BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 71, AFSCME, AFL-CIO

and

CITY OF KENOSHA

Case 196
No. 59673
MA-11373

(Equipment Operator Testing Grievance)

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, on behalf of the Union.

Davis & Kuelthau, S.C., **Mr. Roger E. Walsh**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "City", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Kenosha, Wisconsin, on May 22 and July 2, 2001. The hearing was transcribed and both parties thereafter filed briefs and reply briefs that were received by September 13, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

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> Whether the City violated Article V of the contract when it administered its testing procedures for the Equipment Operator position and, if so, what is the appropriate remedy?

BACKGROUND

The genesis of this case dates back to 1993 when then-Union Vice-President Cecil Gardner filed a grievance over his failure to pass a test for the Equipment Operator position. That grievance was eventually resolved in 1993 when the City agreed to follow certain testing procedures that were modified somewhat over the years. Gardner in 1993 was allowed to take the test again, but he failed it again.

The City and the Union in 1993 also agreed to the following agreement (Joint Exhibit 4):

. . .

Selection Process

1. List to be established for Equipment Operator utilizing names of employees who passed exam over last five years (if interested) and current Equipment Operators (if interested). Employees will be contacted to determine interest.

2. Employees who have applied as a result of the current posting dated June 4, 1993 will be included on list if they are currently Equipment Operators or if they have successfully completed an Equipment Operator examination in the last five years.

3. Employees will be certified from list to vacancies according to labor agreement and Civil Service rules. The Equipment Operator list will remain in effect on a continuing basis.

4. Qualifying examinations for Equipment Operator will be given as the workload of Personnel Department permits. Vacant positions will be filled from the eligible list current at the time the vacancy is to be filled.

5. The probationary period for promotion to Equipment Operator shall be six months in length. The probationary period may be positively terminated at any time between two months and six months at the discretion of the Department Head.

> Upon 60 days in the new position, probationary Equipment Operators shall receive a pay increase, if applicable, in accordance with Section 31.02. Equipment Operators, for pay purposes, will be treated the same as Sewage Plant Operator I, Water Plant Operator I, etc.
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> 6. Employees currently classified as Equipment Operators who have successfully completed their probationary period of who previously were classified as an Equipment Operator for nine (9) months or more, will not be required to re-take the Equipment Operator examination.
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> 7. Employees on the Equipment Operator list who decline two promotion or transfer opportunities or who do not successfully complete probation as an Equipment Operator will have their name removed from the Equipment Operator eligible list. They may reapply when the position is again posted.

. . .

John Prijic, Superintendent of the Street Division, testified that the tests now being used were based upon information he received from the Army School for Equipment Operators, operator manuals, his own experience, and information he received from City personnel who deal with heavy equipment. He added that the tests help evaluate a probationary employee's ability to "do two or three or four operations simultaneously into a smooth operation"; that the City no longer has a three-minute walk-around test; that probationary employees take the tests whenever they want; that the equipment manuals have checklists for preventative maintenance and daily walkarounds; and that employees must memorize those checklists in order to pass. He also said that for test number 4, he tests employees on two different types of loaders, two different types of backhoes, and one of the graders to determine if they can pick up castings, which is something he said is done almost daily in the construction season.

He further stated that the time limits for tests 4, 5, 6 and 7 were agreed to in 1993 with then-Union Vice-President Gardner and about five probationary operators as part of the grievance settlement. Prijic added that none of the tests have been independently validated; that the grading test (number 9), is "very similar" to the Army's grading test; that he devised all the tests with former Union Vice-President Garner's help who never objected to them; that the tests were refined after probationary employees performed them; that some small changes have been made in the tests since then; and that the tests today are a little easier because employees can pick their own equipment on which they are to be tested, which was not so in the past. He also said that test number 5 is designed to determine when an employee has the ability to level an object while moving it and that: "The coordination of multiple functions simultaneously under control is what our guys have to do, otherwise they are not safe and they are not productive."

On cross-examination, he said that the tests are spread out over a number of days; that they are not given in any particular order; that employees can take the tests over and over again; and that one employee was tested 58 separate times.

Prijic was recalled as a witness on the second day of the hearing and testified that probationary employees are "evaluated on their overall job performance in the field"; that supervisors regularly give them input on how to better do their jobs; that there is a direct correlation between how well employees do on the tests and how well they do their job; that since using the tests, production has increased and preventable mistakes have decreased; and that before 1993 "there were not any formalized tests" and no written standards. He also said that the City's equipment operators do different kinds of work than do the operating engineers who are members of Operating Engineers Local 139 because Local 139's members usually work on very large construction projects, while City employees usually dig "small, small trenches or small manhole excavations" and other "minor problems", which is why the City contracts out for large construction projects. He also said that the standards for becoming an operating engineer for the City are much lower than Local 139's standards; that the Union from 1993 and up to the filing of the instant grievance never complained about the testing procedures; that the amount of water in buckets used for training was decreased over the years; that only one person was ever injured in the tests since 1993 and that was because the supervisor was at fault; and that supervisors routinely instruct operators on safety.

On cross-examination, Prijic testified that the City cannot guarantee how much time operators can train on a machine; that "some completely green probationary" employees have passed all the tests; that if operators "can perform the tests well, they can perform the work in the field well"; and that the Union refused to extend grievant Richard Lentz's probationary period unless it was for an indefinite probationary period, which the City could not do because it needed to fill the position right away.

Tom Richards, Local 139's Training Director, testified on behalf of the Union via telephone and described Local 139's training program and the classes it offers. He said that those tests typically are longer than 3-5 minutes; that a 3-5 minute test "might be enough for examining an operator's "simple skills"; that test 4 "appears to adjust a person's speed, as such, not necessarily their skill"; and that a person needs 300-500 hours of "stick time" before taking a test for an end loader and at least "double that" for the excavator and grader. He also said that tests can be validated only after a long period of time; that the sample here was too small to determine whether the tests were fair; that operators in the industry are not required to memorize an equipment's checklist; that some of the tests here do not measure an operator's true ability to handle equipment; that some of the time limits "are quite strict, almost to the point of being overly difficult"; and that some tests are unsafe.

On cross-examination, Richards testified that he has no knowledge of whether the City instructs employees on safety; that a "70 percent pass rate or something like that" indicates that testing is fair; that he has never performed tests 1-9; and that he has never seen them done.

Equipment Operator Thad Jensen testified that he was not allowed to pick the machines he was tested on; that the different water buckets used in the tests had varying degrees of difficulty when being moved; that some of the tests were unfair; and that operators never pick up water in the field. On cross-examination, Jensen stated that he had no difficulty in performing the maintenance checks on tests 1 and 2; that he was excused from taking test 3; and that he was given about 50 chances to pass the various tests; and that he passed some of the tests on the equipment to which he was assigned.

Equipment Operator Lentz testified that he did not complete his probationary period because he got injured on the job; that he twice tested on the same piece of equipment; that he had to continue a test even after he had passed it; and that he passed one test only after he had learned to "rev up" the engine. On cross-examination, he testified that he did not take test number 2 and that he took and passed tests numbers 1, 4, 5, 6 and 8.

Supervisor Bob Wilson testified that there is a direct correlation between how well operators do on the tests and how well they do in the field, and that the tests properly measure an operator's skills.

Superintendent of Waste Joe Badura, who formerly served in the streets division for about 20 years, also testified that there is a direct correlation between how well operators do on the tests and how well they do in the field because "the tests seemed to pick out the guys who had the dexterity and could do it." He also said that before the testing procedure was initiated, "there were no standards. It was just like a rubber stamp." On cross-examination, he testified that there is a correlation between how many stick hours operators have and how well they do in the field, and that the same is true for passing the tests.

POSITIONS OF THE PARTIES

The Union claims that the City has violated Article V of the contract because, "The probation and testing of equipment operators was deficient"; because the City "has not committed to even a minimum level of employee training time on the equipment or to the testing of actual job duties"; because tests 1-3 are contrary to industry practice and "needlessly encourage craming", because tests 4-8 "emphasize speed over concerns for safety"; because tests 6, 7, and 8 are scored in an arbitrary fashion; because test 9 does not emphasize safety; because the tests were never validated; and because the original select group of operators in 1993 when the tests were promulgated "was not typical of equipment operators serving probation." The Union also argues that "Jensen did not receive a fair opportunity"; that "Safe

operation was not a primary concern"; and that "Employees should be tested on actual job duties".

The City asserts that the tests are valid because the Union in 1993 agreed to them and never complained about them prior to the instant grievance; because "a 76% pass rate indicates that the tests are reasonable"; and because, "The tests adequately measure the performance level desired by the City." The City also contends that the grievants did well on the tests "despite their inexperience in operating equipment", and that, "The Union has failed to substantiate its claims that the tests are unsafe."

This case turns in part on Article V of the contract, entitled "Filling Vacancies", which provides, in pertinent part:

5.03 Filling Vacancies.

A. Posted vacancies in the following positions shall be filled by the person applying for the vacancy who has the longest City seniority provided such person is qualified and able to discharge the duties and requirements of the position within the probationary period.

Construction and Maintenance Worker I

Construction and Maintenance Worker II

Laborer

Waste Collector

Utility Worker

Building Maintenance Helper I

Building Maintenance Helper II

Water Meter Reader

B. In the event of a vacancy in any other position represented by the Union, the City retains the right to <u>administer written and/or oral examinations to determine qualifications and aptitudes for the position</u>. In these positions, the senior applicant who receives a qualifying score on the examinations and who desires a position shall be awarded the

> position. If another opening in the same classification occurs within six (6) months of the original posting, the new vacancy need not be posted. Employees previously awarded a vacant position from such original posting shall be contacted to determine if they desire the new opening, and the senior qualified applicant from such original posting shall be contacted to determine if they desire the new opening, and the senior qualified applicant from such original posting who desires the position shall be selected. (Emphasis added).
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> 5.06 c) Employees appointed to a position of Water Equipment Operator or Equipment Operator shall serve a probationary period of not less than two (2) months, nor more than six (6) months at the discretion of the Department Head.
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> . . .

The City under this language has the right to "administer written and/or oral examinations to determine qualifications and aptitudes for the position." That being so, the main question here centers on whether the City's testing procedures are fair. If they are, the grievances must be denied; if they are not, the grievances must be sustained.

The record shows, through Training Director Richards' testimony, that some of the testing procedures are contrary to industry practice and that they might be improved. However, the City rightfully points out that what goes on elsewhere is not as important as what goes on here since the City has unique needs that are not necessarily the same as those found elsewhere on much larger construction projects. As to that, Prijic, Wilson, and Badura all testified that the tests over the years have filled the City's needs and that they do, in fact, accurately measure whether probationary employees can properly handle the construction equipment used by Equipment Operators.

In addition, the record here establishes that employees over the years have experienced about a 76.5 percent passing rate. Since Richards testified that a "70 percent pass rate or something like that" indicates that the testing is fair, it must be concluded that the testing here is also fair despite its shortcomings.

Moreover, Prijic testified without contradiction that almost all of these testing procedures came about only after the Union in 1993 challenged the prior system which did not use any objective criterion; only after former Union Vice-President Garner agreed to them; and only after the parties resolved a similar issue that was codified in the formal agreement set forth above at pp. 2-3. Prijic also testified that the Union prior to the filing of the instant

grievances never challenged the testing procedures between 1993 and 2001. As a result, it must be concluded that the Union acquiesced to those procedures and that it now is estopped from challenging them.

The Union claims that this earlier agreement is no longer binding because some of the procedures have changed over time and because there has been an "evolution in the tests". While it is true that some changes have occurred relating to how much water a bucket can hold and whether a bucket can be squeezed, the Union never challenged them at the time. In addition, there have been other changes – such as expanding the time it takes to do the grader test, expanding the probationary period, allowing employees to retake particular tests as long as they wanted (in one case 58 separate times), and allowing employees to pick their own equipment - which have made the testing easier. Given the Union's acquiescence, I find that the 1993 negotiated agreement still stands.

The Union also argues that the 1993 agreement is no longer applicable because the original group of operators in 1993 when the tests were promulgated "was not typical of equipment operators serving probation." Again, while some differences between then and now may exist, they are not that major and, more importantly, they cannot serve to override the fact that the 1993 agreement has no termination date, which means that it is still in effect. If the Union believes that changed circumstances exist to modify that agreement, it therefore must do so at the bargaining table and not through an arbitration proceeding.

Lastly, the Union cites several cases in support of its claim that the present testing procedures are unfair. In FETCO ENGINEERED SYSTEMS, 90 LA 1283 (1988), Arbitrator Charles R. Miller ruled that the testing procedures were unfair because there was no correlation between a person's score and their job performance; because the test did not relate to the specific job in issue; because the test did not prove the grievant's ability or inability to perform certain work; and because the test "was more of an I.Q. quiz. . ." That case is distinguishable, however, because Prijic, Wilson and Bandura all testified that the testing here <u>does</u> accurately measure whether probationary employees can properly use the construction equipment used on the job. Indeed, the Union itself acknowledged the same thing when it agreed to such testing in 1993.

That also is what separates the facts here from the other case cited by the Union, CLEVELAND REGIONAL TRANSIT AUTHORITY, 101 LA 669 (1993). There, Arbitrator Jerry A. Fullmer ruled that a test was unfair because it required applicants to weld a much thicker piece of metal than what was actually used on the job, which is why he ruled: "fairness would require that the materials used be of the same thickness as those actually worked upon by the Equipment Body Mechanic (Bus) Grade 5." <u>Id</u>, at 673. For the reasons stated above, I find that the testing here was job-related and that the Union agreed to it.

Based upon the above, it is my

AWARD

That the City did not violate Article V of the contract when it administered its testing procedures for the Equipment Operator position and that the grievance therefore is denied.

Dated at Madison, Wisconsin this 4th day of January, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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