

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 97, AFSCME, AFL-CIO

and

CITY OF WAUKESHA

Case 163

No. 64557

MA-12936

Appearances:

John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 44316, Racine, Wisconsin, appearing on behalf of the Union.

Donna Hylarides Whalen, Assistant City Attorney, City of Waukesha, 201 Delafield Street, Waukesha, Wisconsin, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the Employer named above are parties to a 2004-2006 collective bargaining agreement that provides for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned to hear a dispute involving the assignment of a crew leader. A hearing was held on June 2, 2005, in Waukesha, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on August 22, 2005.

ISSUE

The issue is:

Did the Employer violate the collective bargaining agreement when it failed to assign the Grievant temporarily as the mason crew leader on October 27, 2004? If so, what is the appropriate remedy?

BACKGROUND

The Grievant is John Murphy, an employee with the City since 1982. He is classified as a motor equipment operator II and has been on the mason crew for 15 years. He got on the mason crew through a posting procedure. The crew leader is Ken Melotik, also a bargaining unit member. Melotik posted for the position a few years ago. When Melotik was absent, the Grievant was always assigned as crew leader up to October 27, 2004. The Grievant is the most senior person on the mason crew.

On October 27, 2004, Melotik was absent for part of the day after 11:00 a.m. He worked four hours in the morning. The Grievant was not assigned as the temporary mason crew leader. The Grievant questioned why he was not assigned as crew leader and filed a grievance.

The Grievant was assigned to the leaf crew about 10 days before October 27, 2004 and stayed on that crew until around the first week in December. He was the only person from the mason crew assigned to the leaf crew. The Grievant testified that in the past, the employees with less seniority have been transferred on to the leaf crew.

There is a difference in pay rate for crew leaders but out of class pay is not paid for the first day assigned and there is no claim for money in this grievance. Crew leaders are not assigned on a daily basis but hold those positions through posting procedures.

Before Melotik became crew leader, Allen Leonard was the crew leader of the mason crew. When Leonard was absent, Melotik was temporarily assigned to be crew leader, despite the fact that the Grievant had more seniority than Melotik.

Jose DeLeon is a supervisor in the Department of Public Works and noted that assignments to the leaf crew were not made on the basis of seniority. He collected the time records for the Grievant and Melotik for October 27, 2004, and those records show that Melotik worked 4 hours on October 27th. When Melotik left at 11:00 a.m., no one was assigned to be the temporary crew leader.

DeLeon thought the Grievant had been assigned to leaf pick-up for about two or three weeks before the date in question. The Grievant was assigned to a vehicle that not everyone can run, as it requires some special driving skills in backing up. DeLeon found the Grievant to be especially good at driving that vehicle. DeLeon testified that no one likes the leaf pick-up duty. He admitted that at times, the most senior employee would be assigned as crew leader because he would have the most experience. However, he was aware that Melotik used to be the temporary crew leader on the mason crew when there with other employees with more seniority. On the sign crew, there were times when no one was assigned because of lack of experience. Richard Bradetich was the most senior on the sign crew but the work orders went to Ray Hudzinski, and no grievances were filed. Bradetich was new to the sign crew. People

sometimes leave a crew for years and come back later to that crew, or they might transfer to a crew and have seniority but no experience on that crew.

A temporary crew leader is not always assigned, according to DeLeon. If only two people were on a crew, he thought it would be foolish to assign a temporary crew leader. Before October 27th, DeLeon always assigned the Grievant to be the temporary crew leader on the mason crew. He did not believe he changed things, but that there were only two people on the crew and he didn't see the need to assign one to oversee the other.

Bruce Wery is the Union president and has been an employee with the City for 30 years. He is the crew leader of the sewer crew. He posted for the position and was the senior applicant. When Wery is absent, the most senior member of the crew, Jim Stanton, becomes the temporary crew leader. Stanton has more seniority on that crew than anyone except Wery. Wery has been on the sewer crew for 8 years once before and now for 16 years.

The crew leader is a position in the salary schedule. Crew leader positions are posted and employees may post for them. The senior most qualified applicant is awarded the position on a trial basis. The crew leader positions are for the sewer crew, the mason crew, the sign crew, and the street crew. Wery believed that before October 27, 2004, the senior person was always assigned as crew leader when the crew leader was absent.

Wery was involved in filing this grievance and presented it at a step one meeting to Thomas Fell, the Street Superintendent. The grievance was presented orally at step one. Fell apparently agreed with the Union that in the future, the Grievant would be acting crew leader in Melotik's absence. However, the agreement fell apart within 10 minutes and the Union leaders were told that the agreement was not acceptable. DeLeon was not present when the step one meeting took place but was involved in step two and three. Fell called DeLeon into his office after meeting with the Union officers.

Paul Feller has been the Director of Public Works since 1995 and has been an employee with the City since 1974. He testified that personnel within crews are interchangeable to a certain extent. The foremen will exchange personnel among the crews depending on needs for certain types of work. Snow plowing, brush pick-up and leaf pick-up projects are listed as the duties under every crew. Feller was never aware that work assignments were made on the basis of seniority. He has been involved in contract negotiations, and there has been no discussion of seniority for work assignments in the past 10 years.

Feller denied the grievance at step two, stating in his written response that the contract did not refer to temporary assignments and that the City had the right to assign work and

determine the size of the work force under the management rights clause in the contract. The

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Union did not claim that it had lost a promotional opportunity. Feller does not consider the pay differential when working out of class to be a promotion. James Payne, the City Administrator, answered the third step of the grievance and denied it because there was no contract language requiring the City to use seniority in making temporary assignments.

DeLeon has been an employee since 1985, previously in the bargaining unit and served as Union steward for awhile. He believed that Section 8.01 of the bargaining agreement had been in place for at least 20 years, before he started with the Street Department, and there were no grievances over it before this one. He believed that the contract never was interpreted to require seniority in temporary assignments. He recalled that a couple of contracts ago, Section 9.11 was modified to revert back to the first hour for out of class pay with the start of the 9th work hour, but there was no intent to make the Employer use seniority to make temporary assignments. DeLeon was not aware that anyone thought that a temporary crew leader had to be assigned in all cases. He testified that there are often times that no one is designated as a temporary crew leader.

Employees report to the City garage and get their daily assignments there. The Superintendent and the two foremen start work at 6:00 a.m., and assign work to the particular crews and adjust assignments according to the needs of the day. They look at who is available and who is capable to do certain types of work. The assignments are based on abilities and needs. Senior employees may have more work experience and ability in their areas. The temporary assignment to a crew leader position would show on a work order.

After October 27th, the Union believes that Robert Owens, with less seniority than the Grievant, was assigned to be the mason crew leader. However, DeLeon disputed that and testified that he never got any pay differential. DeLeon never designated Owens to be a temporary crew leader. Wery testified that he has heard Owens give instructions to mason crew members to do things such as bring materials, bring trucks, what to do, in Melotik's absence. Giving instructions is a function of the crew leader.

THE PARTIES' POSITIONS

The Union

The Union argues that the practical way to fill temporary crew leader positions is to offer those vacancies to other workers in the department involved on a seniority basis. It acknowledged that the posting of temporary crew leader positions is not practical. The City gave a convoluted reason for not choosing the Grievant as temporary crew leader in this case.

crew in inverse order of seniority. While DeLeon testified that he selected Murphy because Murphy was good at operating the equipment, Murphy should not be held back from promotional opportunities because he is good at a job. The fact that there is no back pay for this four-hour assignment does not exonerate the City from its obligation to extend such promotional opportunities by seniority as it had prior to October 27th.

The Union also objects to the manner in which this grievance was handled by the City. Wery testified that he had a step 1 meeting with Fell, and an agreement was reached. The agreement was that in the future, Murphy would become acting crew leader in the absence of the permanent mason crew leader. Case closed.

But then the City reneged on the deal, the Union says. The Union cites a case from Kenosha County where the County attempted to renege on an agreement reached between the parties at step 2. In a prohibited practice complaint, the examiner held that the second step grievance settlement was a legally enforceable collective bargaining agreement for the purposes of Sec. 111.70(3)(a)5, Wis. Stats. The examiner ordered the County to cease and desist from refusing to abide by the terms of the second step grievance settlement agreed to by the County. A similar decision was reached in Oneida County by another examiner, who ruled that the county had committed a prohibited practice by refusing to abide by the terms of a settlement reached between the parties.

In this case, the Union points out that City Administrator Payne testified that if a grievance were settled at step 2, he would consider the matter resolved. The matter was settled at step 1. It was resolved. Thus, the grievance should be sustained as a result of the City's representative, Fell, agreeing to it at the step 1 grievance hearing.

The City

The City asserts that the labor agreement is not ambiguous and there is no language which supports the Union's contention that the City is required to make a temporary crew leader assignment when the crew leader is absent. The City retains the right to manage and direct the work force, assign work to employees, determine the size of the work force and the number of employees assigned to any particular operation. Section 8.01 of the agreement says that the City will recognize seniority and it will be applied in promotions, demotions, transfers, layoffs, recall from layoffs, filling vacant positions, vacation preference and shift preference. Section 8.05 refers to promotions, layoffs and recall from layoffs. In order to adopt the

Union's positions in this matter, the arbitrator would have to include the terms "work

assignment” or “temporary work assignment” to the list of areas in which seniority is applied

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under Sections 8.01 and 8.05. Moreover, there is no bargaining history or past practice to support the Union’s position. Even within the Grievant’s work crew, there was no consistent past practice because Melotik was regularly given the temporary crew leader assignment while he had less seniority than Murphy.

The City further believes that the Union’s position would lead to absurd and nonsensical results because the Union would require the City to designate the temporary crew leader on the basis of city wide seniority, regardless of that employee’s experience on a particular crew. Also, the City notes that Payne’s third step response does not constitute a binding precedent. His attempt to resolve the matter was not intended to alter his determination that no violation of the labor agreement had occurred.

In response to the Union’s brief, the City disputes that there was a settlement of the grievance at Step 1 that is binding. Fell needed to check with DeLeon prior to issuing an answer at Step 1, and Wery stated that after Fell discussed the matter with DeLeon, Fell was no longer willing to sustain the grievance and told the Union that the grievance was denied. Fell’s final response at Step 1 was a denial of the grievance. The grievance went to Step 2, Feller, one take after the alleged violation took place. If the Union believed it had a resolution to the grievance, it would have to wait for the next instance of a temporary crew leader not being given out before it would know that DeLeon was not complying with Fell’s alleged resolution. This sequence shows that although a grievance settlement may have been discussed, the grievance was not sustained by Fell and was denied.

The City also objects to the Union’s contention that the temporary crew leader assignment is a “vacancy” as contemplated by Article 9. Article 9 provides for a posting for 5 days and the job filled within 30 days, and then the applicant has a 30 work day probationary period. Those provisions apply to permanent vacancies, not temporary assignments which are addressed by Article 9.11.

DISCUSSION

There are two aspects here – first of all, whether the City must always assign a temporary crew leader in the absence of a crew leader and secondly, whether the City must assign the temporary crew leader by virtue of his seniority. In this case, the crew leader was absent for four hours and there was no one assigned to be the temporary or acting crew leader for the remaining four hours of the shift. There is no language nor any past practice that speaks to whether the City must always assign a temporary crew leader in the absence of a crew leader. DeLeon noted that a temporary crew leader is not always assigned. In this case,

the crew leader was gone for only four hours, and no one was assigned to be the temporary

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crew leader. There is nothing in the contract nor in the record that would demand that the City always assign a temporary crew leader when the crew leader is absent.

Additionally, there is nothing in the record that shows that anyone was assigned. Thus, it becomes difficult to sustain the Union's position that the Grievant should have been assigned because he was more senior than – who? While Wery claimed that he overheard Owens, who is less senior than Murphy, giving instructions to the mason crew, Wery does not claim that Owens was assigned to be the temporary crew leader on October 27th or that anyone else was so assigned on that date.

The next question is whether the City is obligated to assign a temporary crew leader by seniority. The Union argues that the Grievant should not lose a promotional opportunity. The Union also says that while it agrees that it is not practical to post a temporary crew leader position, the City should offer such vacancies, when filled, to workers on a seniority basis. However, neither the contract language nor the past practice supports these arguments.

The labor contract states in Section 8.01: “The employer agrees to recognize seniority and it shall apply in promotions, demotions, transfers, layoffs, recall from layoffs, filling vacant positions, vacation preference and shift preference (providing there is a vacancy). Seniority shall for the purpose of this Agreement, be defined as an employee's length of continuous full-time service since their last date of hire.”

The temporary absence of a crew leader does not create a vacancy. The absence of any employee does not create a vacancy. Employees may be gone for sick leave or vacations or whatever reason, and their absence does not create a vacancy. Moreover, it is up to the Employer to determine when to fill a vacant position or not. Section 9.01 of the labor contract recognizes this, as it states in part: “When a vacancy is announced in a job classification.....” The filling of a true vacancy results in posting procedures and probationary periods. The same is not true in filling a temporary crew leader's position. That's why it's a temporary position – because the permanent position is filled, and the crew leader is coming back to work after his or her absence. Section 9.11 deals with the out of class pay for temporary assignments such as the temporary crew leader assignment.

Further, the temporary absence of a crew leader does not create a promotion under Section 8.01. If every temporary absence of a crew leader resulted in a “promotion” of a temporary crew leader, Section 9.11 would be in conflict with Section 8.01. The contract must be read as a whole. The parties provided for the higher pay in Section 9.11, and the “promotion” listed in Section 8.01 is not for temporary assignments.

There is no clear and consistent past practice of assignment temporary crew leaders by seniority. The Grievant admitted that Melotik was assigned to be the temporary crew leader when Leonard was the crew leader, even though the Grievant had more seniority than Melotik. No one filed a grievance over that. While it is usually the case that the senior and more experienced person is assigned the temporary crew leader, there is no right to it through the past practice or the labor contract.

As to the Union's contention that the grievance was resolved at Step 1 and the City should be held to the deal, there was only a temporary "deal" that fell apart in 10 minutes after Fell talked to DeLeon. The parties did not write up a settlement or sign it. Step 1 provides for discussing the matter with the Union steward and the employee's immediate supervisor, who shall attempt to settle the grievance among themselves. If it is not settled, the supervisor has up to five working days to answer the grievance. While Fell was inclined to agree with the Union, he had not talked to DeLeon at that time, and once he did, the "deal" fell apart within minutes. This cannot be called a binding settlement agreement. Certainly the Union would not want to be held to such a standard to honor a deal where all relevant people had not been consulted at Step 1 and the initial response was revoked within 10 minutes. The matter was not resolved at Step 1. It would wreak havoc on the grievance process to find that this was a binding settlement agreement under these facts. No one would ever attempt to settle a grievance. There was only a temporary agreement, even less temporary than the four hours of Melotik's absence that create this whole grievance in the first place.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 14th day of October, 2005.

Karen J. Mawhinney /s/

Karen J. Mawhinney, Arbitrator

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