

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF WAUSAU

and

**CITY OF WAUSAU DEPARTMENT OF PUBLIC WORKS
EMPLOYEES UNION LOCAL 1287, AFSCME, AFL-CIO**

Case 122
No. 66895
MA-13674

(Work Classification Grievance)

Appearances:

John Spiegelhoff, Staff Representative, AFSCME Wisconsin Council 40, AFL-CIO, 1109 East 9th Street, Merrill, WI 54452, on behalf of the Union and Grievants Brandon Ball and Eric Smith.

William P. Nagle, City Attorney, 407 Grant Street, Wausau, WI 54403, on behalf of the City of Wausau.

ARBITRATION AWARD

The City and the Union are Parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union filed a petition with the Wisconsin Employment Relations Commission for arbitration of two grievances concerning the same issue of alleged denial of pay for working in a higher classification for two bargaining unit members, Grievants Brandon Ball and Eric Smith. The Parties stipulated to having the two cases consolidated into one proceeding. From a panel the Parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on August 7, 2007 in Wausau, Wisconsin. No transcript was prepared. The Parties filed written briefs and the record was closed on September 25, 2007.

ISSUES

The Parties did not stipulate to a statement of the issues. The Union states the issues as:

Did the City violate the collective bargaining agreement when it denied higher classification pay to Brandon Ball and Eric Smith on January 2, 2007? If so, what is the appropriate remedy?

The City states the issues as:

Is an Operator entitled to Level 6a pay for directing traffic at a job site?

The Union's statement of the issues is selected as best reflecting the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 – MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

- A. To direct all operations [sic] City government.
- B. To hire, promote, transfer, assign and retain employees in positions with the City;
- C. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- D. To relieve employees from their duties because of lack of work or other legitimate reasons;
- E. To maintain efficiency of City Government operation entrusted to it;
- F. To take whatever action is necessary to comply with State or Federal law;
- G. To introduce new or improved methods or facilities;
- H. To change existing methods or facilities;
- I. To contract out for goods or services. Whenever possible, the Employer shall provide the Union a reasonable opportunity to discuss contemplated subcontracting that would result in the layoff of bargaining unit personnel prior to a final decision being made on such subcontracting.
- J. To determine the methods, means and personnel by which such operations are to be conducted;
- K. To take whatever action is necessary to carry out the functions of the City in situations of emergency.

The Union and the employees agree that they will not attempt to abridge these management rights and the City agrees it will not use these management rights to interfere with rights established under this agreement or for the purpose of undermining the Union or discriminating against any of its members.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this agreement (see Exhibit 'A' for a complete list of these employees) may be processed through the grievance and arbitration procedures contained herein, however, the pendency of any grievance or arbitration shall not interfere with the right of the City to continue to exercise these management rights.

. . .

ARTICLE 33 – HOURS AND OVERTIME

. . .

E. Work in Different Classification: Any employee who performs work in a higher classification for three (3) or more hours daily shall receive the rate of pay for actual hours worked in that classification for that classification. If the employee is performing work in a lower classification, the employee shall receive no lower than the employee's regular rate. This section shall not apply when an assignment to a lower position at a lower rate is necessary to preserve the job of an employee due to the inability of an employee to perform the employee's job due to health or other legitimate reasons.

. . .

APPENDIX A SALARY SCHEDULE HOURLY RATE

ELECTRICAL/DPW

<u>LEVEL</u>	<u>CLASSIFICATION</u>	<u>STEP D</u>			
. . .					
		<u>1/1/07</u>	<u>7/1/07</u>	<u>1/1/08</u>	<u>7/1/08</u>
6a	Traffic Maintainer	\$19.30	\$19.49	\$19.88	\$20.08
6	Equipment Operator III** Parking Facility Coordinator* Sewer Construction Worker II Trades Technician I	\$19.02	\$19.21	\$19.60	\$19.79

. . .

Equipment list for Level 6 6b: Chip spreader (self-propelled); motor graders; backhoe (5/8 c.y. and over); loader-backhoe; dozer (10 ton and over); hydrocrane; end loader (street use); umps (trailer mounted or more than 8 h.p.); street sweeper (3 c.y. hoper); trucks-tandem axle; compressor (100 CFM and over); centerline spraying machine; Bombardier; snowblower (end loader attachment); asphalt paver; steam bailer; asphalt distribution truck; Vacall; roller (3 ton and over); holder; bitumen kettle – (150 gal. and over)

. . .

4	Equipment Operator** I	\$18.01	\$18.19	\$18.56	\$18.74
---	------------------------	---------	---------	---------	---------

Equipment List for Level 4: Trucks-single axle; end loader-yard operations only; roller (less than 3 tons); bitumen kettle (less than 150 gal.); water distribution truck; brush chipper; jack hammer; chi spreader helper; Vacall helper, steam boiler helper; miscellaneous small engine equipment (30 HP or less)

. . .

BACKGROUND AND FACTS

The Grievants were probationary employees in the Equipment Operator I classification for the City of Wausau and normally work first shift for the street department. On January 2, 2007 they worked third shift, 11:00 p.m. to 7:00 a.m. for snow removal operations. Snow removal operations, as opposed to snow plowing, are usually done on a pre-scheduled basis.

The Grievants were each assigned to drive trucks that carried electronic message boards and other items used to direct traffic around snow removal and other operations. The message board flips up and down and can be programmed to display various traffic related messages. This is what used to be called flagging, with flags, signs or poles, to direct traffic around work sites before the use of message boards. The City has two trucks equipped with messages boards. One is a pickup truck; the other is a larger sign truck. Both are vehicles that an Equipment Operator I can operate. The Grievants put the required message on the boards and drove the trucks to the needed locations and routes as directed by the lead person, set out signs and generally directed traffic around the work zone. No employees in the classification of Traffic Maintainer worked that shift with the Grievants. After their eight hour shift they requested to be paid at the rate of Traffic Maintainer, which is a higher classification than Equipment Operator I. The higher pay rate was denied by the City and the Union filed Union grievances over the matter. The grievances were denied by the City and this arbitration followed.

The City has position descriptions for many of its job classifications. The position descriptions are not intended to be a complete list of duties and responsibilities nor to limit or modify rights associated with the supervisory functions of the City. There are duties contained in the position descriptions which some employees in the classification, such as at least one of the Grievants, have not done, or done very rarely. The position description for Equipment Operator I, a Level 4 position, provides in part:

PRIMARY FUNCTION

Responsible for the safe and efficient operation of light to medium automotive equipment including routine servicing and light maintenance of equipment.

**ESSENTIAL JOB FUNCTIONS AND
MAJOR DUTIES AND RESPONSIBILITIES**

- Operation of the following equipment: single axle trucks; end loader – yard operations only; roller (less than three tons); leaf blower; tractor (30 h.p. or less); tar kettle (less than 150 gal.); leaf pusher; floor sweeper; water distribution truck; brush chipper; jack hammer; concrete saw; crack routers; chain saws; pumps (8 h.p. or less).
- Heavy manual labor, generally assigned to lower seniority operators.
- Other duties as assigned.

Several years ago the Parties negotiated a Level 6a pay level for the Traffic Maintainer position due to skills and hazards of the job as usually the first person on a site. The position description for Traffic Maintainer, a Level 6a position, provides in part:

PRIMARY FUNCTION

Responsibilities include painting all street markings, curbs and parking lots as directed and in accordance with local traffic regulations. Work also involves serving as a truck driver for sanding, salting or snowplowing operations during winter months in addition to regular signing duties.

**ESENTIAL JOB FUNCTIONS AND
MAJOR DUTIES AND RESPONSIBILITIES**

- Operate and maintain gasoline powered paint striping machine to mark crosswalks, parking staffs, etc.
- Operate and maintain scotchlite applicator for use in bonding reflective materials to a variety of sign blanks.
- Prepare and install street signs, traffic signs and other permanent markings, including anchoring posts.
- Repair damaged signs.
- Serve as a truck driver for sanding, salting or snowplowing operations during winter months.

Most, if not all, of the employees in the Department of Public Works, including the Grievants, receive in house and off site training in traffic control, flagging, cones and work zone safety, including use of sign trucks and message boards. Not everyone who is trained in traffic control does traffic control duties. It takes between 5 and 30 minutes to program a message board depending on the message and familiarity of the user. Sometimes a person using one of the trucks with message boards has to get out of the truck and also flag traffic in addition to using the message board. Many employees, regardless of classification and including Equipment Operator I's, have been assigned to do this traffic control work from time to time. The supervisors or lead worker directs the traffic control activities of Equipment Operator I's and III's if they are working in the absence of Traffic Maintainers. Employees below the Level 6a classification do not typically do the core job duties of a Traffic Maintainer.

It is not clear from the record how many consecutive hours have been worked doing flagging or driving a sign truck by employees in classifications lower than Traffic Maintainer. No one below Level 6a has been paid at the 6a Level for doing this work.¹ Previous time and duties surveys by the City in 1976 indicate that some full time Level 3 Laborer positions had spent up to 20% of their time flagging for street oiling operations and another up to 50% of his time in winter flagging for snow removal. Another spent 5% of his time setting up and taking down barriers. Those duties were considered by their supervisors as important for the position. Laborer positions over time were no longer filled and employees were put into Equipment Operator I positions over time. Some employees, such as the Grievants, spend approximately 2% of their time on traffic control duties. The two employees in the Traffic Maintainer position can sometimes spend up to 60% of their time setting up traffic routes,

¹ Prior to the creation of Level 6a, the Traffic Maintainers were at Level 6, comparable to an Equipment Operator III position. No one below that level who had done traffic control has been paid at the Traffic Maintainer Level.

work zones, flagging, inputting messages into the electronic signs, and driving the sign trucks. Yet, they may spend 30% to 60% of their time making and placing signs. It is variable. Traffic Maintainers are often assigned to work during third shift snow removal operations doing traffic control. They also do some other assigned work and duties that are not considered Traffic Maintainer work.

Further facts appear as in the discussion.

POSITIONS OF THE PARTIES

The Union

In summary, the Union argues that the essential duties of the Traffic Maintainer position are well established through time and through bargaining history of the position. The job description is incomplete in regards to the essential duties of the Traffic Maintainer. There are other essential duties. A current Traffic Maintainer spends approximately 60% of his time setting up work zones with barricades, flagging traffic, signage in work zones, driving and using the sign truck, and inputting messages into the sign board. These are essential duties to his job and traffic control constitutes a good majority of his time.

The Union also argues that Traffic Maintainers are subject to Article 29 call in provisions. The Traffic Maintainer classification is the first one to be called in for emergency situations or in many snow removal occasions, to set up barricades or use the sign truck. The Union questions if the City believes the duties of diverting traffic from a work zone is a duty shared across classifications, why don't they call in Equipment Operator I's or III's. City actions in call in situations do not support its proposition that traffic control is shared across job classifications.

The Union also argues the bargaining history supports its position. As part of negotiations several years ago the Level 6 Traffic Maintainer position was elevated to Level 6a, higher than Equipment Operator III and other Level 6 classifications. The reason was due to inherent hazards of the job on busy roads and advanced skills necessary to set up a safe work zone for other workers. The Traffic Maintainer position is highly skilled with knowledge and abilities which are compensated at a higher rate than Equipment Operator I or II.

The Union argues that the Grievants worked approximately 8 hours on the night of January 2, 2007. The collective bargaining agreement calls for higher classification pay when an employee works more than three hours in a higher classification. Grievants may put up barricades during the normal course of their duties and on occasion flag traffic, but probably not for more than three hours on any given day. On January 2, 2007 they worked more than

eight hours doing traffic control, setting up barricades, driving the sign truck, flagging traffic, inputting messages into the sign board, and directing traffic. They did a multitude of tasks associated with the job functions of a traffic maintainer. They should receive higher classification pay having performed those activities after three hours.

The Union also argues that the contract is clear and unambiguous. If an employee does work in a higher classification they shall be paid the higher wage. Traffic control is not an essential duty performed by Operator I's. A City argument that Operator I's have done this work in the past and not been paid the higher wage is not established by the City as a past practice. There is no evidence these employees performed traffic control for more than three hours. If so, then they are not entitled to the higher pay. Ambiguity should go against the City in establishing a practice. The Union believes traffic control is an essential duty primary to the Traffic Maintainer position and not an essential duty to an Equipment Operator I position. Past practice cannot vitiate clear contractual language, citing arbitral precedent. If the contract is clear there is no need to consider a practice as binding. The following occurred: 1) the duties for Operator I have been well established through time; 2) the duties for Traffic Maintainer have been well established through time; 3) the Grievants performed duties normally associated with Traffic Maintainer position, and; 4) the collective bargaining agreement is clear – the Grievants are entitled to higher classification pay.

The Union contends the City wishes to pick and choose which Traffic Maintainer duties are subject to higher classification pay. Making or repairing signs and striping lines are essential job duties of a Traffic Maintainer. A City Traffic Maintainer testified traffic control is also an essential part of his job on an every day basis, nearly 60% of his job duties. He is the first employee call in for an accident or snow removal. If the City truly believes that this is a job duty shared across all job classifications, the Union asks why would the City bother to call in any Traffic Maintainer for traffic control. The City does not call other job classifications when traffic control is necessary because they know traffic control is an essential part of the job and they would violate the agreement if they did not call in a Traffic Maintainer. The arbitrator should not allow the City to pick and choose what parts of the Traffic Maintainer job duties are subject to higher classification pay.

The Union further argues that an award for the City muddles job classifications and will lead to further erosion of clear duties defined within classifications. The wage schedule delineates job classifications. Each distinct job classification has a level and wage rate assigned to it which have been collectively bargained for many years. Job duties associated with these positions are well established through passage of time. The City has the authority to change job descriptions associated with the job classifications if they thought the situation warranted it. The City has never broached the subject in negotiations about not paying higher classification pay for traffic control to Level 6 employees or below, or not paying higher classification wages for traffic control duties in a lower classification. The City never took the initiative of changing the job description for Operator I or Operator III and including traffic

control duties in those job descriptions. After a grievance is filed the City maintains that traffic control is a duty shared across classifications. It is clear in the collective bargaining agreement if an Operator I for example used a chip spreader then they would receive higher classification pay. In this example the Operator I operated a piece of equipment normally associated with an Operator III job classification. In the instant dispute an Equipment Operator I operated a sign truck that is a piece of equipment normally operated by the job classification of Traffic Maintainer. This dispute should not be different. The equipment and duties performed by Grievants on January 2, 2007 are normally performed by a Traffic Maintainer and their wage should be paid at a higher level. To deny this could potentially erode job classifications across the bargaining unit.

It is also the argument of the Union that the City has not produced testimony or evidence relating to the duration of employees performing traffic control in the past. The record was devoid of how many hours employees worked when they performed traffic control in the past. It is conceivable they worked less than three hours. These employees typically set up and take down the work zone, which does not take more than three hours on any given day. In the instant dispute the Grievants performed higher classification work for more than three hours and should receive higher classification pay. The Union argues that traffic control is a core duty of the Traffic Maintainer position. Grievant's testimony is that only 2% to 5% of their work duties in any given year is traffic control. A current Traffic Maintainer estimates he spends 60% of his time performing traffic control. Traffic control constitutes more than a majority of his time as a Traffic Maintainer. The Grievants worked January 2, 2007 at night in a moving work zone performing a much higher level of traffic control as a special skill and ability to protect the work crew on the move, which requires greater skill and ability than a stationary work zone. The City believes no special abilities are needed to perform the task. The Union disagrees and has shown otherwise.

The Union contends the instant dispute is factually different from the previous arbitration between the Parties. The other issue was quite simplistic in nature and was changing light bulbs in parking ramps. That work changed job classifications numerous times in contrast to traffic control always being the primary core duty of the Traffic Maintainer position. In the other case the arbitrator noted there is nothing about the job requiring special skills or knowledge. The Union demonstrated the Traffic Maintainer position was elevated to a higher classification with the increase of skills and abilities which included all duties such as traffic control - not just making and repairing signs. The work done by the Grievants on January 2, 2007 had increased in complexity and skill in contrast to the previous award.

The Union argues that the mere fact the City assigned traffic control to Equipment Operator I's and III's in the past does not mean higher classification pay is not warranted. The City attempts to make a broad sweeping statement the Union has somehow acquiesced to a

practice to receive higher classification pay when it comes to traffic maintenance duties. However, this does not take into account the duration of the work, the advanced skill needed to perform the work nor the equipment involved. The Union also argues an award for the Union will not open a Pandora's Box. The City has not shown the frequency of employees working more than three hours performing traffic control similar to the duties Grievants performed January 2, 2007. The work performed coupled with its duration in the instant dispute is probably not the norm. An award for the Union will not bankrupt the City. The City has a safeguard in the agreement whereby the employee must work three hours or more to receive the higher classification.

The City

The City argues, in summary, that flagging and traffic control are job tasks performed by all employees in the department of public works for which no special or premium pay has ever been given. Flagging duties were easily conveyed and understood with no special training required. It was typical that summer help, laborers and low level operators would perform this task. If a higher level of employee performed the task they were still paid their higher level pursuant to contract. In no case were flag people, if lower than Level 6a, ever paid Traffic Maintainer pay or any higher pay than their classification. Flag person work has always been the lowest level of all duties, always the most basic responsibility of all employees and no one has ever been paid "up" for any flagging duties, or "down" beneath their pay level. Technology has made the flag job safer now with message boards on vehicles, but still the same function. There is no specialized skill required for the job. Such duties are provided in the job descriptions such as Grievant's as "other duties as assigned".

The City argues all employees are trained in flag duties and work zone safety. The practice has always been to use all the employees in this work and they all receive training to insure safety for everybody. However, none in Levels 2,3,4,5 or 6 have ever been paid Level 6a pay to do flagging or work zone safety work. The City also argues management right to assign duties. The practice of the Union has been to recognize the management does have the right to assign these duties to anyone in the Union and to employees other than Traffic Maintainers without any increase in pay.

The City contends the two Traffic Maintainers do flag work as well as other non-6a work. Traffic Maintainers do flag duties and do not get paid "down" for this work. The contract does not allow it. Their specialized duties are the construction of signs and painting and striping streets and parking areas. When there is none of this work to do they do flag work. They also drive trucks as their job description reflects. Flagging and truck driving is beneath Level 6a work and they are not paid down pursuant to contract. The City has not temporarily laid them off when there isn't Level 6a work to do, but assigned them work in a

lower level. Traffic Maintainer core duties for which Level 6a money is paid involve work in the sign shop and street painting. These types of things are in their job description as a primary function and essential duty. Flagging and traffic control are duties that they, along with the sixty-nine other employees in the Union, have always performed. Traffic control is not part of the core duties of a Level 6a Traffic Maintainer. The Traffic Maintainers do this work because they have far less core work than other people in other positions. This practice is common within public works departments. Flagging and traffic control – non Traffic Maintainer work - is a big part of what Traffic Maintainers do, and that is not a specialized core duty.

The City argues arbitral authority clearly supports the City's position. In a prior case where the City did not have to pay Electrical Worker II pay to Operator I's or Trade Technicians for changing light bulbs. The mere fact that work is done within a particular classification does not make it the work of that classification in the sense of being an element in arriving at the pay of the classification. There is nothing about the job requiring special skills or knowledge and is basic to work performed in their own classifications. The case is similar here in that flagging and traffic control is not specialized work requiring specialized training and knowledge required of a Traffic Maintainer for times when a Traffic Maintainer is doing core tasks such as making signs or painting streets. There are not specialize skills required of a person doing the work at issue, as there were none in changing light bulbs. In this case the Grievants would have to be making or repairing signs or painting lines for at least three hours. Driving a truck with a message board is not Level 6a work. Even if punching in the arrow direction was 6a work (and it is not), ten seconds of this punching in does not trigger Article 33E for working at least three hours in a specialized, core area of the higher job class.

The City contends flagging and traffic control is garden variety work that every public works employee has always done and always will do. There is nothing technical about the work. Safe place and employee safety is the prime concern whenever any employee is in the right of way. The only reason the two Traffic Maintainers are called first when after hours street work is needed is because when they are not working in the sign shop or painting streets and are not needed to plow snow, they have nothing to do. This is not higher classification work. Traffic control and the safety of employees is an obligation and concern of all 71 public works employees and the department. The Union asserts the novel approach that the work has always been Level 6a work, however because it is usually performed in less than three hours, it has not been compensated as higher classification work. The length of time that a particular job takes has nothing to do with the level of work or pay it requires. Level 3 work is Level 3 work regardless of how much time is spent doing it. The Union offers nothing whatsoever to show that flagging and traffic control was Level 6a work.

The City argues Grievant Smith did not put the request on his time card, someone else did. The City further argues that the job description for the Traffic Maintainer position is not incomplete. The fact that a current Traffic Maintainer spends most of his time setting up work

zones is not indicative of whether or not it is an essential function. The Traffic Maintainers may be misclassified. The work is not a core function of a Level 6a pay. How the position was raised from Level 6 had nothing to do with the job duties.

The City also argues it calls in employees with seniority in mind and the two Traffic Maintainers have relatively high seniority - second and tenth. In order to fill their time traffic control would be the logical duty for them. Police, fire personnel and others set up barricades. The Traffic Maintainers are called in not because they are the only ones trained in traffic control. They are also called in to perform many other functions that may come up. Testimony of inherent hazards was not verified by anybody else. There is no federal, state or local requirement that someone who sets out cones or barricades, drives a sign truck, flags traffic, or inputs messages into a sign board is required to have any special training. The City makes sure all 70 Public Works employees are trained and educated in safety concerns. They work in the streets. To argue a flagger or Traffic Maintainer requires special advance skill for their safety alone is incorrect and foolish. There is no basis to assert that this work was higher classification work. The Union admits that the practice of having all of the employees do traffic control is a long-standing practice. There was no evidence that any of this control work was less than three hours or more than three hours. The hours may not be continuous, but they are there. It is absurd that the Union is asking anyone to believe that a non-Level 6a employee has never performed traffic control for more than three hours during a shift. Article 33 talks about work in a higher classification - it does not set forth what the higher classification work is in every instance. There is no ambiguity. Employees never put in for higher classification pay in the past because they never thought of it as that. The Union has a "what do we have to lose" strategy. This type of work has never been a big issue until now. This is not work in a higher classification.

DISCUSSION

The Grievants were probationary employees in the Equipment Operator I classification at wage Level 4 who each worked an eight hour third shift on January 2, 2007 doing traffic control, primarily by inputting messages into electronic message sign boards and then driving sign board trucks to provide a movable work zone for snow removal operations. They were part of a larger snow removal crew and were under the general direction of a lead worker. They, along with all other department of public works employees, have received instruction and training in traffic control and work zone safety. They had also received instruction and training in the use of the sign boards and sign trucks. After their shift they requested to be paid at the Level 6a wage rate of a Traffic Maintainer position. Their claim, and that of the Union, is that they worked more than three hours that day doing work in a higher classification and Article 33 E of the collective bargaining agreement requires pay for the time worked in the higher classification. The City, in denying their request and grievances, contends that the actual duties they performed, flagging with the sign trucks and traffic control, are not higher classification work. Article 33 E states:

E. Work in Different Classification: Any employee who performs work in a higher classification for three (3) or more hours daily shall receive the rate of pay for actual hours worked in that classification for that classification. If the employee is performing work in a lower classification, the employee shall receive no lower than the employee's regular rate. This section shall not apply when an assignment to a lower position at a lower rate is necessary to preserve the job of an employee due to the inability of an employee to perform the employee's job due to health or other legitimate reasons.

The issues in this case require determining if the duties performed by the Grievants was work in the higher classification. It is an out of class pay dispute.² The Union argues that the work done by the Grievants is part of the core duties and essential functions of the Traffic Maintainer position. The City argues that all employees, regardless of classification, perform those duties and they are the "other duties as assigned" which occurs across many job descriptions, including Equipment Operator I. The Union contends the work performed requires specialized skill in a hazardous situation. The City maintains there is nothing technical about this work and it does not involve the specialized knowledge of the core areas of the higher classification.

The Parties have negotiated wage Levels for various classifications into their collective bargaining agreement. Some of those negotiated Levels contain lists of equipment used in the classification. The lists of equipment are very similar to what is set out in some of the respective position descriptions. The Parties have not negotiated position descriptions into the collective bargaining agreement. The City has developed those. The Union maintains those position descriptions are incomplete. Recognizing that the position descriptions themselves indicate they are not a complete list of specific duties and responsibilities, and the argument of the Union that they are incomplete, the position descriptions do help and shed some light in determining if the work performed by the Greivants are part of the core or essential duties so

² A form of analysis for out of class pay disputes which addresses many of the arguments of the Parties is that stated by Arbitrator Daugherty in WILSON JONES CO., 51 LA 35, 37 (1968):

In all such cases the critical questions are (a) What are the key or core elements of the jobs involved which distinguish one job from the other(s) and justify the wage rate differentials between (among) them agreed to by the parties, and (b) did the aggrieved employee(s) perform actual work that "invaded" said core elements?

Daugherty also addressed the governing considerations when the work of the questioned classifications overlap:

In many such cases there are substantial areas of overlap in the operations specified for two or more jobs . . . But in such case an employee in one job cannot properly be said to have taken over the work in another job until and unless he has been required to perform operations that . . . are key and relatively exclusive to the latter classification.

as to render this work in the higher classification. The position description for Traffic Maintainer contains the following:

PRIMARY FUNCTION

Responsibilities include painting all street markings, curbs and parking lots as directed and in accordance with local traffic regulations. Work also involves serving as a truck driver for sanding, salting or snowplowing operations during winter months in addition to regular signing duties.

ESSENTIAL JOB FUNCTIONS AND MAJOR DUTIES AND RESPONSIBILITIES

- Operate and maintain gasoline powered paint striping machine to mark crosswalks, parking staffs, etc.
- Operate and maintain scotchlite applicator for use in bonding reflective materials to a variety of sign blanks.
- Prepare and install street signs, traffic signs and other permanent markings, including anchoring posts.
- Repair damaged signs.
- Serve as a truck driver for sanding, salting or snowplowing operations during winter months.

In this case the Grievants were not painting street markings. They were not drivers for sanding, salting or snowplowing. They did not operate paint striping machines or a scotchlite applicator or repair and install street signs, traffic signs and other permanent markings. They did not repair damaged signs. They did not perform any of the primary, essential or “core” duties listed in the position description. The Traffic Maintainers also work in the sign shop and develop traffic routes. The Grievants did not work in the sign shop and did not develop traffic routes, as opposed to traffic control around and through the movable snow removal work zones. Other than the contested traffic control work of January 2, 2007, there is nothing in the position description itself or other duties as testified to by a current Traffic Maintainer that the Greivants did that night. The Traffic Maintainer testified he spends up to 60% of his time doing traffic control duties. That begs the question as to whether these are core, primary and essential job functions making this higher level work. It is difficult to understand why these duties would not be listed as a primary or essential job function, being sometimes up to 60% of a Traffic Maintainers work, if they are indeed a core duty of that position. The position description and duties other than traffic control indicate they are not.

The position description for an Equipment Operator I also speaks to its primary and essential, or core, duties. Again, although not exhaustive, it provides:

PRIMARY FUNCTION

Responsible for the safe and efficient operation of light to medium automotive equipment including routine servicing and light maintenance of equipment.

**ESSENTIAL JOB FUNCTIONS AND
MAJOR DUTIES AND RESPONSIBILITIES**

- Operation of the following equipment: single axle trucks; end loader – yard operations only; roller (less than three tons); leaf blower; tractor (30 h.p. or less); tar kettle (less than 150 gal.); leaf pusher; floor sweeper; water distribution truck; brush chipper; jack hammer; concrete saw; crack routers; chain saws; pumps (8 h.p. or less).
- Heavy manual labor, generally assigned to lower seniority operators.
- Other duties as assigned.

Here, the Grievants operated a sign truck and pickup truck which each had a message board on it. They were licensed and qualified to operate those vehicles within the classification of Equipment Operator I. The safe and efficient operation of light to medium automotive equipment is a primary function of the classification. The sign truck, one of which is a pickup truck, appears to be that type of equipment. And besides the operation of specific equipment and doing heavy manual labor, an Equipment Operator I essential function is to perform other duties as assigned. Operating a sign truck appears to fit within the position description. This indicates it is not within the core, primary or essential duty of a Traffic Maintainer position. The use of the sign trucks also appears to be the type of equipment within the equipment list in the collective bargaining agreement Appendix for Equipment Operator I. But, that does not end the inquiry.

The Parties differ sharply on whether the work performed requires the specialized skill needed for the higher classification. In this regard they both refer to a previous grievance arbitration concerning Article 33 E, CITY OF WAUSAU, Case 110, No. 644777, MA-13008 (Nielsen, Dec. 2005). In that case a person in a lower classification was denied a higher classification rate for changing specialized light bulbs in City parking ramps. The City points out that the instant case is similar in that flagging and traffic control is not specialized work requiring the specialized training and knowledge required of a Traffic Maintainer for those times when that person is doing core tasks such as making signs or painting streets. There is

merit in the City's argument. This is seen in the circumstances of the training all public works department employees receive. While all the employees are trained in traffic control and work zone safety, not all are trained in the other primary and essential functions of the Traffic Maintainer, such as street marking with the use of specialized equipment and sign making. While many DPW employees do traffic control, based on this record, few, if any, other than Traffic Maintainers, paint street markings and make and place permanent signs. Most, if not all, of the DPW employees are trained to a more general level of traffic control and work zone safety, which militates against this being specialized training for special skills and knowledge.

The Union correctly points out that the previous award concerned a situation where the duties of changing the light bulbs was one that had historically been done by several other classifications, and contrasts that to this case arguing traffic control has always been the primary core duty of the Traffic Maintainer position. The Union points to the testimony of bargaining history when the position was raised to Level 6a commensurate with the increase of skills and abilities which included all duties such as traffic control. The Union distinguished this from the previous arbitration award, and points out that the duties of traffic control have changed from simple hand flagging to the use of electronic message boards on trucks in moving work zones. The Union is correct in that the previous award did not deal with any increase in skills. However, the record is clear here that many employees do traffic control work, not just one classification. And they have for some time. The Union's argument on bargaining history being tied to skills in traffic control goes too far. All DPW employees are trained in traffic control and work zone safety but that has not resulted in an increase in the level of their classifications. It is true that there is training in these particular duties, but again, it is training given to the department employees generally. Although there may be some additional skill in inputting messages into the electronic message board, the record shows two things. It takes relatively little more than showing someone how to do this to learn the skill, and it takes at most thirty minutes to input a message – usually less. This part of the job is short in time and there is no indication in the record that any significant time, let alone three hours, was spent by either Grievant inputting messages into the sign boards. It is also instructive to note that the lead worker or supervisor gave direction to Equipment Operator I's when doing traffic control. The hazards cited by the Union in being the first to set up the safety zone are no doubt real. But they would be similar to initially setting up any barricade or safety zone that is routinely done by employees in the lower classifications. There is risk and danger to most of the employees in that they are engaged in street work and other work often around heavy equipment. These matters also militate against the argument that they are exercising an increased level of skill that is core to the higher classification.

Additionally, although the current Traffic Maintainers spend up to 60% of their time doing traffic control, the amount of time spent on that part of the job does not necessarily make it a core function or primary duty of a Traffic Maintainer. As the previous arbitration award stated, and as noted by the City, the fact that work is done within a particular classification does not make it the work of that classification in the sense of being an element in arriving at the pay of the classification. Here, traffic control is a function of a Traffic Maintainer position

and may take up a majority of time. But from the overall position description, as noted above, it does not appear to be a primary function as opposed to a function of lesser importance, even though it may take more time.

The City argues that past practice supports its position because lower classifications have always done traffic control without the higher classification pay. The Union argues that the record does not show any instances where the work was performed for more than three hours so as to trigger Article 33 E. The past practice arguments have some bearing here, but not in interpreting Article 33 E. If Article 33 E were ambiguous then any binding past practice would be helpful in interpreting it. But Article 33 E is not ambiguous. Its meaning is clear. If work in a higher classification is performed for three hours then all such work is paid at the higher rate. That is clear and unambiguous. The parties do not argue different interpretations. The dispute is not about the agreement language, it is about the nature of the underlying job duties. Past practice is of no aid in interpreting the language, but it does help in filling gaps and understanding matters not specifically included in the written agreement. The Parties have negotiated wage Levels for various classifications, including some equipment lists for various Levels. But they have not negotiated all the duties, core or otherwise, or the position descriptions themselves.

In order to be binding, a past practice must be, among other things, mutual and recognized by the parties as binding. The record here is not very well developed on the exact nature of the practice of assigning traffic control work to employees below Level 6a. It is clear that this work has been frequently assigned to the lower classifications without objection by the Union. It is less clear if this has been viewed by the Union as a binding practice and if so what the scope is. The Union argues a lack of evidence that any such previous assignments were for more than three hours. But the evidence does imply that such work has occurred for more than three hours at a time. The position classification questionnaires of the predecessors to Operator I position, the Laborer position, indicates 20% of time for flagging oiling operations in one case and 50% of the time flagging for snow removal in another, during various periods or seasons, were spent in traffic control and that was considered an important duty of the position. This was based on a 40 hour week. It is difficult to see a scenario where less than three hours in some days would have been worked in these duties, at least on occasion, during any given week. If there is any practice or custom of the Parties here it would support the City's position.

The Parties disagree on the implications of usually having the Traffic Maintainers called in to do traffic control before lower classifications. The Union argues this shows that traffic control is a core function of the higher classification. But, as the City points out, the two incumbent Traffic Maintainers have relatively high seniority and would be expected to be called in more frequently. At times traffic control can take up to 60% of their time. That leaves 40% for other duties. Snow removal is usually scheduled work. As the City points out, if large amounts of their time is not spent on their other duties that is why they are doing the other traffic control work.

It is not unusual for job duties to be found among several job classifications.³ The challenge is to determine which of those duties are core, primary or essential to a particular position, if any. Besides the factors noted above, here, the physical demands of inputting the electronic messages and driving the sign trucks is not dissimilar to the Equipment Operator I duty to operate light to medium automotive equipment and use a number of other smaller pieces of mechanical equipment. This is not a large degree of change, if any, from other Equipment Operator I work. This is in contrast to a Traffic Maintainer needing to operate larger equipment for sanding, salting and snowplowing and specific equipment for marking streets and making signs. The risks encountered by performing traffic control is a risk of being on the streets during, as is the case here, snow removal operations done by employees as well as Traffic Maintainers. It is not an extraordinary event for an employee below the Level 6a classification to do this work. The only separate work area would be where the signs are made, and that is not implicated here. The function of traffic control, though improved by the use of electronic message boards as opposed to hand flagging, is still a function of traffic control and is not a new function. The Grievants were both relatively new employees with not a lot of training and instruction in traffic control and message boards, and do not bring considerable prior experience and skill to the job. This is important, but not complex work that is done in a short amount of time. Safety zones were set up in view of training and direction given by the lead worker. Once the safety zone is set up, even though movable, there does not appear to be a great deal of personal skill needed to maintain the safety zone. Practically all of these factors⁴, consistent with the factors discussed above, weigh in favor of the City position.

The Parties make some additional arguments as to the ramifications, financial and otherwise, of an award in favor of the other. Those may be practical implications but they are beyond the scope of deciding whether these particular traffic control duties at issue here are core, primary or essential duties of a Traffic Maintainer performed for three or more hours. And there is no indication here that the Grievants were assigned the duties to simply avoid paying employees in a higher wage Level or to avoid paying overtime to any other employee.

On the basis of the foregoing and the record as a whole, I am not persuaded that the traffic control duties performed by the Grievants on January 2, 2007 were core, primary or essential duties of a Traffic Maintainer Level 6a position that were performed for three or

³ See, e.g. .Elkouri & Elkouri, How Arbitration Works, (6th Ed.) pp. 697-704. See also, ALASKA DEPT. OF TRANSPORTATION, 78 LA 999 (Tilbury, 1982); HANNA MINING CO., 73 LA 123 (Axon, 1979).

⁴ Many of these factors are sometimes referred to in analyzing issues such as the one in this case. See, e.g. CITY OF KAUKAUNA, Case 86, No. 52320, MA-8917 (Mawhinney, August, 1995).

more hours so as to require higher classification pay for that work. The City did not violate the collective bargaining agreement when it denied higher classification pay to the Grievants for January 2, 2007. Accordingly, I issue the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 2nd day of January, 2008.

Paul Gordon /s/

Paul Gordon, Arbitrator