

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUKESHA WATER UTILITY EMPLOYEES' UNION, LOCAL 3938,
OF THE AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

WAUKESHA WATER UTILITY

Case 12
No. 66940
MA-13695

Appearances:

John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044316, Racine Wisconsin 53404-7006, for Waukesha Water Utility Employees' Union, Local 3938 of the American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Joel S. Aziere, Davis & Kuelthau, S.C., Attorneys at Law, 300 North Corporate Drive, Suite 150, Brookfield, Wisconsin 53045, for the Waukesha Water Utility, referred to below as the Utility or as the Employer.

ARBITRATION AWARD

The Union and the Utility 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, as Arbitrator to resolve Grievance No. 2006-001, filed on behalf of "Local 3938." On August 30, 2007, hearing was held in Waukesha, Wisconsin. Jacqueline Rupnow and Cheri Koble filed a transcript of the hearing on September 18, 2007. The parties filed briefs and reply briefs by December 4, 2007.

ISSUES

The parties did not stipulate the issues for decision. The Union states the issues thus:

Did the Utility violate the collective bargaining agreement when it assigned duties, historically performed by members of the bargaining unit, to supervisory, managerial, executive or confidential employees for a six-week period from approximately November 1, 2006 through December 13, 2006?

If so, what is the appropriate remedy?

The Utility states the issue thus:

Whether the Utility violated the terms of the collective bargaining agreement in the assignment of Karen Staats' duties during her leave of absence in November of 2006.

I view the record to pose the following issues:

Did the Utility violate the collective bargaining agreement by its assignment of Karen Staats' duties during her leave of absence from approximately November 1, 2006 through December 13, 2006?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

. . .

1. Bargaining Unit. The Employer recognizes the Union as the sole and exclusive bargaining representative for all regular employees of the Waukesha Water Utility excluding supervisory, managerial, executive, craft, confidential and professional employees . . .

2. Temporary Employees. Temporary, casual and seasonal employees excluded from the bargaining unit shall not perform bargaining unit work or jobs historically performed by bargaining unit employees except to fill in for employees(s) on a leave of absence or during emergencies including peak work loads and special studies.

ARTICLE II – MANAGEMENT RIGHTS

1. The Employer has all management rights it possesses by law except as modified by this Agreement.

2. Management rights are prerogatives and functions which encompass those aspects of Utility operations which do not require discussion with or concurrence by the Union or rights reserved to management which are not subject to collective bargaining.

3. Except as modified by this Agreement, it is agreed that the rights, functions and authority to manage all operations and functions of the Waukesha Water Utility are vested in management and include, but are not limited to, the following:

. . .

C. To . . . assign . . . employees.

. . .

K. To determine the methods, means and personnel by which Utility operations are to be conducted.

. . .

M. To exercise discretion in the . . . assignment of personnel and the technology of work performance.

ARTICLE III – SENIORITY

1. Seniority Date. An employee's seniority shall commence upon the date and hour of last hire with the Utility. . . .

2. Definition. Seniority shall be defined as the net credited continuous, full-time equivalency service of the employee. . . .

7. Seniority List. A seniority roster of employees in the bargaining unit shall be posted on the Employer bulletin boards. The seniority roster shall list the employee's name, date of last hire, seniority date and classification. . . .

ARTICLE IV – DUES DEDUCTION – FAIR SHARE AGREEMENT

1. Representation. The Union, as the exclusive representative of all employees in the bargaining unit . . .

APPENDIX B 2006 WAGE SCHEDULE (+3.00%)

. . .

Position . . .

Operations Support Person . . .

BACKGROUND

The form initiating Grievance No. 2006-001 was filed on November 17, 2006 (references to dates are to 2006, unless otherwise noted). The form alleges, "recognized union bargaining unit position duties distributed to three non union employees during medical leave of Ms. Karen Staats". Staats works for the Utility as an Operations Support Person, and is a member of the bargaining unit.

Staats took a medical leave for knee replacement surgery and the necessary recuperation from November 1 through December 12. She had knee replacement surgery in March on her other knee. That surgery and recuperation necessitated a medical leave of absence for roughly twelve weeks, from March into May. Peggy Steeno works for the Utility as its Administrative Services Manager. This is a supervisory position, not included in the bargaining unit. Steeno is Staats' immediate supervisor.

Prior to the March and the November leaves of absence, Staats and Steeno discussed how Staats' duties would be covered during her leave. Prior to each absence, Staats issued an e-mail detailing the allocation of duties resulting from these discussions. She issued the e-mail concerning the first leave on March 7 and concerning the second on October 31. The two e-mails are the same for all practical purposes. The October 31 e-mail reads thus:

In my absence the following job(s) duties will be distributed to the person(s) listed below, please see them or see Peggy for any other questions:

Lynn: daily job sheets and time sheets
Peggy: Purchase Orders/Packing Slips
Lee: Job set ups and water applications
Lori: Hydrants in and outs

There will be folders on my desk labeled for:

- *Blank purchase orders
- *Packing Slips
- *Job Set up forms completed work
- *Daily job sheets

For emergency inventory parts Dan Hyland or Jim Brown will be in charge of ordering. My contact person is Peggy Steeno.

The reference to "Lynn" is to Lynn Nelson, the Utility's Human Resource Assistant. Nelson's position is not in the bargaining unit. The reference to "Peggy" is to Peggy Steeno. The reference to "Lee" is to Lee Hintz. Hintz is the Utility's Plant Accounting Analyst. His position is in the bargaining unit. The reference to "Lori" is to Lori Sweet, who is the Utility's Executive Administrative Assistant. Sweet's position is not in the bargaining unit.

There is no dispute either that the duties performed during the two leaves of absence by Nelson, Steeno and Sweet are duties historically performed by Staats or that those duties fall within Staats' position description. It is not disputed that Utility creates position descriptions without bargaining their content with the Union.

Under the most recent labor agreement, the parties agreed to discuss, at quarterly meetings, issues of joint concern to Utility management and to the Union. The discussions demand the presence of the Utility's General Manager, Dan Duchniak, as well as Union representatives. On March 15, the parties conducted a quarterly meeting. Nelson's notes from that meeting detail that the parties discussed the cross training of unit employees and Union concerns "that the workforce is dwindling". The parties addressed the assignment of work during Staats' leave of absence. Nelson's notes summarize the discussions thus:

- ✓ In Karen's absence, Lynn, Lee, and Peggy were assigned some of Karen's duties. This would have been an ideal time to cross-train other admin staff on her duties, such as Purchase Orders and Packing Slips that Peggy is taking her time to do herself. Was disappointed that staff wasn't assigned more of Karen's backup.

Dan said he would confirm, but he assumes Peggy is handling . . . it because there wasn't much time to train staff before Karen left on leave. He also said it is also a good way for the manager to learn the process, too. The Union hoped that maybe after Peggy has learned the process, she may feel comfortable letting staff do some of it.

It is undisputed that the Union did not formally file a grievance or a demand to bargain regarding the assignment of duties noted in the March 7 e-mail.

In a memo to Duchniak dated November 3, Union representatives stated,

The union has received notice from Ms. Karen Staats . . . informing that she will be out of work beginning November 1, 2006 until approximately 12/13/06, due to surgery and her recuperation period.

We look forward to discussing and working with management to implement a successful plan to distribute the duties she performs as a represented employee to other represented employees, with the goal being a smooth transition of quality work performed in a timely manner.

Past discussions regarding cross training are of particular interest to the union. . . .

Please advise, at your earliest convenience, when a meeting date may be arranged.

Duchniak responded in a memo dated November 8, which noted that the Utility was following the same duty assignments in November as it had in March; that “the distribution of Karen’s work is contractually supported by Article II”; and that he would discuss the matter with the Union at the quarterly meeting set for November 21. This response prompted the filing of Grievance No. 2006-001.

The parties’ concern with whether the Utility’s right to assign is limited by bargaining unit work dates back some time. From the Union’s perspective, the governing concern is established in a memo from then incumbent City Administrator James Payne, to “All Department Directors” dated April 12, 2001. The memo states:

Nevertheless, if there is work that can be considered to be within that body of work defined as union work, then it should be preserved for union members. Not only should that make sense to the union, but it should also make sense to the employer who is compensating people based on their job responsibility.

The Utility is governed by a Water Commission, which the Mayor, one alderperson and three citizen members.

From the City’s perspective, the governing concern is better traced to the collective bargaining from the fall of 2002. The Union proposed the following amendment to the management rights clause:

The employer acknowledges the right of the Local to all work, duties, assignments, and functions as performed by members at the time of execution of this Agreement or as assigned to members at any time that this Agreement is in force and effect.

The Union ultimately dropped this proposal.

Union concern with bargaining unit work has prompted grievances other than Grievance 2006-001. It filed three grievances under the 2003-05 labor agreement. The Union filed the grievances on May 18, June 21 and October 12 of 2005. The first two prompted a settlement agreement dated December 15, 2005. That agreement states:

1. . . . The parties to this agreement desire to reach a final and binding resolution of grievances over bargaining unit work filed May 18, 2005 and June 21, 2005.
2. The Union agrees to withdraw these grievances with prejudice.
3. The Grievance Withdrawal Agreement shall not be construed as an admission or waiver of rights by either party.
4. This Grievance Withdrawal Agreement and the facts surrounding the grievances shall have no precedential value between the parties and may not be used or referenced by either party in connection with any subsequent grievance or contract interpretation issue. . . .

The October 12, 2005 grievance concerned the Utility's assignment of the writing of a portion of its procedures manual concerning the Plant Accounting Analyst. The grievance form alleges that rather than having the incumbent in that position, a unit employee, write that portion of the manual, as was done with other positions, the Utility improperly assigned the duty to a non-unit employee. The grievance seeks the "Return of work to bargaining unit." On October 31, 2005, the parties commenced bargaining for a successor to the 2003-05 agreement. The Union's initial proposal did not contain any proposal to define bargaining unit work or to limit the Utility's right to assign work. The parties conducted the Step 2 meeting on the October 12, 2005 grievance on November 23, 2005. The Utility denied the grievance at that step. The Union declined to arbitrate it. At no point in the collective bargaining process for a successor to the 2003-05 agreement did the Union make a proposal to define bargaining unit work or to limit the Utility's right to assign work.

The balance of the background is best set forth as an overview of witness testimony.

Donna Aschenbrenner

Aschenbrenner is the Utility's Accounting Assistant. She is a member of the unit and serves as the Union's Treasurer. Aschenbrenner confirmed the Union's concern with protecting the work performed by Staats, and noted its specific concern with non-unit employees completing daily job sheets, daily time sheets, purchase orders and packing slips. These duties fall within Staats' job description and within a job study conducted cooperatively by the Utility and the Union. She noted that Nelson had prepared roughly thirty purchase orders during Staats' second medical leave of absence. Sweet did not have to perform any of the duties that the October 31 e-mail identified as her responsibility. The Union did not grieve the Utility's assignment of Staats' duties regarding the first leave of absence because the Union understood from comments made by Duchniak at the quarterly meeting in March that the assignment of duties would be a one-time only occurrence.

Peggy Steeno

Steenno noted that her discussion with Staats prior to each medical leave of absence produced "the most logical people functionally who would have the knowledge of duties and be able to perform them most efficiently in her absence" (Transcript at 55). The administrative office of the Utility employs ten people and is too small to permit rigid separation of job functions. In fact, the Utility has a long history of unit and non-unit employees covering each other's duties as needed. Hintz is the backup for Nelson's duties regarding payroll calculations. Sweet often handles customer service duties when unit employees are unavailable or too busy. Nelson and Staats routinely back each other up regarding employee time sheets, and management personnel assist in inventory duties which are typically done by unit employees. Hintz has approved payrolls when Steeno is unavailable to do so. Throughout her eight year tenure at the Utility, this flexible approach has characterized work flow in the Utility office. The parties have never, during bargaining, attempted to define bargaining unit work. It would, in any event be impossible.

Lynn Nelson

Nelson could not recall Duchniak ever implying to the Union that the assignment of Staats' duties during her March leave of absence would be a one-time event. At the Step 2 meeting on Grievance No. 2006-001, the Utility raised a view that the Union's failure to grieve the assignment of duties for Staats' first leave of absence impacted its grievance on the second. Union representatives argued that Duchniak led them to believe the duty assignment would be a one-time event; that the leave of absence did not provide a good opportunity for cross training; and that problems with Utility software made it impossible to spread the work throughout the unit. In fact, Utility issues with software occurred in May of 2005 and in July. Nelson sees job overlap in the Utility office, specifically regarding Hintz' backup of her duties and regarding her backup of unit employees' customer service duties.

Dan Duchniak

Duchniak sees the Utility's right to assign as unfettered. The parties have not limited it by defining bargaining unit work, which is, in any event, indefinable. At no time did he indicate to the Union that the Utility regarded the assignment of duties during Staats' first leave as a one-time event. He did note at a quarterly meeting that he thought it a good idea for Steeno to become familiar with Staats' duties and that the leave did not present a good opportunity for cross-training. Utility software issues never coincided with Staats' absences and he never asserted they did.

Further facts will be set forth in the **DISCUSSION** section.

THE PARTIES' POSITIONS

The Union's Brief

The Union contends, after a review of the evidence, that it never waived its right to challenge the assignment of bargaining unit work. No Union proposal regarding the management rights clause produced any modification of the language governing this grievance and thus cannot support any finding of waiver. Nor is there evidence to warrant finding any Union waiver of the grievance during a past reassignment of Staats' duties. At best, the evidence shows the Union did not grieve the issue due to management representations that it hoped to explore the possibility of cross training unit employees and the performance of Staats' duties by managerial employees would assist the effort. That no cross training occurred cannot be held against the Union. The remaining asserted bases for a waiver are unpersuasive. Use of an exempt employee to prepare a procedures manual in 2005 has no bearing on this dispute and the withdrawal of two grievances in 2005 shows no more than a non-precedential agreement between the parties.

Arbitral precedent establishes that the defense of bargaining unit work is central to a collective bargaining relationship, whether or not the labor agreement specifically defines unit work. Articles I and IV of the agreement establish the Union's status as exclusive collective bargaining representative for the unit, and exclude members of management. Article III of the agreement recognizes seniority only for unit employees, not for managerial employees. The wage appendix specifically incorporates Staats' position into the unit. These provisions codify the job security interests recognized in arbitral precedent. Article 1, Section 2 specifically focuses these general concerns onto the grievance. That section allows certain non-unit employees to perform work historically performed by a unit employee. The absence of any mention of managerial employees is crucial. The limited exception "must be seen for just that – an exclusion – and conversely, a prohibition on the use of managerial . . . or other excluded classes to perform work historically performed by members of the bargaining unit."

Examination of Staats' job description establishes that Nelson and Steeno performed work within the scope of Staats' normal duties, including daily job sheets, purchase orders and packing slips. Examination of the actual managerial time involved in performing these duties establishes that the work "is far beyond any claim that it was *de minimis*." Examination of a memorandum issued by the City Administrator establishes that the preservation of unit work is as significant for the Employer as for the Union. As the remedy appropriate to the Utility's violation of the agreement, the Union seeks that the grievance be sustained; that the unit work at issue here be distributed to unit employees; that any affected employee be made "whole for lost wages and benefits"; and that the Utility be ordered to cease and desist from the assignment of bargaining unit work to anyone other than a bargaining unit employee.

The City's Brief

After an extensive review of the evidence, the Utility contends that the labor agreement does not restrict its ability to assign work. The agreement neither defines bargaining unit work nor creates any provision "specifying duties traditionally performed by bargaining unit members or duties to which bargaining unit employees are entitled." Beyond this, there is no agreement provision to limit "the Utility's ability to assign work as it sees fit." Article II, in fact, gives this authority to the Utility. Article I, Section 2 limits the Utility's ability to assign "work or jobs historically performed by bargaining unit employees" in certain circumstances, which do not apply to this grievance.

Staats took another medical leave of absence in March. The Utility assigned her duties precisely then as now. The Union filed no grievance, effectively waiving any right to claim a contract violation in the present case. Arbitral precedent confirms this waiver. Detailed examination of the Union's arguments against the testimony it offered manifests that the Union has not consistently challenged the use of non-unit employees to cover Staats' duties even in this case. At Step 2 of the processing of this grievance, the Union offered a series of reasons for failing to challenge the March assignment of Staats' duties. None withstand scrutiny. The Union's failure to grieve the March assignment of duties, coupled with its failure to request bargaining over the assignment must warrant a waiver of the matters asserted in the present grievance.

Beyond this, the Union processed three grievances challenging Utility assignment of work during collective bargaining for a 2006-08 agreement. The Union made no proposal regarding the subject matter of the grievances, thus waiving its right to grieve the second reassignment of Staats' duties. Arbitral precedent confirms finding such a waiver. During bargaining for the 2003-05 labor agreement, the Union proposed to restrict "the assignment of duties traditionally performed by bargaining unit employees". However, it dropped this proposal. This confirms a waiver of the result the Union seeks in this grievance.

Even if no waiver of the grievance exists, the parties "have a long and well established past practice of bargaining unit and non-bargaining unit employees performing the same duties and/or covering the duties of one another." This practice extends back for decades. The Union produced no rebuttal evidence because there is none. Thus, past practice confirms that the Utility has the unfettered right to assign this type of duties to any regular employee.

Even if the grievance had merit, "there is no remedy available" for it. No unit employee lost wages or hours. The parties' practice confirms that the Utility requires normal duties to be accomplished during normal work hours. The Utility concludes that "the Union's grievance is completely without merit and must be dismissed in its entirety."

The Union's Reply Brief

The Union notes that the bulk of the argument focuses on waiver. The Utility's failure to raise the issue of waiver until the hearing highlights that "no waiver exists." The 2002 bargaining proposals address only the management rights clause, not the provisions at issue here. The agreement is silent on the authority the Utility asserts, which is to substitute non-unit managerial employees for work traditionally done by the unit employees. The three grievances withdrawn by the Union were withdrawn "on a non-precedential basis", thus precluding their use as a basis for waiver. However the Utility chooses to characterize the testimony regarding Staats' March absence, the fact remains that the parties discussed the reasons for the absence and for having non-unit personnel perform her work. This fact precludes finding a waiver since the evidence does not show the Union voluntarily gave up any right to challenge "the ongoing use of excluded management personnel forever."

The management rights clause cannot be read as broadly as the Utility asserts. Reference to "personnel" in the labor agreement connotes unit employees, not anyone the Utility chooses to treat as "personnel." Contrary to the Utility's assertion, the agreement does not authorize the use of non-unit personnel to perform unit work, except in a narrow exception limited to "temporary, casual and seasonal employees." The Union has shown actual harm from the Utility's acts. The "sixteen hours" of duties normally performed by Staats that were performed by Steeno and Nelson "add up to real dollars." Beyond that, the grievance could, consistent with arbitral precedent, be remedied by a cease and desist order. The Union concludes its argument on remedy thus, "we ask for a ruling that sustains our grievance by distributing the union work to union members, distributes the monetary value of the lost earnings potential to the bargaining unit, and directs the utility to cease and desist from assigning bargaining unit work to managerial . . . employees."

The Utility's Reply Brief

The Union's "reliance on Elkouri to support its argument that the Utility cannot assign work to members outside of the bargaining unit is misplaced and fails to reveal the entire content of the section cited". The management rights clause at issue here permits the Employer to determine the "personnel" by which its operations are conducted. Union reference to Article 1, Section 2 affords the Union no more support. Arbitral precedent supports construing that provision narrowly, thus restricting it to the specific classes of non-unit employees it refers to. Beyond this, Article II, Section 3 is written to broadly grant the Utility any right not otherwise limited by the agreement. In any event, the subsections of Article II, Section 3 specifically grant the Utility the broad, unilateral assignment rights that warrant denial of the grievance.

Beyond this, the Union "misapplies, and appears to misunderstand the legal doctrine of *ejusdem generis*." The U.S. Supreme Court "has cautioned against the misapplication of the doctrine", and analysis of its reasoning clarifies why the Union has mistakenly applied the doctrine. Article I, Section 2 is not ambiguous and this cautions against the use *ejusdem generis* in this grievance. Beyond this, the Union improperly uses the doctrine to "alter and expand the purpose of Article I, Section 2." That purpose "is to prevent the Utility from replacing bargaining unit employees with temporary, casual, and/or seasonal employees or removing work from the bargaining unit and giving it to temporary, casual, and/or seasonal employees, except in specifically identified circumstances." It has no proper bearing on the use of non-unit managerial employees.

Repeated reference by the Union to "bargaining unit work" or to "work historically performed by the bargaining unit" cannot obscure that the agreement does not define either or grant them any basis that could govern the grievance. The evidence establishes that the Utility "has sole and exclusive control over the creation of job descriptions and job duties." There is, then, no proven basis for either of the references the Union creates to support its requested remedy. It follows that "the Union's grievance is completely without merit and must be dismissed in its entirety."

DISCUSSION

My statement of the issues draws from each party's. Each states the issue broadly, because the dispute regarding "bargaining unit work" ranges across a number of agreement provisions. The Employer's statement does not include a potential remedial issue, which I view as an oversight. My issue tracks the Union's inclusion of detail regarding the leave, but tracks the Employer's by not presuming as fact whether the work, in Staats' absence, was historically performed by unit members.

The parties' arguments focus to a large extent on waiver issues. I find this approach less persuasive than taking them as arguments on the merits. Viewed on the merits, the issue is less whether either party abandoned any position asserted here than whether any of those positions establishes a contract violation.

My view of the merits of the grievance reflects that unlike the Union's statement of the issue, I do not believe the evidence shows that the work done during Staats' second leave "was historically performed by unit members." In my view, the failure of proof on this point makes it impossible to find a contract violation.

Although the Union cites a number of agreement provisions, the force of its arguments focuses on Article I, Section 2 read together with Article II, Section 3. The former provision protects work "historically performed by bargaining unit employees" from being lost to non-unit temporary, casual or seasonal employees. The latter provision demands that the Utility exercise its management rights without undermining other agreement provisions.

The record establishes that Staats has historically performed the completion of daily job sheets, daily time sheets, purchase orders and packing slips that form the core of the Union's concerns in the grievance. Her position description confirms this as does the WMS study. The issue is not, however, whether these duties fall within the normal scope of her position, but whether the Utility was constrained from assigning those duties to any non-unit employee during her second medical leave of absence. The Union's case breaks down on this point factually and contractually.

Factually, the evidence shows that there is overlap in the performance of duties within the Utility office and that this overlap spans unit and non-unit employees. Hintz picked up some of Staats' duties in the same fashion that he serves as a backup to Nelson and to Steeno regarding certain of their duties. This overlap spans Steeno's and Nelson's tenure at the Utility. Steeno's and Staats' discussions regarding the distribution of duties for her first medical leave bears on this point. Those discussions tailored the coverage of her absence to a procedure resulting in minimal disruption to the normal flow of work in the Utility office. Coverage for the second absence tracked coverage for the first. Union concerns with this coverage, voiced at the March quarterly meeting, are instructive here. Its concern for cross training and its expression of disappointment that the duties were not spread more widely across unit members highlights that the coverage was not a violation of understood assignment practices, but an ill-advised policy choice by the Utility. This confirms that the assignment of work within the Utility office to cover Staats' absence has not historically been restricted to assignment among unit members. This cross unit overlap of duties dates back for at least eight years. It is not necessary to find this constitutes a binding past practice to note that the assignment restriction the grievance seeks has not characterized past Utility job assignments. This points the analysis to whether there is a contractual basis to ground the assignment restriction the grievance seeks.

There is no demonstrated contractual basis to vest Staats' duties, during her absence, in the bargaining unit. The agreement does not define bargaining unit work. Articles I and IV confirm the Union's status as exclusive bargaining representative for the unit, but neither specifically addresses the coverage of the duties of a unit employee during a medical leave of absence. The seniority provision, as well as the wage appendix, establishes some of the conditions of Staats' employment, but there is no dispute that the parties expected Staats to return to work and that the coverage of her duties was temporary.

This leaves Article I, Section 2, read with Article II, Section 3 to ground the Union's arguments. Those provisions can not, however, be stretched as far as the Union attempts. Article I, Section 2, specifically governs the use of temporary, casual and seasonal employees and contains no reference to the assignment of work. Its express purpose is to shield "work or jobs historically performed by bargaining unit employees" from permanent erosion by Employer use of non-unit temporary, casual or seasonal employees. The Union's assertion of the doctrine of *ejusdem generis* unpersuasively stretches this provision beyond its intended purpose. The stretch is evident, since the Union essentially argues that had the Utility used temporary, seasonal or casual employees to do all of Staats' work during her leave, it would not have violated the agreement. This works a paradoxical result, since accepting the Union's view punishes the Employer for choosing to cover only part of her duties with non-unit employees. This result points to an unpersuasive reading of Article I, Section 2 that is rooted in the Union's stretching it beyond its intended purpose.

Nor can Article II, Section 3 address the contractual void posed by the grievance. There is no showing that the Employer's coverage of Staats' duties had an adverse impact on any agreement provision. There is no showing that Steeno's or Nelson's performance took work away from any unit employee and no showing that it precluded any overtime opportunity. Rather, the evidence shows that the regular full-time employees maintained their full-time status with the mix of duties within the office being altered temporarily while Staats recuperated. In sum, the evidence shows neither a factual nor a contractual basis to ground a conclusion that the Utility violated the labor agreement by covering Staats' second medical leave of absence precisely as it covered the first.

The scope of this conclusion can be clarified by tying it more closely to the parties' arguments. Assertions of waiver obscure, in my view, the interpretive issue posed by the grievance. "Waiver" has been defined as "the intentional relinquishment of a known right." *Black's Law Dictionary*, (West, 4th edition). The Union's failure to grieve the Utility's coverage of Staats' first leave does not show the intent to give up the right to grieve. Ignoring that the legal notion of waiver may be better suited to one-time litigation than to an ongoing bargaining relationship; the March quarterly meeting indicates that the Union was concerned with how the Utility covered the absence. That it voiced its concern at a quarterly meeting rather than through a grievance can not be held against the Union as a waiver without creating a disincentive for choosing informal discussions over litigation and a corresponding incentive for formal litigation.

The Union's dropping of two of the 2005 grievances has no bearing on this dispute, as established by the terms of the written withdrawal agreement. Treating the Union's failure to arbitrate the October 12, 2005 grievance as a waiver of an unrelated dispute is unpersuasive. What the Union intended by not forcing the matter to arbitration is purely speculative, and it is a stretch to equate its concern with the coverage of Staats' second leave with its concern with the use of a non unit employee to complete a survey of a unit employee's duties. It is evident that the Union is concerned with the loss of work over time and the potential erosion of the unit. These concerns are far reaching and it is unpersuasive to take the dropping of a single grievance as the intentional abandonment of the entire concern. The Union's attempt to establish that Duchniak led them to believe that coverage for the March absence was a one-time event represents their

attempt to avoid a waiver of the grievance. There is no basis to support such a waiver in the first instance, and thus what Duchniak did or did not say at the March quarterly meeting or during the processing of any grievance is irrelevant to the resolution of this grievance.

The discussions at the quarterly meeting do have a bearing on the merits of the grievance. Grievance arbitration is to give the bargaining parties the benefit of their agreement, and it is essential that the parties acquire through negotiation what is enforced in arbitration. The discussion at the March quarterly meeting establishes that the Union viewed the assignment restriction it seeks in this grievance as an appropriate policy choice. That may be the case, but this highlights that the Union did not view the restriction as an established practice, and the policy choice must be established through negotiation before it can be enforced in arbitration. The Utility persuasively argues that the Union's dropping of the management rights proposal in the bargaining for a 2003-05 agreement has a bearing on this grievance. It does not support finding a waiver, but underscores the flaws of reading the agreement without the inclusion of the proposal to have the same effect the proposal sought.

The Employer argues that its rights under Article II, particularly at Sections K and M, grant it the unfettered right to assign unit and non unit personnel as it did regarding Staats' leaves of absence. The Union's view that reference to "employees" or to "personnel" in that Article should be read to refer to bargaining unit personnel is persuasive in my view. In any event, the terms of Section 3 highlight that Utility exercise of its management rights is not unfettered, since those rights may be "modified by this Agreement." The issue posed here is not whether the Employer possesses by law, by contract terms, or by arbitral implication the unfettered right to assign employees as it deems fit. Rather, the issue is whether the specific exercise of its right to assign coverage for Staats' second medical leave undercut any agreement provisions. As noted above, it did not and thus the Award entered below denies the grievance.

AWARD

The Utility did not violate the collective bargaining agreement by its assignment of Karen Staats' duties during her leave of absence from approximately November 1, 2006 through December 13, 2006.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 4th day of February, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator