

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES UNION, LOCAL NO. 75**

and

**CITY OF GREEN BAY**

Case 345

No. 62213

MA-12200

(Ron Guilette Grievance)

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**Appearances:**

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Ying Tao Ho**, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, on behalf of the Union.

**Attorney Lanny M. Schimmel**, Assistant City Attorney, 100 North Jefferson Street, Green Bay, Wisconsin, on behalf of the City.

**ARBITRATION AWARD**

The Drivers, Warehouse and Dairy Employees Union, Local No. 75, (herein the Union) and the City of Green Bay (herein the City) were parties to a collective bargaining agreement dated October 31, 2001, and covering the period January 1, 1999 to December 31, 2001, and providing for binding arbitration of certain disputes between the parties. At the time of the events giving rise to the grievance herein, the agreement had expired and the parties were in negotiations for a successor agreement. On March 14, 2003, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over an alleged violation of the collective bargaining agreement as a result of the City's failure to award overtime work to Ronald Guilette, an employee in the Department of Public Works. The Union requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on September 18, 2003. The proceedings were transcribed. The parties filed briefs by November 17, 2003, whereupon the record was closed.

## ISSUES

The parties were unable to stipulate to the framing of the issues. The Union would frame the issues as follows:

Did the Employer violate the collective bargaining agreement when it refused to let the Grievant work on a Saturday?

If so, what is the remedy?

The City would frame the issues as follows:

Was the City required to offer or allow the Grievant to work Saturday overtime pursuant to the collective bargaining agreement?

If so, what is the remedy?

The Arbitrator frames the issues as follows:

Did the City violate the collective bargaining agreement or past practice, when it failed to offer Saturday overtime to the Grievant on June 1, 2002 ?

If so, what is the appropriate remedy?

## PERTINENT CONTRACT PROVISIONS

### ARTICLE 8. SENIORITY AND JOB POSTING

#### Sanitation Section:

Employees who have been temporarily assigned into the Sanitation Section as laborer during a holiday week shall be granted the opportunity by seniority for Saturday overtime created by the holiday after regular employees of the Sanitation Section and prior to employees otherwise eligible provided any such temporarily assigned employee has worked at least three (3) days in the Sanitation Section during that week.

#### Volunteer List:

Throughout the year, for various reasons, the Sanitation Section needs laborer help during the regular work day. Anyone interested in volunteering for temporary assignment to help out in these situations will be allowed to sign a notice which will be posted monthly.

Employees signing this notice will be assigned as needed using inverse seniority with everyone on the list being used before forcing Street Section employees. This notice will be posted monthly. Therefore, anyone signing the notice will be on the volunteer list until the next notice is posted.

The City agrees to ask for volunteers to operate recycling equipment in an effort to allow regular employees in sanitation to maintain their Monday through Friday job assignments on Saturday.

Sanitation Section Truck Drivers shall be required to assist in the labor responsibilities at least forty percent (40%) of the day on a daily basis. Employees grandfathered under the December 1, 1983 Memorandum of Understanding shall continue to be exempted from this provision.

### **BACKGROUND**

The City of Green Bay Department of Public Works contains a number of separate divisions, among which is the Sanitation Section. The Sanitation Section is responsible for collecting and disposing of garbage, brush and other refuse within the city. The Section employs two classifications of bargaining unit employees – drivers and laborers. The employees work in teams, with one driver and one laborer assigned to each truck, but, according to the terms of the collective bargaining agreement, the drivers are to switch duties with the laborers and pick up the refuse at least 40% of the time. Laborers and drivers are the two lowest classifications on the contract wage scale, with laborers being at level G-1 and drivers being at level G-2.

From time to time there is a need for extra labor in the Sanitation Section, such as after Christmas, when trees need to be picked up, or after a severe storm, when there is a large amount of brush from fallen tree limbs. At such times, employees from other sections may be temporarily assigned to the Sanitation Section, either on a voluntary or mandatory basis, to handle the extra work. When workers are forced into the Sanitation Section, assignment is according to inverse seniority.

The Sanitation Section does not collect refuse on holidays, so weeks that have holidays usually result in the creation of Saturday overtime. Occasionally, this coincides with weeks when workers are also temporarily assigned from other sections. In the past, this situation created friction within the bargaining unit because the least senior employees would get the undesirable mandatory assignments, but the overtime was offered first to the Sanitation employees and then to the most senior employees in the Department according to the master seniority list. To resolve this problem, a number of year **years** ago the language in Article 8, cited above, was added to the contract to give the less senior mandatory assignees preference for overtime if they meet the criteria set forth in the provision.

The Grievant is an equipment operator in the Street Section of the DPW. He is a 13-year employee and is at level G-6 on the pay grid. During the week of Memorial Day, 2002, the Grievant was temporarily assigned to the Sanitation Section for four days, where he was assigned to a compactor truck and instructed to pick up brush from a recent storm, which he did. That Saturday, June 1, 2002, the Section had available overtime, which was offered to Sanitation Section employees according to the contract. After the Sanitation employees had been offered the overtime, the remaining hours were offered Department wide according to seniority. The Grievant protested and was told that he did not qualify for overtime under the contract because he was assigned to the Sanitation Section as a driver, not a laborer, and, therefore, he was not eligible. The Grievant filed the instant grievance, which was pursued through the contractual grievance procedure without resolution, resulting in arbitration.

### **POSITIONS OF THE PARTIES**

#### **The Union**

The Union asserts that clear contract language controls this case. The contract provides that employees temporarily assigned as laborers into the Sanitation Section shall have first opportunity for Saturday overtime provided other conditions are met. There is no dispute that the Grievant met the other conditions. The only dispute is whether he was temporarily assigned as a laborer.

Testimony shows the long-standing practice to be that assignment is a two-step process. First, the employee is assigned as a temporary laborer. After reporting to Sanitation, the employee is assigned to a particular task, either as laborers or drivers. The employees do not know what they will be assigned to do until they meet with the Sanitation Supervisor. The phrase "assigned into" in the contract refers to step one of the process, where the employees are initially assigned to Sanitation. Once they report, they cannot be assigned into Sanitation again. To read the contract otherwise would make the word "into" redundant. Once in Sanitation, a Street employee may be assigned as a laborer or a driver. This is consistent with Sanitation Section practice, where laborers may be assigned as drivers, as needed, but drivers are never assigned to laborers' work.

The next section of the contract, "Volunteer List," also makes the point that the Sanitation Section occasionally needs laborer help and that employees may volunteer for this work before Street employees will be mandatorily assigned. This supports the argument that employees are temporarily assigned to the Sanitation Section as laborers and, once there, may be assigned laborers' or drivers' work, as Sanitation Section laborers are. The current language was, in fact, proposed because the least senior Street employees objected to being transferred to Sanitation during the week, but then having the senior employees receive all the overtime. That being the case, there is no logical or policy reason for distinguishing between employees assigned as laborers and those assigned as drivers, especially since they do the same amount of physical work.

Past practice also supports the Union's position. John Wied testified that the City's long-standing practice has been that employees assigned to Sanitation, whether they are assigned to be laborers or drivers, get the first opportunity for Saturday overtime, as long as they worked three days during the week. This practice has existed for over 20 years. Also, Richie De Groot testified that he worked in Sanitation the same week as the Grievant as both a laborer and driver and was initially offered Saturday overtime. The offer was only withdrawn due to a potential grievance from another employee, but the initial offer supports the existence of the practice. If a past practice is unequivocal, clearly acted upon and ascertainable overtime it is controlling. Those conditions exist here and the practice should be upheld.

Finally, the Grievant did perform laborers' work while in the Sanitation Section. He drove a compactor by himself and spent most of the week picking up brush. Terry Wegner, a Sanitation driver, testified that drivers are never taken off their truck and assigned such work; it is always performed by laborers. Brush pickup is a lot of work and thus is assigned to laborers because they have less seniority. Therefore, the Grievant was working as a laborer when performing brush pickup and should have been offered the overtime.

### The City

The City asserts that the Grievant did not qualify for the overtime. The plain language of the contract establishes that only employees assigned to the Sanitation Section as laborers are entitled to Saturday overtime. The Grievant was assigned as a truck driver, which is a distinct position. The position of laborer is a lower paid and less desirable position, hence the incentive of overtime to those who are assigned to that role. Throughout the agreement, the positions of laborer and truck driver are distinguished, making it clear that the parties intended to treat them separately. Thus, by specifically referring to laborers in the section referencing Saturday overtime, the parties clearly intended to restrict the entitlement to that position.

While there is overlap between the positions of laborer and truck driver, arbitrators will distinguish them based on pay scale, job duties and applicability of out of class pay to lesser paid employees who are temporarily transferred to the position. All of these factors support a distinction being drawn between laborers and truck drivers here. Since they are clearly distinct positions and only laborers are entitled to Saturday overtime, an employee assigned as a truck driver has no contractual claim.

During the week in question, the Grievant was assigned and worked as a truck driver. He drove a compactor truck and did brush pickup throughout the week. The testimony of Union Steward John Wied and Operations Superintendent David Damro support the proposition that brush pickup in a one-man compactor is truck driver work. The Grievant was solely responsible for the compactor. Thus, there is no question his position was that of a truck driver, not a laborer.

The Union erroneously argues that any employee assigned to Sanitation is a “laborer” in an attempt to circumvent the issue. This defies the rules of contract interpretation and, if followed, would lead to absurd results. As this arbitrator held in NECEDAH AREA SCHOOL DISTRICT, WERC CASE 20, No. 58146, MA-10854 (EMERY, 5/11/00), rules of contract interpretation generally require meaning to be given to all words. Further, clear and unambiguous language must be applied as written. Elkouri and Elkouri, How Arbitration Works, 5<sup>th</sup> Edition, p 482 (1997).

The Union’s interpretation of the contract would make the word “laborer” superfluous. The contract specifically provides that overtime is to be offered first to employees assigned to Sanitation as laborers, but the Union maintains that anyone assigned to Sanitation is a laborer. Thus, the word “laborer” is meaningless under the Union’s view, which violates contract interpretation principles and is in error.

As the Union witnesses attest, the language was added to the contract to provide a benefit for the employees doing the least desirable jobs, that is, the laborers. Truck driver duties extend beyond those of laborers and command a higher rate of pay. Thus, the Union’s proposed interpretation would frustrate the intent of the parties.

The Union’s proposed interpretation would also lead to contradictory results, which should be avoided. ELKOURI, SUPRA, AT 495. Laborers who perform truck driver duties are entitled to truck driver pay. Therefore, a laborer assigned to operate a compactor, as the Grievant was, would have received an increase in pay while performing the duties. Yet, the Union argues the Grievant was working as a laborer. These are inconsistent and irreconcilable positions. If everyone in Sanitation is a laborer, there is no need for different rates of pay. If they are distinct, then truck drivers should not qualify for benefits specifically reserved for laborers. The Union cannot have its cake and eat it, too. The City’s position is the only rational interpretation of the language and should be adopted. This would provide a simple and clear solution and would adhere to the rules of contract interpretation.

### DISCUSSION

The parties are in accord that the Grievant fulfilled all but one of the criteria under the language of Article 8 dealing with the Sanitation Section to qualify him for the offer of Saturday overtime on the week in question. That is, he was temporarily assigned to the Sanitation Section for at least three days during a holiday week. The only matter in dispute is whether he was assigned as a laborer, as that term is used in Article 8. If so, he was entitled to be offered Saturday overtime on the Saturday in question and, if not, he wasn’t. For the reasons set forth below, I find that the Grievant was assigned as a laborer and, therefore, was entitled to the overtime.

The City argues forcefully that the pertinent contract language only applies to employees temporarily assigned to Sanitation as laborers and that the Grievant was not assigned as a laborer. Whatever the merits of the former proposition, I disagree with the latter and, therefore, sustain the grievance.

The evidence reveals that the Grievant, an equipment operator in the Street Section, was temporarily assigned to work in the Sanitation Section during Memorial Day week in 2002. He testified that he learned of this assignment when he was told to report to Sanitation by Street Supervisor Jim Elmer. Elmer did not tell him what duties he was to be assigned, but merely told him to report. When the Grievant reported to Sanitation, he was told by Sanitation Supervisor Gary Lemerond that he was to take out a compactor truck and pick up brush, which he did for the balance of the week.

Union Steward and Street employee John Wied testified that the foregoing scenario is typical of how temporary assignments to Sanitation are handled and that as long as the relevant contract language has existed, he has never known a temporarily assigned employee to be denied the opportunity to pick up Saturday overtime regardless of the actual duties they performed. That is, employees are generically pulled out of other sections and sent to Sanitation, where they are then assigned to specific tasks. Thus, in Wied's view all employees temporarily assigned to Sanitation are initially assigned as laborers and, therefore, are entitled to priority in taking available Saturday overtime assuming the other contractual criteria are met. As will be explained, I agree with Mr. Wied to a point.

Terry Wegner, a Sanitation Driver, testified that drivers are never required to work as laborers beyond the contractual requirement of assisting with laborer duties 40% of the time on two-man trucks. Thus, a driver would never be required to take out a compactor truck alone. On the other hand, laborers may be assigned drivers' duties. When a driver position needs to be filled, the laborers are offered the work on the basis of seniority. If no one accepts, then the position is filled by forcing a laborer to do it on the basis of inverse seniority. If this happens, a manpower shortage may occur in the laborer classification.

According to the contract, Joint Ex. #2, lines 406-416, in such cases other DPW employees may then be temporarily assigned to Sanitation as laborers, first by means of a volunteer list, and then by forcing on the basis of inverse seniority. That is apparently what happened here. Because there were no available volunteers, the Grievant was forced into a temporary assignment in the Sanitation Section. That he was assigned as a laborer is indicated by the fact that he could have been assigned to any duties in the Sanitation Section, which a driver apparently could not, and was assigned to a brush truck, which drivers apparently are not. When Sanitation laborers are assigned driver duties they receive out of class pay, but they do not become drivers, *per se*. Similarly, when a temporarily assigned laborer is instructed to drive a brush truck he does not thereby become a driver.

This does not mean, as the City asserts, that the term “laborer,” as used in the Sanitation Section language becomes superfluous. As with many apparently clear terms, however, its meaning in this context can only be properly be gleaned by reference to the surrounding facts and circumstances. The contract, as currently worded, does not require that all temporary assignees to the Sanitation Section be classified as laborers, thereby making the reference in lines 399-400 meaningless. It merely requires that those who are temporarily assigned as laborers be according priority in taking available Saturday overtime during holiday weeks. Thus, it is theoretically possible that if a specific need for a driver arose an employee could be assigned to that position who would not then qualify for the overtime preference. Because of the way work is assigned in Sanitation, however, that typically doesn’t happen because driver vacancies are filled by Sanitation laborers. Also, temporarily assigning employees as laborers rather than drivers gives the Sanitation Section more flexibility because the temporary assignees can be assigned to any duties. While it is clearly more expedient for the City to make assignments in this fashion, however, it also carries the requirement of honoring the overtime priority provision.

For the foregoing reasons, and based upon the record as a whole, I hereby enter the following

**AWARD**

The City violated the collective bargaining agreement and past practice when it failed to offer Saturday overtime to the Grievant on June 1, 2002. Therefore, the City shall make the Grievant whole by paying him for the hours he was entitled to have been offered on June 2, 2002, at one and one-half times his rate of pay at that time.

The Arbitrator will retain jurisdiction of this case for a period of 30 days after entry of the Award to resolve any issues arising in the implementation of the Award.

Dated in Fond du Lac, Wisconsin, this 9<sup>th</sup> day of February, 2004.

John R. Emery /s/

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John R. Emery, Arbitrator