

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 244, AFSCME, AFL-CIO

and

CITY OF SUPERIOR

Case 196

No. 65235

MA-13158

(Posting of Daily Jobs)

Appearances:

James E. Mattson, Staff Representative, 8480 East Bayfield Road, Poplar, Wisconsin, for the labor organization.

Cammi Koneczny, Acting Human Resources Director, 1316 North 14th Street, Superior, Wisconsin, for the municipal employer.

ARBITRATION AWARD

The City of Superior and Local 244, AFSCME, AFL-CIO, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the City concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to the assignment of daily jobs. The Commission designated Stuart D. Levitan as the impartial arbitrator. A telephonic hearing in the matter was held on January 24, 2006; it was not transcribed. The parties filed briefs on February 27, 2006, and waived their right to reply. At the arbitrator's request, the City supplemented the record on June 23, 2006.

ISSUE

The Union states the issue as:

“Did the Employer violate the terms of the collective bargaining agreement and the long-standing past practice by improperly posting daily assignments outside

the Street Division and having Parks Division employees performing Street Division work? And if so, the appropriate remedy is for the Employer to make the grievants whole for any and all lost wages and benefits due to this improper assignment of work and to follow the long-standing past practice by first assigning Street Division work to the Street Division employees before offering the work to employees working outside the Street Division.”

The Employer states the issue as:

“Did the City violate AFSCME Local #244 Union Agreement when it assigned the Parks Division crew to a project where the clam truck would be used as part of completing the project?”

I state the issue as:

“Did the City violate the collective bargaining agreement on June 17, 2005 by assigning the job of removing railroad ties from East Fifth Street to Parks Division employees? If so, what is the appropriate remedy?”

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 **MANAGEMENT RIGHTS**

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

- A) To direct all operations of the City.
- B) To establish work rules and schedules of work.
- C) To hire, promote, schedule and assign employees to positions with the City.

...

- D) To introduce new or improved methods or facilities.
- J) To determine the methods, means and personnel by which City operations are to be conducted.
- K) To take whatever action is reasonably necessary to carry out the functions of the City in situations and emergency.

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ARTICLE 5
CLASSIFICATION AND WAGE RATES

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- 5.03 Regular part-time and full-time employees will be fully classified for the entire year and will not receive less per hour when working in lower classifications. When working in higher classifications than his/her permanent or yearly rate, he/she will receive the pay attached to the higher classification. Any employee with a classification who is assigned to work within that classification and who exercises his/her seniority to bump into a lower classification, will receive the rate of pay attached to the lower classification for the time he/she worked in the lower classification. The exception to this would be that if the person assigned to the lower classification has the same rate as the person assigned to the higher classification and both individuals are qualified to perform either task. The most senior employee may exercise his/her right to bump to the lower classification and receive their normal rate of pay. The purpose is to assure that no additional cost is passed on to the City.
- 5.04 Permanent Rate: For employees hired before July 1, 1986, except for employees working in the Wastewater Treatment Operations Division, the permanent classification is based upon the one in which the employee spent the majority of his/her total hours during the preceding calendar year.
- 5.05 Yearly Rate: All employees hired after July 1, 1986, and all employees on the seniority roster of the Wastewater Treatment Operations Division, will not be covered by the permanent rate in 5.04. Employees will receive the rate for which they spent the majority of hours in the preceding calendar year whether higher or lower than the rate for the current calendar year.

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ARTICLE 7
SENIORITY AND EFFECT OF SENIORITY ON FRINGE BENEFITS

- 7.01 Effective January 1, 1986, seniority according to this Agreement, shall begin with the employee starting date of employment within this bargaining unit. After January 1, 1986, employees re-assigned from other bargaining units shall, however, retain longevity, sick leave accumulation and vacation based upon his/her years of service credited

in such other bargaining unit. Seniority shall not be diminished by absence due to illness, authorized leaves of absence or temporary layoff. Seniority lists shall be maintained by each division and on a unit-wide basis. Each seniority list shall be brought up to date annually and copies of same shall be mailed to the Secretary of the Union.

7.02 The seniority of each employee of the City of Superior shall be maintained within the various divisions of the Public Works Department. Any person newly employed in any division, except employees returning from military service placed in a new division, shall begin at the bottom of the seniority list of that particular division.

7.03 Effect of Employee Status Upon Seniority:

A) Full-Time employee:

A regular employee is hereby defined as a person hired to fill a regular full-time position requiring the services of said employee for the normal work day and work week as spelled out hereinafter, for twelve (12) months each year and who has satisfactorily completed the probationary period.

B) Part-Time Employee:

1) A part-time employee is an employee hired or accommodated under ADA to fill a regular part-time position that requires a lesser number of hours in any weekly or bi-weekly pay period than that established for a regular full-time employee. Part-time appointments are made for accommodation of employees under the Americans with Disabilities Act. This definition would apply to any reference of part-time throughout the contract.

2) An employee who accumulates six months or more of continuous employment in any calendar year in a part-time capacity shall accumulate seniority based on his/her starting date of employment of that year.

C) Seasonal Employee: See Appendix C.

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ARTICLE 8 PROMOTION

8.01 Promotions, according to the terms of this Agreement shall be made strictly in compliance with seniority among qualified employees. In the event a vacancy occurs, it will be filled according to seniority, provided the senior employee is interested in the position and can qualify as set forth hereinafter.

The divisional units within the Public Works Department for the purpose of this Article are as follows:

1. Street Division – including the Landfill
2. Maintenance and Construction Division
3. Animal Shelter Division
4. Parks and Recreation Division – and Nemadji Golf Course
5. Wastewater Treatment – Operations
6. Wastewater Treatment - Collection System
7. Central Equipment Division

8.02 The following rules regarding promotions shall apply:

- A) Promotions within the Division: First consideration shall be given to employees in division in which the vacancy occurs. In the event employees are not considered qualified by the Employer or if the employee wishes, he/she may be returned to their former position without loss of seniority rights. In this event, the next senior employee in that division, if interested, will be offered the position. In qualifying for the new position, employees shall serve a probationary period of up to ninety (90) calendar days to demonstrate their ability to perform the work. During said period they shall be paid five percent (5%) less than the base rate for the position.
- B) Promotion Considering Unit-Wide Seniority: The above procedure shall prevail until the position is filled. In the event no employee within the division is considered qualified, unit-wide seniority will prevail among qualified employees in filling that position.
- C) In the event no City employee is considered qualified by the Employer, the Employer may then advertise publicly for applicants for the position.

- D) Seasonal and Substitute employees may be considered for vacant full-time positions before outside applications for vacant full-time positions are considered.

8.03

- A) Employees of Local 244 may exercise their divisional seniority on a daily basis in bidding for jobs for that day, providing said employees are qualified to fill that particular position in question. Such bidding shall occur after 3:30 P.M. the previous day and before 7:00 A.M. that day, except when the Mayor declares an emergency in which case management reserves the right to assign work assignments without regarding to bidding, but according to seniority and classification.
- B) Jobs on the paving crews and garbage crews shall be bid on a weekly basis only.
- C) Bidding on positions at the waste water treatment plant shall be done with the knowledge that change could take up to sixty (60) days to implement, providing that the bumping will only be allowed where there is a qualified replacement available at no additional cost to the City.
- D) Bidding on positions at the landfill shall be done as follows:
Working Foreman – Employee successfully bidding on position agrees to remain in the position for a five year period; Heavy Equipment Operator – Employee successfully bidding on position agrees to remain in the position for a three year period. Employees accepting these positions will remain on the Street Division seniority list and will be exempt from utilizing his/her seniority to bump out of the landfill and will be protected from a more senior employee in Local #244 bumping into his/her position at the landfill for the specified time period. These employees would not be exempt from overtime rights within the Street Division.

8.04 In the event a dispute arises regarding the qualifications of any employee, the matter may be submitted to the grievance and arbitration procedure of this Agreement.

8.05 The maintenance positions at the Waste Water Treatment Plant operations will be posted in accordance to Article 8 of the Working Agreement with the parameters that the person(s) successfully obtaining

this position will remain within the position for a minimum of five (5) years. The employee cannot use seniority to bump out of the position nor can more senior employees use their seniority to bump into the maintenance position for a five (5) year period.

BACKGROUND

This grievance concerns the process the City followed in making job assignments on June 17, 2005.

The collective bargaining agreement between the parties contains a provision which bases the annual wage rate for certain employees on the rate they received the prior year. Employees hired after July, 1986, and employees in the wastewater treatment division, receive a yearly rate (laborer, light equipment operator, skilled laborer, medium equipment operator, heavy equipment operator, working foreman) based on the classification in which they spent the majority of hours in the preceding calendar year. Employees (other than in the wastewater treatment division) hired before that date have a permanent classification based upon the one in which the employee spent the majority of total hours during the preceding calendar year.¹

The collective bargaining agreement also contains a provision under which represented Streets and Parks employees may exercise their divisional seniority each day in bidding for particular job assignments, subject to their qualifications. Depending on the employees' hiring date, these assignments may have a significant impact on future wages.

On June 17, 2005, the City Department of Public Works was engaged in an ongoing reconstruction project of East Fifth Street. The project necessitated the removal of railroad ties on the roadbed. Due to an unsatisfactory experience performing that task on a prior date, DPW management decided to use a piece of equipment known as a "clam truck." The clam truck is classified as Heavy Equipment.

Although DPW equipment and machinery belongs to the DPW rather than separate divisions, the clam truck is used primarily by the Parks Division. On June 17, 2005, there were four Parks Division employees with experience operating the clam truck, and one Street Division employee who had been trained to operate it (although others in the Street Division also held the necessary Class A license to do so).

DPW management assigned the task of removing the railroad ties to the Parks Division, purportedly because of its employees' greater familiarity with the clam truck. Within an hour or so, however, supervisors realized that using the clam truck also presented problems, due to its great weight; sometime between 8:30 and 9:00 a.m., supervisors brought in a front-end

¹ While the functional difference between sections 5.04 and 5.05 is not completely clear to me, both share the same underlying premise – that prospective wage rates are based on past assignments.

loader to remove the ties, using the clam truck to unload the ties from the front-end loader into trucks for transport to Duluth, Minnesota for disposal.

For 2005, the four employees named in the grievance worked the following hours in respective pay classifications (their 5.05 yearly rate classifications in bold face):

	<i>Laborer</i>	<i>Skilled</i>	<i>LEO</i>	<i>MEO</i>	<i>HEO</i>
<i>Kennelly</i>	636.5	139	1210	127	0
<i>Larson</i>	1099	250.25	452.75	267.75	8
<i>Tyykila</i>	1410.25	45	376.5	119.5	4
<i>Johnstad</i>	1091.5	386.75	524.25	96.5	15

On June 24, the Union grieved the matter, as follows:

Circumstances of Facts: Improperly posting of daily job description with a division and then posting it in a separate outside division, without allowing employees of (division) in which work is being performed first option.

Article of Contract violated: 5.05, 7.02, 8.03. Failure to comply with working agreement when combining specified listed divisions per article 8-8.01. This prevents employees their rights of exercising daily bidding "seniority: per division. This also prevents an employee the right to earn a higher rate or even to lose a earned rate.

Request for Settlement: To cease and desist this practice and to make all involved employees whole.

On June 27, 2005, Superintendent of Public Works Clarence Mattson wrote the president and steward of Local 244 as follows:

This letter should act as formal notification that the above mentioned grievance has been denied at the first level.

There appears to be no violation of the union contract Article 5.05, 7.02 or 8.03. However I feel Article 3 - A, B, F & J describes how postings are also formulated.

From my understanding of the grievance the union must be looking for one posting and seniority list for Street, Parks and Recreation and Construction & Maintenance. This is a very interesting concept that could be explored in the future.

You may elevate this grievance to the second step if you desire.

The Union advanced the grievance to the second step, consideration by the mayor. On August 23, 2005, Mayor Dave Ross wrote Paul Graden, Chief Steward of Local 244, as follows:

In your grievance you contend that the Parks Division, assigned to a particular project, prevented certain Street Division employees from being able to bid a higher rate of work for that day.

As I understand the facts of that day, the Parks Division was assigned to the project at the beginning of the day because of the need to have the Clam Truck used in the operation. As the project unfolded and the use of the truck did not work to accomplish the task, these Parks employees used other equipment to finish the job. This was a practical and efficient solution to the task at hand.

Under the Contract Article 3 Management Rights, gives management the right to maintain efficiency of City operations. It would have been disruptive and inefficient to stop the project and have all Street Division employees rebid their assignments midway through their day. I therefore must deny your grievance.

Since you are in contract negotiations perhaps this is a matter than can be addressed, along with the daily bidding language that is being discussed.

The Union advanced the grievance to the third step, consideration by the Human Resources Committee, which denied it on September 21, 2005. The Union thereafter advanced the matter to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

Long-standing past practice has been for the employee within each division to have the opportunity to bid on respective daily divisional jobs before employees from other divisions. The only exception is under a declaration of emergency. This practice makes sense, in that the employees within a division know the work of their division more intimately than do employees from other divisions. There is an obvious benefit from the standpoint of efficiency and safety to this practice. That there may have been some isolated occurrences when employees from other divisions were assigned work belonging to the streets division does not mean the practice of assignment within division was not long-standing. The union accepts that outside divisional employees may be allowed to bid or be assigned work within the streets division once the divisional employees have been given first preference for job assignments.

Pieces of equipment belong to the Department of Public Works and not to any division, but they are just that – pieces of equipment. It is the type of work performed by any piece of equipment that holds relevance here.

The labor agreement defines and affirms divisional seniority rights for employees. Article 8 underscores the dynamic role divisional seniority plays on a daily basis as employees are allowed to exercise their divisional seniority to daily bid on jobs.

Under Article 5.05, there are adverse economic consequences to Streets Division employees when employees from outside divisions are allowed to simply come in and take regular work away from Street Division employees. Employees must rely upon the divisional seniority to earn their yearly rate. Every hour of pay matters, and one of the grievants missed earning his yearly rate by just a few hours. Contract language strongly guarantees employees the right to bid upon the available work. This is a major component of the agreement; to have this right eroded by an adverse arbitration decision would fundamentally undermine the long established relationship between the parties regarding conditions of work.

Fundamental divisional seniority rights of represented employees are at stake in this case. Employees have the first right to work within their division, and the first right to daily bid on work which can positively or negatively affect their yearly rate of pay. Employees must be able to rely on the terms of the collective bargaining agreement for their economic security and for their right to dignity at the workplace through having some control over the work they perform. They are not mindless cogs in the employer's wheel of work.

The long standing past practice has been clear; street division employees have always been assigned work within their division before employees from other outside divisions are given job assignments in their division.

The arbitrator should uphold the grievance and uphold the assignment of work based on divisional seniority. Grievants should be made whole for any lost wages and benefits due to the improper awarding of daily divisional job assignments outside their division. The arbitrator should underscore the contractual guarantee of represented employees to their fundamental right to exercise divisional seniority for their daily job assignments within their division.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

Article 3 of the collective bargaining agreement provides management with the right to determine methods, means and personnel by which its operations are to

be conducted, and to maintain the efficiency of city operations. The City has further shown that there is a long-standing past practice of the DPW divisions working together to complete projects. Moreover, it is neither the practice nor required to repost assignments during the day on changed conditions; that would not be practical. The City acted appropriately in assigning the removal of the railroad ties to the Parks Division. The Streets employees were assigned to work equal to their base rate of pay and did not lose any pay because of the assignment.

The parties waived their right to file reply briefs.

DISCUSSION

In this grievance, the Union is not protesting that work was given to non-union employees, or even that work was given to employees in the wrong union; rather, the Union grieves that work was given to certain of its members rather than others. This grievance essentially pits the employees in one division, Streets, against another, Parks, all of them represented by AFSCME Local 244.

In its grievance, the Union cited three sections of the collective bargaining agreement which it asserted the city's actions violated. By its brief, the union expanded its argument to include a broader basis of past practice, and largely ignored specific contract provisions.

Section 5.05 regulates how the yearly rate is set for employees who were hired after July 1, 1986, and all employees at the wastewater treatment plant. Although the Union protests the *manner* in which employees were assigned to various pieces of equipment (and thus logged hours at different rates), it makes no claim that the employer erred in its calculations of each employee's hours or paid an improper rate. Indeed, other than citing the impact on prospective wage rates which flows from Section 5.05, the Union does not even mention this section in its brief. Because of Section 5.05, employees are affected by the manner in which jobs are bid and assignments are made, but the employer's actions on June 17, 2005 did not violate this section of the collective bargaining agreement.

Section 7.02 establishes how seniority is maintained within each division in the Public Works Department. Again, the Union challenges how assignments were made to employees in two different divisions, but does not actually challenge the accuracy of any seniority lists. The employer's actions of June 17, 2005 did not violate Section 7.02 of the collective bargaining agreement.

Section 8.03 enables employees to use their divisional seniority to bid on jobs each day. Again, the Union does not allege that the city failed to follow divisional seniority in the bidding for jobs on June 17, 2005, but rather that a plum assignment (i.e., one requiring the use of heavy and medium equipment) was given to the wrong division, namely Parks. The

employer's actions of June 17, 2005 did not violate Section 8.03 of the collective bargaining agreement.

Having found no violation of any of the provisions of the collective bargaining agreement cited in the union's grievance, I turn to the heart of the union's argument, the claim that past practice required the assignment of the job clearing railroad ties from the roadbed to the Streets Division.

The collective bargaining agreement affords the employees the first right to work within their division. But the collective bargaining agreement also affords supervisors certain management rights in determining which division should perform a particular assignment. Specifically, Article 3 of the collective bargaining agreement empowers the City to "direct all operations ...establish work rules and schedules of work ... assign employees ... determine the methods, means and personnel by which City operations are to be conducted" The collective bargaining agreement states that these powers are "subject only to the provisions of this Contract and applicable law."

I believe that the concept of past practice as an aid in interpreting a collective bargaining agreement is well enough established to be considered part of the "applicable law" of labor relations, and thus capable of affecting the terms of Article 3. Indeed, the classic formulation of the standards needed to establish a past practice is now over a half-century old: "In the absence of a written agreement, 'past practice,' to be binding on both Parties, must be (1)unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." CELANESE CORP. OF AM., 24 LA 168, 172 (Justin, 1954).

Not all matters in the workplace are equally fit for a binding past practice, and custom affecting a benefit of personal value to employees – work schedules, lunch breaks, leaves of absence, etc. --- and more likely to be accorded status as a past practice than are matters affecting the operation and direction of the workforce, such as determining the size of a work crew. *How Arbitration Works*, 6th Ed., Alan Miles Ruben, ed., (BNA, 2003), pp. 611-16.

Departmental managers determined that removal of the railroad ties could best be undertaken through use of the clam truck. That decision was entirely within their authority, and is not subject to my review. I can and do review, however, what they did after making that determination.

Based on the pre-printed divisional lists of equipment, the clam truck is not considered a Streets Division piece of equipment. Moreover, although several Streets employees had the Class A licensure that made it *lawful* for them to operate a clam truck, only one Street division employee was actually trained to operate the equipment.

Department managers thus faced a dilemma. The assignment was at a site – a public thoroughfare – that has traditionally been considered the purview of the Streets Division. But

the assignment required (or so they reasonably thought) equipment and expertise traditionally associated with the Parks Division. Thus, employees in each division had a reasonable claim that past practice supported their getting this assignment.

Based on the practical issue of which employees were most familiar with that piece of equipment, department managers determined that the job should be performed by employees of the Parks Division. Nothing in the record indicates that they made this determination in bad faith or as part of a subterfuge to evade the contract. Given the reasonableness of this determination, and the somewhat less-than-overwhelming evidence of past practice, I cannot find on the basis of this record that this initial determination wrongfully abridged any right, privilege or protection enjoyed by the Union.

Ninety minutes or so into the workday, supervisors realized that the clam truck presented problems as well, and called in a front-end loader. Although the grievants were clearly qualified to operate that equipment, the department did not rebid the days' assignments. That was also a reasonable determination; to open the entire days' work plan for two full divisions would be a woefully inefficient way to operate the department.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 19th day of July, 2006.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

