BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF TWO RIVERS

and

TWO RIVERS CITY EMPLOYEES, LOCAL 76, AFSCME, AFL-CIO

Case 92
No. 61970
MA-12119

(Cross-Training Grievance)

Appearances:

Mr. Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 14002 County Road C, Valders, WI 54245, on behalf of Local 76.

Davis & Kuelthau, S.C., by Attorney Mark L. Olson, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, WI 53202-6613, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 2000-02 labor agreement between the City of Two Rivers (City) and Two Rivers City Employees, Local 76, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission assign a member of its staff as an impartial arbitrator to hear and resolve a dispute between them regarding the assignment of cross-trained utility operators at the City's Water and Wastewater Treatment Plants during the period of the 2000-02 contract. The Commission designated Sharon A. Gallagher to hear and resolve the dispute. Hearing was originally scheduled for May 7, 2003, postponed and rescheduled for June 19, 2003, postponed and rescheduled and held at Two Rivers, Wisconsin, on September 4, 2003. A stenographic transcript of the proceedings was made and received on September 12, 2003. The parties agreed at the conclusion of the hearing that they would postmark their initial briefs to the Arbitrator on October 31, 2003, and that the Arbitrator would thereafter exchange them for the parties. The parties also reserved the right to file reply briefs and agreed to arrange a date for that exchange between each other. Prior to October 31, 2003, the parties jointly requested that the Arbitrator hold the case in abeyance pending their

attempts to settle the case. On April 20, 2004, the City and the Union advised that the case could not be settled and that the Arbitrator would have to issue a decision. Thereafter, the Arbitrator received the parties initial briefs by August 4, 2004, and their reply briefs on September 15, 2004, whereupon the record herein was closed.

ISSUES

The parties were unable to stipulate to an issue or issues for resolution in this case. However, they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument in this case, as well as the parties' suggested issues. The City suggested the following issues for determination:

> Did the City violate the terms of Article XIII of the 2000-02 collective bargaining agreement when it assigned cross-trained utility operators or other cross-trained Utility employees to perform work at either the Water or Wastewater Treatment Plants? If so, what is the appropriate remedy?

The Union suggested the following issues for determination:

> Did the Employer violate the 2000-02 collective bargaining agreement when it adjusted the regularly scheduled work days and work weeks of employees in the Water Filtration, Water Distribution and Wastewater Treatment Departments and denied payment of overtime which would have resulted? If so, what is the appropriate remedy?

Based upon the relevant evidence and argument in this case, the Arbitrator shall determine the City's issues as they more reasonably state the dispute between the parties.

RELEVANT CONTRACT PROVISIONS

ARTICLE III – MANAGEMENT RIGHTS

The City possesses 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. These rights include the following:

A. To direct all operations of City government.

B. To establish reasonable work rules, with the reasonableness of the rules to be subject to the grievance procedure.

C. To hire, promote, transfer, assign and retain employees.

D. To suspend, demote, discharge and take other disciplinary action against employees, for just cause.

E. To relieve employees from their duties because of lack of work or for other legitimate reasons.

F. To maintain efficiency of City government operations entrusted to it.

G. To take whatever action is necessary to comply with State or Federal law.

H. To introduce new or improved methods or facilities.

I. To determine the number, structure and location of departments and divisions; and the kind and amounts of services to be performed.

J. To change existing methods or facilities.

K. To determine the methods, means and personnel by which operations are to be conducted.

L. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

M. To determine the schedule of work for employees in the bargaining unit.

N. To contract out for goods and services; however, such contracting out shall not result in a reduction of the normal work hours nor be used to decrease, replace or displace bargaining unit employees.

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ARTICLE XIII – NORMAL WORK WEEK, WORK DAY AND WORK SHIFT

A. Normal Schedule: Except as noted below, the normal schedule of work is eight (8) hours per day and the established work week is forty (40) hours from Monday through Friday.

1. Summer Season: From March 1 through November 30 of each year, the normal work day for certain designated classifications of employees shall be from 7:00 a.m. to 3:00 p.m. (with the exceptions of employees

assigned to street sweeping, street painting, meter reading, bridge opening and landfill operations). Such designated employees shall receive a ten (10) minute paid coffee break to be taken at the work site between 9:00 a.m. and 9:10 a.m. Such designated employees shall receive a thirty (30) minute lunch break (including wash-up time) to be taken between 12:00 noon and 12:30 p.m. at the work site, unless such schedule is modified by a non-bargaining unit supervisor. The designated classifications of employees are as follows:

1. Clerk III
2. Electrician
3. Equipment Mechanic
4. Equipment Operator I
5. Equipment Operator II
6. Head Lineman
7. Lineman Trainee, Second Class Lineman, First Class Lineman, Expert Lineman
8. Park and Cemetery Foreman
9. Public Works Foreman
10. Public Works Utility Man
11. Public Works Maintenance Man
12. Treatment Plant Mechanic
13. Utility Records Clerk/Service Person
14. Utility Serviceman
15. Water Service Foreman
16. Utility System Technician

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B. Changes in Schedule:

1. Within 24 Hours/Emergencies: In the event it is necessary to change employees from one regular schedule of days and/or hours to another schedule of days and/or hours, the employees shall be given at least twenty-four (24) hours notice of change. For emergencies such as snow removal, ice control, flood control, and so on, the Employer shall have the right to schedule the work week as may be necessary from one (1) shift to another shift without regard for prior notice. Any employee who is called in for work outside his/her normal work schedule shall not be sent home early on subsequent days nor denied his/her regular work week schedule to avoid overtime payment without his/her consent. The spirit of this provision is that the employer shall not be penalized during

emergency conditions through overtime payments, but neither shall the Employer adjust the working hours after emergency conditions in such fashion as to deny employees legitimate overtime.

2. Less Than 24 Hours: Work performed on revised schedules during the twenty-four (24) hour notice period shall be compensated at one and one-half (1-1/2) times the normal rate of pay whether or not the total working hours for the week are in excess of the normal work week. Work in excess of eight (8) hours per day or forty (40) hours weekly, including credit for paid holidays (except those employees regularly assigned weekend work) will be compensated for at the rate of one-half (1-1/2) times the regular rate of pay.

C. Standby: Employees are expected to do and receive pay for "standby" duty at such rate as may be from time to time established by agreement. At such periods they will keep themselves available within call at all times. The regular "standby" period shall be from Monday 7:00 a.m. to the following Monday at 7:00 a.m.

D. Wastewater Treatment Plant and Filtration Plant:

1. Normal Week: For employees in the Wastewater Treatment Plant and Filtration Plant the normal work week may be scheduled into a shift to include any day of the week on a regular schedule. Specific arrangement of work schedules shall be the function of the Employer.

2. Normal Day: For employees in the Wastewater Treatment Plant and Filtration Plant, the normal work day shall be established into specific daily hours on a regular basis. Such determination shall be the function of the Employer.

ARTICLE XIV – PAY POLICY

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C. Standby Duty:

1. Pay: The rate of pay for employees who are required to be available for emergency services for a period of seven (7) days in one (1) week is as follows:

Rotation	Premium –2000	Premium –2001	Premium -2002
8 or more employees	$52.58 per week	$100.00 per week	$103.00 per week
4 to 7 employees	$64.25 per week	$120.00 per week	$124.00 per week
3 employees	$83.23 per week	$160.00 per week	$165.00 per week
2 employees and under	$129.97 per week	$250.00 per week	$258.00 per week

In the event the City anticipates permanent changes in any of the standby rotations, it shall notify the Union in writing. Thereafter, this provision shall be reopened for negotiations upon request of the Union to the City.

2. Step-Up Pay: An employee assigned by a non-bargaining unit supervisor to do work out of classification for a period of six (6) hours or more in one (1) day shall receive the higher rate of pay for all hours worked. Work which is common to an employee's present classification and the higher classification [sic] is assigned to shall not be considered work out of classification. . . .

E. Overtime: Work in excess of eight (8) hours per day or forty (40) hours weekly including credit for paid holidays and work on Saturdays and Sundays, except those employees regularly assigned to weekend work, will be compensated for at the rate of one and one-half (1-1/2) times the regular rate of pay. Overtime shall not be paid more than once for the same hours worked.

F. Call In Pay: Any employee not scheduled to work who is called in to work shall be paid for two (2) hours at one and one-half (1 ½) times the employee's regular rate of pay, providing the employee is not called in to work hours contiguous to his/her regularly scheduled work shift, including both work immediately prior to or following the regularly scheduled work shift. Such non-call-in work contiguous to the employee's regularly scheduled shift shall be paid at time and one-half.

If any employee has completed his/her regularly scheduled work shift he/she shall receive call-in pay as specified above if he/she is asked to return to work by the City.

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APPENDIX A

. . .

JOB CLASSIFICATION AND PAY SCHEDULE

Salary Schedule **January 1, 2000 – Three (3) Percent Increase**
January 1, 2001 – Three (3) Percent Increase
January 1, 2002 – Three (3) Percent Increase

Position	Hourly Rate			
	Rang	01/01/200	01/01/01	01/01/0

. . .

Plant Operator Treatment Plant Mechanic Parks and Recreation Lead Worker Utility Service-Certified Distribution Head, Building & Grounds Maintenance	5	$15.16	$15.61	$16.08
Recreation Maintenance Supervisor Public Works Utility Man Recreation Facility Attendant & Maint. Plant Operator-Wastewater Grade 2 Cert Equipment Mechanic	6	$15.58	$16.05	$16.53
Clerk III Utility Records Clerk/Service Person Plant Operator-Wastewater Grade 4 Cert	7	$15.70	$16.17	$16.66
Certified Plant Operator-Waterworks Grade 1 Surface H2O Certified Plant Mechanic	8	$15.82	$16.29	$16.78
Utility Draftsman Equipment Operator II Utility Systems Technician Certified Plant Operator-Waterworks Grade 1 & Wastewater Grade 2 Certified Plant Operator-Wastewater Grade 4 Certified and Sub-grades	9	$16.27	$16.76	$17.26

Engineering Aid I Park & Cemetery Foreman Certified Plant Operator-Waterworks Grade 1 & Wastewater Grade 4	10	$16.97	$17.48	$18.00
Inspection Technician Certified Plant Operator-Waterworks Grade 1 & Wastewater Grade 4 & sub-grades	11	$17.58	$18.11	$18.65
Water Service Foreman	12	$17.74	$18.27	$18.82

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Regarding the various Plant Operator and Certified Plant Operator classifications listed above obtaining cross certification shall be at the option of the employee, except that:

1. The City shall have the right to establish pre-hire skill/training/certification requirements appropriate for the job;

2. In regard to vacancies posted on and after July 1, 1998, the City shall have the right, at the time the vacancy is posted, to establish training and certification requirements appropriate to the job as conditions of the employee's continued employment, which may include cross training and/or cross certification.

The pay grades for employees holding cross certifications shall be payable to all eligible bargaining unit employees, regardless of date of hire and regardless of whether the employee obtained cross-certification voluntarily or as a condition of continued employment.

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BACKGROUND

The parties have had a collective bargaining relationship since they negotiated and entered into their first contract covering the years 1972-73 (Jt. Exh. 6). In that initial labor agreement, Article XIII — Normal Work Week, Work Day and Work Shift read as follows:

ARTICLE XIII – NORMAL WORK WEEK, WORK DAY AND WORK SHIFT

In those bargaining units represented by AFSCME Local 76 and for administrative and clerical employees, the established work day is eight (8) hours and the established work week is forty (40) hours from Monday through Friday. Work in excess of eight (8) hours per day for forty (40) hours weekly including credit for paid holidays and work on Saturdays and Sundays, except those employees regularly assigned weekend work, will be compensated for at the rate of 1-1/2 times the regular rate of pay. Overtime shall not be paid more than once for the same hours worked.

Employees are expected to do and receive pay for "standby" duty at such rate as may be from time to time established by agreement. At such periods they will keep themselves available within call at all times. The regular "standby" period shall be from Monday 7:00 A.M. to the following Monday at 7:00 A.M.

For employees in the sewage plant and filtration plant, the normal work day shall be established into specific daily hours on a regular basis. Such determination shall be the function of the Employer.

In the event it is necessary to change employees from one regular schedule of days and/or hours to another schedule of days and/or hours, the employees shall be given at least 24 hours' notice of change. For emergencies such as snow removal, ice control, flood control, and so on, the employer shall have the right to schedule the work week as may be necessary from one shift to another shift without regard to prior notice. Any employee who is called in for work outside his normal work schedule shall not be sent home early on subsequent days nor denied his regular work week schedule to avoid overtime payment without his consent. The spirit of this provision is that the Employer shall not be penalized during emergency conditions through overtime payments, but neither shall the Employer adjust the working hours after emergency conditions in such fashion as to deny Employees legitimate overtime.

Work performed on revised schedules during the 24-hour notice period shall be compensated at 1-1/2 times the normal rate of pay whether or not the total working hours for the week are in excess of the normal work week. Work in excess of eight (8) hours per day or forty (40) hours weekly, including credit for paid holidays (except those employees regularly assigned weekend work) will be compensated for at the rate of 1-1/2 times the regular rate of pay.

Any employee not scheduled to work who is called in shall be paid for a minimum of two (2) hours.

In October, 1973, the City proposed to revise Article XIII to delete the second to the last paragraph of that Article, quoted above and replace it with the following:

> Work performed on scheduled [sic] revised during the twenty-four (24) hour notice period shall be compensated at the normal rate of pay except that hours worked in excess of eight (8) hours per day or forty (40) hours per week will be compensated for at the rate of one and one-half (1-1/2) times the regular rate of pay.

The Union made no counter proposals regarding this language and the City ultimately dropped it in negotiations (Union Exh. 1).

In July, 1974, the City again proposed to change Article XIII to include in the 1974-77 agreement the words "energy shortage" as a type of emergency under Section B(1). This proposal was also withdrawn by the City in November, 1974, and the Article remained unchanged in the 1974-77 agreement.

The language of Article XIII has remained as quoted immediately above from 1972 to date. However, during negotiations for the 1997-99 labor agreement, the City proposed to increase the grade pay of wastewater and water operators for every hour worked if these operators became cross-trained and cross-certified to work in the plant where they were not normally scheduled to work. At no time during negotiations for the 1997-99 agreement did the City propose to change the language of Article XIII. The parties were unable to reach a voluntary settlement and they filed for mediation with WERC. Mediator Marshall Gratz was assigned to the case.

It is undisputed that during negotiations and mediation which lead to the parties' voluntary agreement to the 1997-99 contract, neither the Union nor the City discussed the issue of scheduling cross-trained/certified (hereafter C-T/C) employees in the plant where these employees were not regularly scheduled to work. The Union's Chief Negotiator in these negotiations was Staff Representative Jerry Ugland of Wisconsin Council 40, AFSCME, AFL-CIO. 1/

1/ Ugland did not testify herein and he no longer represents this bargaining unit.

The testimony of Union and City witnesses on this point can be summarized as follows. Union witness Kowalski, a City Water Plant Operator since 1977 who was present at negotiations on behalf of the Union, stated that the parties never discussed that C-T/C employees' regular straight time schedules could be changed once employees became cross-trained and cross-certified (Tr. 51). Kowalski also stated that he could not "remember" anything specific being said at bargaining about cross-training/certification — that he could only remember that the City wanted something in the agreement on the point, which language the City proposed (Tr. 50). 2/ City Manager Buckley, who was on the City's bargaining team

in 1997, stated herein that he recalled that the City told the Union at negotiations and in mediation that the City needed the flexibility that cross-training/certification would give it but that he did not "recall" that the scheduling flexibility of Article XIII was a specific point in negotiations because the City was not seeking to change that part of the contract (Tr. 173). Buckley stated that Union did not object to the pay increases proposed for C-T/C employees by the City. Buckley stated that it was known by the parties that in 1998, the State of Wisconsin, DNR, would be mandating for the first time that a State-licensed operator be on duty at all times when a municipal water plant was operating (24 hours per day and 7 days per week). Both Buckley and Kowalski stated that the Union was more concerned in negotiations about grandfathering current employees, not forcing them to become cross-trained/certified, than about anything else regarding the City's proposals on this point (Tr. 50-51; 173-174).

2/ Union witness Casebeer, a Wastewater Plant Operator since 1997, was not on the Union's bargaining team in 1997.

The parties submitted proposals and counter proposals showing the bargaining history of cross-training/certification during the mediation that lead to the 1997-99 agreement. The Union submitted Final Offers to Mediator Gratz dated May 14, 1997, and February 17, 1998, and the City submitted Final offers to Mr. Gratz dated June 23, 1997, and January 17, 1998. In its May 14, 1997 offer the Union proposed Grade 9 and 10 pay increases for C-T/C employees and it proposed the following "clarification" language:

. . .

> Postings of Plant Operator and Certified Plant Operator positions shall be for the wastewater treatment plant or the water filtration plant. An employee who is a Plant Operator shall be regularly scheduled in the plant for which the employee bid. The employee shall not have a reduction in wage rate as a result of working in a plant for which the employee did not bid. Cross training of Plant Operators between the wastewater treatment plant and the water filtration plant shall be at the Plant Operator's option. Assignment of an employee to the plant for which they have not bid shall be offered in order of greatest seniority first.

. . .

In its February 17, 1998 offer, the Union dropped the above-quoted "clarification" entirely and accepted higher pay (Grades 10 and 11) as proposed by the City for C-T/C employees (as shown in the tentative agreement quoted below). The only new language

limiting the City's power regarding C-T/C employees in the Union's offer read as follows: "Obtaining cross certification shall be at the option of the employee."

On April 14, 1998, the parties reached a mediated settlement of all contract issues which read in relevant part as follows:

. . .

5. **APPENDIX A – JOB CLASSIFICATION AND PAY SCHEDULE**

Effective January 1, 1997, prior to the across the board wage increase, revise the pay schedule as follows:

PAY GRADE

Public Works Maintenance Worker	3
Utility Service (Cert. Dist.)	5

PAY GRADES

	Water-Works	Waste-Water	Both
Plant Operator (no certification)	5	5	
Plant Op. (Wastewater Grade 2 Cert.)		6	
Plant Op. (Wastewater Grade 4 Cert.)		7	
Certified Plant Op. (Wastewater Grade 4, Cert. and subgrades)		9	
Certified Plant Op. (Waterwks Grade 1, Surface H.2.O	8		
Cert. Plant Op. (Waterwks Grade 1 & Wastewater Grade 2 Cert)			9
Cert. Plant Op. (Waterwks Grade 1 & Wastewater Grade 4 Cert)			10
Cert. Plant Op. (Waterwks Grade 1 & Wastewater Grade 4 Cert and subgrades)			11

. . .

Regarding the various Plant Operator classifications listed above, obtaining cross certification shall be at the option of the employee except that: (1) the City shall have the right to establish pre-hire skill/training/certification requirements appropriate for the job; and (2) as regards [sic] vacancies posted on and after July 1, 1998, the City shall have the right, at the time the vacancy is posted, to establish training and certification requirements appropriate to the job as conditions of the employe's continued employment which may include cross training and/or cross certification. The pay grades for employes holding cross certifications shall be payable to all eligible bargaining unit employes, regardless of date of hire and regardless of whether the employe obtained cross-certification voluntarily or as a condition of continued employment.

After the 1997-99 agreement was ratified and executed the parties did not propose to change the relevant language concerning C-T/C employees or Article XIII. In October, 1999, part-time operator Duaine La Palm became a full-time employee at the City's Water Plant. This left the City with no part-time employees to fill in for Water and Wastewater operators on weekend vacations or leaves, as La Palm had done this work as a part-time employee. Two meetings were held — one in the Water Plant and one in the Wastewater Plant — regarding how best to try to cover vacations and leaves at the plants. All operators were present at these meetings as well as Plant Superintendent Lambries.

Union witness Kowalski stated that at the meeting held at the Water Plant, all operators agreed to the terms of a memo (dated October 22, 1999) issued by Lambries regarding how the Department would cover open shifts in the future. Union witness Casebeer stated that at the meeting held at the Wastewater Plant, management never asked the operators for input regarding covering open shifts, that operators were simply told what would be done in the future. Lambries stated that the operators agreed to the procedure that he summarized in his October 22, 1999 memo which was posted on the plant bulletin boards in both plants and which read as follows:

. . .

> The following items were discussed at a meeting between affected employees and management on October 20, 1999. The majority agreed that this plan should be implemented on a one year trial basis effective immediately. This plan will be reviewed in October 2000.
>
> 1. Only one employee per plant per day will be allowed to take vacation.
>
> 2. No vacations on Saturday or Sunday unless a "Special Occasion" warrants it. This decision will be made on a case by case basis by the Superintendent.
>
> 3. Vacation requests should be turned in one week in advance of the dates requested off. If this is not done the vacation may be denied.
>
> 4. If a Saturday or Sunday is approved for a "Special Occasion", another person trained in the position will be required to take the persons [sic] place.
>
> 5. On or about January 15 of each year, a calendar for the months of April thru December of that year will be posted along with a memo requesting that anyone with specific vacation needs submit one of the vacation request sheets. A separate sheet should be made out for days in different weeks. On or about March 20, all the vacation requests that have been

turned in since January will be reviewed and a calendar will be printed showing those requests. (Each year the Memo that accompanies the January 15 calendar will indicate the exact date that vacation requests will be accepted, March 20 is only an approximate date.) If there is a problem with any of the requests it will be resolved before the calendar is issued. On April 1 of each year the calendar with the scheduled vacations will be posted in each department (Water Service Dept. already uses this process). At this point someone with more seniority will not be allowed to bump another employee who has requested vacation prior to the March deadline. Anyone wishing to use vacation in January, February or March should submit a vacation request form as soon as you are aware of your needs. The requests for these three months will be approved on a first come first serve basis. Should two people request the same date at the same time, seniority will prevail.

6. Vacations for the Water Service Crew will be determined by the Water Department Foreman.

Lambries admitted herein that he did not send a copy of the above memo to any Union officers, and that he should have done so under the contract. Union witness Kowalski was on the Union Executive Board at the time he attended the meeting at the Water Plant and Kowalski stated that another Union representative (Mleciva) may also have been present at the Water Plant meeting that lead to the above-quoted memo (Tr. 60, 87). The Union never objected to the terms or application of the memo. Union witness Casebeer stated that he filed a grievance regarding the memo at this time but that it was dropped by the Union (Tr. 108).

On November 10, 1999, Lambries posted the following memo at the Water Plant regarding covering a vacation request of (Union witness) Kowalski:

. . .

I am looking for a volunteer to take Craig Kowalski's shift on November 20 & 21, 1999. Both nights are 7 PM – 7 AM shifts. Your normal work hours will be adjusted to accommodate these two nights.

Once you "volunteer" for a weekend shift, your name will be removed from the list until all full time operators trained in surface water have pulled a weekend vacation.

If interested in working Craig's shift, please contact me by 10:00 AM Friday, November 12, 1999. If I do not have anybody volunteer, I have no choice but to "force" someone to work these shifts.

The substance of this memo then became part of the policy/procedures regarding covering vacations at the Water Plant thereafter.

On a date unknown 3/ Water Plant employees John "Bucky" Gordon and George Luebke both of whom had chosen not to become cross-certified to work in the Wastewater Plant, filed a grievance in which they asked to be removed from having to cover weekend vacations at the Water Plant and asked that the more highly paid C-T/C employees be used for this purpose.

3/ The dates on Union Exhibit 7, the grievance filed by Gordon and Luebke, appeared to have been whited-out and the exhibit re-copied. No explanation was given.

In a June 16, 2000, Step 3 answer to this grievance, City Manager Buckley took the following positions and offered a settlement of the grievance:

. . .

> As I have told you and these employees in our various meetings on this grievance, the City believes that it is entirely within its rights to require these certified water plant operators to be among the roster of "relief operators" for that facility. Even though the pool of relief operators for the Water Plant has become much larger over the past year, with the implementation of wage rate incentives for cross-training, that does not exempt the regular water plant operators from being called upon to fill in for other, vacationing water plant operators.
>
> Thus, the City denies that it has violated the labor agreement by continuing to include these two employees on the relief operator "volunteer list," and rejects the proposed remedy of removing Mr. Gordon and Mr. Luebke from that list.
>
> Based on my discussion with you, Jim Miller, and the grievants, however, I am aware that the employees in question have other concerns about vacation and relief operator procedures that were implemented by the Water/Wastewater Superintendent, Mr. Lambries, in late 1999. Following consultation with Mr. Lambries, and in the interest of promoting cooperation with the Union, the City proposes to settle this grievance by implementing the attached policy on "Vacation Procedures and Scheduling for Water Filtration Plant, Water Service Department and Wastewatern [sic] Treatment Plant," to be effective within ten days following acceptance of this grievance settlement by the City and the Union.

. . .

Buckley expressly reserved the City's rights under the contract "to make future modifications to these (vacation) procedures."

Although the Union did not agree to the grievance settlement proposal (also dated June 16, 2000) which was enclosed in the Step 3 answer, the City posted the proposal on both plant bulletin boards and it became the "Vacation Procedures and Scheduling Policy" applicable to all unit plants/departments, as follows:

. . .

1. Up to two operators (1 per shift) on vacation per day in the Water Filtration Plant.
2. Up to two employees on vacation per day in Water Service Department.
3. Up to two employees on vacation per day in the Wastewater Treatment Plant.
   Conditions: If there are position vacancy's, vacations in the affected area are subject to denial.
   If work is not being completed due to vacationing emmployees, [sic] vacations in the affected area are subject to denial.
   If there will be construction projects that will require all staff to be present to accomplish these projects, vacations are subject to denial.
4. Operators that normally work weekends, will be allowed up to 3 weekends off per year.
5. Vacation requests should be turned in at least two weeks in advance of the dates requested off so I have a reasonable amount of time to schedule and notify replacement operators. If this is not done, the vacation is subject to denial.
6. Employees that have both a Wastewater and Surface Water license will be required to cover vacations in both the Water and Wastewater Plants because their pay has been increased to cover these additional responsibilities. Those employees are: Chris Behrendt, Bob Brull, Dave Casebeer, Chuck Denor, Wayne Hendrick, Tom Clark, and Craig Kowalski.
7. Employees with a Surface Water license will be required to cover vacations in the Surface Water Treatment Plant. Those employees are: : Chris Behrendt, Bob Brull, Dave Casebeer, Chuck Denor, Wayne Hendrick, Tom Clark, Tim Schramm, John Gordon, Craig Kowalski, George Luebke, Kevin Perry, and Garret Wachowski.
8. Vacation sign up policy will be handled the same as it was this year.
9. When a person asks for a weekend vacation, I will post a sign up sheet asking for a volunteer to work his/her shift. If I do not have someone

volunteer to work the shift, I will have to appoint someone to work. If more than one employee signs the volunteer list, seniority will prevail. Once a person works a weekend vacation, they will not have to work another weekend vacation until everyone on the list has worked for a weekend vacation. The persons hours will be changed to cover the vacationing employee shifts. I will attempt to do this as least 2 weeks ahead of the scheduled vacation.

10. If there are part time Certified Operators available, I will attempt to use them first to cover vacations in the plants they are certified to operate. This will be at the discretion of the Supt.

THIS POLICY REPLACES ALL EXISTING VACATION POLICYS FOR THE WASTEWATER PLANT, SURFACE WATER PLANT, AND WATER SERVICE DEPARTMENT

Again, the Union did not object to this Policy nor were any grievances filed and Lambries never sent and Union officers copies of the posted Policy. Gordon and Luebke's grievance was dropped by the Union. The above-quoted Policy was applied to all unit employees thereafter.

The Vacation Procedures and Scheduling Policy was amended by the City again on March 30, 2001, and on January 14, 2002. In the March 30, 2001 Policy, paragraphs 1-4 remained the same as those in the June 16, 2000 Policy, but the remainder of the Policy was changed as follows:

. . .

5. Employees that have both a Wastewater and Surface Water license will be required to cover vacations in both the Water and Wastewater Plants because their pay has been increased to cover these additional responsibilities. Those employees are: Chris Behrendt, Dave Casebeer, Chuck Denor, Wayne Hendrick, Tom Clark, Craig Kowalski, and Garret Wachowski.
6. Employees with a Surface Water license will be required to cover vacations in the Surface Water Treatment Plant. Those employees are: : Chris Behrendt, Dave Casebeer, Chuck Denor, Wayne Hendrick, Tom Clark, Tim Schramm, John Gordon, Craig Kowalski, George Luebke, Duaine LaPalm, and Garret Wachowski.
7. Vacation sign up policy will be handled the same as last year. A vacation calendar will be posted in January and removed in March. Anyone signing this calendar will be quaranteed [sic] vacation as long as items 1, 2, and 3 above are not violated.

8. Vacation requests after the calendar is removed in March, will be done on a first come / first serve basis. Please turn these in early, to allow me sufficient time to notify and schedule replacement operators.
9. I will ask certified part time operators to cover weekend vacations in the plants they are licensed to operate. If part time certified operators are unavailable, I will go to the lists for each plant.
10. When a person asks for a weekend vacation and a certified part time operator is unavailable, I will post a sign up sheet asking for a volunteer to work his/her shift. If I do not have anyone volunteer to work the shift(s), I will have to appoint someone. This will normally be the person with the least seniority that has not pulled a weekend vacation already.

    If more than one employee signs the volunteer list, seniority will prevail. Once a person works a weekend vacation, they will not have to work another weekend vacation until everyone on the list has worked for [sic] a weekend vacation. The persons [sic] hours will be changed to cover the vacationing employee's shifts. Once the vacation calendar is removed in March, I will set up the replacement operators postings so that the operators have more than enough time to determine which weekend they might want to work.

    If a person has a [sic] approved vacation immediately before or after the scheduled weekend vacation of another person, that person will not be required to work the weekend before or after his/her vacation.

THIS POLICY REPLACES ALL EXISTING VACATION POLICYS FOR THE WASTEWATER PLANT, SURFACE WATER PLANT, AND WATER SERVICE DEPARTMENT.
NAMES WERE UPDATED ON MARCH 30, 2001

The Policy was changed again by the City on January 14, 2002. The amended policy remained the same as the March 30, 2001 Policy in paragraphs 1-6 but differed in the remaining paragraphs as follows:

. . .

7. A vacation calendar will be posted in January of each year and removed in March. Anyone signing this calendar will be quaranteed [sic] vacation, as long as items 1 through 4 above are not violated.
8. Vacation requests after the calendar is removed in March will be done on a first come / first serve basis. Please turn these in early, to allow me sufficient time to notify and schedule replacement operators.
9. Taking vacation time on holidays will not be allowed.

10. When a person asks for a weekend vacation, I will post a sign up sheet asking for a volunteer to work for the vacationing employee. If I don't have anybody volunteer, I will appoint a replacement. This will normally be the person with the least seniority that has not pulled a weekend vacation already.
If more than one person volunteers to work, seniority will prevail.
Once a person works a weekend vacation, they will not have to work another weekend vacation until everyone on the list has worked for a weekend vacation.

THIS POLICY REPLACES ALL EXISTING VACATION POLICYS FOR THE WASTEWATER PLANT, SURFACE WATER PLANT, AND WATER SERVICE DEPARTMENT.
NAMES WERE UPDATED ON JANUARY 14, 2002

THIS POLICY WILL GO INTO EFFECT 1-14-02

Again, both the March 30, 2001, and the January 14, 2002 policies were posted on both plant bulletin boards. No objections or grievances were filed by the Union thereon and the new policies were applied to all unit employees on and after the dates listed thereon.

As discussed above, on November 10, 1999, Superintendent Lambries began requiring employees to "volunteer" to work weekends at the Water Plant in order to cover weekend vacation for Water Plant employee Kowalski (Union Exh.4). From June 19, 2000, through May 16, 2002, Lambries issued similar memos seeking volunteers to cover weekend vacations for various Water Plant employees on the same terms as quoted above in the November 10, 1999 memo (City Exh. 10). In each instance, Lambries either got a certified Water Plant employee or a C-T/C employee to volunteer to work the weekend (at straight time) or he ordered such an employee (who was not on-call or on approved vacation) to cover the weekend (at straight time) by giving the operator more than 24 hours notice of a change in their regular schedule. No objections or grievances were filed regarding these memos or Lambries' actions concerning them. 4/

4/ The Union did not submit any documents to show that it ever objected to the City's actions at any time relevant hereto. The only prior grievance the Union submitted herein was that of Gordon and Luebke, described above.

Union witnesses Casebeer and Kowalski, both C-T/C employees, stated that prior to 1999, the City had always issued an annual or master schedule showing all work days and shifts for all unit employees and that the City had granted requested vacations based on the

master schedule. Union witness Casebeer stated that from 1999 to 2001, C-T/C employees had not had their regular schedules changed very often to work at the plant they were not normally assigned to work. Casebeer could only remember five to six times per year during this period that changes from the master schedule occurred for C-T/C employees. The City submitted records which specified the changes it made in C-T/C employee schedules, none of which were challenged by the Union.

For example, City Exhibit 12 showed that in 1999 one change was made to cover weekend vacation which was covered by employee Clark; in 2000, three changes were made to cover weekend vacations which were covered by employees Behrendt, Casebeer and Hendrick; in 2001, six weekend vacations were covered by employees Luebke, Kowalski (two weekends), La Palm (two weekends) and Wachowski. In 2002, the City had two seasonals (the Schramm brothers) who became cross-certified and they covered Water Plant employee vacations for the most part. However, three additional weekends were covered in 2002 by Casebeer, Hendrick and Wachowski. In 2003, prior to the hearing herein), Hendrick had covered one weekend vacation.

FACTS

It is undisputed that after John "Bucky" Gordon retired from the Water Plant on August 23, 2002, the City decided not to replace him. This meant that the City then employed three Water Filtration operators, one less than the full complement. The City managers chose to work short, using the Schramm brothers (college students who were DNR certified operators) during the summer season and C-T/C employees to cover Gordon's shift. The City made this decision because it had been ordered by the DNR to renovate the Water Plant and because the City believed that after it completed the necessary $4 million renovations to the Water Plant, the City would no longer need three Water operators due to the improved technology of the Plant and it did not want to have to lay off a newly hired operator. City Manager Buckley also explained that whenever the City has hired a new operator they seldom come on board fully trained and certified, requiring the City to spend time and money to train and certify new operators. Buckley and Lambries stated that they believed that the renovated Water Plant could run with two operator/mechanics and that the renovations will not be completed until the Fall of 2004 at the latest.

It is undisputed that when changing C-T/C employee work schedules (since 1999) Superintendent Lambries gave employees as much as three months notice or as little as two days' notice that their master scheduled hours (and the plant where they would work) would change. Lambries has never given C-T/C employees less than 24 hours notice of a schedule change since 1999 (Tr. 125). Lambries stated that in making schedule changes using C-T/C employees, he exempts those on vacation and those on-call, using only the remaining C-T/C employees. As a result, no unit employee has ever had to give up a scheduled vacation day due to a change in the master schedule.

Union Exhibit 11 shows the extent of the disruption during each work weak (including weekends) created by the City's decision not to replace Gordon following his retirement on August 26, 2002. This document shows that from August 26, 2002, through February 2, 2003, the following changes and additional changes were made to the following employees' normal work schedules:

Name	Changes	Additional Changes
Behrendt	3 times	3 times
Casebeer	5 times	3 times
Clark	5 times	0 times
Denor	5 times	4 times
Glaser	6 times	3 times
Hendrick	5 times	6 times
Kowalski	2 times	3 times
Wachowski	5 times	6 times

Union Exhibit 11 did not indicate how many notices of change each employee received and how many of these changes/additional changes were made to cover operator vacations and sick leave (unrelated to Gordon's retirement). 5/

5/ City Exhibits 6 and 11 appear to conflict with the Union exhibits in this area, although it should be noted that Union Exhibit 11 covers four months less than City Exhibits 6 and 11. The City's exhibits show fewer schedule changes across a longer period of time (following Gordon's retirement), as follows:

8 changes; Denor and Clark
6 changes; Glaser and Casebeer
10 changes; Wachowski
3 changes; Kowalski
9 changes; Hendrick
7 changes, Behrendt
2 changes; College/Summer Help

For purposes of this decision, I have assumed that the Union's Exhibits, showing higher change figures, are correct. The evidence is undisputed that all schedule changes covered more than one work day and were ordered with from 48 hours to two months notice to the affected employees.

Although Union Witness Casebeer asserted that employee Hendrick was favored over the other employees because Labries accommodated Hendrick's personal schedule and refused to do so for other employees, this was not borne out by Union Exhibit 11 and City Exhibit 12. Indeed, City Exhibit 11 showed that Union witnesses Casebeer and Kowalski had acted as replacement operators for Gordon from his retirement on August 26, 2002, through May of

2003 the least number of times of any unit employee (12 times each); that Hendrick had acted as Gordon's replacement 20 times during the period and that Clark, Denor and Wachowski each replaced Gordon 24 times, the highest number during the period covered; and that Casebeer also called in sick on 2 of the 12 times he was to replace Gordon making his total times replacing Gordon (10) the least in the unit. City Exhibit 6 also showed that, from April 15 through June 8, 2003, Hendrick had 22 schedule changes while Casebeer had 14 schedule changes but because Casebeer was sick 1 day, he only worked a total of 13 schedule changes for the period. 6/

6/ In these circumstances, the Union failed to prove that the City had engaged in any favoritism in assigning cross-certified employees or in changing employee work schedules.

City Manager Buckley also stated herein that the annual cost of maintaining the cross-certification program was $2,800 per year per employee. This amount does not include the cost of training, materials and exams which the City has borne since the parties agreed to the program in 1998. In this regard, Buckley noted that after Union witness Casebeer was certified in water filtration, his pay went from Grade 9 to Grade 11 for every hour worked; and after his waste-water certification, Union witness Kowalski's pay for each hour worked went from Grade 8 to Grade 10.

On October 14, 2002, employees Casebeer and Wachowski filed the instant grievance. On the Step 1 form, they listed the contract violation and the adjustment required as follows:

> Replace retired position with cross training individuals.
> Post and hire.

On the October 23, 2002, Step 2 form, the Grievants listed the contract violation and the adjustment required as follows:

> The violation is that cross training was never intended to replace a union job. When John Gordon retired the city started using the men in cross training to replace him. We (the Union) never agreed to use the cross training in this way. Mike Lewis assured us this was never the intent of the cross training. . . . Post the job or pay overtime to fill his position. 7/

7/ The reference to "his" and "him" is to John Gordon.

On November 22, 2002, the City made the following Step 3 response to the instant grievance:

. . .

> The written grievance as filed at Step 2 does not cite "the specific section of the contract alleged to have been violated," as is required by Article IX, Section D. of the Bargaining Agreement. Instead, the written grievance states that the use of cross-trained Wastewater Treatment Plant personnel, on a rotating basis, to fill shifts at the Water Filtration plant is somehow inconsistent with the "intent" of the parties when contract language on cross-training was negotiated. Further, I understand from our meeting on November 19 that AFSCME business agent Neil Rainford is of the belief that such use of cross-trained employees is in violation of Article XIII, Section B ("Changes in Schedule") of the bargaining agreement, and that the City's practices may be unjustly denying the cross-trained workers overtime compensation to which they are entitled. While Mr. Rainford's points were raised very late in the process, I will attempt to address herein both the issues raised in the original grievance and those raised by Mr. Rainford at our Step 3 meeting some four weeks later.
>
> First of all, the City does not accept the Union's written argument that the use of cross-trained wastewater plant personnel at the Water Filtration Plant is contrary to the intent of the cross-training language in the bargaining agreement. I was actively involved as a member of the City's negotiating team for the current bargaining agreement, and recall no representation made by Mike Lewis (as alleged in the grievance) that cross-trained individuals would not be used to fill shift vacancies at one of the plants.
>
> The City agreed to monetary incentives (higher wage rates) for employees who become cross-trained precisely because there is value to the City in having individuals who are qualified to operate both plants. Where the City decides to assign such personnel to work is a matter of Management Rights, as stated in Article III of the bargaining agreement. Relevant language contained in the listing of management rights includes the rights:
>
> A. To direct all operations of City government
>
> C. To hire, promote, **transfer, assign** and retain employees (emphasis added)
>
> F. To maintain the efficiency of the City government operations entrusted to it

H. To introduce new or improved methods or facilities

J. To change existing methods or facilities

K. To determine the methods, means and personnel by which operations are to be conducted.

M. To determine the schedule of work for employees in the bargaining unit

The higher wage rates for cross-trained individuals are a "win-win" situation for the City and the cross-trained employees. The employees "win" by receiving a higher wage rate than they otherwise would—regardless of which plant they are assigned to. The City "wins" by being able to assign workers where it needs them, resulting in more efficient operations to the benefit of ratepayers.

I find no language in the bargaining agreement that would lead me to believe that the City does not have the right to assign cross-trained employees between the water and wastewater plants in the manner it has since John Gordon's retirement. Further, the City did not represent in any past bargaining sessions that it would never use cross-trained individuals to fill shift openings created by a position vacancy at either the water or wastewater facility. Thus, the written grievance as presented at Step 3 is denied.

Further, the City does not agree with Mr. Rainford's additional arguments in support of this grievance, which be belatedly presented at our November 19 meeting. The cross-trained wastewater employees who have been scheduled to work shifts at the Water Filtration Plant have been notified of such scheduling in excess of 24 hours in advance, so the City is in compliance with provisions of Article XII, Section B ("Changes in Schedule"). In addition, the City does not accept Mr. Rainford's argument that the scheduling methods used by the City in this instance would qualify any of the effected workers for overtime pay under the contract—all have worked what is considered a "normal day" for the water or wastewater plant, in accordance with Article XIII, Section D of the contract, and none of the schedule changes in question have resulted in the employees in question working over 40 hours per week without receiving overtime pay.

. . .

POSITIONS OF THE PARTIES

The Union

The Union argued that regularly scheduled hours of work are provided for in the labor agreement. In this regard the Union noted that Article XIII, Section A, states the regular work hours and days of the Utility Serviceman position and that Wastewater Treatment Plant (WWT)

and Water Filtration Plant (WF) employees' normal work days and normal work weeks are established/arranged pursuant to Article XIII D so as to be "regular." In addition, a 1996 side letter provides that WWT and WF operators "shall continue to work according to the existing schedule which includes four (4) hour, eight (8) hour and twelve (12) hour shifts."

Union witnesses Kowalski and Casebeer stated herein without contradiction that for many years prior to 1999, WWT and WF employees received their annual work schedules covering all of their work days in the year in December of the year before; that when employees were called in to work during an emergency, their work schedules were not changed and they therefore received overtime for emergency work; and that when employees were called in to cover non-emergency work (i.e. to cover employee sick leave), their regular schedules were not changed. Manager Lambries admitted that there was no past practice of altering employees' regular annual schedules prior to the parties' entering into the cross-training agreement in 1999.

The Union also observed that Article II protects past practices like those concerning regular schedules for unit employees and therefore in this case, City should have to prove it has the right to change regular schedules guaranteed by the labor agreement. The Union pointed to the 1996 side letter regarding Park and Recreation Department employees that gave the City the right to "adjust the normal schedule" of such employees for six special events, as further evidence that the City has no right to unilaterally deviate from unit employees' regular daily/weekly schedules.

The Union then analyzed Article XIII, Section B, as follows. The Union urged that all of Section B must be read together and that one cannot logically separate the first sentence of the Section from the rest of the Section, as the City has urged the Arbitrator to do. Thus, sentence 1 of the Section covers emergencies where 24 hours advance notice of work can be given; sentence 2 covers weather-related emergencies where the City cannot give 24 hours notice of work; sentence 3 states that employees are entitled to finish their regular shifts and to maintain their regular work week schedule to avoid overtime unless the employee consents; sentence 4 states the spirit of the Section — that the City should not unfairly deny overtime pay.

In this case there was no emergency created by the retirement of John Gordon. Rather, the City simply decided that it would not replace Gordon, that it would work short, using cross-trained employees. The Union asserted that the City could not modify the regularly scheduled hours of employees "except in response to an emergency and the Agreement clearly prohibits the alteration of regular schedules after an emergency, much less a non-emergency, to deny overtime" (Union Brief, p. 18).

In the Union's view, the City's attempt to separate sentence 1 of Article XIII, Section B1, is contrary to rules of grammar, 8/ rules of contract construction and contrary to the evidence of bargaining history and past practice submitted herein. The Union contended

that adopting the City's reading of sentence 1 would render meaningless sentence 4 of the Section. The Union noted that the heading of Section B1 was added after 1972, long after the substantive language was placed therein and that no evidence was proffered to show that the parties intended (by adding the heading) to change the meaning or application of the Section. The Union queried, if the City actually had the authority to unilaterally alter work schedules, why had the City negotiated the 1996 Park and Recreation side letter giving it the right to change work schedules for those employees to accommodate six special events.

8/ The Union cited no specific grammatical rules which would be violated if the City's approach were adopted herein.

In sum, the Union asserted that the proven past practice and the language of Article XIII, Section B, (when all sentences thereof are read together) square perfectly with each other and demonstrate that the City can adjust work schedules only for emergencies, giving 24 hours notice if possible, and that the City cannot alter an employee's regular schedule to deny overtime.

The Union argued that the cross-training provisions of the contract do not allow the City to make the constant work schedule changes it has made since the retirement of Gordon. In this regard the Union noted that the City never discussed modifying regularly scheduled hours of work with the Union when the cross-training provisions were placed in the contract. The Union contended, citing City Exhibits 1 and 4, that the cross-training bonuses "were a response to a very credible demand for pay catch-up in the 1997 negotiations" (Union Brief, p. 24).

In any event, the Union disagreed with the City's assertion that it would not have received a *quid pro quo* for the cross-training bonuses had it had to continue to pay overtime pay when transferring cross-trained employees. On this point the Union argued that the City received added flexibility to transfer employees from plant to plant during their regular work days and that more employees were certified to work at both plants, as increasingly required by the DNR. The Union urged that the City never bargained for the right to constantly modify regular schedules when it bargained to pay WWT and WF employees to get cross-trained.

The Union urged that the grievance be sustained, that the Arbitrator order a make-whole remedy (from the date of the grievance, October 9, 2002, forward) and a cease and desist order.

The City

The City argued that the relevant contract language is clear and unambiguous, entitling the City to reassign CT employees at WWT and WF, in its discretion, without paying them overtime pay. The City asserted that the *quid pro quo* for such a liberal reassignment right was

the stepped-up pay — paid on all hours worked annually. In this regard, the City noted that Article XIII, Section B, gives the City the right to reassign CT operators to other shifts with 24 hours notice and to reassign them in non-emergency situations with less than 24 hours notice; that Article XIII, Section E, also states that the normal work week for operators is 40 hours and Section D gives the City the unfettered right to schedule days, shifts and work weeks for WWT and WF operators. These provisions, the City argued, require a conclusion that overtime can only be earned by CT operators after 40 hours in a week, making overtime after 8 hours in a day inapplicable assuming the City followed all other requirements of Article XIII, as stated above.

The City pointed out that CT operators receive between $1.22 and $1.39 per hour for each hour they work (whether they are on a reassignment or not) in exchange for the City's right to reassign them without incurring overtime liability, pursuant to Article XIII and the CT provisions of the 1997-99 labor agreement. In addition, the City asserted that the Management Rights clause of the contract grants the City broad rights to "assign" employees, to maintain City efficiency and to determine "the methods and means" of City operations. Furthermore, the City noted that it has paid overtime only over 40 hours per week to CT operators since 1998 because it has always given those operators at least 24 hours' notice of their reassignment. The City has never denied CT operators scheduled vacation time off.

The City urged that the bargaining history supports a conclusion that the parties intended that the City would have the right to reassign CT operators (upon proper notice) without paying them overtime as a *quid pro quo* for the enhanced wages they would receive. In this regard, the City observed that City Administrator Buckley stated herein that in mediation, the parties agreed that in exchange for the stepped-up hourly pay proposed by the City, WWT and WF operators hired after 1998 would be required to become cross-trained and certified; that current operators could choose to do so or not; and that any CT operators would be subject to assignment at either the WWT or WF without regard to which plant they were hired into.

The Union's final offers support the City's arguments regarding bargaining history. In this regard, the City pointed out that the Union never proposed that CT operators receive overtime pay; that the City's offer of January 19, 1998, proposed to pay CT operators more than the Union had proposed for them for all hours worked; that no reference was ultimately made in the parties' settlement to work by seniority for CT operators, as the Union dropped that proposal in mediation/the final offer process; and the City proposed to pay (and it has paid) all costs of cross-training and certification.

The City argued that it would not have been fiscally responsible or logical for the City to agree to increase wages for all hours worked and to all of the other provisions concerning cross-training (so advantageous to employees and so costly to the City) if it had not received the right to reassign CT operators (upon proper notice) without incurring overtime liability. The Union did not suggest modifying Article XIII, Section B, in its May 19, 1997, or its

February 17, 1998, final offers. The City urged that Article XIII, Section B, has clearly and unambiguously granted it the power to reassign operators with 24 hours notice since the 1970s and the Union never attempted to change this in bargaining.

The City contended that the Union failed to prove a past practice existed of paying CT operators overtime pay when reassigned with 24 hours notice. The City noted that in 1998 the DNR notified all municipal utilities that new guidelines would be issuing requiring licensed operators to be on duty at all times at WWT and WF plants. None of the City's operators were cross-trained and certified in 1998 and they were therefore always assigned to the plant that they had hired into. All this changed after the parties reached agreement on the 1997-99 contract. Therefore, the City argued that the relevant past practice which exists herein goes back only to 1998.

The City's June 16, 2000 posted Vacation Procedures and Scheduling document states that CT operators must cover other employees' vacations because "their pay has been increased to cover these additional responsibilities." No grievances were filed regarding this or any other City posting concerning scheduling. In 2000, non-CT operators Gordon and Luebke filed a grievance alleging that they should not have to cover vacations because this was the responsibility of CT operators who were paid for reassignment. The City urged that it is disingenuous of the Union to now seek overtime pay for CT operators when it had argued to the contrary in the 2000 grievance. In all of these circumstances, the City urged the Arbitrator to deny and dismiss the grievance in its entirety.

In Reply

The Union

The Union asserted that the City had tried to use City Manager Buckley's testimony herein to prove that the City bargained the right to change Operator regular schedules using Article XIII, B1, giving cross-training/certification pay as a *quid pro quo* therefor. The Union noted that Article XIII had not been changed since the 1970's and that Buckley's testimony indicated that he did not recall that scheduling flexibility was specifically discussed at bargaining for the 1997-99 contract. The Union also urged that its witness, Kowalski stated that schedule changes were not discussed and that the Union would not have agreed to them in any event. The Union argued that it never tried to change Article XIII, B because it covers only emergency situations and gives the City no power to change Operator regular schedules for any other reasons.

Although the City had argued that the past practice prior to 1998 was irrelevant, the Union urged that it was not. In this regard, the Union noted that prior to 1998, the City was free to assign Operators anywhere it wished, within their regular schedules, as there were fewer DNR licensing requirements prior to 1998 than there are now. In any event, the evidence showed that the City never pulled Operators off their regular schedules prior to 1998 and this was the past practice relevant to this case.

Regarding bargaining history, the Union argued that the fact that it dropped language in its final offer stating that cross-trained Operators must be regularly scheduled in their bid plant should be discounted. In any event, the Union argued that the City could schedule cross-trained Operators at the non-bid plant so long as it was done in good faith and not to defeat the job posting provision. The Union, however, did not submit any evidence to support these assertions.

Concerning the City's argument that the Union failed to grieve the City's re-scheduling of cross-trained Operators for years prior to bringing the instant grievance, the Union noted that the evidence showed that it had grieved scheduling issues twice although both grievances were dropped; that one of the grievances simply fell through the slats, and that the City's settlement proposal regarding the second grievance was rejected by the Union's interim Staff Representative (Union Exh. 6-9). In these circumstances, the Union contended that the evidence failed to support a conclusion that a mutually agreed-upon past practice allowing intermittent schedule changes was created or that the Union had waived its rights to further complain regarding scheduling issues.

The Union observed regarding the City's argument that the Gordon grievance contained the damning admission that cross-trained Operators were understood to be receiving extra pay in exchange for the City's ability to schedule them with more flexibility, that Grievant Gordon was not authorized to speak for the Union. Although Gordon did not testify at the instant hearing, the Union then conjectured in its brief, regarding the reason why Gordon had made the above admission in his grievance. The Union argued that only by mutually agreed-upon changes to the collective bargaining agreement could the City change Operator regular schedules.

The Union urged that the City had "used force, illegal meetings . . . false promises of trial periods and a series of unilateral policies. . ." to gain what it had failed to legally negotiate into the labor agreement and that the Arbitrator should not reward the City for such conduct. (Union Reply Brief, p. 3) Therefore, the Union sought a cease and desist order and a make-whole remedy herein.

The City

The Union's argument that Article XIII B covers all scheduling and overtime compensation and limits hours worked for Operators to eight per day, takes Article XIII out of context and overlooks other important parts of the contract which must be given full effect under arbitral rules of construction. In this regard, the City noted that Article XIII D states that the City is to make specific work schedule arrangements; and the "normal week" and "normal day" are to be determined by the City. This language is quite different from the work week and work day defined in the agreement applicable to other unit employees, such as those in the Park and Recreation Department. Thus, for WF and WWT Operators, Article XIII D,

gives the City the right to establish shifts to include any day of the week and the right to establish specific daily schedules, so long as they are established "on a regular basis." In regard to the term "regular" contained in the phrase," on a regular basis," the City urged that the Union misinterpreted the use of "regular" in its initial brief. The City argued that the entire phrase must be found to describe how the City is to establish employee work hours, and that the Union's contention that "regular" modifies "daily hours" is incorrect.

In addition, the City observed that a Side Letter dated November 6, 1995, clearly states that the parties agreed that WF and WWT Plant Operators' normal shifts are to be 12 hours long. In these circumstances, the Union' arguments that Article XIII B alone controls this case and requires that C-T/C Operators be paid overtime whenever they work more than 8 hours in a day, must fail. In the instant case, the Union has also ignored the fact that no C-T/C Operator has ever been given less than 24 hours' notice of a schedule change, which requires a conclusion that Article XIII B2 is not in issue here. Were the Arbitrator to agree with the Union's narrow interpretation of Article XIII B, this would mean that the above-cited provisions of the agreement would have no force or effect and such an approach is contrary to the accepted rules of contract construction.

The Union's argument that a 1995-96 Side Letter regarding "special event" hours for Park and Recreation employees is not applicable to WF and WWT Operators as the Operators' hours and work week are covered by the specific language of Article XIII D, and the November 6, 1995 Side Letter, not Article XIII A. Therefore, in the City's view, the special events Side Letter cited by the Union and any past practice regarding it are irrelevant to this case.

The Union has argued that the City cannot change the annual schedule issued by the WF and WWT Plant managers without incurring overtime liability for the City. The City contended that it has not paid overtime to C-T/C Operators since the parties agreed to stepped-up pay for C-T/C Operators in 1999. Indeed, the City pointed out that the Operators' annual schedules have been used merely as a starting point or template and that they have been subject to discretionary changes since 1999 and that changes have been made by the City in order to provide vacation and sick leave to Operators. In addition, the Union failed to prove that any Operator ever had his/her vacation canceled or that they ever lost any contract benefit due to the City's having changed the annual (Master) schedule. The City relied upon Article III, which expressly grants the City the right to set work schedules as well as to direct operations and to determine the methods, means, and personnel by which operations are to be conducted.

Comparisons of sentences 1 and 2 of Article XIII B1, demonstrate that the Union's assertion that Article XIII B1 applies only to emergencies is wrong. In this regard, the City argued that sentence 2 of Article XIII B1 is an exception to the rule stated in sentence 1: that sentence 1 by its express terms, covers only non-emergency situations with 24 hours notice, while sentence 2 covers emergency situations "without regard for prior notice." In the City's view, these two sentences cannot be properly construed any other way.

The Union's contention that past practices regarding overtime and scheduling are preserved by Article II of the contract is not supported by the language of Article II and this argument must be disregarded. On this point, the City observed that Article II preserves only past practices not specifically referred to in the agreement. As Article XIII covers schedule changes, any past practices concerning scheduling must be disregarded and the clear language of Article XIII must prevail. The Union's attempt to use a reference to alleged overtime payments made after the death of Operator Bill Pfalmer must also be disregarded. On this point, the City noted that the Union failed to offer any proof as to when overtime was accrued and who the Operators were who allegedly received overtime pay due to the death of Pfalmer.

In all of the circumstances, the City urged the Arbitrator to deny and dismiss the grievance in its entirety.

DISCUSSION

The initial dispute in this case concerns the proper interpretation of Article XIII, Section B1, which has been a part of the parties' labor agreements since 1972. The Union has argued that this Section must be read as a whole and that it allows the City to change regular employee schedules only in two types of emergency situations — one, where there is more than 24 hours before the schedule change and the other, where there is less than 24 hours prior to the needed change. In contrast, the City has argued that sentence one of Section B1, must be read separately from the second sentence of the Section, as sentence one concerns non-emergency reassignments while sentence two (and those that follow it) concern emergency situations where there is less than 24 hours notice that a schedule change is needed. The Union has also argued that the title of Section B1, should not affect the interpretation of the Section as the title was added well after the provision was first placed in the agreement and the substantive language of the Section never changed. The City argued to the contrary on this point—that the title was added to clarify that there was a difference between sentence one situations and those covered by the remainder of the Section.

I note that the parties offered no evidence of bargaining history regarding what the parties intended by the language of Section B1, or why they added the title to Section B1. Therefore, any analysis of the provision can only be done based upon the words of Section B1. The question arises whether Section B1 is clear and unambiguous. I believe that it is.

In my view, the first sentence of Section B1, as reflected by its title, concerns changing an employee's "regular schedule of days and/or hours to another schedule of days and/or hours. . . ." The use of the word "another" refers back to the term "regular schedule" strongly implying that the change in schedule, if made pursuant sentence one, must be to another regular schedule. Significantly, the first sentence of Section B also does not refer in any way to emergencies, and it requires the City to give 24 hour's notice of a change in an employee's regular schedule. Common sense and a knowledge of the ordinary meaning of the

term "emergency" tell us that sentence one of Section B1 was not intended to be applied to emergencies. Emergencies are sudden, urgent and unforeseen occurrences which often require immediate action. As one could never have 24 hour's notice of a true emergency, it is clear that the first sentence of Section B1, is only applicable in non-emergency situations. Furthermore, the title of Section B1 also separates "Within 24 Hours" from "Emergencies" by a slash mark, showing that the parties intended to distinguish the former type of schedule change from an emergency situation. Given the above analysis, the City's argument that sentence one of Section B1, does not apply to emergencies and must be read separately from the rest of that Section makes logical sense.

In contrast, sentence two of the Section concerns only ". . . emergencies such as snow removal, ice removal, flood control, and so on. . . ." This list of emergencies as well as the fact that this sentence makes no reference to "regular schedules" support the above interpretation of sentence 1, that sentence 1 does not apply to emergency situations. I agree with the Union that Gordon's retirement did not constitute an emergency under any definition of that term. Indeed, the City has not argued this point herein. In my view, the final two sentences of Section B1, constitute a preservation of overtime provision in emergency situations, which was designed to insure that employees who are "called in . . . after emergency conditions" are not denied legitimate overtime pay. The last sentence of the Section explains the intent or "spirit" of both sentences three and four in this way and it makes no reference to regular schedules. As sentence two of Section B1, concerns only emergencies, I find it is not relevant to this case.

The substantive language of Article XIII, Section B1, has not changed since the 1970's. The Union has argued that Article II of the labor agreement contains a maintenance standards clause which preserves past practices that have arisen concerning Section B1. However, Article II specifically preserves only those past practices not addressed in the labor agreement. Here, Article XIII covers Operator work hours and work week, making Article II inapplicable. I note that the City has traditionally employed part-time and seasonal employees to fill in for full-time WWT and WF operators' vacations and leaves; and that there have been periods of time after 1998, when the City has not had sufficient part-time and seasonal employees (who had the necessary licenses) to cover full-time operator vacations and leaves.

Article XIII, Section D, is extremely broad and leaves to the City the designation of the normal week and normal work day of WWT and WF employees. Also, the City has had a consistent past practice of giving operators an annual schedule at the end of the December prior to the work year covered by these annual schedules. The evidence showed that the annual schedules that have been given to WF and WWT Operators since 1999 have not been set in stone, that operators have had their schedules changed for various reasons (including lack of staff) without being paid overtime pay therefor. For example, in 1999, part-time operator LaPalm was hired as a full-time Operator, leaving the City without enough help to cover full-time Operator vacations and leaves. The City then held two plant meetings to discuss the problem. Superintendent Lambries and all unit employees were present, including

at least two Local Union officers. These meetings resulted in the October 22, 1999 memo which Lambries posted at both plants and applied thereafter. Although Union witness Casebeer filed a grievance over this memo, the Union inexplicably failed to pursue the grievance and it did not otherwise protest the application of the October 22 memo. Clearly, the language of the October 22 memo allowed the City to change Operators' regular schedules to accommodate vacation requests.

In November, 1999, Lambries posted a request for a volunteer to cover a weekend vacation request made by Operator Kowalski. In this request, Lambries made it clear that all operators would be expected to "volunteer" for at least one weekend to cover vacation time off and that the volunteer's hours would be adjusted to avoid overtime pay. The substantive content of this request thereafter became part of the policy/procedure regarding vacations at both plants. Water Plant Operators Gordon and Luebke, who had chosen not to become cross-trained/certified under the 1997-1999 contract, filed a grievance seeking to be excused from working weekends to cover for vacations because, they alleged, C-T/C operators were being paid a bonus to work in both plants. This grievance was also dropped by the Union without explanation. 9/

9/ The Union made assertions in its Initial Brief regarding why this grievance was dropped but submitted no evidence thereon at the instant hearing. Therefore, the Union's assertions on this point cannot be considered herein.

The City's proposed settlement of the Gordon/Luebke grievance, although never formally accepted by the Union, was then posted at both plants and it became City policy in June, 2000. Again, the Union failed to object to this approach and no grievances were filed over the posting and application of this new policy. Significantly, this June, 2000 policy stated that C-T/C operators were expected to cover vacations in both plants "because their pay has been increased to cover these additional responsibilities." In March, 2001, and in January, 2002, the City posted amended policies at both plants, (the substantive portions of which did not change from the June, 2000 memo). Once again, the Union failed to file any grievances or to otherwise object to these policies or to the City's assertion therein why C-T/C Operators' pay had been increased. All of the above evidence strongly supports the City's arguments herein.

The Union has argued that because Lambries did not follow the contract and send a copy of these memos/posted policies to the Union President, the Union cannot be charged with knowledge of their existence and arguments of waiver and acquiescence must fail. The City did violate the labor agreement by failing to properly notify the Union of its policy changes. However, as the instant grievance failed to list this as a contract violation, this allegation is not properly before me for decision.

The fact that these policy changes were posted and discussed in plant-wide meetings, that they were the subject of two dropped grievances and that the policies were applied to all employees for years, renders the Union's arguments on this point simply unpersuasive. 10/ The record evidence clearly showed that the Union and its officers were aware of these policy changes and that the Union acquiesced in them. Here, the City and WWT and WF Operators worked well together from October, 1999, until the instant grievance was filed on October 14, 2002, to accommodate each other's needs in the area of covering shifts when the City was short of Operators. Indeed, prior to 1999, no WWT or WF Operators were cross-trained/certified. By 2002, there were eight C-T/C Operators. It is also undisputed that from October, 1999, to date, the City has never paid C-T/C Operators overtime pay for time they worked on changed schedules whenever the Operator was given at least 24 hour's notice in advance of the change. Furthermore, the parties met and negotiated the 2000-02 labor agreement and executed same in July, 2000. Not one word was apparently spoken during those negotiations regarding the issues the Union has brought before me. All of this evidence supports a conclusion that for years, the Union has, at best "sat on its hands" or at worst, knowingly waived its rights to object and pursue overtime pay for C-T/C Operators on changed schedules with 24 hours notice.

10/ The record evidence failed to support in any way the Union's assertions at page 3 of its Reply Brief.

The Union has argued that the City was obligated to bargain a side letter for the C-T/C Operators, like that appended to the effective agreement concerning Park and Recreation special event hours of work. I disagree. The contract contains Article XIII, Section A, which defines the work day/week for Park and Recreation employees. Article XIII A, does not apply to the WWT and WF employees. In addition, Article III, Section M, allows the City the discretion to set work schedules and as WF and WWT Operators normal work week/day are specifically covered by Article XIII D, they cannot be covered by Article XIII A.

The City has argued that its statements at bargaining and mediation regarding the 1997-99 contract demonstrated that the Union was aware that the City wanted the C-T/C language in order to gain flexibility in staffing both plants. The evidence on this point falls short of the kind of clear bargaining history arbitrators prefer to reply upon in a case such as this one. In this regard, I note that Union witness Kowalski stated that he could remember no discussion or rationale given for the City's proposal — only that the City said that it wanted something in the agreement on cross-training/certification. City Manager Buckley stated that the parties never talked about Article XIII, Section B1, in negotiations because the City was not trying to change that provision of the agreement. This evidence was not detailed enough to be helpful.

However, based upon the parties' written proposals and Buckley's testimony, it is clear that the parties discussed the fact that that newly hired operators would be expected to become cross-trained/certified and that the City intended to assign those newly hired operators without regard to their plant of hire pursuant to the City's C-T/C proposal. In addition, the evidence is undisputed that the Union's major concern in the negotiations was to grandfather incumbent operators, allowing them to decline to become cross-trained/certified. In addition, the evidence showed that both sides knew that beginning in 1998, the DNR would require the City to staff both plants with licensed operators, 24/7. This evidence tends to support the City's claim that the Union knew that agreement to the C-T/C proposal necessarily meant that the City would have greater flexibility to assign C-T/C operators to work at either plant.

The City also asserted that the Union's withdrawal of "clarification" language contained in its May 14, 1997 final offer demonstrated that the Union knew that C-T/C assignments would not have to be either regularly scheduled in their bid plant or based upon seniority as the Union had proposed in its clarification language. By dropping this language, the City urged, the Union clearly agreed that C-T/C operators would not have to be "regularly scheduled" in the bid plant. In my view, this evidence very strongly supports the City's assertions herein. In addition, the fact that the Union did not call former Staff Representative Ugland or Mike Lewis (named in the grievance) to testify regarding the parties' discussions at negotiations on these points, also tends to support a conclusion that the Union knowingly dropped its "clarification" language with full awareness of the implications thereof.

The Union argued that the bonus pay granted to C-T/C operators was justified by the fact that WWT and WF Operators were then lowly paid compared to operators employed in comparable plants. 11/ However, the Union failed to submit any evidence herein to support this comparability claim and this argument must be rejected.

11/ The Union argued that the City received an adequate quid pro quo for wage increases granted C-T/C Operators in 1999 (without increased transfer flexibility being granted to the City) because the City could have transferred/used employees at their non-bid plant on their regular work days and their regular work hours. As the Union presented no evidence to support this argument, it must be rejected as speculation.

In all of the circumstances of this case, the clear language of Article XIII B1, is supported by the evidence of bargaining history and the parties' past practices. Where as here, the Union acquiesced in the City's posted policies and waived of its rights by its failure to pursue any grievances or objections to changing C-T/C operator's schedules, a conclusion that the grievance herein must be denied and dismissed in its entirety is inescapable.

AWARD

The City did not violate the terms of Article XIII of the 2000-02 collective bargaining agreement when it assigned cross-trained Utility employees to perform work at either the Water or Wastewater Treatment Plants. The grievance is, therefore, denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 8th day of October, 2004.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

SAG/anl
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