BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABOR ASSOCIATION OF WISCONSIN AND WISCONSIN INDIANHEAD TECHNICAL COLLEGE CUSTODIAL & MAINTENANCE EMPLOYEE'S ASSOCIATION, LOCAL 722

and

WISCONSIN INDIANHEAD TECHNICAL COLLEGE

Case 78
No. 64193
MA-12833

Appearances:

Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of the Association.

Victoria L. Seltun, Attorney at Law, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin 54702, appearing on behalf of the Employer.

ARBITRATION AWARD

Wisconsin Indianhead Technical College, hereafter WITC or Employer, and Labor Association of Wisconsin and Wisconsin Indianhead Technical College Custodial & Maintenance Employee's Association, Local 722, hereafter Association, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Upon the request of the Association and WITC, the Commission appointed Coleen A. Burns, a member of its staff as arbitrator to hear and decide the instant grievance. Hearing was held in Superior, Wisconsin on March 10, 2005. The hearing was transcribed and the record was closed on May 11, 2005, following the submission of written briefs.

ISSUES

The parties have stipulated to the following statement of the issues:

Did the Employer violate the terms and conditions of the collective bargaining agreement when the employer denied available work hours to the Grievant?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTCLE I – RECOGNITION

. . .

Section 3. The Board agrees that the work normally performed by the custodial employees will not be assigned to any other employees, unless mutually agreed to by both parties.

. . .

ARTICLE XII – WORK WEEK

Section 1. The regular workweek shall consist of forty (40) hours per week, computed on five (5) eight (8) hour working days per week with a ½ hour paid meal period.

Section 2. An employee workweek may be modified to reflect four (4) ten (10) hour days either for the summer months of June, July, and August, or for the school year of September through May, provided:

A. The Campus Administrator approves such plan; and

B. The number of weeks during either the summer or school year periods that may be affected will be at the discretion of the Campus Administrator; and

C. Any such workweek modification will expire at the end of each summer period or each school year period, and any proposal for a new or renewed workweek modification must be made by May 1 for the summer period and August 1 for the school year period.

. . .

Section 5. In an emergency as determined by the Supervisor, overtime will be assigned by classification according to seniority. However, the Employer reserves the right to hire temporary help for absence of existing employees or for excessive work beyond the normal needs of the institution. This help is exempt from seniority rights and union dues obligations. Employment of temporary help cannot exceed twenty-five (25) consecutive workdays.

Employment of temporary help beyond twenty-five (25) consecutive days will be allowed based upon "the mutual consent" of both parties.

BACKGROUND

The Association's collective bargaining unit includes the classifications of Maintenance Custodian, Custodian I and the red-lined classification of Custodian II. Part-time Custodian David Murray, hereafter Grievant, is a five-year employee of WITC. The Grievant works at the Superior Campus and is a member of the Association's collective bargaining unit. Unless expressly stated otherwise, the employees and "practices" referred to below pertain to the Superior Campus.

Prior to January, 1998, available Saturday work was offered to bargaining unit employees on a rotating seniority basis. Full-time bargaining unit employees who worked on Saturday were paid at their overtime rate. On-call staff, who are not members of the Association's bargaining unit, was not used to perform Saturday work unless the bargaining unit employees refused the work.

In January, 1998, a full-time Maintenance Custodian was assigned Saturday as part of her regular work schedule and began to perform Saturday work at her regular rate of pay. Following this assignment, Saturday work was not generally available to other employees unless this Maintenance Custodian was absent from work. When this Maintenance Custodian was absent on Saturday, bargaining unit employees, including the Grievant, were offered the Saturday hours on a rotating seniority basis. Full-time bargaining unit employees normally received overtime for performing this Saturday work and the Grievant normally received straight time for performing this Saturday work. On-call staff was not used to perform this Saturday work unless the bargaining unit employees refused the work.

Commencing in October, 2004, the Saturday work was divided among all full-time bargaining unit employees, including this Maintenance Custodian; with the effect that each full-time employee, including this Maintenance Custodian, was scheduled to work every fifth Saturday. When the bargaining unit employee was scheduled to work on Saturday, he/she received another day off and was paid straight time for the regular Saturday shift of eight hours. When the scheduled bargaining unit employee was absent on Saturday, the Employer assigned the Saturday work to on-call staff and did not offer the Saturday work to the Grievant.

The Grievant has a higher wage rate than the on-call staff. The fringe benefits of the Grievant are pro-rated, based upon hours worked.

On or about October 7, 2004, a grievance was filed alleging that WITC violated the collective bargaining agreement because the Grievant should have been offered Saturday hours that had been assigned to on-call staff. The grievance was denied and, thereafter, submitted to grievance arbitration. The parties have stipulated that the grievance is properly before the Arbitrator.

POSITIONS OF THE PARTIES

Association

Prior to October 2, 2004, the Grievant was part of the rotation for filling-in for available work on Saturday. Since October 2, 2004, the Grievant has not been offered available Saturday work, but rather, the Employer has used on-call staff for those hours not filled by the full-time staff.

Article-I-Recognition, Section 3, includes the following: "The Board agrees that the work normally performed by the custodial employees will not be assigned to any other employees, unless mutually agreed to by both parties." Article XII, Section 5, allows for the Employer to hire temporary help in the absence of existing employees or for excessive work beyond the normal needs of the institution. In the instant case, this Section 5 exemption is not appropriate. The Employer merely used temporary on-call staff to replace the Grievant, which violates the provisions of the collective bargaining agreement.

The Employer violated the collective bargaining when it denied available work hours to the Grievant. In remedy of this violation, the Arbitrator should order the Employer to cease and desist from further violations of this nature. The Employer should also compensate the Grievant, at his regular straight-time rate, for all hours denied to the Grievant.

WITC

Prior to October 2, 2004, the Grievant was included in the rotation for available Saturday work. There is conflicting testimony with respect to the willingness of bargaining unit members to work available Saturday hours. On a number of occasions, the Grievant turned down Saturday work.

The parties' collective bargaining agreement permits the utilization of on-call staff, as determined by the supervisor, "for absence of existing employees or for excessive work beyond the normal needs of the institution." On Saturday October 2, 2004, a bargaining unit member, Don Warren, was scheduled to work, but chose to take the day off. . Consistent with the discretion granted by the collective bargaining agreement, Supervisor Gamache elected to utilize on-call staff.

There is no contractual language that guarantees these Saturday hours to the Grievant. Given WITC's right to exercise discretion, its prior action in offering some Saturday hours to the Grievant does not establish a binding past practice. The exercise of this discretion was neither arbitrary, nor capricious.

WITC has acted consistent with its inherent and reserved rights. The grievance is without merit and should be dismissed.

DISCUSSION

The Grievant is the only part-time bargaining unit member employed at the Superior Campus. The Association argues that the Grievant has a contractual right to be offered Saturday hours that become available when the bargaining unit employee scheduled to work on Saturday is absent from work. [1] The Employer argues that it has the contractual right to assign such work to on-call staff.

As the Association argues, under the plain language of Article I, Section 3, work normally performed by the custodial employees may not be assigned to any other employees unless mutually agreed to by both parties. The evidence of the parties' past practice establishes that Saturday work is work that is normally performed by the custodial employees represented by the Association. Thus, under the plain language of Article I, Section 3, the Employer does not have the right to offer Saturday work to on-call staff unless mutually agreed to by the parties.

Article I, Section 3, does not stand alone, but rather, must be construed in accordance with the other provisions of the collective bargaining agreement. One such provision is Article XII, Section 5, which states as follows:

> Section 5. In an emergency as determined by the Supervisor, overtime will be assigned by classification according to seniority. However, the Employer reserves the right to hire temporary help for absence of existing employees or for excessive work beyond the normal needs of the institution. This help is exempt from seniority rights and union dues obligations. Employment of temporary help cannot exceed twenty-five (25) consecutive workdays. Employment of temporary help beyond twenty-five (25) consecutive days will be allowed based upon "the mutual consent" of both parties.

The work in dispute has become available because the full-time employee that was scheduled to work on Saturday was absent. As a review of Section 5 reveals, the parties have agreed to contract language that expressly addresses such absences. Specifically, the parties have agreed that the Employer has the right to "hire temporary help" for such absences if the employment of the "temporary help" does not exceed twenty-five (25) consecutive days.

Given the specific right to "hire temporary help" for absences of existing employees which do not exceed twenty-five (25) consecutive days, the Employer correctly argues that the prior practice of offering the disputed Saturday work to the Grievant does not give rise to a "past practice" that is binding upon the Employer. Rather, the prior practice involves the exercise of management discretion.

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[1] At hearing, Association witness Robert Zimmerman gave his opinion that the Employer should offer the disputed work to all bargaining unit employees prior to assigning the work to on-call staff. Consistent with the stipulated issue, the undersigned limits her decision to a discussion of the Grievant's rights.

Conclusion

By assigning the Saturday work in dispute to on-call staff, rather than offering the work to the Grievant, the Employer has not violated the parties' collective bargaining agreement. Rather, in assigning the disputed Saturday work to on-call staff, rather than offering this work to the Grievant, the Employer has exercised rights reserved to management under the language of Article XII, Section 5.

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

AWARD

1. The Employer did not violate the terms and conditions of the collective bargaining agreement when the employer denied available work hours to the Grievant.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 3rd day of August, 2005.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

CAB/gjc
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