BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LA CROSSE CITY EMPLOYEE'S UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, LOCAL 180

and

CITY OF LA CROSSE

Case 310
No. 59929
MA-11460

(Grievant Mark Johnson)

Appearances:

Davis, Birnbaum, Marcou, Seymore & Colgan, LLP, by **Attorney James G. Birnbaum,** 300 Second Street North, Suite 300, La Crosse, WI 54602-1297, appearing on behalf of the Union.

Attorney Peter B. Kisken, Deputy City Attorney, 400 La Crosse Street, La Crosse, WI 54602-3396, appearing on behalf of the City.

ARBITRATION AWARD

La Crosse City Employee's Union, Service Employees International Union, AFL-CIO, Local 180, hereinafter the Union, with concurrence of the City of La Crosse, hereinafter the City, requested the Wisconsin Employment Relations Commission to designate a member of its staff to serve as an arbitrator to hear and decide a grievance dispute concerning Grievant Mark Johnson, hereinafter the Grievant, and in accordance with the grievance and arbitration procedure contained in the parties' collective bargaining agreement, hereinafter the Agreement. The undersigned, Stephen G. Bohrer, was so designated. On November 29, 2001, a hearing was held in La Crosse, Wisconsin. The hearing was not transcribed. On February 25, 2002, and upon receipt of the last of the parties' written reply briefs, the record was closed.

On the basis of the record submitted, the Arbitrator issues the following Award.

ISSUES

The parties did not agree on a statement of the issues. The Union would state the issues as follows:

1. Did the City violate Articles 19 and 12, and/or past practice on March 14, 15 and 16, 2001, and additional dates, when it assigned only one operator to run both the Plant and the Filter Belt Press?

2. If so, what is the appropriate remedy?

The City would state the issues as follows:

1. Did the City violate the collective bargaining agreement when it did not offer overtime to the Grievant on March 14, 15 and 16, 2001, when it did not need the Grievant to work overtime as another employee, within the same position classification, was available to operate the machinery in question?

2. If so, what is the remedy?

The Arbitrator frames the issues for determination as follows:

1. Did the City violate Article 19 of the Agreement, or a past practice, on March 14, 15 and 16, 2001, or on dates thereafter, when it assigned one Operator to simultaneously operate the Filter Belt Press machine and the Gravity Belt Thickener machine at its Waste Water Treatment Plant facility?

2. If so, what is the appropriate remedy?

PERTINENT AGREEMENT PROVISIONS

ARTICLE 12
OVERTIME

A. Employees subject to this Agreement shall be compensated at the rate of one and one-half (1 ½) 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 [sic] on a 37 ½ hour week, overtime shall be at straight time cash or compensatory time for the first 2 ½ hours of weekly overtime.

. . .

ARTICLE 19
RESERVATION OF RIGHTS

Except as otherwise specifically provided herein, the management of the City of La Crosse 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.

. . .

BACKGROUND

The City is a municipal employer which operates a Waste Water Treatment Plant facility, hereinafter the Plant facility. The City employs various Operators to treat and process the City's sewage fluids. The Plant's facilities include two buildings: the Filter Building and the Plant Building. Within the Filter Building is a machine called the Filter Belt Press, hereinafter the FBP machine. Within the Plant Building is a machine called the Gravity Belt Thickener, hereinafter the GBT machine.

The purpose of the FBP and GBT machines is to separate the solids from the water within the sewage material. After the solids are separated, the City transports it to farmers' fields to be used as fertilizer. The remaining water is discharged into the Mississippi River. The FBP machine is the Plant facility's most recently acquired machine and was first operational in late 1999 or early 2000. The Plant facility runs three consecutive eight-hour shifts.

On March 14, 15 and 16, 2001, Operator Mark A. Johnson, hereinafter the Grievant, was operating the FBP machine during the first shift. It was determined by Plant management to continue to operate the FBP machine beyond the first shift and into of the second shift. Consequently, Todd Kjos, a second shift Operator, was directed to operate the FBP machine beginning on the second shift and until that work was done. In addition, Kjos was to continue to operate the GBT machine, as previously assigned to him, such that Kjos was simultaneously operating the FBP and GBT machines for part of the second shift. Both the Grievant and Kjos are qualified to operate the FBP and GBT machines.

On March 19, 2001, Grievant filed a grievance alleging that the City violated Articles 12 and 19, and the parties' past practice, by denying Grievant overtime hours on March 14, 15 and 16, 2001, and on any future dates involving similar circumstances. The parties thereafter advanced their dispute through the collective bargaining procedure to arbitration.

Additional background information is set forth in the Positions of the Parties and in the Discussion below.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the City violated the express provisions of Article 19 when it did not post a work rule change prior to its failure to assign the Grievant overtime hours. Article 19 states that "[n]ew rules or changes in rules shall be posted in each department five (5) calendar days prior to their effective date unless as emergency requires a more rapid implementation of such rules." Prior to March 14, 2001, the parties would sit down and negotiate the impact of work rule changes. However on March 14, 2001, and continuing thereafter, the City altered the work rule by assigning only one Operator to simultaneously work both the FBP and GBT machines. By doing so, the City failed to post the work rule change and did not negotiate its impact with the Union. Since there was no emergency asserted, the City is in violation of Article 19 which resulted in a loss of overtime for the Grievant.

Second, the Union asserts that a past practice has been established and the City has violated that past practice. Assistant Superintendent Brueggen testified that from 1980 until February of 2000, when Brueggen retired, the rule has been that two Operators are to be assigned separate pieces of equipment when the two pieces of equipment are simultaneously operating. If an Operator is not available, the practice has been to either have the existing Operator work beyond his shift, and thereby qualify for overtime, and/or to call in another qualified Operator to ensure that one person is not simultaneously operating two pieces of equipment. In addition, the parties have adjusted related internal grievance disputes which are

consistent with the City's past practice. Examples include three instances since 1996 where the City's actions were challenged by the Union with the result of overtime being paid. It should be noted that the most recent example of this occurred after Brueggen's retirement.

For these reasons, the Union asserts that the grievance should be sustained. As an appropriate remedy, the Union seeks a cease and desist order that the City assign separate operators to the FBP and GBT machines when the machines are simultaneously operating and until such time as the City posts a proposed work rule change and negotiates the impact of that change with the Union. In addition, the Union seeks back pay for the Grievant, and all others similarly situated, pursuant to Article 12 of the Agreement and for all amounts of lost overtime.

The City

The City asserts that the express language of Article 19 gives management the exclusive right to determine its methods of operation. Specifically, it provides that management has the right "to determine the schedule of work" and "to determine the methods, processes and manner of performing work." Because this language is clear, the Union's past practice argument must fail.

The City also argues that the Union is confusing an "operation method" with a "working condition." There is nothing in the Agreement which makes the assignment of overtime a working condition. Further, there was no testimony or any of the documents produced at the hearing that refers to a right of overtime. Therefore, there is no guaranteed right of overtime.

As for the Union's alleged related instances of granted overtime, the credibility of such evidence is questioned since it was provided by a former Union steward. Further, these examples are not relevant because they only amplify the Union's incorrect contention that the City does not have the right to control its operational methods.

Since the Agreement does not require any overtime, then it makes sense for the City not to pay the Grievant overtime where there is another employee within the same job classification who was available and who was qualified to operate the FBP machine.

The Union has failed to meet its burden of proof of a clear, longstanding and mutual past practice.

Superintendent Paul testified that the FBP machine is easy to operate and that there are safety mechanisms built into the unit. In addition, and according to Paul, the FBP and GBT machines virtually run themselves. Further, Paul notified the Union prior to purchasing the FBP machine that it was heavily automated. Therefore, Paul's decision to have one Operator simultaneously operate the GBT and FBP machines is not suspect.

The City has broad authority to determine its methods of operation and to operate on the most efficient basis. It is generally accepted that unless restricted by contract, management has the right to make changes as long as the act itself is not wrongful. (Citations omitted). In this case, the City made a change in operational methods, as opposed to working conditions, and there is nothing in the Agreement which would prohibit this. Rather, the clear language of Article 19 supports this. Therefore, the Agreement has not been violated and the grievance should be denied.

The Union's Reply

The City ignores the following language in Article 19: "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." This sentence exists and it is determinative of the issues in this case.

The City's asserted distinction between operational "methods" and "working conditions" is an irrelevant semantic exercise. The fact remains that the City changed an agreed practice which had been negotiated and posted per Article 19. If the assignment of one Operator to operate the FBP machine was not a "work rule," then why did the City previously sit down with the Union to negotiate new rules before posting them and unwaveringly follow the new rule until the action giving rise to this grievance occurred?

The Union does not assert that the Agreement includes a provision which guarantees overtime. However, the work rule and past practice require that the City assign a separate operator to the FBP machine after the first shift where there is someone else running the GBT machine during that same shift. Brueggen testified that he regularly polled unit employees to see who was available to operate the FBP machine after the first shift. Note that Article 12 (A), does not require overtime for simply working more than the eight-hour shift on any given day, but rather only when an employee works more than 40 hours per week. Working beyond the first shift does not automatically trigger overtime pay.

The City's Reply

The Union makes errors in its presentation of the facts. The Union references 1997 as the year in which the parties negotiated work rules. However, this case deals with the FBP machine, which was not installed until 1999. Therefore, the 1997 date has no significance in this matter. The Union also attempts to establish a past practice of the FBP machine through Brueggen. However, the FBP machine was running for only one week at the time that Brueggen had retired. Therefore, this is insufficient to establish a past practice. Further, and contrary to the Union, there was no evidence establishing a past practice in the use of assigning hours worked on the FBP machine.

This case involves the assignment of an employee in the most efficient manner for the operation of the Department. After the Grievant worked the FBP machine during his regular shift hours, Superintendent Paul felt that it was unnecessary for the Grievant to continue working where a second shift Operator was available in the same position classification and where there were no safety issues involved. The City disagrees that the Grievant is entitled to these hours as overtime.

Arbitrators have generally held that in the absence of specific contractual limitations or a showing of bad faith on the part of the employer, decisions in the areas of work assignment and reorganization of job classifications fall within the residual rights that adhere in management. (Citations omitted).

This case is an assignment of work issue which involves "operation methods." Contrary to the Union's position, it does not involve "working conditions." The Union has not cited any arbitral cases which hold that the assignment of work is a working condition.

DISCUSSION

The Union's grievance raises the following questions: 1) whether the City's directive that an Operator simultaneously operate two machines is a unilateral change in "working conditions" or is a change in "operational methods;" and 2) whether that directive violates the requirement in paragraph two of Article 19 of the Agreement that "[n]ew rules or changes in rules" be posted prior to implementation. The Union asserts that that language in paragraph two is determinative while the City's assertions concentrate on its right "to determine the methods, processes and manner of performing work" in paragraph one of that same article. Alternatively, the Union asserts that the City's directive violates a past practice regarding the non-simultaneous operation of machines. The issues, therefore, as framed by this Arbitrator, are whether the City violated Article 19 of the Agreement, or a past practice, on March 14, 15 and 16, 2001, or on dates thereafter, when it assigned one Operator to simultaneously operate the Filter Belt Press (FBP) machine and the Gravity Belt Thickener (GBT) machine at its Waste Water Treatment Plant facility; and, if so, what is the appropriate remedy.

The issues for determination do not include whether there was a violation of Article 12 regarding overtime. However, if this Arbitrator determines that there was a violation of the first issue, as framed by this Arbitrator, then Article 12 will become a basis for determining an appropriate remedy. If there was no violation, then Article 12 does not enter into the analysis.

Elkouri and Elkouri, How Arbitration Works, 5th Edition, p. 684 (1997) discusses the distinction between "working conditions" and "operational methods" as follows:

> The line of demarcation between "operation methods" and "working conditions" often must be determined. In one case Arbitrator Whitley P. McCoy noted the difficulty that such determination may entail. The agreement of the parties recognized the exclusive right of management to determine

> methods of operation, but it also restricted the right of management to change working conditions by requiring negotiations with the union before such changes could be made. The employer changed the operations of some employees from a noncontinuous to a continuous basis in the interest of plant efficiency, with the result that the employees were ordered to work through a period previously allowed for washing up. Arbitrator McCoy ruled that the order requiring the employees to work through the wash-up period was proper as an incidental result of the employer's good faith exercise of the exclusive right to determine the methods of operation. He stated the general considerations involved:
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> > The distinction between a change in working conditions, which by the terms of the contract must be the subject of negotiation prior to its institution, and a change in methods of operation, which by the terms of the contract is a sole function of management, is not easy to define or even to make clear by example. Abolition or sharp curtailment of an existing practice concerning rest time, wash-up time, paid lunch period, furnishing of shower baths and lockers, matters pertaining to sanitation, safety and health, or such like matter are clearly changes in working conditions. On the other hand, a change in the use of pot heaters to McNeill presses or from noncontinuous to continuous operation is just as clearly a change primarily in methods of operation. The latter changes usually cause, with respect to the individuals affected, some change in their working habits, but they are primarily and essentially changes in methods, not in conditions, and as such are exclusively a management function, subject only to the right of affected employees to resort to the grievance procedure to correct abuses or hardships such as decreased earnings or stretchout. Of course a change that was merely in form one method, used as a pretext to institute a change in working conditions, would not be justifiable.
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> . . .

Id. (Quoting GOODYEAR TIRE & RUBBER CO. OF ALABAMA, 6 LA 681, 687 (MCCOY, 1947)).

I find that the City's act of changing from non-simultaneous to simultaneous operation of machines is a change primarily in operational methods. This kind of change is within the parameters of those described in the quote just above and is more closely aligned with examples such as a change in the use of machinery or a change from a noncontinuous to continuous operational method.

Further, there is insufficient evidence that the City was acting in bad faith. Rather, the evidence indicates that the City was acting in the interests of efficiency and not out of pretext. In this regard, Arbitrator McCoy's explanation is helpful:

> As long as decisions are made in good faith, in the interest of efficiency of operation, and do not involve the imposing on employees of conditions different

> from those already existing with respect to other employees on similar machines or operations, no injustice is done the employees. No employee has a vested right in the use of a particular old machine that would preclude the company from installing a new one nor a vested right in a particular method of operation that would preclude the company from changing that method. If the new machine, or the new method on the old, results in too heavy a work load, too low pay, or any other hardship, the employee has his remedy in the grievance machinery. But he does not have the right to delay the exercise of managerial functions by insisting on prior negotiations.

GOODYEAR TIRE & RUBBER CO. OF ALABAMA, SUPRA, at 687.

Turning to Article 19, this is a type of management-rights clause. Paragraph one of Article 19 is somewhat disorganized in structure, probably the result of years of bargained modifications. Nonetheless, that paragraph is sufficiently clear that the City has retained its management rights, except as specifically provided, including those items listed. It states that ". . . the management of the City . . . and the direction of the work force, including but not limited to the right . . . to make reasonable rules and regulations governing conduct and safety, to determine the schedule of work . . ., together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management." However, Article 19 does not end at this point.

Paragraph two of Article 19 states that the City must post "[n]ew rules or changes in rules . . . five (5) calendar days prior to their effective date . . ." On its face, this paragraph is a notice provision regarding "rules" such that the City is required to notify the Union prior to their implementation. The Union, however, would have me interpret the word "rules" in paragraph two in isolation from the word "rules" in paragraph one of Article 19. Thus, and according to the Union's view, the phrase "new rules or changes in rules" in paragraph two is broader in scope than "rules . . . governing conduct and safety" in paragraph one and includes other "rules" that the parties agree to, including the alleged work rule that changed in this case.

I do not find that the Union's interpretation of the word "rules" in Article 19 is persuasive. That word is specifically referenced in both paragraphs of Article 19 and it seems clear to me that the second reference is to be viewed in the context of the first. Thus, when the Department is making "new rules or changes in rules," that language is referring to those "rules . . . governing safety and conduct." If the parties had intended a broader understanding of the word "rules" in paragraph two of Article 19, then it was incumbent upon them to state it. I will not read additional meaning into Article 19 where the language by itself is already clear.

As discussed above, I find that the City's actions in this case are changes primarily in operational methods. In adopting Arbitrator McCoy's reasoning, and applying it to this case, I also find that "rules . . . governing conduct and safety" in paragraph one of Article 19 are likely to be matters pertaining to sanitation, safety and health, i.e., pertaining to changes

primarily in working conditions. Although an argument could be made in this case that a change from the non-simultaneous to simultaneous operation of machines affects conduct and safety, such a change is still primarily a change in operational methods. Therefore, the changes that occurred in this case do not trigger the notice requirements in paragraph two of Article 19 and that provision does not come into play. The facts in this case are changes of "rules" primarily in operational methods and are outside the ambit of paragraph two of Article 19. Under the present form of Article 19, the City is not obligated to notify the Union of such changes prior to implementation.

The Union's argument on past practice does not apply. Since the language in Article 19 is clear with respect to the kinds of rules that the Department is required to provide advance notice to the Union prior to implementation, evidence of past practice cannot be considered in resolving the matter before me. Further, and contrary to the Union's assertion, there is no evidence of prior rules that were negotiated and posted regarding the non-simultaneous or simultaneous operation of machines at the Plant facility.

I am aware that the City's change in operational methods from non-simultaneous to simultaneous operation of the FBP and GBT machines affects those employees, including the Grievant, who may otherwise qualify to work additional hours for overtime. However, this change is primarily and essentially a change in operational methods and there is insufficient evidence that the City was acting in bad faith or that its acts were used as a pretext. Consequently, the loss of any overtime is an incidental result of the City's exercise of its right "to determine the methods, processes and manner of performing work." Further, any "rules" that were changed as a result of the Department's directive to assign one Operator to simultaneously operate both the FBP and the GBT machines on the dates in question did not trigger the requirement in Article 19 for the City to notify the Union and post "new rules or changes in rules . . ."

AWARD

Based upon the foregoing and the record as a whole, it is the decision and award of the undersigned Arbitrator that the City did not violate Article 19 of the Agreement, or a past practice, on March 14, 15 and 16, 2001, or on dates thereafter, when it assigned one Operator to simultaneously operate the Filter Belt Press machine and the Gravity Belt Thickener machine at its Waste Water Treatment Plant facility. Therefore, the grievance is denied.

Dated at Eau Claire, Wisconsin, this 21st day of May, 2002.

Stephen G. Bohrer /s/
Stephen G. Bohrer, Arbitrator

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