

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN CENTER DISTRICT

and

**CHICAGO REGIONAL COUNCIL OF CARPENTERS NORTHERN REGION
AND
DISTRICT COUNCIL 7 INTERNATIONAL BROTHERHOOD
OF PAINTERS AND ALLIED TRADES LOCAL 781**

Case 13
No. 65200
MA-13153

Appearances:

Matthew R. Robbins and Asmaa Abdul-Haqq, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 N. RiverCenter Dr., Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Robert W. Mulcahy and Neil B. Stekloff, Michael Best & Friedrich, LLP, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or Staff member as Arbitrator to hear and decide the instant grievance. Staff member Coleen A. Burns was so appointed on January 6, 2006. A hearing was held in Milwaukee, Wisconsin on February 2, 2006. The hearing was transcribed. The record was closed on April 6, 2006, upon receipt of post-hearing written argument.

ISSUE

The parties waived the contractual timelines with respect to the issuance of the Arbitrator's Award. The parties were not able to stipulate to a statement of the issues.

At hearing, the Union framed the issues as follows:

Did the Employer violate the collective bargaining agreement by failing to pay the Grievant at the head painter wage rate?

If so, what is the appropriate remedy?

At hearing, the Employer framed the issues as follows:

1. Whether Mr. Crain has waived his grievance pursuant to Article 10, Sections 3 and 8(a), of the collective bargaining agreement by failing to raise it within five (5) working days of the incident leading to the grievance?
2. Whether Article 11, Section 1, of the contract bars the arbitration of Mr. Crain's grievance on timeliness grounds because the Grievant did not request arbitration within 90 working days of the District's denial of the grievance?
3. Whether Article 11, Section 10, of the contract precludes the arbitrator from ordering the District to grant a wage increase to the Grievant?
4. Whether Article 13 of the contract requires the District to promote Mr. Crain to the Head Painter position?

PERTINENT CONTRACT LANGUAGE

ARTICLE 4 – MANAGEMENT RIGHTS

- 4.2 The District has the right to schedule and assign work as required in a manner most advantageous to the District and consistent with the public interest.

. . .

- 4.4 The District reserves the right to discipline or discharge for just cause. The District reserves the right to lay off for lack of work or funds, or the occurrence of conditions beyond the control of the District or where continuation of such work would be wasteful and unproductive. The District shall have the right to determine schedules of work and to establish the methods and processes by which such work is performed.

. . .

ARTICLE 5 – RECOGNITION

5.1 The District recognizes the Union as the exclusive collective bargaining agent for the appropriate certified bargaining unit and is the certified representative for those employees in this bargaining unit occupying the classifications as defined appropriate “Certification of Representatives” promulgated by the Wisconsin Employment Relation Commission.

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ARTICLE 10 – GRIEVANCE PROCEDURE

...

10.3 **Step One.** An employee who has a Grievance shall first present the grievance orally to the employee’s immediate supervisor, either alone or accompanied by a Union representative within five (5) working days of occurrence of the incident leading to the grievance.

10.4 **Step Two.** If the grievance is not settled at the first step, it shall be reduced to writing and presented to the immediate supervisor within five (5) working days of the completion of step one. Within five (5) working days, the supervisor shall furnish the employee and the Union with a written answer to the grievance.

10.5 **Step Three.** If the grievance is not settled at the second step, the Union or the employee shall have the right to make an appeal in writing within ten (10) working days to the District President. The President shall confer with aggrieved and the Union before making a determination. The decision shall be reduced to writing and submitted to the aggrieved employee and the Union within ten (10) working days from the date of receipt of the appeal.

10.6 **Step Four.** If the answer of the President upon a matter, which may be submitted to final and binding arbitration, is unsatisfactory to the Union, the Union may advance the grievance to arbitration.

10.7 All written grievance appeals shall set forth the provision of the Agreement under which the grievance was filed.

10.8 Time limit for filing and advancement

- a. If a Grievance is not presented within the time limits set forth above it shall be considered “waived”. If a grievance is not appealed to the next step within the specified time limit or any agreed extension thereof, it shall be considered settled, on the basis of the District’s last answer. If the District does not answer a Grievance or any appeal thereof within the specified time limits or any agreed extension thereof, the Union may treat the Grievance as denied at that step and immediately appeal the grievance to the next step.
- b. The term “working days” as used in this Article shall mean the days in which regular District business is conducted. Exclusive of weekends and holidays.
- c. The time limits set forth in this Article may be waived by written consent of both parties.
- d. By written agreement, the parties may waive any of the steps set forth in the Grievance Procedure.

ARTICLE 11 – ARBITRATION PROCEDURE

- 11.1 No item or issue may be the subject of arbitration either advisory or binding, unless such arbitration is requested in writing within 90 working days following the action or occurrence which gave rise to the issue to be arbitrated.
- 11.2 Arbitration may be initiated by the Union serving the District a notice in writing, of its intent to proceed to arbitration. The notice shall identify the contract provision upon which it relies, the grievance or grievances, the department, and the employees involved.

...

- 11.10 The arbitrator shall neither add to, detract from, nor modify the language of this Agreement in arriving at a determination of any issue presented that is proper for arbitration within the limitations expressed herein. The arbitrator shall have no authority to grant wage increases or wage decreases.

...

ARTICLE 13 – BASE PAY

13.1 There shall be an increase of 3% per year on each employee's base wage rate. The wage rate in effect at the end of the 1999-2004 Agreement shall be the determinant for the 3% per annum increases, which shall be effective on the given dates.

Wages for the affected employees shall be as follows; the first line is the rate in effect at the end of the 1999-2004 Agreement:

<u>Effective</u>	<u>Carpenter</u>	<u>Head Carpenter</u>	<u>Painter</u>	<u>Head Painter</u>
6/1/04	\$24.43	\$24.96	\$22.87	\$23.36
6/1/05	\$25.16	\$25.71	\$23.55	\$24.06
6/1/06	\$25.92	\$26.48	\$24.26	\$24.78
6/1/07	\$26.70	\$27.27	\$24.99	\$25.53
6/1/08	\$26.70	\$27.27	\$24.99	\$25.53

BACKGROUND

By letter dated February 23, 2005, Union Business Representative Rick Schreiner advised the Employer's President, Richard Geyer, as follows:

District Council No. 7; Painters Local 781 would like to file a grievance on behalf of Dennis Crain. It is our belief that he should be getting foreman's pay on all hours worked as a painter at the Wisconsin Center District. We appreciate your time and energy in this matter and hope this can be resolved in a timely matter.

By letter dated March 3, 2005, the Employer's Director of Human Services, Donald J. Sleaper, responded:

Mr. Geyer asked me to respond to your letter of February 23, 2005, filing a grievance on behalf of Dennis Crain for foreman's pay. You did not cite a violation of WCD/Painter No. 7 labor contract, rather your "belief that he (Dennis Crain) should be getting foreman's pay."

The Wisconsin Center District has not posted a foreman (Head Painter) position as being open for application. The Wisconsin Center District is not planning to hire any additional painters at this time and has decided to not fill the Head Painter position that was vacated when Clyde Werner retired recently. At this time the Wisconsin Center District has been considering reduction of additional staff and or reduction of hours to reduce and control cost.

The grievance is denied for the following reasons. The Wisconsin Center District is not aware that Step 1 and 2 of the grievance procedure happened. The Wisconsin Center District has not received Step 1, 2 or 3 in a timely manner as outlined in the Union Contract. The Union did not specify a section of the contract that the Wisconsin Center District violated.

In a letter dated April 4, 2005 and addressed to the Employer's Director of Building Services, Robert Seefeld, Union Business Representative Schreiner states, in relevant part:

This letter shall serve as District Council No. 7's follow up to the grievance filed on behalf of Dennis Crain who had and continues to perform all of the duties of "head painter" as defined in the labor agreement, but fails to be compensated at that applicable wage rate.

Pursuant to Article X of our agreement, step one of the Grievance Procedure was satisfied on March 29, 2005. Kindly consider this letter as step two as defined in the procedure.

Our position remains that the Wisconsin Center has an established past-practice of maintaining a head painter position despite the number covered in the bargaining unit, and has done so in the other building trades classifications. Dennis Crain has demonstrated his ability to capably handle these added responsibilities in that capacity, and accordingly we assert he warrants the additional contractual compensation. We look forward to addressing this matter with you. Thank you for your time and attention to this matter.

In a letter dated April 14, 2005 and addressed to President Geyer, Union Business Representative Schreiner states, in relevant part:

In accordance with the terms of our labor agreement, kindly consider this as Step Three of the Grievance Procedure provided for in the collective bargaining agreement.

IUPAT, DC 7 continues to assert that Dennis Crain has and continues to perform all of the duties of "head painter" as defined in the labor agreement, but fails to be compensated that that applicable wage scale rate.

We look forward to conferring with you on this matter.

By letter dated April 25, 2005 and addressed to Union Representative Schreiner, HR Director Sleaper states, in relevant part:

Mr. Geyer asked me to respond to your letter of April 14, 2005, filing a Step Three grievance on behalf of Dennis Crain for "head painter"

I am sorry you were unable to wait to meet with us today 4/25/2005. Mr. Seefeld was in another meeting that ran long and I had asked Mr. Staerkel to step in for Mr. Seefeld when I was told you were not able to wait and had left. I have called your office and left a message with them for you so we could reschedule.

You indicated in your letter that you “assert that Dennis Crain has and continues to perform all the duties of “head painter” as defined in the labor agreement.” I do not see in the contract a definition of the duties of a “head painter.” Would you be so kind as to tell me where the position is defined in the contract?

I would also like to reiterate my past statement from your prior Step Three grievance letter of February 23, 2005 that WCD denied on the same subject.

The Wisconsin Center District has not posted a foreman (Head Painter) position as being open for application. The Wisconsin Center District is not planning to hire any additional painters at this time and has decided to not fill the Head Painter position that was vacated when Clyde Werner retired recently. At this time the Wisconsin Center District has been considering reduction of additional staff and or reduction of hours to reduce and control cost.

Again if you would like to reschedule our appointment call me at 414-908-6086.

In a letter dated September 13, 2005 and addressed to President Geyer, Union Business Representative Schreiner states, in relevant part:

This letter is to inform you of our intention to go forward with the arbitration hearing in regards to Dennis Crain and the lead painter position.

In a letter dated September 26, 2005 and addressed to Union Business Representative Schreiner, Employer Attorney Robert Mulcahy stated, *inter alia*, that “We are not waiving any objections to the procedural or substantive arbitrability of this matter.” In a letter dated October 3, 2005, Union Attorney Matthew Robbins, states, in relevant part:

Enclosed please find a copy of a Request to Initiate Grievance Arbitration with regard to the Dennis Crain grievance filed on behalf of the Painters. We believe that it is the Union’s position that the employer is in violation of Article 13 of the collective bargaining agreement, as well as the contract as a whole.

I will be happy to discuss this with you at our convenience.

POSITIONS OF THE PARTIES

Union

When the parties negotiated their first contract in 1996, two positions were created: Head Painter and Head Carpenter. Val Galanti was awarded the Head Carpenter position despite being the sole Carpenter at the company. Clyde Werner, the more senior Painter, was awarded the position of Head Painter. The Grievant, who had worked for the Employer and its predecessor for sixteen years, remained in the position of Painter.

On August 1, 2004, Werner retired; with his last workday being June 16, 2004. At the time of Werner's retirement, negotiations for the current contract were in progress, with the Grievant being the Union's negotiator for the painters. The prior contract expired on June 1, 2004 and the current contract was settled on December 13, 2004.

Since Werner's retirement, the Grievant has been performing the same Head Painter duties that Werner previously had performed. Currently, the difference in pay between the Head Painter and Painter is \$.51.

As the party challenging arbitrability, the Employer bears the burden of proof. Given the strong presumption favoring arbitrability, the Employer's burden is a heavy one. Overcoming that presumption requires clear and convincing evidence that the parties agreed that arbitrability should be denied. The Employer has not met its burden of proof.

A continuing violation of a collective bargaining agreement gives rise to a continuing grievance that is not subject to time limitations. The Employer's failure to pay the Grievant at the Head Painter wage rate constitutes a "continuing violation" and, thus, is not time barred.

In June of 2004, the Grievant broached the topic of the Head Painter position with his supervisor, Director of Building Services Robert Seefeld, and again at a meeting shortly after the contract was signed. At the meeting, Seefeld informed the Grievant that his concerns about the Head Painter would not be addressed until the matter of hiring a Chief Electrician was resolved. The Employer did not hire a Chief Electrician until January of 2005.

Relying upon his supervisor's statements, the Grievant postponed filing a grievance. The Grievant should not be penalized for believing that his concerns would be addressed without resort to the grievance process. It would be inequitable and unjust for the Employer to benefit from its own "unclean hands."

HR Director Sleaper testified that the Grievant's supervisor did not respond within five (5) working days of the Union's February 23, 2005 written grievance. The Employer argues that HR Director Sleaper's letter of March 3, 2005 was written under the authority of President Geyer, but nowhere in Article 10.4 does it state that a supervisor's agent can furnish a written answer to a grievance. Moreover, the March 3rd letter was not furnished within the contractual

five day window. HR Director Sleeper testified that President Geyer never met with the Union about the grievance; never sent the Union a letter within ten working days of making a decision on the grievance; and never responded, in writing, to the Union's April 14, 2005 step three letter.

The Employer has acknowledged that it failed to strictly adhere to Articles 10.4 and 10.5. It is entirely unreasonable for the Employer to insist on the Union's strict application of the grievance procedure. The Union's formal filing of the grievance on February 23, 2005 should not be fatal to its case.

The Employer has the right to assign work, but not to transfer job duties to an employee without compensating the employee at the applicable wage rate. The Grievant is performing the duties that had been performed by the former Head Painter. The Employer's argument that the Grievant is not performing all the essential functions of the Head Painter because he lacks a painting staff is contrived since the Employer acknowledges that, except for three limited occasions, the Head Carpenter has not had a carpenter staff under his supervision since the position's creation.

The grievance is procedurally arbitrable. By failing to compensate the Grievant at the Head Painter wage rate, the Employer has violated the collective bargaining agreement. The Employer must be ordered to compensate the Grievant at the applicable Head Painter wage rate.

Employer

The Head Painter retired on August 1, 2004. The Grievant waited until February 23, 2005 before attempting to initiate the grievance process. Rather than presenting the grievance orally to Seefeld, as required under the contract, a letter was sent to President Geyer. The District denied the grievance by letter dated March 23, 2005 and, at that time, informed the Grievant that the grievance was untimely and procedurally defective. The Grievant tried to resurrect an identical grievance on March 29th.

The Grievant failed to raise the issue within five (5) days of the incident giving rise to the grievance, *i.e.*, Werner's retirement. Accordingly, the Grievant has waived his right to grieve pursuant to Article 10, Sections 3 and 8(a) of the contract.

Inasmuch as Arbitration is "Step Four" of the contractual grievance procedure, the last possible action or occurrence that could "give rise to an issue to be arbitrated" is the "Step Three" denial of the grievance. On April 25, 2005, and in no uncertain terms, the District denied the grievance at "Step Three." The Grievant did not request arbitration in writing until September 13, 2005; which is ninety-eight working days after April 25, 2005. It was not until October 3, 2005, that the Union identified the provision of the contract alleged to have been violated, *i.e.*, Article 13.

The Grievant's request to arbitrate was untimely under Article 11, Section 1 of the contract because it was made more than 90 working days after the incident giving rise to the grievance, namely WCD's denial of the grievance at Step Three of the grievance procedure. The District has never agreed to extend the grievance timelines and has consistently maintained that the grievance was neither filed, nor appealed, in a timely manner.

The grievance is not arbitrable. The grievance should be denied without addressing the merits of the grievance.

The grievance also falls on its merits. The remedy requested in the grievance would increase the Grievant's wage rate. The Arbitrator does not have authority to order such a remedy because, under Article 11, Section 10, the arbitrator does not have the authority to grant wage increases.

Under the contractual management rights clause, the Employer has the exclusive right to determine staffing levels and to schedule and assign work in a manner most advantageous to the Employer – which necessarily includes the right to fill or to not fill the vacant Head Painter position. The Employer exercised these management rights when, following Werner's retirement, it decided to not fill the Head Painter position. The Employer's belief that current workload does not justify the addition of another Painter is borne out by the fact that Crain's hours as a Painter have not increased since Werner's retirement.

Article 13, the provision relied upon by the Union, establishes a pay scale for positions should the District choose to fill them. Article 13 does not require the Employer to employ a Head Painter or to promote the Grievant to that position.

The Grievant has admitted that there is no justification for the pay differential except when the Head Painter has painting staff members to train, direct and supervise. The Grievant, unlike the former Head Painter, has had no subordinate Painters. Notwithstanding the Grievant's belief to the contrary, the Head Carpenter has supervised many subordinate Carpenters in recent years and, approximately twenty times per year, continues to supervise a large team of employees in the installation and removal of the basketball floor at U.S. Cellular Arena.

There are seven essential functions that distinguish the Head Painter from the Painter position. As Head Painter, Werner performed significantly more of these seven essential functions than the Grievant currently performs. The Grievant's job duties and work hours have not changed in any meaningful way since the Head Painter's retirement. The grievance should be denied.

DISCUSSION

The Grievant is claiming that he is entitled to receive the Head Painter pay rate because he has performed and continues to perform the duties and responsibilities of the Head Painter.

This claim presents a continuing grievance in that the act complained of is reoccurring. Given the continuing nature of the grievance claim, the undersigned rejects the Employer's claim that the "Step One" contractual time line for filing the grievance is computed from the date of the Head Painter's retirement, *i.e.*, August 1, 2004.

Prior to February 23, 2005, the Grievant spoke with his supervisor regarding the Head Painter position. However, it is not evident that the Grievant or any Union representative raised a grievance claim until Union Representative Schreiner's letter dated February 23, 2005. This letter was directed to District President Geyer. Under the terms of the contractual grievance procedure, an appeal to the District President is "Step Three" of the grievance procedure and the "right" to appeal occurs "if the grievance is not settled at the second step."

Section 10.8 (d) provides that the parties may, by written agreement, waive any of the steps of the grievance procedure. As reflected in the District's letter of March 3, 2005, such a waiver did not occur in the present case.

Given the absence of an agreement to waive "Step One" and "Step Two" of the contractual grievance procedure and the continuing nature of the grievance, the Grievant's oral presentation of the grievance to his supervisor on March 29, 2005 is timely within the provisions of "Step One" of the parties' collective bargaining agreement. Once the "continuing grievance" has been filed at "Step One", the contractual time limits for processing the grievance apply; unless the record establishes that the parties have agreed otherwise.

The Grievant's supervisor did not provide a "Step One" response. Section 10.8(a) includes the following: "If the District does not answer a Grievance or any appeal thereof within the specified time limits or any agreed extension thereof, the Union may treat the Grievance as denied at that step and immediately appeal the grievance to the next step." By letter dated April 4, 2005, the Union filed a timely "Step Two" grievance.

The Grievant's supervisor did not provide a "Step Two" response. By letter dated April 14, 2005, the Union filed a timely "Step Three" grievance.

HR Director Sleaper's testimony indicates that President Geyer delegated his "Step Three" authority to HR Director Sleaper and that the Union agreed to meet with HR Director Sleaper on April 25, 2005 to discuss the "Step Three" grievance. The April 25, 2005 meeting was not held because an Employer representative was delayed and a Union representative was not able to wait.

In his letter of April 25, 2005, HR Director Sleaper confirmed that he was responding to the Union's "Step Three" grievance on behalf of President Geyer and offered the Union the opportunity to reschedule the meeting of April 25, 2005. It is not evident that the Grievant or any Union representative requested that the "Step Three" grievance meeting be rescheduled, with or without President Geyer. Under the facts of this case, the failure of President Geyer to meet with the Union at "Step Three" of the grievance procedure does not establish that the District has failed to adhere to the contractual grievance procedure.

The contract language provides no reasonable basis to conclude that President Geyer may not authorize HR Director Sleaper to provide the “Step Three” written decision. Contrary to the argument of the Union, the fact that President Geyer did not issue a written decision under his own signature does not establish that the District has failed to adhere to Section 10.5 of the contractual grievance procedure.

On or about May 9, 2005, the District provided the Union with copies of drafts of a new position description for the Painter and Head Painter positions. On August 25, 2005, HR Director Sleaper and Union Business Representative Schreiner met at the office of Lyle Balistreri of the Milwaukee Building and Construction Trades Council.

HR Director Sleaper recalls that the meeting was initiated by Mr. Balistreri. HR Director Sleaper further recalls that, at the meeting, he initially stated that the District had responded to the grievance that had been presented by the Grievant and that the District was not changing its position. According to HR Director Sleaper, he responded to Mr. Balistreri’s attempts to facilitate a different resolution of the grievance by advising Mr. Balistreri that he did not anticipate that the District would change its position, but that he would go back and review the matter.

Union Business Schreiner recalls that the parties primarily discussed the drafts of the Painter and Head Painter job descriptions; but that there were also discussions of whether or not, under these position descriptions, the Grievant should receive Head Painter’s pay. Union Business Schreiner recalls that the Union expressed the view that Head Painter pay was warranted and that the parties agreed to review the matter and then talk. Union Business Representative Schreiner states that, when he subsequently telephoned HR Director Sleaper to follow-up on the meeting of August 25, 2005, he was advised that the District would not post a Head Painter position and would not pay the Grievant at the Head Painter rate. According to Union Business Representative Schreiner, nothing was said about the timeliness of the grievance during the August 25, 2005 meeting or subsequent phone call.

The first time that the Union requested arbitration was in its letter dated September 13, 2005. Section 11.1 of the parties’ collective bargaining agreement states as follows:

No item or issue may be the subject of arbitration either advisory or binding, unless such arbitration is requested in writing within 90 working days following the action or occurrence which gave rise to the issue to be arbitrated.

The language of “Step Four” provides

10.6 **Step Four**. If the answer of the President upon a matter, which may be submitted to final and binding arbitration, is unsatisfactory to the Union, the Union may advance the grievance to arbitration.

The record provides no reasonable basis to conclude that the parties mutually intended the August 25th meeting, or the subsequent telephone call, to be a continuation of the “Third Step,” or any portion of, the grievance process. Under the facts of this case, the “answer of the President,” as that term is used in “Step Four,” is HR Director Sleeper’s letter of April 25, 2005. This “answer,” which did not grant the Union’s grievance request that the Grievant receive Head Painter pay for performing the duties of the Head Painter, is “the action or occurrence which gave rise to the issue to be arbitrated.”

The record does not establish that the Employer waived, or agreed to extend, the 90 day time limit set forth in Section 11.1. As the Employer argues, the Union’s written arbitration request of September 13, 2005 was made more than “90 working days following the action or occurrence which gave rise to the issue to be arbitrated.”

The Union argues that the District has unclean hands because it did not furnish the written answer to the grievance within the time lines set forth in Article 10.4. Article 10.8(a) addresses the District’s failure to answer a grievance within the specified time limits; *i.e.*, the Union treats the grievance as denied at that step and immediately appeals the grievance to the next step.

In summary, the parties have agreed upon the remedy for each party’s failure to adhere to the contractual grievance and arbitration timelines. Applying the remedy agreed upon in Section 11.1 of the parties’ collective bargaining agreement, the undersigned concludes that this grievance may not be the subject of arbitration.

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

AWARD

1. Mr. Crain did not waive his right to file his grievance of March 29, 2005.
2. Article 11.1 of the contract bars the arbitration of Mr. Crain’s grievance.
3. The grievance is dismissed.

Dated at Madison, Wisconsin, this 3rd day of July, 2006.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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