BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF LA CROSSE

and

SEIU LOCAL 180, AFL-CIO

Case 336
No. 65481
MA-13232

Appearances:

Mr. James G. Birnbaum, Esq., Birnbaum, Seymour, Kirchner & Birnbaum, 300 N. Second Street, Suite 300, P.O. Box 300, La Crosse, Wisconsin 54602-0308, on behalf of Local 180.

Mr. James W. Geissner, Director of Personnel, City of La Crosse, 400 La Crosse Street, La Crosse, Wisconsin 54601, on behalf of the City.

ARBITRATION AWARD

According to the terms of the 2002-05 labor agreement between the above-listed parties, the City and Local 180 requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator to resolve a dispute between them regarding the proper placement of a new Mini-Trash Compactor into the equipment list contained in Memorandum of Understanding #7 for purposes of assignment and pay. Arbitrator Sharon A. Gallagher was appointed. A hearing was scheduled for April 12, 2006, but postponed and then held on May 24, 2006 at La Crosse, WI. No stenographic transcript of the proceedings was made. The parties submitted their initial briefs by June 22, 2006 and their reply briefs by July 8, 2006, whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues for determination herein but they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The Union suggested the following issues for decision:

1. Did the City violate Article 10(H), Memorandum of Understanding No. 7, the Wage Scale and past practice when it included the new trash compactor truck under Labor (sic) II classification?

2. If so, what is the appropriate remedy?

The City suggested the following issues:

3. Did the City violate Article 10, and Memorandum of Understanding #7, and the wage-scale provisions of the collective bargaining agreement when it failed to include the new Mini Trash Compactor under the Maintenance Worker I classification?

4. If so, what is the appropriate remedy?

Based upon the relevant evidence and argument and having considered the parties' suggested issues, this Arbitrator finds that the City's issues more accurately state the controversy between the parties and they shall be determined herein.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 2
GRIEVANCE PROCEDURE

Matters involving the interpretation, application or enforcement of this contract shall constitute a grievance under the provisions set forth below:

Step 1. The employee shall meet with and discuss the grievance with their immediate supervisor, with union representative present, within thirty (30) calendar days or by the first regular working day following thirty (30) calendar days, of the date the employee should have known of the grieveable matter. If no solution is reached the employee may,

Step 2. Reduce the grievance in detail to writing within seven (7) calendar days following the meeting, using an "Initiation of Grievance Form" and submit it to the supervisor who will forward it to the Director of Human Resources, who, with the Department Head, within ten (10) working days (Monday through Friday, excluding holidays) shall attempt to resolve the grievance and answer the grievance in writing. Within those ten (10) working days, representatives of the Union, the grievant, the Director of Human Resources or his/her designee, the Department Head or his/her designee, and the supervisor shall meet to attempt a resolution of the disputed matter. The parties' representatives shall have the authority to settle the grievance.

Step 3. If a satisfactory solution cannot be reached, the Union may, within thirty (30) calendar days of the grievance meeting, appeal to the Wisconsin Employment Relations Commission who will appoint a neutral arbitrator. The Union shall copy the City on all requests for grievance arbitration, the findings of the arbitrator to be final and binding on the parties hereto.

It is understood that the 30 calendar day requirement to file a grievance in Step #1 above shall be interpreted to mean the next regularly scheduled working day that both the employee and supervisor are present at work.

The parties may by written agreement extend the time limits contained in the grievance procedure.

The arbitrator shall not add to, or subtract from the terms of this agreement.

The City and the Union agree that the decision of the arbitrator shall be final and binding on both parties.

The grievance procedure set forth herein shall be the exclusive complaint of any employee as to any matter involving the interpretation or application of this agreement.

All complaints originating in all City departments shall be handled in the manner outlined above and no deviation therefrom will be permitted. Specifically, employees are prohibited from presenting such complaints, formally or informally to officers of the City of La Crosse not included in this procedure.

Members, stewards, officers/or representatives of the Union are permitted to discuss and/or adjust the grievances between an employee and his/her supervisor during or after regular working hours. In carrying out the above duties the parties shall not interfere with the normal and efficient operation of the department. A person(s) acting in the above capacity shall suffer no loss of pay for said action. A grievance shall be adjusted on an individual basis unless otherwise agreed to by the parties. No members, stewards, officers/or representatives of the Union shall be harassed during the performance of their duties in discussing and adjusting grievances.

ARTICLE 10
WAGES AND SALARY SCHEDULE

. . .

H. **New Equipment**

The City shall notify the Union, upon receipt, of the purchase of a new piece of equipment for the purpose of negotiating the equipment's appropriate placement in one of the existing pay categories contained in Memorandum of Understanding #7, attached.

. . .

Memorandum of Understanding #7
Equipment/Job Classification List

. . .

This letter is to confirm the understanding reached by the parties during negotiations for the 2002-2005 collective bargaining agreement. The following was agreed to:

EQUIPMENT CLASSIFICATIONS
SEIU LOCAL 180 – CITY OF LA CROSSE

. . .

C. LABORER II
Trash Compactor
Mower – 10 foot

D. MAINTENANCE WORKER I
Truck, one (1) ton or larger used for Maintenance in the Sewer Department
Truck, two (2) ton or larger including tandem
Truck, two (2) ton or larger w/sander, salter, or snowplow
Power broom
Street sweeper (light)
Tractor w/attachments
Brush chipper
Stump chipper
Paint machines, street
Concrete saw, 25" or less
Pipe locator – electronic w/transmitter or similar
Cable locator
Main tapping machine (less than 2" tap)
Electronic lead locator
Chain saw or Cut off saw
Pull Behind Groundsgroomer

BACKGROUND

It is undisputed that in the past, the parties have impact bargained when the City has added new equipment to its inventory in an effort to place the equipment in a classification and on the pay scale, pursuant to Article 10, Section H. These impact negotiations have sometimes resulted in agreements whereby the new equipment is then listed under a job classification contained in Memorandum of Understanding #7 (MOU 7) and thereafter paid according to the

contractual wage rate for the appropriate classification. However, it is also undisputed that in the past when the parties have failed to agree upon placement of a new piece of equipment in MOU 7, the City has thereafter placed the equipment in MOU 7 under the classification it believed appropriate and paid for its operation in accord with the listing. The Union has never objected to the City's actions and it has never attempted to go to interest arbitration over placement of new equipment in MOU 7 on the wage scale.

In 1999, the Union filed a grievance, the only prior case on point, regarding the proper placement in MOU 7 of a Log Loader. Significantly, all relevant substantive portions of Articles 2 and 10 as well as of MOU 7 contained in the 1999-2000 labor agreement read as they now appear in the effective 2002-05 agreement, quoted above. The Log Loader grievance proceeded to arbitration before WERC Arbitrator Coleen Burns, whose succinct and well-written award (hereafter Burns Award), read in relevant part as follows:

. . .

> By adopting Article 10(H), the parties have agreed upon the procedure to be followed when the City purchases a "new piece of equipment." Specifically, Article 10(H) requires the City to notify the Union of the purchase of a new piece of equipment "for the purpose of negotiating the equipment's appropriate placement in one of the existing pay categories contained in Memorandum of Understanding #7. . . ."
>
> Article 10(H) provides a procedure for "negotiating" the "appropriate placement" of a new piece of equipment. Article 10(H) does not require the City to accept the Union's negotiation position. Nor does it require the City and the Union to reach any other agreement during negotiations. Indeed, Article 10(H) does not provide any procedure for resolving an "impasse" in Article 10(H) negotiations.
>
> To accept the argument that a grievance arbitrator has jurisdiction to resolve an impasse in Article 10(H) negotiations would be to add a procedure to the contract that was not negotiated by the parties. Article 2 of the parties' collective bargaining agreement expressly prohibits the grievance arbitrator from adding to, or subtracting from the terms of the agreement. Accordingly, the undersigned does not have authority to determine the appropriate placement of a "new piece of equipment" in Memorandum of Understanding #7.
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> . . .
>
> If Article 10(H) negotiations fail to produce an agreement as to the appropriate placement of a "new piece of equipment." Then the Union has the right to negotiate appropriate placement when it bargains a successor agreement. At that time, either party has a statutory right to have negotiation impasses resolved by an interest arbitrator.

In summary, it is undisputed that the City has negotiated with the Union on the issue of the newly purchased Log loader's appropriate placement in one of the existing pay categories contained in Memorandum of Understanding #7. Assuming arguendo that the newly purchased Log Loader is a new piece of equipment within the meaning of Article 10(H), the City did not violate Article 10 when it failed to include the newly purchased Log Loader under the Equipment Operator III classification.

FACTS

In October, 2005, the City purchased a new truck over one-ton which contained within it a mini-trash compactor (MTC) to replace a tow-behind trash compactor which had to be pulled into place for use by a pick-up truck. The City notified the Union of the purchase and offered to meet and discuss the proper placement of this equipment on the equipment list in MOU 7, pursuant to Article 10 Section H. The parties met on October 20, 2005, but they were unable to agree to the placement of the MTC into MOU 7, as the City believed the MTC should be placed under the Laborer II classification and the Union felt that it should be placed and paid under the Maintenance Worker I classification. By letter dated October 31, 2005, the City summarized the October 20th discussions and notified the Union that the MTC would be placed under the Laborer II classification, as follows:

. . .

> The previous trash compactor was a pull behind unit and difficult to maneuver. It was listed under Laborer II on the equipment list. The new mini-trash compactor is one unit (truck and compactor together) and does not require a CDL. The City proposed the new mini-trash compactor be placed at Laborer I, with the exception that seasonal employees would not be able to operate it. This decision was based on the complexity and the fact that it is safer to drive than the older version. The union requested it be placed under Maintenance Worker I classification.
>
> After a discussion between the parties the City offered to place it at Laborer II, the same classification as the previous trash compactor, although the new equipment is safer and less complex. The union maintained it was to be placed under Maintenance Worker I.
>
> The parties reached an impasse. The City appreciates the union's concerns, however we believe the roper placement of this new equipment is at the Laborer II level. The mini-trash compactor will be placed at Laborer II on the equipment list.

. . .

The Union filed the instant grievance on November 8, 2005. It is undisputed that in negotiations for the 2006-07 labor agreement, the Union made no proposals regarding the proper placement of the MTC into MOU 7. Ultimately, the MTC was listed under the Laborer II classification in MOU 7 in the 2006-07 agreement (as the City had notified the Union would occur by its October 31st letter). The 2006-07 agreement was executed by the parties on or before March 7, 2006.

POSITIONS OF THE PARTIES

The Union

The Union argued that the Burns Award should not govern the instant case for the following reasons. First, the Union noted that in the prior case the Union had sought to place the new Log Loader into a higher classification (Operator III) than the old piece of equipment it replaced had traditionally been placed (Operator II), so that no past practice regarding placement in MOU 7 was applicable to the Union's assertions and Arbitrator Burns would "…have had to act as an interest arbitrator to assign the log loader to a classification." In contrast, the instant case concerns the placement of a large truck, which happens to contain to contain a trash compactor; and large, over one-ton heavy trucks have traditionally been placed under the Maintenance Worker I classification pursuant to past practice. The Union further noted that it is the City which argued that the MTC should be placed in an MOU 7 category which contains no trucks, contrary to practice. Here, the Union asserted, unlike the Burns Award, this Arbitrator would merely be enforcing the express standard of MOU 7, if she places the MTC into the Maintenance Worker I classification.

In addition, the Union urged that past cases where no agreement was reached between the parties as to placement, did not involve the assignment of trucks to a MOU 7 classification; that the City was unreasonable in its assignment of the MTC to the Laborer II classifications, which contains only tow-behind vehicles, no trucks; and that in the past, the City has used the weight of trucks as an excuse to deny reclasses and to deny Mechanic compensation. In these circumstances, the Union contended that the City should be estopped from arguing that the weight of the MTC truck is not determinative. Also, the Union observed that the City failed to prove that any of the factors it listed was used in the past to place equipment in MOU 7. In this regard, the City's assertion that because a piece of equipment is easier to operate it should be paid at a lower rate, could unfairly result in the future placement of all new equipment in the Laborer I classification.

Therefore, the Union contended that as this Arbitrator has a clear standard by past practice and MOU 7 to apply, she should rule in favor of the Union and award backpay equal to the difference between the Maintenance Worker I rate and the Laborer II rate to all those who operated the MTC during the relevant period.

The City

The City argued that it met its contractual obligations under Article 10, Section H to notify and then to meet and discuss in good faith with the Union regarding the MOU 7 placement of the MTC, and that having reached impasse thereon on October 20th, the City was privileged to place the MTC where it believed it should be in MOU 7; that after reaching impasse in impact bargaining with the Union, the City had no further contractual or statutory obligations to reach agreement with the Union on the proper placement of the MTC into MOU 7. Only if the Union had insisted upon going to interest arbitration and made a final offer regarding the placement of the MTC into MOU 7 would the City have had further legal obligations. Here, the Union failed to make any proposal regarding the MTC during contract negotiations for the 2006-07 agreement, and it agreed to a complete contract with the City which both parties executed in early March, 2006.

In addition, the City urged that Article 2 of the labor agreement specifically leaves this Arbitrator without authority to establish a wage rate for the MTC as she would thereby add to the terms of the contract in violation of Article 2. Further, the City noted that in 2000, Arbitrator Burns ruled against the Union in the Log Loader case, a case that is factually and substantively identical to this case. Therefore, the City argued that the Burns Award should be res judicata of the issues herein. As the Union failed to make any contract proposals during negotiations for the 2002-05 and the 2006-07 labor agreements regarding the Log Loader and the MTC respectively, the City urged this Arbitrator to find that the Union thereby waived its rights to object thereto in this case.

Also, the past treatment of new equipment supports the City's arguments in this case. In this regard, the City observed that since 1992 when MOU 7 was placed into the labor agreement, the parties have met and negotiated regarding the placement of eleven pieces of new equipment into MOU 7; that the parties have agreed on the placement of seven of those pieces but that no agreement was reached in the case of four pieces of new equipment and in the case of the latter four situations, the City then placed the equipment into an MOU 7 classification without any objection or contract proposal from the Union.

Finally, the City asserted that if this Arbitrator reaches the merits of the Union's claims herein regarding how to place the MTC, it urged that it has always used twelve factors concerning safety and complexity of the equipment in order to place new equipment into MOU 7 and that the weight of the vehicle alone has not been determinative of where each piece of equipment has been placed on the MOU 7 list in the past, and it should not be so in this case. The City noted that as the Union failed to call as witnesses the two employees who regularly operate the MTC, leaving City witness' testimony uncontradicted regarding the operation of the MTC, the Arbitrator should draw a negative inference against the Union on its claims on the merits herein. In all of these circumstances, the City urged the Arbitrator to deny and dismiss the grievance in its entirety.

Reply Briefs:

The Union

The Union asserted that the prior Award rendered by Arbitrator Burns is neither res judicata nor should the Union be estopped from arguing its inapplicability to the instant case. As the Union herein is merely asking this Arbitrator to apply the rate standards extant in the collective bargaining agreement for the MTC, not to establish a new rate as the Union sought in the grievance before Arbitrator Burns, res judicata and estoppel principles should not apply. The Union asserted that ". . .the Burns Decision stands for the proposition that where there is no discernable rate in the contract for trucks or pieces of equipment, then a duty to bargain and negotiate is triggered" (U. Reply, p. 2). Here there was "no need to negotiate" and "no obligation" to do so as a long-standing past practice existed directing how to pay operators based upon truck weight.

The fact that the Union attempted to negotiate a rate for the MTC does not require a conclusion that the Union waived its right to argue no negotiation of a rate was necessary for the MTC or that it conceded that rate negotiation was required. Finally, the Union noted that the evidence showed that the only factor used to place trucks on MOU 7 has been truck weight and that the MTC operators' opinions regarding whether they enjoy driving/operating the MTC was irrelevant to this dispute so that drawing a negative inference based upon these alleged missing witnesses would be entirely inappropriate.

The City

The City asserted that the Union misstated and/or failed to prove the facts of this dispute in its introduction. To the contrary, the evidence showed that 1) in setting truck pay rates, weight is not the only factor considered by the parties; 2) the City exhausted impact bargaining before it set a rate for the MTC when no agreement thereon was reached, so that the evidence failed to show the City acted "unilaterally" as the Union claimed. The City noted that the lower Laborer I rate includes operation of trucks that are similar in size to the MTC so that not all large trucks are paid at the Maintenance Worker I rate. The City asserted that the Union is essentially asking this Arbitrator to add a new clause to the contract "establishing an absolute standard for all trucks" (ER Reply, p. 6). The City noted that in no case in which the parties failed to reach agreement on a rate in MOU 7, did the Union seek to negotiate the rates when those labor agreements were open for negotiations. The City asserted that Union Witness Heller was not competent to testify regarding the MTC as he had never operated it or any of the large trucks or other equipment on the list, nor did he participate in impact bargaining regarding the MTC. The City urged that its assignment of the MTC to the Laborer II rate was reasonable and that the Union failed to prove a past practice that truck weight alone was the determining factor in pay rate disputes between the parties.

In summary, the City urged that it met its contractual obligations to the Union, that no contract language required the MTC be placed under any particular classification and that a ruling in favor of the Union herein would require a conclusion that all trucks must be paid at the Maintenance Worker I rate, an illogical and absurd result.

DISCUSSION

This Arbitrator agrees entirely with Arbitrator Burns' analysis of Article 10, Section H stated in her 2000 Award and this Arbitrator finds the Burns Award to be "on all fours" with this case. Therefore, this Arbitrator holds, as did Arbitrator Burns, that she has no jurisdiction to place the MTC onto the Equipment List contained in MOU 7 and that this grievance must be denied and dismissed.

In this case, the Union has attempted to persuade the Arbitrator that the facts before Arbitrator Burns were so different from those in this case that Arbitrator Burns' Award cannot control the outcome here. I disagree. Indeed in my view, the facts of both cases and the arguments therein are remarkably similar. The slight variations between the two cases can only be described as constituting a classic "distinction without a difference." Thus, whether the Union sought to place the MTC or MOU 7 in an area covering certain arguably similar trucks while it sought to place the Log Loader in they prior case or MOU 7 in an area listing no Log Loaders or similar equipment is neither material nor relevant. Simply put, there is no language in the parties' labor agreement or MOU 7 which directs or requires a grievance arbitrator to place any new equipment into any area of MOU 7. And contrary to the Union's claims, this Arbitrator finds that there are no express standards or terms in the contract or MOU 7 which directs or requires specific placement of the MTC into any part of MOU 7.

Rather, the language of Article 10(H) is clear and unambiguous -- it requires the City to notify the Union "upon receipt, of a new piece of equipment" and it requires the parties to negotiate "the equipment's appropriate placement in one of the existing categories contained in Memorandum of Understanding #7 . ." As Arbitrator Burns observed,

> Article 10(H) does not require the City to accept the Union's negotiation position. Nor does it require the City and the Union to reach any other agreement during negotiations. Indeed, Article 10(H) does not provide any procedure for resolving an "impasse" in Article 10(H) negotiations.

In these circumstances, the Union's past practice and proper placement evidence and arguments are inadmissible and they have not been considered herein.

The Union has also argued that only where there is no discernable rate for a new piece of equipment does a duty to bargain arise. This argument is specious and must be rejected as Article 10(H) on its face makes no such distinction of the placement -- all new equipment must be negotiated.

In this Arbitrator's view, the result of this Award should be that no further cases will be filed in this area as this Award and Arbitrator Burns' Award should stand for the clear proposition that under no circumstances would a grievance properly lie to place new equipment onto MOU 7. I also specifically find that the City met all of its contractual obligations regarding the mini-trash compactor truck by notifying the Union of its purchase and offering to meet to discuss and then meeting with the Union regarding placement of the MTC onto MOU 7 and reaching an impasse thereon. The Union failed to bring their dispute over MTC pay before an Interest Arbitrator. This Arbitrator would be exceeding her authority and acting in violation of Article 2 were she to place the MTC onto MOU 7.

Based upon the above analysis, I issue the following

AWARD

The City did not violate Article 10 and Memorandum of Understanding #7 and the wage scale provisions of the effective labor agreement when it failed to include the new Mini-Trash Compactor under the Maintenance Worker I classification. The grievance is therefore denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 17th day of August, 2006.

Sharon A. Gallagher, /s/
Sharon A. Gallagher, Arbitrator

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