

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AFSCME LOCAL 1269, AFL-CIO**

and

**CITY OF MENASHA (UTILITY)**

Case 104

No. 59320

MA-11250

*(Student Help Grievance)*

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Appearances:

**Mr. Richard C. Badger**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Davis & Kuelthau, S.C., **Mr. Kirk D. Strang**, on behalf of the Utility.

**ARBITRATION AWARD**

The above-captioned parties, herein “Union” and “Utility”, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Oshkosh, Wisconsin, on January 5, 2001, and July 10, 2001, at which time the parties agreed I should retain jurisdiction if the grievance is sustained. The hearing was transcribed and the parties subsequently filed briefs and reply briefs that were received by January 22, 2002.

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

### ISSUE

Since the parties did not jointly agree on the issue, I have framed it as follows:

Did the Utility violate Article XXVI of the contract when it assigned student help to perform meter reader duties and, if so, what is the appropriate remedy?

### BACKGROUND

The Utility for years has employed student help to perform various duties, including reading meters. Manager of Business Operations Sandra Brink thus testified that the Utility has hired the following students to perform some of the meter reader duties (Utility Exhibit 2):

1985	Tim Waters	Summer
2 yrs.	Paul Hewitt	Summer
1991	Jennifer Kropidowski	Summer
1992	Sara Knorr	Feb/Summer
1992	Sara Knorr	Dec/Jan
1996	Colleen Martenson	Summer
1997	Colleen Martenson	Summer
1997	Sara Knorr	Dec/Jan
1998	Colleen Martenson	Summer
1999	Amanda Smith	Summer
2000	Amanda Smith	Summer

Article XVII of the parties' predecessor 1998-1999 contract provided in pertinent part:

...

- C. Temporary: A temporary employee is a person hired for a temporary opening of not more than ninety (90) calendar days duration and who at the time of his hire is notified that he is being hired as a temporary employee. For summer help, the union may allow extensions of the ninety (90) calendar day duration, if requested by the Utility. Time limits therein may be extended by mutual consent of the parties. Temporary employees shall not accrue seniority nor be entitled to any fringe benefits under this Agreement. The rate paid temporary employees is at the discretion of the Commission, but will generally be compatible with rates paid for similar work in the community, but will not exceed a rate which is twenty-five (\$0.25) cents per hour below the starting rate for employees in the department for which the employee is

hired. At no time shall temporary employees be working while permanent employees are on layoff status. (Emphasis added).

The Union in 1999 contract negotiations proposed the following clause dealing with student summer help (Joint Exhibit 7):

Article XVII – Definition of Employees. Revise as follows:

- A. Remove following sentence from paragraph C: “For summer help, the Union may allow extensions of the ninety (90) calendar day duration, if requested by the Utility.”
- B. Add new paragraph D that reads as follows: “Summer Help: Summer help is defined as students hired during school breaks to help with non-skilled labor not to exceed 600 hours per calendar year. Summer help will not be used for relief work of Union jobs.”

The parties subsequently agreed to the following language which is now part of Article XVII of the current contract:

...

- D. Student Help: Student help is defined as students hired during school breaks to perform non-skilled labor not to exceed 600 hours per calendar year per student. Student help will not be used for relief work as set forth in Article XXVI.

...

Article XXVI in turn states:

Any employee who has qualified to work in relief capacity of a particular job, shall be compensated while in such capacity at the hourly wage which is one step advanced from the hourly wage he is presently paid on his normal assignment.

Any employee who has qualified to work in relief capacity of the Water Maintenance Foreman and Line Foreman job, while assigned to work such capacity for a minimum of three and on-half (3-½) hours, shall be compensated at the hourly wage which is one step advanced from the hourly wage he is presently paid in his normal assignment.

Timothy Gosz, the President of Local 1269, participated in the 1999 contract negotiations leading to the current contract. He testified that the Union proposed contract language limiting the use of student help because student help was improperly “being used in relief capacity” and because the Union wanted to “prevent student help from being placed in a Union job to fill in when they’re on vacation or sick, or whatever functions relief work had been used for in the past.” He also said, “I don’t recall much discussion of that particular issue” in negotiations; that he remembers Attorney Edward Williams, who was the Utility’s chief negotiator, then “reading off a few things. . .”; that the parties never discussed making an exception for meter readers; that meter readers could not “fill in for the job completely . . .”; that they could only do “some of the functions . . .occasionally”; and that the Utility in the past has not used student help to work as relief for meter readers.

On cross-examination, Gosz testified that the Utility recently had been using student help to work as meter readers, which is “why the Union chose to address it.” He also said that the Union in the 1999 contract negotiations never disagreed with Attorney Williams when he read off the list of duties student help could perform which included meter reading, and that no full-time employees have been laid off because of the use of student help.

Meter Reader Pamela Knorr explained that student help has performed the following meter reader duties:

Well, they would --- they had an understanding of how to use the hand-held recorders, which you would record the readings for meter reading, they would load/unload the routes, get final readings at times, would hang notices, which is part of our duty also, hang disconnect notices, they helped with that. So they did a wide – a vast majority of what we would perform as our job duties. I’d add one thing to that. We would mention to them if they would notice things might be out of order with the recorder or something, or a meter is missing, we needed to know that information so correct billing would be taken care of, would correct the problem, so --

She also said that utility workers formerly filled in as meter readers, but that that generated a “nightmare, estimating when one of the meter readers was off. . .” On cross-examination, she testified that she did not know whether meter reading is part of a utility worker’s job description or whether utility workers even have job descriptions.

Manager of Business Operations Brink testified about the difficulty of filling in for meter readers when they are on vacation, and said that student help for most of the last 16 years have performed some meter reader duties. She added that the Utility does not pay set-up relief pay when employees perform the duties of a meter reader; that meter reading duties are in the utility worker’s job description; that the Utility believes meter reading represents

unskilled work; and that student help does not have a job description. She also said that the Union in contract negotiations never proposed to change the duties student help have historically performed; that the Union in negotiations never objected to having student help perform all of a meter reader's job duties; and that student help has never performed relief work for relief pay.

On cross-examination, Brink testified that the Union in negotiations agreed when Attorney Williams listed meter reading as the kind of work that student help would continue to perform. She also said "we wanted to continue to be able to use meter readers in the summer as we've done in past summers", and that the Utility in negotiations never specifically said that it wanted student help to perform all of a meter reader's job duties.

Attorney Williams, the Utility's chief negotiator in those negotiations, testified about his bargaining notes (Utility Exhibit 5) and explained how he on September 28, 1999, told Union negotiators that "meter reading", along with certain other examples, represented the kind of duties that student help would continue to perform under the new language. Williams said that the Union did not disagree with him, which is why he believed the Utility would go on using student help to perform meter reader duties. On cross-examination, Williams testified that he listed "meter reading" as a single act rather than the general duties of a meter reader because he is not a meter reader and because he does not know all of a meter reader's job duties.

Union president Gosz was recalled as a witness and testified that the Union never agreed in negotiations that student help could perform all of a meter reader's regular job duties, and that when Attorney Williams listed various examples of student work which included reading meters, "we took it to mean, you know, read a meter here or there, but not to do the job as they are now." On cross-examination, he answered, "No, I do not" when asked whether he disputed that Attorney Williams read off meter reading as the kind of duty student help would continue to perform.

### **POSITIONS OF THE PARTIES**

The Union claims that the Utility violated the contract when it assigned meter reader duties to student help because "clearly bargained language" limits the use of such help; because student help cannot be used to "provide relief for vacationing meter readers"; because the meter reader job is not "non-skilled"; and because student help has not been limited to so-called "non-skilled" meter reader duties. The Union also asserts that sustaining the grievance will not "unreasonably burden the Utility", as it seeks a remedy that prohibits the Utility from using student help in any future relief capacity.

The Utility contends that the grievance is without merit because the contract “expressly authorizes the use of summer help for meter reading”; because “It is reasonable to conclude that the collective bargaining agreement authorizes the use of summer help for meter reading”; and because the parties’ past practice and bargaining history establish that student help can perform meter reading duties.

### DISCUSSION

This case mainly turns on the interplay between Article XVII, Section D, and Article XXVI. More specifically, it centers on whether meter reader duties can be performed by student help for up to 600 hours pursuant to Article XVII, Section D, which deals with the “Definition of Employees”, or whether such duties cannot be performed because they constitute the kind of “relief work” prohibited under Article XXVI which deals with “Relief Work”.

Both parties claim that the contract is clear and unambiguous and that their respective positions should be sustained. Article XVII, Section D, supports the Utility’s case if one assumes that the references therein to “relief work” and Article XXVI do not encompass meter reader duties. If that assumption is correct, then student help can read meters for up to 600 hours. Article XXVI supports the Union’s case if one assumes that summer help do, in fact, perform “relief work” when they fill in for meter readers when they are on vacation. Given these plausible but conflicting explanations, I find that the contract is ambiguous, which is why it is necessary to examine parol evidence relating to past practice and bargaining history.

As for past practice, I credit manager Brink’s testimony that student help have performed meter reading duties for “most of the time” since 1985 (Utility Exhibit 3), and that meter readers perform their job by entering data on their hand-held recorders and by performing the other duties related above by meter reader Knorr. In addition, Brink testified without contradiction that student help have never been paid the relief pay provided for in Article XXVI when they read meters, thereby indicating that the parties did not consider such work to be “relief work”.

Given that well-developed past practice, it was incumbent upon the Union in negotiations to obtain clear contract language limiting the use of student help for that purpose. For as noted by Arbitrator Richard Mittenthal in his seminal article on past practice, certain “existing practices must be continued until changed by mutual consent. . .” See Mittenthal, “Past Practice And The Administration of Collective Bargaining Agreements”, From *Arbitration and Public Policy: Proceedings of the 14<sup>th</sup> Annual Meeting of the National Academy of Arbitrators* (BNA, 1961), pp. 30, 51.

Arbitrator Mittenthal also points out:

...

Consider next a well-established practice which serves to clarify some ambiguity in the agreement. Because the practice is essential to an understanding of the ambiguous provision, it becomes in effect a part of that provision. As such, it will be binding for the life of the agreement. And the mere repudiation of the practice by one side during the negotiation of a new agreement, unless accompanied by a revision of the ambiguous language, would not be significant. For the repudiation alone would not change the meaning of the ambiguous provision and hence would not detract from the effectiveness of the practice.

It is a well-settled principle that where past practice has established a meaning for language that is subsequently used in an agreement, the language will be presumed to have the meaning given it by practice. Thus, this kind of practice can only be terminated by mutual agreement, that is, by the parties rewriting the ambiguous provision to supersede the practice, by eliminating the provision entirely, etc. *Id.*, at 56.

...

Here, there was no “mutual agreement” in the 1999 negotiations to limit the use of student help to perform meter reader duties. In addition, Attorney Williams on behalf of the Utility on September 28, 1999, expressly referred to “meter reading” duties as the kind of unskilled job that student help would continue to perform and the Union then never objected to his comments. To the contrary, Union president Gosz testified that “I don’t recall much discussion of that particular issue.”

Absent any “mutual agreement” in those negotiations to change it, that past practice survives for the reason stated by Arbitrator Mittenthal above. As a result, the Utility can go on using student help to perform meter reader duties, just as it has in the past.

In light of the above, it is my

### **AWARD**

1. That the Utility did not violate Article XXVI of the contract when it assigned student help to perform meter reader duties.

2. That the grievance is therefore denied.

Dated at Madison, Wisconsin, this 8th day of May, 2002.

Amedeo Greco /s/

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Amedeo Greco, Arbitrator

