BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LACROSSE CITY EMPLOYEES UNION,
LOCAL 180, SEIU, AFL-CIO, CLC**

and

CITY OF LACROSSE

Case 302
No. 58878
MA-11091

(Grievance of Tom Fryseth)

Appearances:

Davis, Birnbaum, Marcou, Seymour and Colgan, Attorneys at Law, by **Mr. James G. Birnbaum**, on behalf of LaCrosse City Employees Union, Local 180, SEIU, AFL-CIO, CLC.

Mr. Peter B. Kisken, Deputy City Attorney, on behalf of the City of LaCrosse.

ARBITRATION AWARD

LaCrosse City Employees Union, Local 180, AFL-CIO, CLC, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of LaCrosse, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 1, 2001 in LaCrosse, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by April 25, 2001. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there are no procedural issues, but were unable to agree on a statement of the substantive issues.

The Union proposed the following statement:

1. Did the City violate a prior consent agreement, grievance settlements, past practice and/or the collective bargaining agreement when it failed to allow the Grievant to be assigned as a City Opening Worker on March 6, 2000?

2. If so, what is the appropriate remedy?

The City proposed the following issue:
Did the City violate the collective bargaining agreement when it assigned a Street Department Maintenance Worker to work out-of-class on March 6, 2000? If so, what is the appropriate remedy?

The Arbitrator frames the issues to be decided as follows:
Did the City violate the Collective Bargaining Agreement when it assigned a less senior employee in the Maintenance Worker II position on the Patch Crew to work out of class in the Utility Opening Worker position on that crew, instead of offering the assignment to the Grievant, on March 6, 2000? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' 2000-2001 Agreement have been cited:

ARTICLE 2
GRIEVANCE PROCEDURE

. . .

The arbitrator shall not add to, or subtract from the terms of this agreement.

. . .

ARTICLE 10
WAGES AND SALARY SCHEDULE

. . .

E. **Assignment to a Higher Classification:**
Hourly employees temporarily assigned to a higher rated position shall receive the established rate for the classification. Employees to be paid higher rate for only actual hours assigned out of class. When assigned to a higher rate of pay for the full day, the higher rate shall apply for all unscheduled and/or unanticipated leave if leave is taken the same day.

The practice of payment for tar crew employees shall be 10 cents per hour for whole day.

. . .

ARTICLE 12
OVERTIME

A. Employees subject to this Agreement shall be compensated at the rate of one and one-half (1½) times their regular rate of pay for services rendered and hours worked over and above their regularly scheduled work week. In no case shall time and a half be authorized for services less than forty (40) hours in one week. For employee's on a 37½ hour work week, overtime shall be at straight time cash or compensatory time for the first 2½ hours of weekly overtime.

. . .

ARTICLE 13
RECALL PAY

A) Employees recalled to work shall be entitled to a minimum of two (2) hours pay at time and one-half.

. . .

ARTICLE 17
TRANSFER

A. Department seniority is recognized and shall be considered in filling vacancies and making promotions in the department, providing the applicant is qualified in accordance with the job description posted by the City. The best qualified candidate of those bidding on the job within the department shall be awarded the position. The City carries the burden to show that the person selected is the best qualified.

. . .

ARTICLE 19
RESERVATION OF RIGHTS

Execpt as otherwise specifically provided herein, the management of the City of LaCrosse and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, or for the reduction in the level of services, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work, to subcontract work, together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management.

New rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless an emergency requires a more rapid implementation of such rules.

. . .

ARTICLE 25
AMENDMENT PROVISION

This agreement is subject to amendment, alteration or addition only by a subsequent written agreement between and executed by the City and the Union wherein mutually agreeable. The waiver of any breach, term or condition of this agreement by either party shall not constitute a precedent in the future enforcement of all its terms and conditions.

. . .

ARTICLE 28
ENTIRE AGREEMENT

The foregoing constitutes an Entire Agreement between the parties and no verbal statement shall supersede any of its provisions.

. . .

BACKGROUND

Employees of the City's Highway (Street) Department are among the employees represented by the Union. The Grievant, Tom Fryseth, is an Equipment Operator II and not regularly assigned to any crew. The Department has three crews: Patch, Cement and Sign Shop, as well as employees who are not assigned to crews, e.g., equipment operators and truck drivers. Each crew has a crew leader who holds the position of Utility Opening Worker.

The pay rate for a Utility Opening Worker is higher than that of an Equipment Operator II. On March 6, 2000, the employee in the Maintenance Worker II position on the Patch Crew, who is less senior than Fryseth, was assigned to the Utility Opening Worker position (in that person's absence) on the Patch Crew. It is stipulated that Fryseth is qualified to perform a crew leader's duties on that crew.

There is a dispute as to what the practice has been with regard to assignment to work out-of-class in higher-paid positions. The Union alleges that there has been a practice of following strict Department seniority in regard to opportunities for overtime, call-in and out-of-class pay. Reget and Iverson both testified it was their experience that the most senior qualified employee in the Department has been assigned to the crew leader position when the latter is absent, and was not limited to those on that crew. Schliefer testified similarly, and that in his experience, management could assign a less senior employee to the higher-rated job, but then paid the most senior employee the higher rate. The City alleges that the practice has been to assign the Maintenance Worker II (MW II) on the crew to the crew leader position when the latter was absent, without regard to seniority, or if no MW II was on the crew, to the most senior member of the crew under the crew leader. Street Superintendent, Randall Hinze, testified that as far as the three crews, that has been the case since he started in 1989, including when he was a crew leader. Hinze conceded that was not the case outside of the crews. In the latter case, the most senior qualified employee is either given/offered the assignment, or in some cases, a less senior employee is assigned to the higher-rated position and the most senior qualified employee also receives the higher rate of pay. Former Street Superintendent Don Gehrig (retired in 1990), testified there were no MW II's on the crews then, and that the most senior employee on that crew was assigned to fill in for the absent crew leader without regard to Department seniority.

Assistant Superintendent Rolland Grosskopf was the Account Clerk/Timekeeper in the Department and on the Union's Executive Committee prior to 1997. He testified that it was generally the most senior employee on that crew who was assigned to fill in as crew leader until the MW II position had been created on the Patch Crew, the employee in that position then being assigned to fill in for the absent crew leader.

Prior to May of 1997, the City had a Maintenance Worker I position that, along with a Laborer position, had rotated on to the Patch Crew and had been paid out-of-class pay as a MW II when they did so. In May of 1997, the City eliminated the Maintenance Worker I position and created a MW II position on the Patch Crew. The other crews already had a MW II on the crew.

In November of 1999, the parties reached agreement regarding the new position descriptions being established. That agreement was memorialized as "Memorandum of Understanding #14" which was appended to their current agreement. MOU #14 states, in relevant part:

MEMORANDUM OF UNDERSTANDING #14
POSITION DESCRIPTIONS

. . .

This letter reflects the understanding reached by the parties during negotiations for the 2000-2001 collective bargaining agreement regarding the newly established position descriptions for SEIU represented employees.

The following issues were discussed:

POSITION DESCRIPTIONS REFLECT CURRENT DUTIES
The last time that a comprehensive position analysis was performed for each city position was in 1964, some thirty-five years ago. Since that time, there have been ad hoc changes and updates of position descriptions prepared by the respective eighteen department heads. Needless to say, with this many drafters of written position descriptions, it was difficult to have any kind of consistency in the scope and breadth of the finished product. Therefore, new position descriptions more accurately reflect what employees actually do.

. . .

OUT OF CLASS PAY
While the position descriptions do not contain references to out of class pay, the subject has been brought up in discussions between the City and SEIU Local #180. The promulgation of new position descriptions WILL NOT affect the current practices in place regarding the payment for out of class work.

. . .

It is agreed that the explanations described above will be maintained during the life of the 2000-2001 collective bargaining agreement.

. . .

In March of 2000, the position description for the Maintenance Worker II position was amended, in relevant part, to add: "Incumbents in this classification may occasionally perform the duties of crew leader."

On March 6, 2000, the individual in the crew leader position (Utility Opening Worker) on the Patch Crew was absent. The employee in the MW II position on that crew, who is less senior than Fryseth, was assigned to the crew leader position without Fryseth having been offered the opportunity to work in the higher-paid position. Fryseth filed the instant grievance based on his being denied the opportunity to work in the higher-rated position. The parties attempted to resolve their dispute, but were unsuccessful, and proceeded to arbitration of the dispute before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union first asserts that the express language of the Agreement mandates that the Grievant should have been assigned the Utility Opening Worker position on March 6, 2000. Article 17 of the Agreement contains specific language concerning the assignment of vacancies to bargaining unit employees in a department. The application of strict department seniority, provided the applicant is qualified, is firmly established in the language that reads, "(A) Department seniority is recognized and shall be considered in filling vacancies and making promotions in the Department, providing the applicant is qualified in accordance with the job description as posted by the City. . ." When such vacancies occur on a temporary basis, the employer may assign an employee who is then entitled to the higher wage rates for that classification, pursuant to Article 10, Section E. The principle of the application of strict departmental seniority has been extended to all occasions when the assignment of work results in monetary improvement, e.g., the payment of overtime (Article 12) and call-out pay (Article 13).

Here, it is undisputed that a temporary vacancy occurred in the Highway Department on the Patching Crew in the Utility Opening Worker position (crew leader) on March 6. At the time, the Grievant occupied the position of Equipment Operator II, which is paid less than the crew leader position. It is undisputed that the City assigned a Department employee with less seniority than the Grievant to the opening. It was stipulated that the Grievant was qualified to perform the job. Further, he has actually been assigned to perform those duties over the past 18 years.

The Union also alleges that the extension of the application of strict departmental seniority, if the person is qualified, to all assignments resulting in financial advantage is found not only in the express language of the Agreement, but in an array of grievance settlements, a consent award, and specific written agreements. Prior grievance settlements, in themselves, are binding authority on the parties. STANDARD OIL COMPANY (INDIANA), 13 LA 799 (Kelliher, 1949). The concept of the strict application of seniority first arose in the grievance settlement area in May of 1984, and involved the denial of overtime based on strict departmental seniority. A second grievance involved a consent award occurring in July of 1984; again over the issue of applying strict departmental seniority for assignments that resulted in enhanced pay, i.e., call-outs and overtime. In both cases, the City adjusted the grievances, and in the latter also agreed to a consent award establishing the supremacy of strict seniority. A third grievance occurred in January of 1985, again involving the application of strict departmental seniority when pay was involved. The City again agreed that the contract had been violated and that they would not engage in similar conduct in the future.

With regard to specific written agreements, in May of 1984, correspondence was exchanged between the parties regarding the issue of applying strict departmental seniority. In order to establish how issues of assigning work which result in greater pay will be handled, the Union sent a letter to the City on May 21, 1984. The City responded with a letter dated May 29, 1984, that very clearly subscribes to the application of strict departmental seniority provided the person is qualified.

The suggestion that because the grievances arose in the context of overtime and call-out pay, the principle of applying strict departmental seniority does not apply to out-of-classification pay, is not persuasive. First, the uncontroverted past practice in the Department regarding out-of-classification pay has been to apply strict departmental seniority, provided the person is qualified. As the practice was uniform and unambiguous, there was no need to file a grievance asserting the application of strict departmental seniority in that context. Second, there is no inherent difference in the concept between overtime, call out pay and out-of-class pay, as in each circumstance, the parties are dealing with a relatively short term and usually unscheduled occurrences requiring the assignment of the work. If the City's argument prevails, the Arbitrator would be creating multiple standards for the same type of work. As this is a residual bargaining unit in which the Union is required to administer the Agreement

for approximately 250 employees in various departments, to permit the application of an additional standard regarding the assignment of work resulting in enhanced compensation would be an impossible administrative nightmare for the Union to monitor. Thus, it would be unreasonable, considering the bargaining history and undisputed application of strict department seniority, to carve out such an exception.

Next, the Union asserts that a compelling past practice conclusively establishes that the City has violated the Agreement in this instance. In order for a past practice to be binding, the practice must be unequivocal; clearly enunciated and acted upon; readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. CELANESE CORP. OF AMERICA, 24 LA 168 (Justin). The evidence conclusively establishes each of those elements. Five employees (Reget, Iverson, Schliefer, Thrower and Fryseth) testified without contradiction that the practice of assigning out-of-class pay on the Patching Crew was by strict departmental seniority provided the employee was qualified. Even the City's witness, Hinze, conceded that prior to May of 1997, the practice was to follow strict department seniority, provided the individual was qualified, in assigning the crew leader position on the Patch Crew. Even though the City recalled Hinze because he was "confused", his confusion did not lead to a denial of the practice. Further, Union witnesses testified without contradiction that the practice has continued since 1997. Thus, there is no question that the evidence establishes the required elements of a binding past practice.

Even if the City is only contending that the practice changed after 1997, following the reorganization and the creation of the MW II position, that argument must fail. The City never negotiated a change to the fundamental practice. The City concedes that the Union was never notified of the City's intent to change the practice with regard to the application of strict seniority. Further, the City's own documents promulgated at the time of the reorganization do not support an intent to alter the practice regarding out-of-classification pay. Virtually all of those documents contain no reference to what the City now claims was its intent. The only documents submitted to support its claim, the Maintenance Worker II position description, is dated March of 2000, the same month this grievance was filed. Such a document hardly supports a claim of a change in practice in 1997. Further, the Memorandum of Understanding 14 clearly eliminates the use of job descriptions as a basis for an alteration of practice concerning out-of-class pay. Thus, the City cannot establish that the practice was in any way altered in May of 1997 sufficient to bind the parties. Further, it is uncontroverted that the Union was not aware that any change had occurred in that respect.

The Union also had no reason to know of the change. Under Article 10, E, the duties have to be "assigned" before out-of-classification pay is earned. The evidence shows that the City has the option of whether or not to assign the duties of the crew leader on any given day. Therefore, for the Union to be aware of whether or not the City had violated the practice, it would have to know on any given day whether or not the work had been assigned. As to any

specific incident, the City was unable to demonstrate that the City was aware of even one such assignment. Second, the Union would also have to be aware of who was on duty on a particular day as the application of strict seniority requires the employer to offer the position to the most senior qualified individual on duty. Simply looking at the payroll list and determining who got paid for out-of-class pay would not reveal to the Union whether or not the practice had been violated. Third, the Union would also have had to be aware of which employees were offered and/or rejected the assignment. The evidence is clear that employees have exercised the option to reject offers to work as the crew leader. Thus, the Union would have virtually no way of knowing which employees were specifically offered or refused the assignment. Finally, the suggestion that because a Union member had been a payroll clerk in the Department that somehow the Union would have knowledge of the change of practice is not supported by the record. The cross-examination of the former payroll clerk, now Assistant Superintendent, Rolle Grosskopf, shows that he would not generally have known who was offered or who had refused the assignment.

Next, the Union asserts that the entire purpose of including the Memorandum of Understanding 14 was to preserve the practice of assigning out-of-class pay to the Utility Opening Worker position on the basis of seniority. Even the language of the MOU contains the emphasized words, "WILL NOT", underscoring the critical importance of maintaining the practices concerning out-of-classification pay.

The practice of assigning extra work, including out-of-classification pay, was clearly enunciated and almost undisputed in the record. The prior grievance settlements and written agreements support the practice. However, not one document submitted by the City supports the non-existence of the practice or any alleged change in the practice after 1997. Further, the City's actions regarding the issue conform to the practice as well. It is undisputed that when individuals are assigned work contrary to the application of strict seniority in the department, the practice is to actually pay the more senior person the premium wage, as well as the less senior person actually assigned to the position. Thus, the Union has established conclusively that the parties have a long-standing practice in assigning work by seniority in the department. Specifically, as to the Patching Crew, the practice has been to assign the work of the crew leader on the basis of strict seniority provided the person is qualified.

In its reply brief, the Union asserts that the City has materially misstated and mischaracterized the testimony in a number of respects. The City also failed to address the Memorandum of Understanding 14, the entire purpose of which was to guarantee the practice with regard to the assignment of out-of-class pay. Moreover, if the MOU was not intended to address the very practice at issue, one must ask what then, was its purpose?

The Union concludes that the grievance should be granted, and the Grievant paid any and all back pay for the times he was denied the opportunity of filling in as the Utility Opening Worker, and the work was assigned to a less senior employee.

City

The City first asserts that the express language of the Agreement does not provide for department-wide seniority for out-of-class pay. Citing Article 2, Article 19, Article 25, Article 28 and the Memorandum of Understanding 14, the City asserts that there is nothing in the Agreement which indicates that strict department-wide seniority is to be used for purposes of out-of-class pay. Further, while past practice is often used to establish the intent of ambiguous contract provisions, it will not ordinarily be used to give meaning to a provision that is clear and unambiguous. Since there is nothing in the Agreement supporting the Union's argument, and the language itself is clear and explicit, the grievance should be denied.

The City next asserts that neither the testimony, nor the grievance settlements establish a past practice of using strict department-wide seniority for out-of-class pay. The Union has asserted that a prior consent agreement, previous grievance settlements and past practice dictate that department-wide seniority should be followed for assigning out-of-class pay in the Street Department. Most lacking, however, is any evidence of the existence of a prior consent agreement to support the Union's position. The Union relies on an unsigned letter drafted by Reget which only references call-out and overtime, and not the issue of out-of-class pay. Similarly, the Union relied on another unsigned letter from Reget to some unknown person that again only addresses overtime, rather than out-of-class pay. Former Street Superintendent Gehrig, who was Superintendent at the time the letters were written, confirmed that the letters did not, and were not meant to, apply to out-of-class pay. Further, Gehrig testified that his letter of May 29, 1984 indicates that department-wide seniority was not to apply to situations of out-of-class pay.

The Union's reliance on previous grievances in 1984 and 1985 to support its argument is also misplaced. The grievances are clearly distinguishable from this case in that they involve issues of overtime and call out, rather than out-of-class pay. Further, there is no evidence as to the disposition of the grievances. Thus, they lack any binding effect in this case.

The City asserts that the Union has failed to establish a past practice of following department-wide seniority for purposes of out-of-class pay. In order for the Union to establish a binding practice in this case, it must demonstrate strong proof of a clear, consistent, long-standing and mutual practice of assigning out-of-class pay based on Street Department-wide seniority. It has not done so. The Union's first witness, Reget, testified primarily about the 1984 and 1985 grievances and the missing consent agreement. Reget testified he had the actual

consent award, but simply neglected to bring it to the hearing. That testimony is not credible. Further, Reget refused to concede that the grievances dealt with issues of overtime and call-out pay rather than out-of-class pay. However, a review of the documents clearly indicates that Reget is adding language that simply does not exist in them. The fallacy of Reget's position is amplified by the position description for Maintenance Worker II, which provides that "Incumbents in this classification may occasionally perform the duties of crew leader." Conversely, the position description of Equipment Operator II, the Grievant's position, contains no language to that effect.

Union witness Iverson also testified that he was basing his testimony on the missing consent award. Iverson also produced Union Exhibit 9, a handwritten note without a date, which is clearly self-serving. Further, he was unable to produce any time cards that would justify the claimed past practice.

Union witness Schliefer testified that the Department uses strict department-wide seniority for out-of-class pay, but was unable to explain how he knew this. He also based his testimony on the missing consent agreement, which he claimed to have seen "lots of times", but was unable to explain why this seemingly important exhibit was missing.

The Union's final witness, Thrower, testified he was a member of the Union's Executive Board, and at the same time was a crew leader in the Street Department. He testified that in his absence, Andresen, the MW II on the crew, took his position, and that Andresen was not the most senior Street Department employee. Thus, the Union knew what was happening, and that the crew leader position was not offered to anyone else. Thrower's testimony is significant in that it is entirely inconsistent with the Union's theory. Past practice provides no guide where evidence regarding its nature and duration is highly contradictory. Except for Thrower, the bulk of the Union's testimony in this case consists of mere general statements, with reference to a 1984 consent agreement that no one could produce. There has been virtually no reference to names of other employees who would be able to support the Union's position. It is well-established that past practice may not be established by mere general statements without reference to names or dates.

In contrast to the Union's case, the City has established that there has not been a practice of using department-wide seniority in regard to out-of-class pay. Current Street Superintendent, Hinze, testified that he has been with the City since 1989 in a variety of positions, including crew leader. Hinze testified that when he was a crew leader and absent from work, the employee in the MW II position on the crew, LaFleur, was assigned to work out-of-class as the crew leader. Hinze had personal knowledge that LaFleur was not the most senior employee. Hinze also testified that in his capacity as Street Superintendent, when a crew leader is absent, he assigns the MW II to the crew leader position for purposes of the sanctity of the crew. He further testified that the Department does not use strict department-wide seniority with regard to out-of-class pay.

The Grievant in this case, Fryseth, stated in his application for the position of Utility Opening Foreman when he was a Maintenance Worker I in 1990, "Have worked with this crew for 12 years. Have taken over the crew when Foreman has been absent for the past eight years." Fryseth testified that at the time he was not the most senior employee in the Department. Fryseth's testimony is significant in that he is the Grievant in this case, and his own testimony does not support the Union's theory.

Former Street Superintendent Gehrig worked in various positions in the Department from 1956 to 1970, and as Superintendent of the Department from 1977 through 1990. Gehrig testified that department-wide seniority was never used with respect to out-of-class pay. Rather, members of the same crew were assigned to the crew leader position in the latter's absence. He also testified that there was no consent agreement governing out-of-class pay, and that his letter of May 29, 1984, did not apply to out-of-class pay. Gehrig's testimony was consistent, and it is significant in that he is retired and has no especial allegiance to the City.

Also called to testify for the City was the current Assistant Street Superintendent Grosskopf, who was for 22 years the Account Clerk/Timekeeper for the Street Department. During that time, Grosskopf was a member of the Union's Executive Board. Grosskopf testified that as the timekeeper, he was uniquely qualified to know how work was assigned within the Department, and further testified that the entire time that he has worked in the Street Department, there has been no practice of following department-wide strict seniority for purposes of assigning out-of-class pay. According to Grosskopf, when the crew leader was absent, the MW II was assigned the position, and that is the way it has been as long as he has been in the Department. Grosskopf also testified, and the Agreement confirms, there is a distinction between out-of-class pay, call out pay and overtime, and the Agreement has separate provisions governing those matters.

Thus, the testimony shows that for the purposes of continuity and sanctity of the crew, the MW II has been assigned the role of crew leader when the latter is absent, and the contention that the crew leader has been replaced by the most senior employee in the Department is not supported by the evidence.

In its reply brief, the City notes its disagreement with the Union's contentions in its statement of facts. The variances in the facts involve a series of letters and grievances which the Union contends are applicable to the issue of out-of-class pay. Conversely, the City relies on the actual language in the letters, which indicates they are applicable only to call outs and overtime. Further, the Union produced no evidence regarding the disposition of these grievances.

The Union places critical reliance on what it refers to as a "consent decree", however, it has failed to produce such an important document. The City contends that such a "consent decree" never existed. Similarly, Union Exhibit 9, is simply a handwritten note by the Union president, and is clearly self-serving and lacking any evidentiary value.

The Union's reliance on Article 17 is misplaced. The Union has taken one sentence of that Article out of context. Article 17 consists of nine paragraphs, none of which apply to this case, and is entitled "Transfers". The Article pertains solely to issues relating to permanent job vacancies and their filling through transfer.

The Union's argument that there are no differences between overtime, call-out pay and out-of-class pay, runs contrary to the actual language of the Agreement. There are vast differences between the three concepts, and there are separate articles governing them in the Agreement. Further, Article 12 and 13 are absolutely silent on the issue of seniority as it applies to overtime and call-out pay. The Union's argument is contrary to the explicit language of the Agreement.

The City asserts that the crux of the Union's case is that the Agreement requires that strict department-wide seniority be used for purposes of out-of-class pay, however, there is no language which supports the Union's argument. In the absence of such language to support its position, the Union has attempted to prove its case through past practice, but has not met its burden in that regard. The City requests therefore that the grievance be denied.

DISCUSSION

This dispute involves the failure to offer the work in a higher classification – in this case the assignment to fill in for the absent crew leader (Utility Opening Worker) position on the Patching Crew on the basis of department seniority, provided the employee is qualified. Article 10, E, Assignment to Higher Classification, provides that employees who are temporarily assigned to a higher classification will receive the higher rate. It is silent as to how assignments are to be made and is, therefore, ambiguous in that respect.

The Union asserts that the clear language of the Agreement requires that *all* work in a higher classification assignments are to be offered on the basis of strict Department seniority as long as the employee is qualified and available. In support of its position, the Union first relies on Article 17, Transfer, A, of the Agreement. However, it is clear on the face of that provision that it is concerned with the bidding and selection of applicants for a permanent position, and not for a temporary assignment such as is involved in this case.

The Union also asserts there is a binding past practice of offering such assignments on the basis of department seniority, if the senior employee is qualified, or of paying the senior qualified employee the higher rate if a less senior employee is assigned to the position. The Union offers as evidence of such a practice grievances in 1984 and 1985, as well as correspondence between the Union and management, all of which concerned recall (call out) pay and overtime and are silent as to working in a higher classification. The only evidence as to an alleged "consent agreement", is an October 10, 1984 notice Reget drafted and which also specifically references "call-outs and overtime" and is silent as to assignments to work in a higher classification.

While call-out pay, overtime and working in a higher classification all involve an economic benefit, they are covered by separate provisions in the Agreement. It does not automatically follow that the method used to determine who will be called out and/or offered overtime, and in what order, is the same to be used for determining who is to first be offered temporary work in a higher classification on the crews.

In order for the Union to prevail then, it must establish the existence of the claimed practice through the testimony of its witnesses. The testimony regarding such a practice, however, instead establishes that the method of assigning work in a higher classification has varied over the years and has, at best, been inconsistent as far as offering it first to the most senior qualified employee in the Department, especially with regard to the crews.

In that regard, Reget, Iverson and Schliefer testified that in their experience and as far as they knew, the practice had been to follow seniority or to pay the most senior employee if a less senior employee is assigned the work. However, Union witness Thrower, who is on the Union's Executive Committee and is Sign Shop Foreman (crew leader), testified that when he has been absent, the employee in the MW II position on that crew, Andresen, has been assigned to take over and Andresen is not the most senior. Thrower further testified that he did not know if it had first been offered to anyone else, but he did not believe it had been. A witness for the City, Grosskopf, who has been the Assistant Superintendent since 1997, but had been the Account Clerk/Timekeeper for 25 years and on the Union's Executive Committee, testified that when Snyder had been a crew leader and Union President, the person on the Patch Crew under the crew leader (usually the most senior) had been assigned as crew leader when Snyder was absent. Grosskopf conceded that prior to 1997 he would not have known whether the assignment had first been offered to others and turned down. However, he testified that since he has been Assistant Superintendent, the MW II on the Patch Crew has been assigned as crew leader when the employee in that position has been absent and that in his experience in the Department, strict department seniority has never been applied in assigning out-of-class pay work.

It appears from the testimony of Thrower and Grosskopf that both have been aware while being on the Union's Executive Board, that Department seniority has not been applied in assigning work out-of-class on the crews and have not considered that to violate the Agreement or practice. That is inconsistent with the Union's claim that it has grieved any time it has been aware of a deviation from the claimed practice and that this is the first instance it has been aware of such a deviation.

As far as the MOU 14, the fact that it references "practices" does not establish what those practices are. There are other explanations as to the purpose of the MOU that are just as reasonable as that of preserving the practice claimed by the Union, e.g., a practice of paying out-of-class pay even though a job description includes as a duty of the position to occasionally fill in for the crew leader.

For these reasons, it is concluded that the Union has not established that the City's actions in this case violated either the express terms of the Agreement or a binding past practice.

Based upon the foregoing, the evidence and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 12th day of October, 2001.

David E. Shaw /s/

David E. Shaw, Arbitrator

DES/gjc
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