BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUSAU

and

WAUSAU FIREFIGHTER ASSOCIATION LOCAL 415, IAFF, AFL-CIO and CLC

Case 106
No. 63347
MA-12555

Appearances:

John B. Kiel, Shneidman, Hawkes & Ehlke, S.C., 700 West Michigan, Suite 500, Milwaukee, Wisconsin 53201-0442, appearing on behalf of Wausau Firefighter Association Local 415, IAFF, AFL-CIO and CLC.

Dean R. Dietrich, Ruder Ware, 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the City of Wausau.

ARBITRATION AWARD

The City of Wausau, hereinafter City or Employer, and Wausau Firefighter Association Local 415, IAFF, AFL-CIO and CLC, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the City, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Susan J.M. Bauman was so appointed. Mediation of the grievance was unsuccessful and a hearing was held on August 11, 2004, in Wausau, Wisconsin. The hearing was transcribed. The record was closed on January 27, 2005, upon receipt of post-hearing written arguments.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to the issue. They agreed that the Arbitrator should frame the issue. The Union frames the issue as:

Did the City of Wausau violate the Collective Bargaining Agreement when it unilaterally issued the August 13, 2003, change of the fire department's trade policy; if so, what is the appropriate remedy?

The Employer frames the issue as:

Whether the City violated the Labor Agreement when it implemented the trade policy dated August 13, 2003? If so, what is the appropriate remedy?

The undersigned frames the issue as:

Did the City violate the collective bargaining agreement when it issued the Trade Table on August 13, 2003? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 4 – 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, but are not limited to, the following:

A. To direct all operations of City government.

. . .

E. To maintain efficiency of City government operation entrusted to it.

. . .

G. To introduce new or improved methods or facilities.

H. To change existing methods or facilities.

. . .

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

. . .

L. To establish reasonable rules and regulations. The Union acknowledges that the establishment and modifications of the rules and regulations of the Wausau Fire Department are within the sole and exclusive power of the Chief and that he may establish, modify and repeal rules or regulations. The Chief will submit any new rule or regulation to the bargaining committee of the Union in advance of the effective date of the new rule or regulation, whenever possible, and the Union will be provided the opportunity of discussing the new rule or regulation with the Chief. However, the City agrees that such rules or regulations will be reasonable with the reasonableness of the rules subject to the grievance procedure.

. . .

Article 11 – PROMOTION PROCEDURE

. . .

D. Engineer's Rank: As of 1/1/03, there shall be created a position of "Engineer" in the Wausau Fire Department. . . . Employees appointed to the rank of Engineer shall be expected to perform the following duties in addition to the requirements of the current MPO rank:

1. Engineers shall assume the role of acting Lieutenant in the absence of the Lieutenant assigned to their station. If no Engineer is available at a particular station, Engineers will be assigned to act as a Lieutenant by crew seniority.

**Exception: In the event that two Engineers are assigned to one station, acting Lieutenant duties shall be assumed by the senior Engineer. If the senior Engineer is not available to act, an Engineer will be assigned to act as a Lieutenant by crew seniority.*

If no Engineer is available to move up and fill a vacant Lieutenant's position on a crew, that vacancy shall be filled by the most senior Firefighter on that crew who is on the acting Lieutenant roster.

. . .

3. The department shall establish a list of qualified Engineer candidates composed of those employees who have passed the departmental driving and pumping tests for acting in this position, and who have passed the State of Wisconsin Motor Pump Operator certification written test administered by the Department. . . .

4. Acting Engineer positions shall be assigned in a manner consistent with Acting Motor Pump Operator.

Article 12 – SALARIES

. . .

C. Acting Pay: . . .

The Acting Lieutenant Roster shall be composed of Engineers and Firefighters with a minimum of 5 years seniority who volunteer to act.

Article 13 – WORKWEEK

. . .

F. Time Trades: Trading of time between individual members of the Fire Department shall be allowed provided the individuals trading time shall have comparable abilities. All time trades shall be approved or disapproved by the Chief, Assistant Chief (or their designee) before being effective. All trade time shall be noted on Trade Report Forms and signed by the authorizing officer. Time trading shall not be permitted if such trading results in premium pay.

. . .

Article 31 – PAST PRACTICES

The City will not unilaterally change any benefit, practice or condition of employment which is mandatorily bargainable.

BACKGROUND

Among many other governmental functions, the City of Wausau operates a Fire Department. The Union is the collective bargaining representative for most of the Department's employees. The City and the Union have been parties to a series of collective bargaining agreements which establish the wages, hours and conditions of employment of the bargaining unit members. In particular, the agreement describes a number of ways a

bargaining unit member may take time off from work, including vacation, holidays, sick leave, and trades. At issue in this proceeding is the manner in which an employee is able to trade a shift with another employee, take time off without using vacation, sick leave or accrued leave. Trades are made entirely for the convenience of the employee.

Prior to August 12, 2003, employees of different ranks were generally permitted to trade with one another, with limitations. Firefighters could trade with motor pump operators, motor pump operators could trade with lieutenants, lieutenants with firefighters, etc., provided that the employees had comparable abilities, always subject to approval of the shift commander. In the event that a trade between a firefighter and a lieutenant occurred, the firefighter had to be on the acting lieutenant roster, a list of personnel designated by the department as able to fill the lieutenant position in the event that someone had to fill in for a lieutenant. Engineers and firefighters with a minimum of five years experience are represented on the acting lieutenant roster. Similarly, a firefighter seeking to trade a shift with a motor pump operator or an engineer had to be on the appropriate acting roster.

Acting rosters for various positions are established to ensure that all necessary positions on any particular shift are filled, and that the chain of command is established at all times. When someone is needed to serve in an acting capacity, the most senior person on the list is asked to act. This results in not all individuals on the acting lists having equivalent experience, thus not all being of comparable ability.

As of January 1, 2003, the position of engineer was created in the Wausau fire department. Prior to that time, there had only been firefighters, motor pump operators and lieutenants (as well as paramedics, not at issue here), who were able to trade shifts as indicated above. The engineer position performs duties over and above those performed by motor pump operators, including the duty to serve as acting lieutenant. This created, in the words of Fire Chief Buchberger, "a whole new layer of positions that were requesting trade allowances, and there was no policy in place to address these, or to give guidance to the officers that were trying, attempting, to make the trade."

In response to this situation, and to provide guidance to members of the department, Chief Buchberger issued a memo:

Date: August 13, 2003

To: All Department Personnel

From: Chief Gary Buchberger

Subject: Trade Policy

Recently a meeting was held between department management and union leadership over how current trades are being implemented and enacted on the different shifts. There seems to be some belief that trades are not being administered equitably and that personnel were not being allowed to trade with large enough pools and that "acting positions" also be part of the allowable trades. As a result of that meeting some flexibility was allowed to the existing trade table. However, I continue to hold to my original position which is that trades be transparent to management. I reiterate that the union contract is quite clear on the subject of trades: "Trading of time between individual members of the Fire Department shall be allowed provided the individual's trading time shall have comparable abilities." In keeping with this philosophy, the requirements of the contract, and to alleviate any questions as to what trades are allowed, the attached table will be utilized by all shift commanders, acting shift commanders, and fire administration to approve trades. Note that the attached table is different from the one currently being used. Ensure that you are using the August, 2003 table for future trades.

The attached table provided:

TRADE TABLE

August, 2003

RANK	ALLOWABLE TRADES
CAPTAINS	CAPTAINS
LIEUTENANTS	LIEUTENANTS ENGINEERS with some restrictions* *Trades may be denied if the number of acting lieutenants on shift (including trades) will exceed one.
ENGINEERS	ENGINEERS LIEUTENANTS with some restrictions* MPO's with some restrictions** *Trades may be denied if the number of acting lieutenants on shift (including trades) will exceed one. **Trade may be denied if there are insufficient acting lieutenants on shift to fill a need for an acting lieutenant position.

MPO's	ENGINEERS MPO's with some restrictions* *Trade may be denied if there are insufficient acting lieutenants on shift to fill a need for an acting lieutenant position
PARAMEDICS	PARAMEDICS
EMT-B's	EMT-B's EMT-I's
EMT-I's	EMT-I"s [sic] EMT-B's
HAZMAT TECH's	TRADE MAY BE DENIED IF THERE IS NOT AT LEAST TWELVE (12) HAZMAT TECH'S ON DUTY TO FILL HAZMAT POSITIONS

All other restrictions and requirements on trades still apply. No trades will be allowed that causes premium pay or overtime pay to be necessary.

Prior to the issuance of the August 13 memo, trades were not automatic. The captain would look at the trade request and the comparable experience and capabilities of the two individuals. In addition, the captain would look at the roster to determine other contingencies of the trade day, and then make a decision as to whether to approve the trade or not. Trades had to be approved by management. The Chief received complaints from the captains regarding what had to be done with shifts and scheduling in order to accommodate trades. Decisions about trades were being made on an individual basis by the captains, engendering concerns that different supervisors allowed different trades. The captains were concerned, and bargaining unit members complained about the process. In response to these concerns, after meeting with union representatives, the August 13 memo and accompanying table were issued. At no time did the Union agree to the new trade policy.

POSITIONS OF THE PARTIES

The Union contends that the Employer has violated the collective bargaining agreement, specifically Article 13F, by unilaterally changing the rules with respect to voluntary shift changes between employees. It contends that the contract language regulating trades has allowed trades between lower and higher ranking bargaining unit members as long as the lower ranking bargaining unit member occupied a position on the department's acting roster. The Union contends that because there is a specific contract provision regarding trades, the management rights clause is not relevant.

The Union argues further that the management rights clause, if relevant, does not allow the Employer to make changes to the trade policy because the manner in which trades are made is a past practice and management's right to adopt work rules is limited by the past practices

clause, Article 31 of the agreement. In addition, any rules adopted by the City are subject to a standard of reasonableness that is not met with this policy. It is unreasonable for the City to assign firefighters to act when convenient for the City yet deny them the opportunity to act when in connection with a trade, a matter of convenience to the employee.

As anticipated by the Union, the City argues that the implementation of the trade policy is a management right retained by the City, as it retains all management rights that are not expressly limited by law or the labor agreement. The establishment of reasonable rules and regulations is a right reserved under the management rights clause to the City which followed the contractual procedure for modification of a rule or regulation. Further, the City argues that the prior trade practice does not create a binding past practice as it was unilaterally implemented by the City.

According to the Employer, the August 2003 trade policy, which is reasonable, was implemented to minimize confusion under the prior trade practice and to ensure that employees can only trade with employees who are qualified and experienced to perform the work in the position. The City contends that the procedure for filling vacancies through acting rosters is not relevant to this matter. Finally, the city argues that it was not statutorily obligated to bargain with the Union over the revised trade policy.

DISCUSSION

The Union filed a grievance contending that the City violated the collective bargaining agreement when it unilaterally issued the August 13, 2003 memo that changed the manner in which members of the bargaining unit could make trades. It is important to note that this grievance does not involve the denial of a trade between individuals because the Employer claims they do not have comparable abilities. The grievance concerns the memo and trade table issued on August 13, 2003 that the Union contends violates the past practice of the parties, or is a newly promulgated rule that is not reasonable.

Unlike some labor agreements which are silent on the issue of trades, the contract between the Union and the Employer states at Article 13F:

> Time Trades: Trading of time between individual members of the Fire Department shall be allowed provided the individuals trading time shall have comparable abilities. All time trades shall be approved or disapproved by the Chief, Assistant Chief (or their designee) before being effective. All trade time shall be noted on Trade Report Forms and signed by the authorizing officer. Time trading shall not be permitted if such trading results in premium pay.

Prior to the issuance of the aforesaid memo, individual trades were routinely approved between lower and higher ranking bargaining unit members as long as the lower ranking bargaining unit member occupied a position on the department's acting list. For example, a firefighter could trade with a lieutenant, provided that the firefighter was on the lieutenant

acting roster and the Chief, Assistant Chief or designee approved the trade. Apparently very few trades were denied. This practice was not negotiated by the parties, but has been of long standing. In fact, the manual provided by the Fire Department to new recruits states:

> Time trades: Trading of time is allowed with personnel for whom you can do the same job. For example, you can not trade with an MPO until you have completed an MPO course and have been tested within our department. You are responsible for keeping track of your time trades and who owes you time and to whom you owe time. Trades have to be approved by the shift commander.

Significant in the contract language, and in the manner in which trades were administered prior to August 13, 2003, is the phrase "comparable abilities," a phrase that is not defined in the collective bargaining agreement. The Union claims that the method of determining comparable abilities is a past practice which cannot be unilaterally changed by the City as Article 31 of the contract provides:

> The City will not unilaterally change any benefit, practice or condition of employment which is mandatorily bargainable.

It follows, then, that if the manner of approving trades is a past practice, the undersigned must consider whether the practice is mandatorily bargainable to determine whether there has been a contract violation. Should the manner of approving trades not be a past practice, the undersigned must determine whether Article 4, Management Rights, allows the City to take the action it did to define comparable abilities. It is noteworthy that both parties to this dispute have focused their attention on the issue of comparable abilities contained in the first sentence of Article 13F. Neither party has presented argument relative to the remainder of the Article, a portion of which I find to be determinative with respect to the issue of past practice.

Past practice is generally a concept that comes into play when a collective bargaining agreement is silent or ambiguous on a particular subject. Under such circumstances, an arbitrator will look to past practice to determine the apparent agreement between the parties. In order to be a binding practice, it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. Often, past practice is described as having "clarity, consistency, and acceptability." Another factor often considered is mutuality, an implied mutual agreement. 1/ Here, the Employer argues that there is no past practice inasmuch as the prior policy was unilaterally implemented by the City and the collective bargaining agreement reserves to the City the right to change or modify the practice, pursuant to its retained management rights, found in Article 4, sections J and L of the labor agreement.

1/ See, Elkouri & Elkouri, How Arbitration Works, pp. 607 – 609 (6th ed., 2003)

When contract language is clear and unambiguous, an arbitrator should not look beyond the four corners of that agreement to decide a grievance. Where the contract language itself is subject to interpretation, arbitral practice calls for a review of extrinsic evidence, such as past practice. In the present case, I find that there was an on-going practice of allowing bargaining unit members to trade shifts with higher-ranking individuals, provided the individual wishing to make the trade was on the acting roster for the position sought, subject to the approval of the Chief or designee. That is, I do not find that there was an unequivocal, mutually agreed to practice of allowing lower ranking employees to trade with higher ranking employees simply based on being on the acting roster.

The term "comparable abilities" is, indeed, ambiguous and past practice might be appropriately utilized to ascertain the meaning of that concept if Article 13F did not also provide that trades had to be approved:

> Time Trades: Trading of time between individual members of the Fire Department shall be allowed provided the individuals trading time shall have comparable abilities. **All time trades shall be approved or disapproved by the Chief, Assistant Chief (or their designee) before being effective.** All trade time shall be noted on Trade Report Forms and signed by the authorizing officer. Time trading shall not be permitted if such trading results in premium pay. (Emphasis added)

This language is not ambiguous. As Arbitrator James W. Engmann said in VILLAGE OF ELM GROVE, MA-6243 (4/91):

> Parties to an arbitration are bound by unambiguous language despite a contrary past practice, even where the practice may have been followed for many years. Thus, this Arbitrator is required to follow the clear and unambiguous language of the contract, even if the Association was successful in showing that a past practice existed and had been followed for many years. Where a conflict exists between the contract language and a past practice, even a long-standing past practice, the Arbitrator is required to overturn the past practice in favor of the clear and unambiguous contract language.

That is precisely the situation before me. The clear and unambiguous language provides that trades must be approved by the Chief or designee before being effective. The requirement of management approval is also incorporated in the recruit manual: "Trades have to be approved by the shift commander." The prior practice, as well as the August 2003 trade policy, provides guidance to the Employer's agents in determining whether a particular trade will be approved. The Employer, however, does not have the unbridled ability to grant and deny trades at will, as the first sentence provides guidance: "Trading . . . shall be allowed provided the individuals trading time shall have comparable abilities." Within this provision,

the Employer has the ability to define "comparable abilities." It has unilaterally done so in the past and, again, on August 13, 2003. 2/

2/ As noted above, the instant grievance does not require the undersigned to determine whether two individuals have "comparable abilities," but rather to determine whether the rule embodied in the trade table is a reasonable rule that the Employer promulgated in accordance with its reserved management rights.

Having found that the manner in which trades were allowed in the past does not establish a past practice that requires bargaining in order to effect a change, I turn to the question of whether the Trade Table implemented in August 2003, viewed as a rule or regulation to be followed in determining trades, is reasonable.

The Agreement provides, in Article 4, Management Rights, that the Employer reserves the right to

> L. To establish reasonable rules and regulations. The Union acknowledges that the establishment and modifications of the rules and regulations of the Wausau Fire Department are within the sole and exclusive power of the Chief and that he may establish, modify and repeal rules or regulations. The Chief will submit any new rule or regulation to the bargaining committee of the Union in advance of the effective date of the new rule or regulation, whenever possible, and the Union will be provided the opportunity of discussing the new rule or regulations with the Chief. However, the City agrees that such rules are regulations will be reasonable with the reasonableness of the rules subject to the grievance procedure.

The City and the Union had discussions regarding the trade policy prior to the issuance of the August 13 memo. The parties were unable to come to an agreement regarding the revised trade table that serves to guide members of the bargaining unit and Fire Department supervisors as to what is meant by comparable abilities. The Union filed a grievance contending that the new trade table was a violation of Article 13F of the collective bargaining agreement. This grievance was denied by the Employer, and I, too, find that the new trade table does not violate Article 13F. The Employer contends that it adopted the new trade table as a lawful exercise of its retained management rights under Article 4L. Although the original grievance was fashioned as a violation of Article 13F only, the Union stated the issue for hearing as whether the implementation of the new trade policy was a violation of the collective bargaining agreement. As I have accepted the more expansive statement of the issue than originally stated in the grievance, it is appropriate to decide whether the new trade table is reasonable, within the context of Article 4L.

The thrust of the Union's argument that the trade table is unreasonable is that persons who are on the acting rosters for higher ranking positions are allowed to serve in those

capacities when it is for the Employer's convenience. Why then, the Union asks, are not these same individuals allowed to fill in for higher ranking personnel when it is for the employee's convenience? In order to be on an acting roster, an individual must have demonstrated the knowledges, skills and abilities to perform the work of that higher ranking position. It follows, then, according to the Union, that those on acting rosters have comparable abilities to those who perform the work regularly and should, therefore, be permitted to trade schedules with them.

This view ignores the fact that an individual can be on the acting roster and have virtually no opportunity to act. When the Employer needs to fill a slot in a schedule from an acting roster, the contract requires that the slot be filled in accordance with seniority. This means that the most senior personnel will serve in an acting capacity more frequently than the others on the acting roster and will gain significantly more experience doing the work of the higher ranking position than the most junior person on the list. An individual who passes the tests and gets placed on the engineer acting roster may never have the chance to practice the skills while serving in an acting capacity. How, then, can it be claimed that the fact that one is on the acting roster, in and of itself, means that the person is of comparable ability to an engineer? In addition, the creation of the new position of engineer resulted in contract language requiring that an engineer serve as acting lieutenant in the absence of a lieutenant. If a firefighter trades with a lieutenant based on the fact that s/he is on the acting roster, additional complications could arise as to which person will act as lieutenant: the engineer who by contract is to be the acting lieutenant or the firefighter who is on the acting roster?

The labor agreement provides that, subject to other terms of the agreement, the City retains the right "[t]o determine the methods, means and personnel by which such operations are to be conducted." (Article 4J, emphasis added) The Agreement is specific with regard to filling vacancies that must be filled in order to attain minimum staffing levels. The Agreement provides for the creation of acting rosters, and the manner in which an individual will be listed on an acting roster. When filling vacancies caused by vacations, illnesses, injuries, and the like, the Employer has agreed to utilize the acting rosters, and has agreed to utilize them in conjunction with seniority. The Employer has not made a similar agreement with respect to how to fill scheduling slots created by the desire of an employee to take a day off without using approved leave. The Employer has agreed that employees can take time off without use of leave, but subject to the provisions of Article 13F, not to any other provisions of the agreement. Specifically, the Employer has not agreed to utilize acting rosters to fill scheduling slots created for the convenience of employees who wish to take time off without using their paid leave, and the undersigned will not read such an agreement into the labor contract.

The fact that one's name appears on an acting roster does not automatically imbue one with all of the qualifications and experience of the position for which one is approved to act. The Employer has retained the right to determine the personnel to conduct its operations under the circumstances created by a bargaining unit member seeking to trade time with another bargaining unit member. The Employer has reasonably determined that not all persons on an acting roster have comparable abilities for the position for which they are, sometimes,

permitted to act. The trade table established in August 2003 is a reasonable modification of a prior trade table. 3/ Although it is very likely that there are specific firefighters on the acting engineer or acting lieutenant rosters who do have comparable abilities to engineers or lieutenants, this can only be determined on a case-by-case basis. A trade table that names individuals, based on their qualifications and training, or specific hours of service in an acting capacity, is clearly an alternative to the August 2003 trade table adopted by the City, but it is not required.

3/ A prior trade table, although not part of the record of this case, is assumed to exist inasmuch as the August 13 memo makes specific reference to "the one currently being used."

By adopting the August 2003 trade table, the City has provided guidance to the members of the Fire Department as to what positions will be permitted to trade. Although it appears to limit trades to a greater extent than prior to that date, and perhaps more than necessary, I find it to be a reasonable rule, adopted in conformance with the rights management has retained under the collective bargaining agreement between the parties.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 11th day of March, 2005.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

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