

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WAUSAU FIRE FIGHTERS, LOCAL 415,
INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC**

and

CITY OF WAUSAU

Case 120
No. 66814
MA-13644

(William Resch Grievance)

Appearances:

Patrick Kilbane, Field Service Representative, International Association of Fire Fighters, 6847 East County Road "N", Milton, Wisconsin 53563, appeared on behalf of the Association.

Dean Dietrich and **Shawn Rauckman**, Ruder Ware, Attorneys at Law, P.O. Box 8050, 500 First Street, Suite 8000, Wausau, Wisconsin 54402-8050, appeared on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and City or Employer, respectively, were parties to a collective bargaining agreement which provided for final and binding arbitration of unresolved grievances. The above-captioned grievance was appealed to arbitration in March, 2007. Afterwards, at the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide that grievance. It was subsequently set for hearing in February, 2008, but the hearing was cancelled. A hearing was held on May 19, 2008 in Wausau, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs and reply briefs whereupon the record was closed July 30, 2008. Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided herein. The Association framed the issue as follows:

Did the City violate the collective bargaining agreement, specifically Article 12, Section C., when it failed to have FF/PM William Resch act as the engineer in the absence of Engineer Kevin Sharpe while both were assigned to the same station and, if so, what is the appropriate remedy?

The City framed the issue as follows:

Did the City violate the 2005-2006 collective bargaining agreement by assigning MPO Strouf to fill the acting engineer position at Station 3? If so, what is the appropriate remedy?

Having reviewed the record and arguments in this case, the undersigned adopts the Association's wording of the issue. Thus, the Association's wording of the issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 2005-06 collective bargaining agreement contained the following pertinent provisions:

Article 4 – 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 Agreement. These rights include, but are not limited to, the following:

. . .

- B. To hire, promote, transfer, assign and retain employees in positions with the City.

. . .

Article 12 – Salaries

. . .

- C. Acting Pay: When assigned to work in a higher classification for four (4) hours accumulative or more per shift, the member of the bargaining unit shall receive the compensation for that classification for each full hour so assigned. For the position of acting Engineer, the senior Firefighter at their respective station where the opening occurs will act. If that Firefighter is not

present, the assignment will be filled by seniority from the crews roster.

FACTS

The Wausau Fire Department is a full firefighting, emergency medical service, and paramedic operation with three stations. Station 1 is near the center of the City, Station 2 is on the City's west side, and Station 3 is on the City's northeast side. Station 1 is regularly referred to as Central Station.

The Department operates with three separate crews, each working a 24-hour shift. The crews are known as A Crew, B Crew and C Crew. Each crew works a schedule of one on, one off, one on, one off, one on and four off. After this nine day cycle, the schedule repeats itself.

There are 18 persons on each shift. The shift staffing at Central Station includes one battalion chief, one lieutenant, two drivers being either an engineer or motor pump operator (MPO), and five firefighters. The shift staffing at Station 2 includes one lieutenant, one driver/engineer, and three firefighters. The shift staffing at Station 3 is one lieutenant, one driver/engineer, and two firefighters.

In 2006, Kevin Sharpe worked as the engineer at Station 3. Beginning in February, 2006, Sharpe went on long-term sick leave which created an absence in the engineer position at that station. For a period of three to four months, William Resch, the senior firefighter at Station 3, filled the engineer position in an "acting" capacity. Per the labor agreement, Resch received "acting pay" for performing the acting engineer duties.

Beginning in September, 2006, management decided to have someone other than Resch fill the engineer position vacancy at Station 3 created by Sharpe's absence. The reason the Employer made this change, and had someone other than Resch fill the engineer position at Station 3, is as follows. Firefighter Chris Barber was soon going to be promoted to engineer. The record indicates that after an employee is promoted in the department, they are often transferred to a different crew and station. Before that happened to Barber though, management wanted him to work at the Central Station so he could get some training on the equipment that is unique to that station. Management felt this training would aid in Barber's transition from firefighter to engineer. In order to accomplish that goal, Battalion Chief Tom Leslie made two temporary job assignments. One assignment involved Barber and the other involved Jeff Strouf. The Strouf assignment will be addressed first.

Strouf was an MPO at the Central Station. Leslie had Strouf "travel" from the Central Station to Station 3 to fill the vacant engineer position there (i.e. Sharpe's vacant position). The terms "travel", "traveled" and "traveling" all refer to the movement of a person from one station to another within the same crew and without changing the personnel roster. "Traveling" essentially amounts to a temporary assignment, and is done to fill open positions

created by employees being on vacation, sick leave, or some other type of time off. The department uses “traveling” to cover short term (meaning day-to-day) vacancies. “Traveling” is not uncommon in the department. It has occurred numerous times in the past. Beginning September 6 and lasting until October 4, 2006, Strouf “traveled” from the Central Station to Station 3 to fill in as the engineer. Specifically, he was “traveled” to Station 3 on September 6, 8, 13, 15, 22, 26 and October 3, 2006. On those dates, Strouf filled in as Station 3’s engineer, and Resch did his regular job at Station 3 as a firefighter/paramedic.

Strouf’s temporary assignment from the Central Station to Station 3 created a temporary engineer vacancy at the Central Station. Leslie then had Barber, who was at Station 2, “travel” to the Central Station, where he was assigned to fill the engineer position there in an “acting” capacity (i.e. Strouf’s vacant position).

On September 26, 2006, the Union filed a grievance which alleged that the City violated the parties’ 05-06 collective bargaining agreement when it assigned engineer Strouf to fill the acting engineer position at Station 3 instead of continuing to fill the position with Firefighter Resch. The grievance was appealed to arbitration.

On October 5, 2006, the Employer implemented the following three transfers: Chris Barber was transferred to Station 3, Al Antolik was transferred to the Central Station, and Bill Resch was transferred to Station 2.

. . .

The record indicates that in the early 1990’s, department employees were routinely “traveled” from station to station to fill openings. When one crew member “traveled” to one station, an opening occurred at that crew member’s station, which necessitated “traveling” someone else to fill that open position. The result was that several crew members were “traveling” from station to station. The parties tried to address the amount of “traveling” that was occurring in the department when they negotiated their 1991-1992 collective bargaining agreement. What they did was to modify the section in Article 12 entitled “Acting Pay”. The second sentence which existed in that section at the time provided thus:

Such assignment shall be made from the on-duty crew if possible and shall be the most senior of the qualified personnel consistent with the efficient operation of the department.

That sentence was eliminated and replaced with the following two sentences:

For the position of M.P.O., the senior Firefighter at their respective station where the opening occurs will act. If that Firefighter is not present, the assignment will be filled by seniority from the crews’ roster.

At some point thereafter (the record does not identify when), the term “MPO” was eliminated and replaced with the term “Engineer”. Thus, the sentence currently reads as follows:

For the position of acting Engineer, the senior Firefighter at their respective station where the opening occurs will act.

The record indicates that MPOs and engineers are both drivers, but they are officially separate classifications. The main difference between the two classifications is that engineers can step up to acting lieutenant, while MPOs cannot step up to acting lieutenant.

The record further indicates that the overall effect of this change in language is that it reduced the amount of “traveling” that takes place in the Department. Now, less “traveling” occurs when an engineer has a day off.

Insofar as the record shows, this case marks the first time a grievance has arisen regarding the contractual language contained in Article 12, Section C.

POSITIONS OF THE PARTIES

Association

The Association’s position is that the Employer violated Article 12, Section C, when it failed to have Firefighter Resch act as the acting engineer at Station 3 in Engineer Sharpe’s absence in September, 2006. It notes that for three months prior to that, Resch had filled the acting engineer position while Engineer Sharpe was off on leave. According to the Association, that’s what the contract language requires. The Association submits that in September, 2006 though, the Employer ignored that contract language and assigned someone else to fill Sharpe’s vacancy (namely, Strouf). The Association contends that action violated the contract. It makes the following arguments to support these contentions.

The Association acknowledges at the outset that the Management Rights clause (Article 4) gives the Employer the general right to transfer and assign employees. That said, the Association avers that this general right to transfer and assign employees is limited by another provision in the contract. Building on that premise, it’s the Association’s view that the Employer’s reliance in this case on the Management Rights clause is misplaced because its right to assign the acting engineer is limited by Article 12, Section C.

As just noted, it’s the Association’s view that the contract provision which is controlling herein is Article 12, Section C. According to the Association, that language identifies in clear and unambiguous language how open engineer positions are to be filled in the department. The Association interprets that language to say “that the senior firefighter assigned to the station where an opening in the Engineer’s position occurs is the member of the bargaining unit who assumes the duties of Acting Engineer and is afforded the pay increase that goes along with those duties.” The Association disputes the Employer’s assertion that it is

attempting to expand the focus of the language via this grievance. As the Association sees it, “it is the Employer who is trying to narrow the focus of the language to something that is meaningless.” It’s the Association’s view that when this language was negotiated, the Employer bargained away some of its management rights to transfer and assign employees because this provision limits/restricts the City’s authority to make certain job assignments (namely, assignment of acting engineers). Building on that premise, the Association argues that Article 12, Section C prevented management from assigning Strouf to fill the acting engineer position at Station 3 while Engineer Sharpe was on leave.

The Association believes that the parties’ bargaining history supports its interpretation of Article 12, Section C. Here’s why. The Association maintains that when that contract language was negotiated 15 years ago, the underlying problem which both sides tried to address was the amount of “traveling” that was then occurring in the department. The Association avers that the new language which was agreed upon in 1991 “was supposed to eliminate the automatic traveling of the senior firefighter on the crew when the senior firefighter at their respective station could fill the opening as the acting M.P.O.” The Association asserts that the Employer must have interpreted the language in the same manner as the Association did because there were no disputes about its meaning/application until September, 2006. It was only then that the Employer deviated from what it had done previously (i.e. have Resch fill the open engineer position at Station 3) and have someone else (i.e. Strouf) fill that position. The Association argues that the problem with the scenario which Battalion Chief Leslie created (i.e. having Strouf “travel” to Station 3 to fill the open position there so that Barber could, in turn, “travel” to the Central Station to fill Strouf’s position) is that it ignores/circumvents Article 12, Section C, and what it requires.

Finally, the Association notes that one of the reasons which the Employer proffered at the hearing for transferring Barber to the Central Station was so that he could train on the equipment there before his official promotion to engineer took place. The Association asks rhetorically why if that was the case, and the Employer’s reason was “so legitimate”, why did the Employer undo it so quickly after the Association filed the instant grievance. According to the Association, that action (meaning transferring Barber from the Central Station to Station 3) “hardly supports the claim that the Employer was using its management rights to get Barber training with the equipment at the Central Station.” In the Association’s view, it’s because the Employer knew it violated the contract.

The Association maintains that if the Employer wants to handle acting engineer assignments differently than what is currently spelled out in the contract, then it should bring its proposed changes to the bargaining table. Until then, the Employer needs to abide by the language contained in Article 12, Section C and exercise its management rights consistent with that provision.

The Association therefore asks that the arbitrator uphold the grievance and impose an appropriate remedy.

City

The City's position is that it did not violate the collective bargaining agreement by assigning Strouf to fill the acting engineer position at Station 3 instead of Resch filling it. The contractual basis for the City's contention is Article 4, which grants the Employer the management right to transfer and assign employees. It's the Employer's view that that provision gave it the right to make the assignment that is disputed herein (i.e. to "travel" Strouf to Station 3 to fill the vacancy created by Sharpe's absence). As the Employer sees it, nothing in the provision which the Union relies on – Article 12, Section C – prevents it from exercising that right at its discretion. It elaborates on these contentions as follows.

The Employer avers at the outset that it has the inherent management right to make job assignments and assign duties and tasks to employees. It cites several arbitration awards, as well as what it characterizes as "arbitral law", for the proposition that management retains all rights not expressly prohibited or limited by either a labor agreement or statute.

Next, the City asserts that its inherent management right to direct and assign the work of fire department employees is augmented by Article 4 (the Management Rights clause). It emphasizes that that provision expressly grants the City the right to "hire, promote, transfer, assign and retain employees." That provision also gives the City the right to "direct all operations" and take actions to "maintain efficiency" within the department.

It's the City's view that both its inherent management rights, as well as the rights articulated in Article 4, support the City's decision to assign Barber to the Central Station to be the acting engineer there and then to "travel" Strouf from the Central Station to Station 3 to be the engineer there. According to the Employer, the City had several legitimate reasons for making the assignments that it made. The first reason relates to Barber's impending promotion to engineer. The City avers that Barber was unfamiliar with much of the equipment used at the Central Station, so management wanted him to work and train on the equipment there to get some "much needed experience." Management felt this training would "make the transition to his eventual promotion less disruptive to the operations of the department." The second reason relates to Strouf "traveling" to Station 3 to fill Sharpe's vacancy. The City submits that Strouf being the engineer there enabled the City to use Resch – who had been working as the acting engineer for three months – to instead be used "as a much needed paramedic" at that station (rather than being an acting engineer). The City maintains that at the time, it was in need of paramedics. While Resch was a paramedic with appropriate training, the City asserts that Resch "had not operated an ambulance for several months, and the City felt it necessary that he get some experience to maintain his competence in that skill."

Next, the City disputes the Association's contention that Article 12, Section C prohibited the City from temporarily assigning Strouf to Station 3 to fill the vacant engineer position caused by Sharpe's absence. According to the Employer, that provision cannot legitimately be construed to limit the City's authority to make temporary job assignments. Here's why. The City notes at the outset that that language deals with compensation for acting

personnel. That's why the language is included in the "Salaries" portion of the Agreement. With regard to the language, the City interprets the first sentence of that provision to say that "when a crew member is assigned to work in a higher job classification for four or more hours during a shift, he or she must be compensated at the rate for the higher job classification." It interprets the second and third sentences to say that when "the City has not assigned an acting engineer to a station, seniority rules apply, and the most senior firefighter may fill the position and be compensated at the higher rate." According to the Employer, the second and third sentences "only specifies what happens when an opening occurs and no assignment has been made." It's the Employer's view that Article 12, Section C is not applicable "where an assignment has been made" pursuant to Article 4. As the City sees it, that provision "only applies where there is an 'open' engineer position." Where an assignment has been made in accordance with Article 4 – as happened here when management assigned Strouf to fill the position – "there is no 'opening' and thus no position to fill." The City argues that if the arbitrator finds otherwise (i.e. and finds that that provision does limit the City's right to make job assignments, including assignments to open engineer positions), that would be contrary to the parties' intentions. The City also contends that if the arbitrator so found, he would be acting outside the scope of his authority because he would be rewriting the agreement.

Finally, the City argues that there is no past practice which prohibits or restricts it from assigning employees duties as it sees fit. To support that premise, it notes that the record indicates that management has temporarily assigned, or "traveled", employees numerous times in the past. According to the Employer, this establishes that the Employer did not relinquish the right to "travel" employees. Even if the City has not previously exercised its right to "assign an employee to the engineer assignment", that does not prevent it from doing so now. In support thereof, it cites the arbitral principle that an employer's non-use of a management right does not negate the existence of that right.

The City therefore asks that the grievance be denied.

DISCUSSION

This case involves two separate, but interrelated, temporary assignments which management made in September, 2006. The first was to assign (i.e. "travel") Strouf from the Central Station to Station 3 to fill Sharpe's vacancy there. That opened up an engineer position at the Central Station. The second assignment was that the Employer then assigned (i.e. "traveled") Barber to the Central Station. The first assignment (i.e. Strouf's assignment to Station 3) is the focus of this case because the Association's grievance expressly challenged that assignment (i.e. Strouf's assignment to Station 3) – not Barber's assignment to the Central Station. The reason the grievance challenged Strouf's assignment is because when he "traveled" to Station 3 to be the engineer there, he displaced Resch who had been filling the acting engineer position there for three to four months. After Strouf came to Station 3 to fill Sharpe's vacancy, Resch went back to his regular job of being a firefighter/paramedic. Thus, Resch was no longer the acting engineer at Station 3.

The Association contends that having Strouf fill the engineer opening at Station 3 in September, 2006 violated Article 12, Section C. The City disputes that assertion, and contends that Article 4 grants it the management right to make the assignments it made here. Based on the rationale which follows, I find that the contract language which is determinative of the outcome herein is not Article 4 (as argued by the Employer), but rather Article 12, Section C (as argued by the Association). Additionally, I find that when that provision is applied to the facts involved here, it results in a finding that the Employer violated Article 12, C when it assigned (i.e. “traveled”) Strouf to Station 3 to fill Sharpe’s vacancy there.

. . .

Attention is focused first on the Management Rights clause which is found in Article 4. That clause gives the City numerous management rights with the caveat that the City has to exercise its management rights “consistently with the other provisions of this Agreement.” Two of the management rights which are specified in that article are the right to transfer and assign employees. As was noted above, in this case the Employer made a work assignment decision which the Association is challenging (namely, the Employer’s decision to temporarily assign Strouf to fill the engineer position at Station 3 for the month of September, 2006). Given the grant of general authority to the Employer to transfer and assign employees, the arbitrator’s initial inference is that the Management Rights clause gives the Employer the right to make the assignment in question unless there is another contract provision that either limits or overrides management’s right to transfer and assign employees. The Association argues that there is, and that this limitation is found in Article 12, Section C. According to the Association, that provision limits the City’s right to fill acting engineer positions. The focus now turns to that provision.

I begin my discussion of that provision with the following overview of the entire section. The first sentence says that when an employee is assigned to work in a higher (job) classification for four or more hours during a shift, the employee is to get paid at the rate for the higher job classification. The second sentence then goes on to deal with one specific position, namely the position of acting engineer. It reads as follows: “For the position of acting Engineer, the senior Firefighter at their respective station where the opening occurs will act.” While the sentence is awkwardly drafted, its meaning is nevertheless understandable. It’s this: when there is an acting engineer opening at a station, the employee who fills the opening will be the senior firefighter at that station. That senior firefighter assumes the duties of acting engineer and gets the corresponding acting engineer pay. The third sentence then goes on to say that if that firefighter is not present, the assignment will be filled by seniority from that crew’s roster. I interpret that sentence to mean that when the senior firefighter at that station is not present, general seniority applies, and the opening will be filled by seniority.

In the context of this case, the focal point is the second sentence. Here’s why. When Sharpe went on leave in early-2006, the senior firefighter at Station 3, Resch, became the acting engineer. It is unclear from the record whether Resch was officially assigned to Sharpe’s position or not. In any event, Resch filled Sharpe’s vacancy as the acting engineer

for three to four months. In their reply brief, the City acknowledges that is what “typically” happens, meaning “if an Engineer is not on duty, a firefighter from the same station typically fills the position during the Engineer’s absence.”

The City contends that notwithstanding the fact that Resch had filled Sharpe’s vacancy at Station 3 for three to four months, it could change who filled that vacancy. What the City is referring to is this: in September, 2006, management had MPO Strouf “travel” from the Central Station to Station 3 to fill Sharpe’s vacant position there and then had Barber “travel” to the Central Station to be the acting engineer there. When Strouf filled Sharpe’s vacancy at Station 3, Resch (who had been filling Sharpe’s vacancy) went back to doing his regular job at Station 3.

At the hearing, the Employer proffered several reasons for those assignments which, in its view, should justify them. I find that even if the assignments were made for legitimate reasons, that does not matter because Strouf’s assignment to Station 3 did not comport with Article 12, Section C. The following discussion explains why.

It was previously noted that the Management Rights clause gives the Employer the general right to transfer and assign employees. This general right to transfer and assign employees is limited though by the second sentence in Article 12, Section C, which identifies how open acting engineer positions are to be filled in the department. That sentence specifies that they are to be filled with the senior firefighter at the station where the opening occurs. That sentence effectively limits/restricts the City’s authority to make one temporary job assignment (namely, who fills an acting engineer opening) because it says that the person who fills the acting engineer opening will be the senior firefighter at the station. As it relates to the facts in this case, the second sentence in Article 12, Section C prohibited the City from temporarily assigning Strouf to Station 3 to fill Sharpe’s vacant position. The City attempts to sidestep the second sentence of Article 12, Section C via the argument that Article 12, Section C “only specifies what happens when there is an open engineer position which has not been filled by assignment.” The Employer avers that in this case, it exercised its management right pursuant to Article 4 and made a job assignment in September, 2006 to an open engineer position when it assigned Strouf to Station 3, so there was no “opening” and thus no position to fill. The arbitrator finds that argument unpersuasive. It would be one thing if Article 12, Section C said that the Employer’s right to make assignments took precedence over this language. However, it doesn’t say that (i.e. that the Management Rights clause takes precedence over this language). In fact, nothing in the second sentence in Article 12, Section C states that it applies only when the City has not assigned an acting engineer to a station, or that it only kicks in after the Employer has chosen not to exercise its management right to make job assignments. That being so, the inference is that the second sentence in Article 12, Section C applies to the filling of all acting engineer openings – including the one that existed at Station 3 in September, 2006.

In so finding, it is my view that I am not rewriting the contract language, but rather applying its plain meaning to the facts and enforcing what is there.

Building on that last point, I've decided to base my decision exclusively on the applicable contract language. While in some contract interpretation cases I look at evidence external to the agreement – particularly at the parties' past practice and their bargaining history – to help me interpret the contract language, I find it unnecessary to do so here. Accordingly, no further comments will be made about the parties' past practice and their bargaining history.

. . .

In order to remedy this contractual violation, the City is to make Resch whole by paying him as an acting engineer for the seven days listed on the second page of Joint Exhibit 5 (i.e. the attachment to the grievance).

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

AWARD

That the City violated Article 12, Section C when it failed to have Firefighter/Paramedic William Resch act as the engineer in the absence of Engineer Kevin Sharpe while both were assigned to the same station. In order to remedy this contractual violation, the City shall pay Resch as an acting engineer for the seven days listed on the second page of Joint Exhibit 5 (i.e. the attachment to the grievance).

Dated at Madison, Wisconsin, this 30th day of October, 2008.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

