights clause). The City submits that this right would be abrogated if the Union's argument in this case was accepted by the arbitrator. To further support its position, it notes that in the last two years, it has issued several directives which it felt were necessary to maintain the effective operation of the department. It further calls attention to the fact that these directives were not grieved by the Union, while this one was.

Second, the City maintains that the directive was needed to ensure the safety of the community and the department's firefighters. As the City sees it, if firefighters are allowed to trade shifts without restrictions, this will compromise the safety of both employees and the public.

Third, the City contends that the directive was mandated by federal law (specifically, the Fair Labor Standards Act). According to the City, the FLSA provides that shift trades among employees must be approved by supervisors and be between employees who work in the same capacity. Building on that premise, the City contends that the directive was issued to ensure that trades among employees complied with that law. The City submits that if firefighters are allowed to trade with each other without restriction, this makes compliance with the FLSA "virtually impossible".

Finally, the City asserts that the directive was needed to ensure having an adequate qualified staff on duty (particularly, having an adequate number of paramedics to staff the department's ambulances). The City avers this is a real and valid concern which should not be overlooked by the arbitrator.

In sum then, the City believes that no contract violation occurred. It therefore requests that the grievance, as well as the Union's requested remedy, be denied.

DISCUSSION

This case involves a directive which the fire chief issued concerning trades. That directive provides, in pertinent part, that henceforth when employees trade shifts or work time with a co-worker, they are to trade with someone who is "capable of performing the same job functions." This essentially means that employees are to trade with someone who is in their classification (i.e. a paramedic is to trade with another paramedic, a MPO is to trade with another MPO, etc.) After the employees involved agree to the trade, the following has to occur: the employee has to complete a trade form, and then the trade has to be approved by a shift commander 48 hours in advance of the requested trade.

The portions of the directive just noted changed certain aspects of how trades had previously been handled in the department. Among the changes were these. First, prior to the issuance of the directive, employees could trade with anyone in the department; they did not have to trade with someone in their classification. For example, a MPO did not have to trade with another MPO. Now, though, they do. Second, prior to the issuance of the directive, employees did not have to complete a written trade form. Now, though, they do. Third, prior to the issuance of the directive, employees did not have to get approval of the trade by a shift commander. Now, though, they do. Fourth, prior to the issuance of the directive, no specific timetable existed for completing a trade. Now, though, there is – namely, 48 hours prior to the date in question.

At issue here is whether the directive violates the collective bargaining agreement. The Union contends that it does while the City disputes that assertion.

In deciding this contractual dispute, I will first address the contract language. After that discussion is completed, attention will be turned to the other arguments raised by the City.

I have decided to begin my discussion on the contract language with the following introductory comment. In many contract interpretation cases, there is ample contract language which can be used to resolve the dispute. In this case though, there is a dearth of contract language which is relevant to the instant dispute. The following overview of the contract language shows this.

Since the basic subject matter of this case involves trades, I think that the logical starting point for purposes of discussion is to ask rhetorically whether there is any contract language dealing with the trading of duty time. That question is answered in the negative. A review of the collective bargaining agreement indicates it does not address the topic of trades. This contractual silence on same means that the parties have not included language in their present agreement dealing with trades.

Next, since this case involves a directive issued by the fire chief concerning trades, the second point for purposes of discussion is to ask rhetorically whether there is any contract language dealing with the issuance of directives, practices or work rules by management. That question is also answered in the negative. A review of the collective bargaining agreement indicates that it does not address that topic either. This contractual silence on same means that the parties have not included language in their present agreement dealing with the issuance of directives, policies or work rules by management.

Next, since the City sees this case, in part, as a management rights case, the third point for purposes of discussion is to ask rhetorically whether there is a contractual management rights clause. That question is also answered in the negative. A review of the collective bargaining agreement indicates that it does not contain a management rights clause.

The foregoing overview of the contract language establishes that in this collective bargaining agreement, there is no language dealing with trades. Ditto for directives. Ditto for management rights. This is surprising to me because, in my experience, such language is often found in firefighter labor agreements. If this collective bargaining agreement contained any of the foregoing provisions, I would certainly hang my proverbial hat on it and use it as the basis for reaching a decision. For example, if there was contract language dealing with trades, the relatively straightforward question for resolution would be whether Directive #2000-102 complied with the trade language or conflicted with it. Additionally, if there was contract language specifying that the employer could issue directives, policies and/or work rules, so long as they were reasonable, the relatively straightforward question for resolution would be whether Directive #2000-102 was reasonable or unreasonable. Finally, if there was a management rights clause in the contract, the relative straightforward question for resolution would be whether management had reserved to itself, via that management rights clause, the right to issue Directive #2000-102.

The focus now turns to the only contract language which is arguably applicable to the instant dispute. That language is found in Article 20, which is entitled “Existing Rights.” It provides thus:

> The rights of all members of the Union and the City existing at the time of the execution of this contract shall no way be modified or abrogated and all privileges, benefits and rights enjoyed by the Union and the City which are not specifically mentioned or abridged in this agreement, are automatically a part of this agreement.

In labor relations circles, this type of clause is usually called a Maintenance of Standards clause. An accepted rule of contract interpretation is that a general Maintenance of Standards clause, such as the one referenced above, does not outweigh a contract clause which is more specific. In other words, specific language takes precedence over a general Maintenance of Standards clause. That was what happened in the CITY OF KENOSHA case which was cited by the Employer in their brief. In that case, Arbitrator Karen Mawhinney based her decision on specific contract language which was found therein which dealt with trading shifts, rather than the contractual Maintenance of Standards clause. Here, though, as has already been noted, there is no specific language dealing with trades, or for that matter, directives or management rights. That being so, the undersigned has no choice but to use the Maintenance of Standards clause as the basis for reaching a decision.

In this case, both sides contend that the Existing Rights clause supports their position. The City's contention will be addressed first.

As the City sees it, the reference in that clause to "rights of. . .the City existing at the time of the execution of this contract" refers to its inherent management rights. Building on that premise, the City maintains that determining staffing levels is a traditional management right, so this clause protects management's right to determine staffing levels via trades. I find this argument unpersuasive. The City's argument overlooks the critical point that what any Maintenance of Standards clause (including this Existing Rights clause) does is simply maintain the *status quo*. In this case though, the City did not maintain the *status quo* on trades; it changed it. That being so, Article 20 does not provide a contractual basis for the City's issuance of Directive #2000-102.

The Union contends that in the context of this case, the reference in the Existing Rights clause to "all privileges, benefits and rights" should protect a past practice, specifically one on trades. The question of whether there is a past practice concerning trades will be decided later. Before addressing that point, it is first necessary to decide if Maintenance of Standards clauses, in general, cover past practices. They do. Arbitrators routinely hold that Maintenance of Standards clauses cover past practices which do not conflict with an express or implied provision in the collective bargaining agreement. In accordance with that generally-accepted view, the undersigned holds likewise.

In situations such as this where a party wishes to enforce a past practice, the practice should be the understood and accepted way of doing something over an extended period of time. Additionally, it should be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered the type of mutually agreeable item that is entitled to contractual enforcement.

The focus now turns to whether the Union established the existence of a practice covering trades. I find that it did. The record establishes that for the last 25 years, employees could trade with whomever they wanted and specifically could trade across classification lines. After the co-workers agreed to the trade, one of them changed the work schedule to reflect the change in personnel working on a particular day. This change on the work schedule formalized the trade. No forms needed to be filled out to document the trade. One of the workers involved then informed the shift commander of the trade. Trades were almost always handled this way and were not usually altered or restricted by management. The City's assertion that shift commanders reviewed and approved all trades is not supported by the record evidence. While a shift commander did deny a trade on two or three occasions when the employees were in different classifications, these denials were the exception and not the rule.

I find that this practice on trades is not in conflict with any express or implied provision in the collective bargaining agreement. That being so, it is entitled to contractual enforcement via Article 20.

The City argues that notwithstanding the existence of this past practice, there are several reasons why Directive #2000-102 should still pass contractual muster. These reasons are addressed below.

First, the City argues that it has the right to develop and implement a directive on trades in order to prevent potential employee scheduling problems. I agree that the City has the inherent management right to issue directives. However, it cannot develop and implement a directive which conflicts with an existing practice. That is exactly what happened here. Consequently, in this instance, the City's inherent management right to develop and implement a trade procedure does not trump the existing trade practice.

Second, the City avers that Directive #2000-102 was needed to ensure the safety of the community and the department's firefighters. It would be one thing if the City had presented record evidence which substantiated that assertion. If it had presented such evidence showing that the existing trade practice compromised the safety of the community and the department's firefighters, the undersigned would have been very reluctant to enforce the practice. However, there is no record evidence which supports this assertion. That being so, it has not been shown

that the existing trade practice imperils the safety of the community or the department's firefighters.

Third, the City contends that Directive #2000-102 was mandated by federal law (specifically, the FLSA). According to the City, it merely incorporated the restrictions on trades which are included in that law into the directive involved here. Quite frankly, the undersigned does not know what restrictions are placed on firefighter shift trades by the FLSA. Assuming for the sake of discussion that there are restrictions on trades contained in the FLSA (a point disputed by the Union), and that Directive #2000-102 merely incorporated those restrictions, that does not get the City off the contractual hook, so to speak. This is because compliance with a collective bargaining agreement is a completely separate question from compliance with a federal statute. The undersigned is empowered to interpret, and remedy violations of, the former; he is not empowered to interpret, and remedy violations of, the latter. Thus, the question involved here is the City's compliance with the collective bargaining agreement; not the City's compliance with the FLSA.

Finally, the City asserts that the directive was needed to ensure having an adequate qualified staff on duty (particularly, having an adequate number of paramedics to staff the department's ambulances). The record evidence does not support this assertion. Proof is necessary and is lacking herein.

It is therefore held that the City violated the collective bargaining agreement (particularly Article 20) when it issued Directive #2000-102.

Having so found, the final question is what action should be taken to rectify same. One option which the undersigned considered was to go through the directive, line by line, and scratch those portions which conflict with the existing trade practice, and leave the remainder of the directive intact. I decline to do so. In my view, my responsibility in this matter is not to rewrite the directive, but rather to decide whether it passes contractual muster as a whole. I find it does not pass contractual muster as a whole because it conflicts with an existing practice on trades. As a result, it is ordered that Directive #2000-102 be rescinded in its entirety.

Based on the foregoing, the undersigned issues the following

AWARD

That the Employer violated the collective bargaining agreement when it issued Directive #2000-102 Time/Shift Trades. In order to remedy this contractual breach, the Employer is directed to rescind the directive.

Dated at Madison, Wisconsin this 21st day of February, 2001.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
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