

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LOCAL 67, AFSCME, AFL-CIO**

and

**CITY OF RACINE**

Case 681  
No. 62522  
MA-12317

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**Appearances:**

**John Maglio**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

**Guadalupe Villarreal**, Deputy City Attorney, City of Racine, appearing on behalf of the City.

**ARBITRATION AWARD**

The Union and Employer named above are parties to a 2000-2002 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and resolve a dispute involving seasonal employees in the Parks Department. The undersigned was appointed and held a hearing on May 4, 2004, in Racine, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. At the conclusion of the hearing, the parties gave oral arguments in lieu of filing briefs.

**ISSUE**

The parties did not stipulate to the framing of the issue. The Arbitrator prefers the City's framing of the issue, which is:

What type of vehicle must an employee operate to be entitled to the regular seasonal truck driver pay? Did the Employer violate the collective bargaining agreement when it paid the regular seasonal truck driver rate only to

those employees who operated a truck that is heavier than a two and one-half yard truck for the actual time spent as truck driver? If so, what is the appropriate remedy.

### **BACKGROUND**

The collective bargaining agreement provides for two classifications at issue here – regular seasonal laborer and regular seasonal truck driver. The truck driver rate is about 30 cents higher than the laborer rate. The contract does not provide guidance for which classification gets what pay when doing what work, and this case relies mainly on the parties' past practices.

The Union believes it has a 30-year past practice of regular seasonal laborers getting the seasonal truck driver rate for their entire shift when operating any motorized vehicle for any amount of time. That includes Cushman utility carts, riding lawn mowers, or a F-10 lawn mower, pick-up trucks, tractors, dump trucks, Jeeps, etc.

In the summer of 2003, the City paid the truck driver rate only when seasonal employees drove a truck that required a Commercial Driver's License (CDL). Those types of trucks are heavier than two and one-half yard dump truck, which excluded the majority of vehicles used in the past that generated truck driver rates. The City admits that it made a decision to set a limit on when employees would get the truck driver pay and to pay only for the time spent driving a certain type of truck, after seasonal employees asked to be paid truck driver pay for driving trucksters.

Scott Sharp, a 27-year employee and the Union President, worked as a seasonal employee in 1976. When he worked in the Parks Department as a regular seasonal, he was paid as a truck driver when he drove a Cushman, a riding mower, an F-10 which is a large tractor with side and front mowers, a tractor with lift box, a pick-up truck, and a dump truck, none of which require a CDL. Sharp stated that there was no difference in the way seasonal employees were paid after CDL's came into effect. They got the higher rate every time they used equipment that was motorized, and they got it for eight hours whether they used motorized equipment eight hours or not. If they transported equipment, they also got the truck driver pay for the entire shift. They did not get the truck driver pay when they did not use any motorized vehicle for any portion of the day.

Tim Uick has work for the City for 25 years, starting out seasonal laborer for two and a half seasons. Whenever he took a vehicle, whether a Jeep or a tractor or a pick-up truck, he got the truck driver rate for the entire shift. Those vehicles did not require a CDL, although the Parks Department has some trucks that now require a CDL. Uick was aware of the practice that an employee who started driving on any given day would be paid the seasonal truck driver rate. An employee teamed up with him would be given the seasonal laborer rate.

Uick stated that the employee driving the truck would also use the motorized lawn mower, the other one would use a push mower or a weed eater. Uick also noted that the partners would sometimes switch in four-hour increments, where one would drive half the day and get four hours of truck driving pay, and the other partner would drive the other half the day and also get four hours of truck driving pay.

Doug Dresen, a 27-year employee and long time Union President, spent one season in Parks as a seasonal employee. He got the truck driver rate every day. His supervisor told him to use a pick-up truck and drive it somewhere, if only for a minute or so around the building, and put down the truck driver rate. Dresen stated that anytime anyone used a motorized vehicle, he got the truck driver rate of pay for eight hours, regardless of the number of hours using that vehicle. Dresen's son, Scott, also worked in the Parks Department and was aware that supervisors had Scott and his partner switch off driving at four hours and both put down eight hours of truck driver pay.

Armando Ruiz has been with the City for six years and started in Parks as a seasonal laborer. When operating a pick-up truck, he got the seasonal truck driver rate of pay. Ruiz would switch off with his partner, and the person driving got the higher rate of pay. The partners would sometimes switch in four-hour increments, and Ruiz testified that they got paid the higher rate of pay for four hours or for the time they drove.

Charles Besler has been an employee for 23 years and worked seven seasons. He got the truck driver rate of pay for eight hours of pay even for moving a carpenter's van for a couple of minutes. His supervisor was aware of this. He got the truck driver rate of pay for the entire day when using motorized lawn mowers.

Jeffrey Kimberlain has been an employee for 27 years and worked as a seasonal laborer for one year. He drove a Jeep and transported lawn mowers, some of which were motorized. He got the higher rate of pay when driving the Jeep. When teamed with a partner, they switched off so that the person driving the Jeep got the truck driver rate of pay and the other person riding the lawn mower got the lower rate of pay.

Russ Castaneda has been with the City for nine years, working as a seasonal laborer for about three seasons. He got the truck driver rate of pay for the entire shift anytime he was operating a pick-up truck and a tractor. Castaneda did not operate lawn mowers. When he worked with a partner, both got paid the higher rate of pay. They worked on ball diamonds, and one would drive a tractor on the street to the park and the other would drive a truck.

Robert Orton worked 10 years as a seasonal laborer in the Parks Department and 17 years as a full-time employee. When in Parks, he drove a pick-up truck or a Jeep and got the truck driver rate of pay for the entire day. His boss told him to put down the higher rate of pay. He usually worked alone and transported push mowers and used the mowers by himself. If he worked with a partner, they would switch off driving, and if his partner drove, he got the

truck driver rate. They did not split a day up but switched off driving on different days. The rate of pay was determined by who drove the truck, not who used a riding lawn mower. The only time he got the truck driver rate of pay for using a lawn mower was when operating a large 72-inch mower or a F-10 mower.

Scott Dresen has worked for the City for nine years, with one season in the Parks. He used pick-up trucks and ball diamond tractors as a seasonal laborer and got the truck driver rate of pay for the entire day. When he worked with a partner, his partner also got the truck driver rate of pay, since both of them were both driving pieces of equipment – a tractor and a truck. He was told by his boss that any motorized vehicle would generate the truck driver's rate of pay. Dresen was not sure of how one would get paid for only driving a riding lawn mower.

Kevin Johnson has worked for the City for nine years and work two seasons in Parks. He cut grass, operated a Jeep with a trailer, a 72-inch riding mower and push mowers. He got the truck driver rate of pay when operating the Jeep. He got the rate of pay for the entire day, although his partner did not. He did not get the higher rate of pay when operating the riding mower. He thought the higher rate of pay went to whoever drove the Jeep, and he and his partner switched off driving on different days. They did not split shifts into four hours of driving.

Sam Cicero, who has been with the City for 18 years, is a supervisor in the Parks Department. He supervised up to 17 seasonal employees and students that worked in the parks. Cicero acknowledged that seasonal laborers would get the truck driver rate for an entire shift if operating pick-up trucks and small dump trucks or a Jeep. If an employee drove only a Cushman or small implement or riding mower, he did not allow the truck driver rate pay. One had to drive a truck to get the truck driver pay. Employees switched off driving trucks by a week at a time. Cicero testified that in 2003, there was a change – employees would only be the truck driver rate if they were operating a CDL licensed vehicle and they would only get the higher rate for the time driving that type of vehicle. There are about 7 vehicles that need a CDL out of 25 or so other vehicles. Upper management told Cicero about the change.

Charles Klimek has been with the City for 25 years and is currently the Labor Supervisor/City Forrester. He worked three seasons as a seasonal employee. As a seasonal laborer, he got paid the truck driver rate of pay for driving certain pieces of equipment, such as a watering truck and a big dump truck. If he drove a pick-up truck, he probably did not claim the higher rate on his time card but he may have claimed it when driving a Jeep. As a supervisor, Klimek had seasonal laborers who got truck driver rates because his employees use a garbage truck, a forestry truck, and a watering truck, all of which are large trucks. The size of the truck triggered the higher rate of pay. Klimek testified that the policy regarding truck driver rate of pay changed to the actual time that employees drive trucks, instead of paying them for the entire day. He thought the change was intended to be more accurate.

The current Superintendent of Parks is James Kendall, who started with the City in that capacity in 2001. He knew of the past practice regarding the seasonal truck driver rate being paid to seasonal laborers who drove trucks, including pick-up trucks, Jeeps, one ton trucks or five yard trucks. He knew that they were paid the whole day. But they were not paid truck driver rate for the Cushman, a riding mower or a tractor. He had heard that this practice had gone on for a long time. In the winter of 2003, it was decided by upper management that the truck driver rate of pay would be applied only to seasonal employees when they drove a vehicle needing a CDL and only when they drove such a type of vehicle.

The change in method of paying truck driver rates was not negotiated with the Union.

### **THE PARTIES' POSITIONS**

#### **The Union**

The Union asserts that three management witnesses admitted that the method for paying seasonal employees changed by policy in 2003. They also admitted that seasonal employees got the truck driver rate of pay for equipment smaller than vehicles needing CDL's. The past practice is important. Ten Union witnesses all got the truck driver rate of pay when operating smaller trucks, and some testified it that they got it when they used Cushmans and lawn mowers. There was no minimum number of hours to get the higher rate of pay, and seasonal employees got it for their entire shift by interpretation and practice. Supervisors knew of the practice. The Union asks that the grievance be sustained and employees be made whole.

#### **The City**

The City contends that there is a dispute over what vehicles generated a higher rate of pay, and the testimony refuted that all motorized vehicles generated the pay. Rather, the higher pay was determined by who drove the truck. The City implemented a change that is consistent with the Department of Public Works. There is a reason for two classes of seasonal employees. If everyone was a truck driver, there would be no need for the two classes of pay. The City questions the credibility of testimony that supervisors would tell employees to merely drive around the building or drive for two minutes to get the higher pay. The City asks that the grievance be dismissed.

### **DISCUSSION**

Article II, Section E of the collective bargaining agreement applies here and it states in part:

The City possess the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine.

This case clearly turns on the past practice, since the contract does not state when seasonal employees get the “regular seasonal laborer” rate of pay and when they get the “regular seasonal truck driver” rate of pay in the contract. The classic definition of a past practice is one that is clear and unequivocal, readily ascertainable over a reasonable period of time, and is a fixed and established practice accepted by both parties. The practice in this case is necessary to determine when a seasonal laborer gets the seasonal truck driver rate of pay.

The past practice here is obviously been established over a long period of time, more than 20 years, and it has been accepted by both parties. Management knew of the practice and acquiesced in it, sometimes even encouraging it to allow seasonal employees get higher pay. The practice must also be clear and unequivocal, however, and that’s where things get muddy here. The practice is neither as wide as the Union would have it or as narrow as management would have it. For example, the practice does not extend to paying truck driver rates for using lawn mowers – because there is no consistency in the testimony on that point. And the practice is much broader than paying truck driver rates only for driving trucks that are large enough to require a CDL.

However, management knew of the past practice when it determined to unilaterally change it – without bargaining with the Union over it or repudiating it in contract negotiations. Therefore, the past practice should be kept in place, but the question is – exactly what is the practice that should be honored here. I find the scope of the past practice is much narrower than the Union claims it to be.

First of all, there is no uniform or consistent practice of paying seasonal laborers the seasonal truck driver rate of pay when they used Cushman’s, lawn mowers or any motorized piece of equipment. Orton, Johnson and Cicero’s testimony was consistent on this point. The truck driver rate of pay went to those driving the truck – whether it was a pick-up truck, a Jeep or a small dump truck or large truck. The practice was consistent with those driving larger tractors, particularly those tractors used on ball diamonds in the parks.

Then there is an inconsistent practice regarding the length of time seasonal laborers got the higher rate of pay when driving trucks. Some testified that they got it for the whole day. But some got it for only four hours when they switched off with a partner. Uick, Ruiz, Orton and Johnson’s testimony matches on the four-hour increments of pay. The difference in other cases is that some people with partners switched in whole day increments, not half days. Some

switched off driving for a week at a time. The City changed the practice to limit the higher rate of pay only for the time spent driving, but it cannot change the past practice in such a manner without negotiating it or repudiating the past practice in contract negotiations.

Therefore, the practice that survives for the length of time is that seasonal laborers who drive pick-up trucks, Jeeps, and small trucks not necessarily requiring CDL's, as well as larger tractors, should get paid the seasonal truck driver rate for a minimum of four hours if they switch half days with partners or for whole days if they don't switch off in half-day increments.

The remedy is to make those seasonal laborers who worked in 2003 through the present time whole for losses incurred by the City's unilateral change in the past practice by paying to them truck driver rates in at least four-hour increments to those who drove pick-up trucks, Jeeps, small trucks, larger tractors during a portion of the day. If they drove the trucks or larger tractors for the entire day, then they should be paid the higher rate of pay for the entire day. The Arbitrator recognizes that the remedy may be difficult to apply, depending on what type of records are available and will hold jurisdiction for applying the remedy for a longer period of time than usual.

### **AWARD**

The grievance is sustained in part. The City violated the collective bargaining agreement by paying seasonal truck driver rates only to employees who operated trucks requiring a commercial driver's license or trucks heavier than two and one-half yards. The seasonal laborers are entitled to the seasonal truck driver pay for operating smaller trucks such as pick-ups, Jeeps, small dump trucks and trucks and larger tractors not requiring CDL's. The City also violated the contract by paying the higher rate of pay only for the actual time spent driving those trucks, when it should have paid them for at least four days if they switched off driving with their co-workers or partners in half-day increments or for whole days if they did not switch driving with partners.

The City is ordered to pay seasonal laborers the higher rates of pay in according with the discussion above from the date that it changed the past practice to the present. The Arbitrator will hold jurisdiction until October 29, 2004, for the sole purpose of resolving any disputes that should arise over the scope and the application of the remedy ordered.

Dated at Elkhorn, Wisconsin, this 23<sup>rd</sup> day of July, 2004.

Karen J. Mawhinney /s/

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Karen J. Mawhinney, Arbitrator