

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OSHKOSH CITY EMPLOYEES UNION
LOCAL 796, AFSCME, AFL-CIO**

and

THE CITY OF OSHKOSH

Case 372
No. 68534
MA-14259

Appearances:

Mary B. Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, W5670 Macky Drive, Appleton, Wisconsin 54915, for the labor organization

William G. Bracken, Labor Relations Coordinator, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, for the municipal employer

ARBITRATION AWARD

Oshkosh City Employees Union Local 796, AFSCME, AFL-CIO (herein the Union) and the City of Oshkosh (herein the City) are parties to a collective bargaining agreement dated August 12, 2008 and covering the period from January 1, 2007 through December 31, 2009, which provides for final and binding arbitration of disputes arising thereunder. On January 2, 2009, the parties jointly requested that the undersigned be appointed to arbitrate a grievance relating to the meaning and application of the terms of the agreement relating to call-ins by seniority. A hearing in the matter was held on February 23, 2009, in Oshkosh, Wisconsin. The hearing was transcribed. The parties filed initial briefs by April 20 and replies by May 5, 2009, whereupon the record was closed.

ISSUE

The parties did not stipulate to a statement of the issues. The Union frames the issues as:

Whether the employer violated the collective bargaining agreement by failing to call in the three grievants for a flooding situation and instead called in less senior bargaining unit members?

If so, what is the appropriate remedy?

The City frames the issues as:

Did the City violate the labor agreement when it did not pick up non-resident bus drivers at their personal residences for the purpose of using buses as patrol cars and assisting patrol officers in performing rescue operations during the City's flood emergency of June 12, 2008?

If so, what is the remedy?

The Arbitrator frames the issues as:

Did the City violate the collective bargaining agreement when it deviated from seniority and by-passed three senior bus drivers who lived outside the city when it offered overtime work during a flood emergency on June 12, 2008?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE I – MANAGEMENT RIGHTS

Except to the extent expressly abridged by a specific provision of this agreement, the City reserves and retains solely and exclusively, all of its common law, statutory, and inherent rights to manage its own affairs, as such rights existed prior to the execution of this or any other previous Agreement with the Union.

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ARTICLE VII – SENIORITY

The Employer agrees to the seniority principle.

Seniority shall be established for each employee and shall consist of the total calendar time elapsed since the date of his/her employment. Seniority rights terminate upon discharge or quitting. Employees who leave the bargaining unit to accept another position within the City of Oshkosh which is outside the bargaining unit and, within one year of leaving the bargaining unit, return to a

position in the bargaining unit, shall retain all accumulated seniority earned in the bargaining unit, shall not earn seniority for time spent outside the bargaining unit, and shall start from zero seniority in his/her division and department. A seniority list shall be posted in each department section, listing the seniority of the employees in each section.

...

Seniority shall be established separately within each division.

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**ARTICLE X – NORMAL WORK WEEK,
NORMAL WORK DAY AND NORMAL WORK SCHEDULE**

...

Transit employees shall work in accordance with present mutually agreed upon schedule. Selection of the runs shall be made semi-annually unless requested in writing by not less than seventy percent (70%) of the total employees affected. Each driver shall make his/her “selection” on the order of his/her division seniority. Transit garage employees shall receive a thirty (30) minute uninterrupted unpaid lunch break. Transit mechanics shall receive a twenty (20) minute paid lunch break.

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For an emergency such as snow removal, ice control, flood control, sickness, and so on, the Employer shall have the right to schedule the work week as may be necessary and from one shift to another shift without regard to prior notice. Any employee who is called in for work outside his/her regular work week schedule shall not be sent home early on subsequent days or denied his/her regular work schedule to avoid over-time payment without his/her consent. The spirit of this provision is that the Employer shall not be penalized during emergency conditions through overtime payment during the 24 hour notice period, but neither shall the Employer adjust the working hours after emergency conditions (e.g., to less than 8 hours per day) so as to deny employees legitimate overtime.

...

ARTICLE XI – PAY POLICY

Overtime: All work performed outside the above normal work day and/or work week shall be compensated at the rate of time and one-half (1 ½) the employee’s regular rate of pay. Employees shall receive twice their regular rate of pay for

all work performed on Easter Sunday. The principle of seniority may apply on a rotating basis, within a division and the specific classification required to perform overtime work. Transit employees shall be paid overtime for work over 40 hours per week or over 8 hours per day only. Water distribution outside crew employees shall have a one-time selection option of overtime or compensatory time.

ARTICLE XII – CALL IN PAY

In the event employees are called for work after their normal work days have been completed they shall receive a minimum payment of two (2) hours pay at the rate of time and one half (1½) their rate of pay. The Employer may change the employees shift upon giving 24 hours notice, except in case of emergency, at which time the 24 hour notice shall be waived.

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OTHER RELEVANT PROVISIONS

OSHKOSH MUNICIPAL CODE – CHAPTER 9 **EMERGENCY AND DISASTER PLANNING AND RESPONSE**

SECTION 9-1 PURPOSE AND DECLARATION OF POLICY

This Ordinance is enacted to set out and clarify the authority of the City of Oshkosh and its officers and employees with regard to emergency and disaster situations. It is intended to grant as broad a power as permitted by statutory and constitutional authority.

SECTION 9-2 DECLARATION OF EMERGENCY AND EMERGENCY POWERS

Declaration of Emergency. Notwithstanding any other provision of law to the contrary, the Common Council for the City of Oshkosh may declare by resolution or ordinance an emergency existing within the City of Oshkosh whenever conditions arise by reason of war, conflagration, flood, heavy snow storm, blizzard, catastrophe, disaster, riot of civil commotion, acts of God, and including conditions, without limitation because of enumeration, which impair transportation, food or fuel supplies, medical care, fire, health or police protection or other vital facilities of the city. If the Common Council is unable to meet with promptness, the City Manager is hereby authorized to declare a state of emergency by proclamation. The proclamation shall be subject to ratification, alteration, modification or repeal by the Common Council as soon as that body can meet, but the subsequent action taken by the Common Council

shall not affect the prior validity of the proclamation. The period of the emergency shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist.

. . .

Authority to act. During a state of emergency, the Common Council by ordinance or resolution, or in their absence the City Manager by proclamation, shall have the authority to legislate for whatever is necessary and expedient for the health, safety, welfare and good order of the city. This shall include, without limitation by enumeration, the authority to bar, restrict or remove all unnecessary traffic, both vehicular and pedestrian, from all local highways.

Emergency Powers of the City Manager. In addition to those powers conferred upon the City Manager in the previous sections, during a state of emergency, the City Manager, in consultation with the Emergency Management Coordinator and other City staff, shall exercise all executive and general administrative emergency powers, including but not limited to all of the following:

- (1) The power to direct all emergency response activities by City departments.

. . .

- (6) The power to delegate any or all of these duties to appropriate City personnel.

BACKGROUND

The first half of June, 2008, brought sustained rains throughout Wisconsin. On June 8, Oshkosh received 4.13 inches of rain, leaving many of the streets impassable due to nearly a foot of standing water. The June 8 rains also left the ground thoroughly saturated, so that another intense rain event on June 12 produced severe conditions. According to a summary by the National Climatic Data Center:

Heavy rainfall, totaling 5.42 inches for the day, over already saturated ground caused widespread flash flooding in the Oshkosh area. Sewage backed into many basements and the foundations of some homes on the south side of the city crumbled, making them uninhabitable. The flooding destroyed 20 homes, caused major damage to 150, and caused minor damage to over 400 others. Several schools sustained damage, including Lourdes High School and the attached St. John Neumann Middle School, which had extensive water and sewage damage. Water built up in the parking lot and caved in windows on the school's lower level. Flood waters rose over five feet, destroying classrooms, athletic equipment, carpets and computers. Damage to the school was well over

\$1 million. The University of Wisconsin – Oshkosh campus also sustained some water damage. High water made 50 to 75 percent of the streets impassable, including parts of U.S. Highways 41 and 45. It also washed out a railroad bridge causing a train to derail and spill diesel fuel into the floodwaters. Thunderstorms that developed in warm, moist and unstable air ahead of an approaching cold front produced torrential rain that resulted in significant flash flooding, especially in the Oshkosh area.

Given the saturated ground conditions and the forecast for more rain, Oshkosh officials monitored weather conditions throughout the day on the 12th. At about 4:30 p.m., conditions had become sufficiently severe that Acting City Manager John Fitzpatrick activated the Emergency Operations Center, housed in the basement of the fire station on Ceape Street. The EOC began monitoring calls for emergency service being received at the 9-1-1 center. Throughout the evening, the 9-1-1 system handled over 500 calls, with police and fire services each also getting at least 100. At some time after 6:00 PM and before 7:20, Fitzpatrick declared a State of Emergency for the City. At the time, half to three-quarters of the city's streets were closed or impassable due to flooding and standing water, and residents were "strongly encouraged to stay off the streets," so emergency personnel could "better respond to emergency situations." At about this time, police were having trouble responding to calls, and some officers had gotten stranded in the high waters. A Fire Department Battalion Chief attempted to drive in from Winneconne, and his car flooded; a large Fire Department truck also flooded and stalled.

As conditions deteriorated and more streets became flooded, Police Chief Scott Greuel indicated his officers would be needing help to respond to emergency calls. Fitzpatrick consulted Greg Maxwell, Transportation Maintenance Supervisor, who confirmed Fitzpatrick's recollection that the city buses would be able to travel safely through the high waters. Fitzpatrick and the other City officials decided to use city buses to drive police officers around the city, responding to emergency calls, rather than have the officers use their squad cars. Given that police officers and citizens were already becoming stranded in their cars, Fitzpatrick decided to send city buses to pick up the Bus Operators at their homes, and called Transit Operations Supervisor Tom Hansen and directed him to call the Transit Operators and let them know the city would be picking them up for this emergency call-in.

Hansen began making the calls sometime after 7:00 p.m., using an alphabetical roster of drivers. Hansen skipped those drivers with out-of-town addresses, because no one was to drive to work and he believed it would be impractical to send buses to pick up drivers living in Appleton, Winneconne and Van Dyne. The City took no steps to stop the bus drivers whose shift ended at 6:24 p.m. from driving home

Sometime between 7:30 and 8:00 p.m., Fitzpatrick directed Maxwell, who lives about a block away from the bus garage, and has a Commercial Drivers License, to take a bus and pick up three drivers whom Hansen had already contacted. When Maxwell left the garage, he

noticed that water came up over his feet through the bus doors. Maxwell had not yet been informed that operators were not to drive themselves in, and two of the drivers drove in together, in a truck, a distance of two or three blocks. Maxwell picked up the third operator, returning about 30-45 minutes later. He was then given the names of the additional eight drivers and told to pick them up in the most efficient order practical. Maxwell asked Fitzpatrick why the drivers weren't to come in on their own, and was told that the police did not want additional vehicles on the roads, which at that time were very flooded with considerable debris and many stranded vehicles. Maxwell left the garage between 8:30 and 9:00 p.m., and returned with the eight drivers about 11:00-11:30 p.m. All were paid from 7:30 p.m. to the time they punched out early the next morning. The drivers then paired off with police officers, driving them around the city until about 3:00 a.m. At 3:00 a.m., after securing one volunteer to remain on duty, Maxwell drove the other transit operators back to their homes.

While Fitzpatrick was directing emergency services from the EOC, other city departments were also responding to the storm and flooding. After being contacted some time after 5:00 p.m., Transportation Director Christopher Strong attempted to drive to the EOC from the western side of Oshkosh and was not able to make it.

Vince Maas, Maintenance Supervisor for the Parks Department, resides in Appleton. He was unaware of the situation until he got a call about 7:00 p.m. about the need to deal with flooding at the zoo. He began calling employees in seniority order. He told the first employee he reached that some animals might need to be moved; that employee suggested he call the woman who was the zoo specialist, a relatively junior employee. Maas did, and she attempted to report, but was thwarted by the impassable roads. Two other employees, reached via the seniority list, did report.

At about 5:30 p.m. on June 12, Kevin Uhen, Central Garage Superintendent, Street Sanitation, directed Supervisor Mark Van Pelt to start calling in employees. Using the seniority list, Van Pelt called in ten employees to set barricades, distribute sand bags, block roads and other related activities. It was up to the employees to get in to work; if some had not been able to make it, the city would have called others. One employee, Al Martin, claimed he was not called in seniority order and was given two hours of pay at time-and-one-half; a subsequent review of phone records indicated the employee was called but did not answer his phone. He did not return the payment.

William Sturm is the Landscape Operations Manager in the Oshkosh Forestry Department. About 6:30 p.m. on June 12, Oshkosh police contacted him and related that there were trees down which they wanted his employees to deal with. Sturm assessed the situation, and concluded that there were safety issues involved in having employees report do the work, and so he did not call any employees in until the following day.

Kevin Sorge is the Superintendent of the Wastewater Treatment Plant. Maintenance Supervisor Jan Brandenburg called him about 5:15 at his home in New London, about 35

minutes away from the treatment plant, informing him of the flooding. Sorge left his house about 5:15, but by 7:00 p.m., could only get to a neighborhood near the plant because of the high water. A dump truck had to be sent to pick Sorge up and bring him to the plant. Another employee, whom Brandenburg had called about 5:30, made it in at 7:30. Other employees were called during the following hours. Throughout the evening, water flow was beyond the capacity of the plant's meters.

Shift change for the police department is at 10:30 p.m. On the evening in question, officers reporting for that shift drove themselves in. Some were stranded, and had to be picked up.

On July 29, 2008, the union filed a "class action" grievance, contending, "Tom failed to use the seniority principle as described in Article VII, Article XXVII. After a number of meetings with management we have come to the grievance procedure," and seeking to "make all drivers whole." Hansen denied the grievance on August 2, explaining:

On June 12, 2008 the E.O.C. called me at home and said they needed buses and drivers. I was instructed to have the drivers remain at home and they would be picked up by bus. I called drivers with an Oshkosh address. Therefore this grievance is denied.

On August 7, Transportation Director Christopher Strong denied the grievance, as follows:

On Thursday, June 12, 2008, the Emergency Operations Center (EOC) requested the transit operations supervisor to get buses and drivers. The buses were to be used for public safety purposes as police vehicles could not drive on most local streets due to the depth of water. The transit operations supervisor called buses and drivers in an appropriate manner to preserve public safety during the flood emergency. Therefore, the grievance is denied.

On October 20, 2008, City Manager Mark Rohloff denied the grievance, as follows:

I have receive the grievance originally dated July 29, 2008, related to concerns expressed over the offering and assignment of work on June 12, 2008 in our Transportation Department and have reviewed the circumstances associated with it.

As a result of the extreme flooding that occurred in and around the City of Oshkosh on this date only local transit operators were called and picked up for special rescue operations of Oshkosh Police and citizens. These operators were compensated for their time they were contacted until their assignments were complete.

After evaluating these facts, and the circumstances associated with this incident and the special assignment, I must respectfully deny this grievance.

Thereafter, the grievance proceeded to arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

POSITIONS OF THE PARTIES

The Union

The Union asserts that the seniority provision applies to all bargaining unit positions, yet every single department that called in employees to work on June 12, 2008 did so by seniority except Transit. A number of those other employees not only lived outside the city limits, but also drove themselves to work. Yet the bus drivers who did not live within the city limits were arbitrarily excluded.

The Employer's rationale that the employees of other departments are called in more often for emergencies is nothing more than an attempt by the employer to secure the right to bypass requirements in the collective bargaining agreement under certain conditions, but the agreement in no way suggests call-ins for emergencies are treated differently from one department to the next. An employee's seniority rights are of utmost importance, and Mr. Hansen made an arbitrary decision when he chose to bypass more senior employees because they did not live within the city limits. In doing so, the Employer violated their seniority rights.

The Union never disputed the severity of the flooding. But flooding is not uncommon in Oshkosh, and nobody stopped the employees who were leaving at 6:24 in the evening of June 12, 2008. Employees also drove themselves in to work the following morning. Also, given the several hours it took to pick up all the employees, some drivers could have been at work sooner had they driven themselves. Further, all other employees in other divisions in the bargaining unit were permitted to drive themselves to work.

The Employer errs in contending that the chemical spill grievance of 2001 is precedent for this grievance. The only reason the Union did not pursue that grievance was because it was assured by the Employer that it recognized it had made a mistake and in the future would call in drivers by seniority. At no point did the Union agree to waive the right for drivers to be called by seniority during emergencies. The maintenance of benefits clause also protects the Union from any unilateral changes to the terms and conditions of the agreement unless negotiated with the Union. The Employer has never bargained any such change. This case is about whether the Employer has the right to arbitrarily bypass more senior drivers for a call-in because they do not live within the city limits. Neither the facts nor the agreement support the Employer's position.

The City

The City asserts that it has retained all of its common law, statutory and inherent rights to manage its own affairs, including the right to take appropriate action in an emergency. In accordance with the clear and unambiguous management rights provision in the collective bargaining agreement, the City decided to pick drivers up at their residences in order to assist police during the flood emergency. The City's decision to do so was clearly reasonable and proper.

Arbitral precedent strongly supports the City's actions in responding to an emergency, which the flood of June 12, 2008 clearly was. Arbitral precedent also strongly supports the City's suspension of the call-in provision during an emergency, which the flood of June 12, 2008 clearly was. An employer, in an emergency situation, must have the flexibility to confront the emergency without regard to certain provisions in the labor agreement.

The City's decision to pick drivers up at their homes in Oshkosh meets the commonly cited arbitral criteria to do so. Management had no part in causing the emergency, which was a classic "Act of God." The emergency involved a situation which threatened material impairment to operations, in that the flood actually impaired the entire operations of the City. The emergency was of limited duration, in that the City suspended seniority for call-ins for only one day, during the peak of the storm. The suspension of the terms of the labor agreement were unavoidable and limited only to the duration of the emergency, in that the City did not want to take the risk drivers would be stranded while trying to drive to the garage.

Once the City made the decision to pick up drivers at their own residences, the seniority provisions for call-in had to be suspended; it made no sense for the City to send buses to pick up drives in Appleton, Winneconne and Van Dyne. The question is not whether this decision was perfect, only whether it was reasonable under the circumstances. Whether or not the grievants could have made it to work is not the point; the point is that during an emergency, the City must be able to respond. The call-in provisions were secondary to the pressing issue of finding a way for bus drivers and police officers to form a team to function and help citizens cope with the flood emergency.

Several City officials tried to drive their cars to either the EOC or the Wastewater Plan (located next to the bus garage) and could not make it. Having buses, which were able to handle the high water, pick the transit drivers up was a prudent course of action.

The city acted in response to an emergency that seriously threatened the safety of citizens and the city's infrastructure. The emergency was brief, and the city's deviation from the call-in provision was in the interest of public safety.

Further, nothing in the labor agreement restricts the city's right to make reasonable decisions regarding picking up bus drivers at their homes so they could report to work to assist police officers in an emergency, actions authorized by state statute and municipal ordinances

relating to emergency situations. Once the city made the decision to pick up drivers at their residences, it would have been unreasonable for the city to pick up non-resident drivers living in Appleton, Winneconne and Van Dyne. Even just picking up drivers who lived within the city, it took about two hours for the city to bring eight drivers to the garage.

The call-in of employees in other departments cannot be compared to the situation affecting the bus drivers. First, calling in employees in other departments is routine, rendering comparisons between the two meaningless. The employees of parks, streets and wastewater expect to be called in for emergency situations, and reported for work as they always do for any emergency. But the bus drivers were not doing normal work, but were acting as extensions of the police officers whom they were driving.

The call-in of the employees in the other departments also occurred at an earlier time than the call-in of the bus drivers, when flooding conditions were not as severe. All the streets and wastewater employees were called in about 5:30 p.m., and the parks employees around 7:00 p.m. The bus drivers were called after 7:00 p.m., when the rain and flooding had become more intense. Due to the deteriorating conditions, Fitzpatrick acted reasonably in deciding not to risk having the bus drivers stranded on streets that had become impassable.

Further, the union has previously accepted the City's decision to by-pass the seniority list in the chemical spill emergency in December 2000. The Union grieved, but never advanced the grievance after it was denied at the first step. In the absence of written corroboration, Union testimony that the former Transit Director said that a mistake had been made to not use seniority and promised it would not happen again must be seen as self-serving hearsay. The evidence shows that the Union did not pursue the grievance and accepted the City's ability to respond to an emergency without calling in employees by seniority.

Union Reply

The City errs in defending its action by claiming that the management rights clause gives it the power to by-pass more senior transit operators during an emergency. The collective bargaining agreement provides for the seniority principle to be adhered to for all bargaining unit employee, including bus drivers. The cases cited by the City do not support its claim.

The City's right to respond to an emergency must be within the confines of the labor agreement. Again, the cases which the Employer cites do not support its actions. While the City may not have expected the amount of flooding that occurred, the Union expected that bus drivers who live outside the city limits would be called in by seniority and offered the opportunity to work. Regardless of whether bus drivers get called in for emergencies on a regular basis or not, the City does not have the unfettered right to bypass more senior drivers; if it wants that ability, it must bargain for it.

The City's decision to pick up Bus Drivers did not give it the right to suspend the seniority call-in provision. The issue is not whether Fitzpatrick had the right to pick up

drivers; it is whether his decision allowed the City to suspend the seniority provision. There is no waiver or exception in the labor agreement that authorizes such a suspension. The City's decision to pick up drivers should not be held against non-resident drivers. The City should not be awarded for making an arbitrary decision to bypass more senior bus drivers because they did not live within city limits.

The collective bargaining agreement does not distinguish between "routine" and "non-routine" calls, and the seniority provisions apply to all employees in all departments.

The Union also stands firm in asserting that it did not accept the City's previous decision to bypass seniority during the chemical spill in 2000. In no way did the Union acquiesce! If the City truly believed that this were the case, the agreement could reflect such. It does not!

The Employer claims it has the right to suspend the seniority call-in provision for Bus Drivers only during emergencies. Their justification is Bus Drivers do not routinely get called in for emergencies. Neither the facts nor the collective bargaining agreement support the employer's argument.

The grievance should be sustained and the three drivers made whole.

City Reply

Contrary to the Union's opinion, there was nothing arbitrary about the City's decision to pick up Bus Drivers at their homes. The flooding created an emergency situation where the City could not risk having drivers get stranded on their way in. The City's decision was well-reasoned and sound, and was not done to slight any driver. Once that decision was made, it was only common sense to bypass drivers who lived outside the city. The severe flooding on June 12, 2008 was an extenuating circumstance that warranted a relaxation of the normal call-in rules.

Further, the Union cannot have it both ways; it cannot argue that it agrees with the City that the flooding was severe, yet state that flooding in Oshkosh is "not uncommon." This flooding was exceptional and extraordinary, and the Union cannot second guess the City's decision to pick up drivers at their homes because it is the City alone that is entitled to make that decision.

Also, the chemical spill incident is relevant and shows the Union acknowledged that extenuating circumstances sometimes require that normal seniority call-in rules be set aside in the interests of safety, efficiency and common sense. That situation has direct parallel to this one, and the fact that the Union dropped its grievance is evidence that it acknowledged the City had the right, under the circumstances, to circumvent the seniority call-in provisions and respond to an emergency situation. There is little or no credible evidence that the City agreed to use seniority in future emergency call-ins.

DISCUSSION

The Union alleges that the City is seeking to secure the right to bypass requirements in the collective bargaining agreement under certain conditions. The Union is right; that is exactly what the City is doing. The question before me is whether in doing so, the City violated that agreement. I have concluded that it did not.

The Union repeatedly describes Hansen's decision to by-pass drivers living outside the city as arbitrary. It was not. The City had declared a state of emergency. Fitzpatrick's declaration was entirely reasonable, given that there was extensive flooding, with a majority of the city streets becoming impassable. Police had urged drivers to stay off the roads if at all possible. Fitzpatrick made the decision that the City would send buses to pick up the transit operators at their homes. Again, given the conditions, and that many people had already become stranded, that decision was entirely reasonable. Under such severe conditions, it would *not* have been reasonable for Hansen to divert resources (namely buses and drivers, both in very limited supply at that moment) to pick up transit operators living in Appleton, Winneconne and Van Dyne. It also would *not* have been reasonable to call the employees living in the outlying area in and run the risk of them getting stranded, giving the reports that the City was receiving regarding the adverse conditions.

The Union is correct that the City did not prevent Transit Operators from driving home when their shift ended at 6:24 p.m. on June 12. However, that does not have a meaningful impact on this grievance. Clearly, the City did not have the resources to drive the off-duty operators home at that time (in contrast to the following morning, when it did have the resources to drive the operators home, and did so). And, the Union could possibly have grieved any action by the City to *prevent* employees from driving home. The City having only three options at that time – prevent the employees from driving home, drive the employees home, or leave the employees to their own devices – the City chose the most practical and allowable option before it, namely leaving the employees to their own devices.

The Union correctly notes the disparity between the call-in procedures for the Transit Operators and the other employees in Local 796, in that employees in the other departments were generally allowed to drive themselves in. However, that difference is not dispositive. First, most of the other employees were called in an hour or two before the transit operators, when conditions were less severe. Also, if an employee in one of the other departments became stranded, the city had additional personnel to call in; other than the three Transit Operators living outside the city, there were no additional drivers whom the city could call if an operator attempted to drive in and got stranded. Further, at least one department, Forestry, did *not* call in employees, explicitly because of the severe conditions, even though the need for dealing with downed trees could be considered high.

The City cites, and I note with approval, VIRGINIA-CAROLINA CHEMICAL CO., 42 LA 237 (Kesselman, 1964), wherein the arbitrator set forth criteria under which management may be permitted to deviate from strictly following contract provisions in the event of an

emergency. These are 1) management must not be directly responsible for the emergency; 2) the emergency must threaten to impair operations materially; 3) the emergency must be of limited time duration; and 4) any contract violation must be unavoidable and limited to the duration of the emergency. Here, the flooding was a natural emergency and certainly not the result of any fault on the part of the City. Furthermore, the record is replete with evidence of the severity of the flooding and the need of the City to call in the Transit Operators in order to aid the police in providing emergency services. The emergency only lasted for the night of June 12-13 and after the situation was under control the City apparently resumed applying the seniority provisions as set forth in the collective bargaining agreement. The emergency here, and the City's response, thus meet the criteria set forth in VIRGINIA-CAROLINA CHEMICAL CO. supporting a finding of reasonableness and justification on the City's part.

There has been one other instance when the city did not call transit operators in by seniority. On Sunday, December 17, 2000, there was a chemical spill at the Hydrite plant in Oshkosh. The then-City Manager called Maxwell and instructed him to get two buses to the airport as quickly as possible. Maxwell called the driver he knew to live closest to the garage, who met him there in about five minutes. The two then each drove a bus to the airport, where police officials told him they needed at least three more buses. Maxwell called two drivers he knew to have keys to the garage, but neither answered their phones. Maxwell then called another driver to the airport, and himself was driven back to the garage, where he called all drivers by seniority except one who was on vacation and one who lived in Appleton. After two drivers came in, they and Maxwell all drove buses to the airport, where they loaded people on the buses and took them to their homes accompanied by Fire Department personnel.

The following day, Maxwell explained to the driver living in Appleton that he had not been called because the situation was an emergency in which time was of the essence. Maxwell believed the driver said he understood and did not have a problem with what the city did.

About three weeks later, the Union filed a grievance, asserting that, "a large number of drivers were at home at the time of the incident and throughout the day, but were not contacted. These were more senior drivers and were denied the opportunity and the right to drive," and seeking that "all drivers which were available and not contacted will receive Call In Pay according article 12." The Union dropped the grievance after discussions with the then-operations manager, who has since retired.

There was conflicting testimony about the aftermath of the 2000 chemical spill at the Hydrite plant. Union witnesses testified that the then-operations manager apologized to the union for calling in drivers outside of seniority, asked them to overlook the violation, and promised it would not happen again. City officials denied that account. There is no documentary evidence on that point.

This incident is not dispositive for either party. As a single event, it could not form the basis of a "past practice" argument by the City. The Union's assertion being entirely uncorroborated, it cannot stand as a statement binding the City in subsequent, similar events.

One of the implications of there being an emergency is that some otherwise standard provisions are suspended. It is beyond the scope of this arbitration to consider what other contractual provisions, if any, could be amended or suspended during a state of emergency. All that is within the scope of this arbitration is consideration of the City's action deviating from seniority and by-passing senior transit operators residing outside the City when it offered overtime to transit operators during the flood emergency of June 12, 2008.

For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The City did not violate the collective bargaining agreement when it deviated from seniority and by-passed three senior bus drivers who lived outside the city when it offered overtime work during a flood emergency on June 12, 2008. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 28th day of August, 2009.

John R. Emery /s/

John R. Emery, Arbitrator

