

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF CUDAHY

and

LOCAL NO. 742, DISTRICT COUNCIL 48, AFSCME, AFL-CIO

Case 113

No. 67547

MA-13936

Appearances:

Mr. Robert W. Mulcahy, Attorney at Law, Michael Best & Friedrich LLP, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin, 53202-4108, appearing on behalf of the City of Cudahy.

Ms. Teresa C. Mambu-Rasch, Attorney at Law, Law Offices of Mark A. Sweet, LLC, 705 East Silver Spring Drive, Milwaukee, Wisconsin, 53217, appearing on behalf of Local No. 742, District Council 48, AFSCME, AFL-CIO.

ARBITRATION AWARD

The City of Cudahy (hereafter “City”) and Local No. 742, District Council 48, AFSCME, AFL-CIO (hereafter “Union”) are parties to a collective bargaining agreement (hereafter “Agreement”) that provides for final and binding arbitration of disputes arising thereunder. On December 10, 2007, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning Dennis Schmidt. The filing requested that the Commission assign a commissioner or staff member to serve as arbitrator. The undersigned was so appointed. A hearing was held on September 10, 2009, in Cudahy, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. A transcript of the proceeding was made. Each party filed an initial post-hearing brief. On November 13, 2009, the parties indicated to the undersigned that reply briefs would not be filed, whereupon the record in this matter was closed.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

ISSUE

The parties entered into a stipulation to allow the undersigned to frame the statement of the issue to be heard. The City has proposed that the issue be stated as follows:

Did the City violate Article VII of the parties' collective bargaining agreement when it promoted someone other than Dennis Schmidt to the Equipment Operator II position on July 6, 2007? ¹

If so, what is the remedy?

The Union has proposed the following statement of the issue:

Whether the City of Cudahy violated the labor agreement, specifically Article VII(2) and Article XXXIII ²(H) and (J), when it failed to award the Operator II position to Dennis Schmidt, when he was the most senior and most qualified Operator I?

If so, what is the appropriate make-whole remedy?

The undersigned adopts the following statement of the issue:

Did the City violate the Agreement when it failed to award the Equipment Operator II position to Dennis Schmidt, who was the most senior, qualified Operator I who applied for the position?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

¹ At hearing, the City proposed a slightly different statement of the issue, which read as follows:

Did the City violate Article VII-Seniority, 1-Definition, when it promoted someone other than Dennis Schmidt to the Equipment Operator II position on July 6, 2007?

If so, what is the remedy?

I understand the broader statement of the issue proposed by the City in its post-hearing brief, which statement refers only generally to Article VII of the Agreement, to be the one the City wishes to submit for consideration.

² The transcript of the proceeding in this case indicates that the statement of the issue proffered by the Union refers to Article "23" of the Agreement. It is clear from every other aspect of the record, as well as the undersigned's notes, however, that the Union's statement of the issue actually referenced Article XXXIII.

ARTICLE IV – MANAGEMENT RIGHTS

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

The City reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not violate the terms of this agreement, nor shall they be exercised for the purpose of frustration or modifying the terms of this agreement. These rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union. Those management rights not specifically enumerated herein continue to repose in the City and the Union agrees it will not challenge or undermine these management rights.

The City has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union or to discriminate against any of its members. The City agrees to a timely notification and discussion in advance of the implementation of any proposed contracting or subcontracting. The City agrees it will not lay off any employees who have completed their probationary period and who have regular civil service status at the time of the execution of the agreement because of the exercise of this contracting or subcontracting right except in the event of an emergency, strike or work stoppage, or essential public need where it is uneconomical for City employees to perform this work, provided it shall not be considered a layoff if the employee is transferred or given other duties at the same pay.

It is understood that management has the discretion and the right to assign work in the City.

It is understood that management has the right to implement a new floater clerk position to be used between City Hall, Police Department, Fire Department, Health Department, and the City Garage as needed. It is further understood that this new position will be a Civil Service position and will be within the bargaining unit.

(Dispatchers are covered by this Article.)

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ARTICLE VII – SENIORITY

1. Definition: Seniority means an employee's length of continuous service with employer since his date of hire. The employee's earned seniority shall not be lost because of absence due to illness or authorized leaves of absence.

A seniority list of Dispatchers shall be maintained.

2. Assignments: Seniority shall be used in determining job assignment (when employee is qualified), vacation assignments and overtime assignments (when employee is qualified). Job assignments as used here shall be interpreted to mean assignments to work within an employee's classification or work at a higher level of classification.

When working at a higher level of classification, seniority shall be used (when an employee is qualified) when the work is temporary. This paragraph does not apply to dispatchers.

For Dispatchers, date of hire shall be used for shift preference when vacancies occur and for vacation selection only.

Appointments to a lower classification, to a lateral classification, or to a higher classification shall be made through existing civil Service procedures, with the following guidelines:

a. Seniority shall be used when an employee is qualified, based upon the qualifications which were developed by the Department Head.

b. Such downward, lateral or upward assignments shall be subject to a probationary period of three (3) months. If any probationer shall be found incompetent or unsuited for the position by the appointing authority to perform the duties of the position to which she/he has been certified, the appointing authority may separate the probationer prior to the completion of the probationary period and return to the position they last held. Further, probationers who find that during the probationary period they dislike the position may voluntarily return to the position they last held.

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ARTICLE XXXIII – SOLID WASTE COLLECTION

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H. POSTING/ASSIGNMENT

For the initial filling of the one man collection vehicle system, vacancies shall be posted and filled based upon seniority. Any Department of Public Works employee may post for such position in the collection system. The duration of the assignment shall be for a period of time necessary for full implementation of the system citywide. Subsequent assignments shall also be by seniority for a one year period, with posting annually in February of each year, if necessary. The employees currently assigned to the one man collection system shall notify the General Manager of the desire to transfer by February 1 of each year. A vacancy will occur only if employees presently assigned notify the General Manager of the desire to transfer.

For the initial and subsequent postings for assignment, if few applicants or qualified applicants do not post for the assignment, then filling of the positions shall be through management assignment of all DPW employees. Starting first with Operators with the lowest Department seniority. The employee shall retain his basic classification as Operator for all purposes other than the collection system. The labor contract for the Operator position shall apply for all other work performed by these classifications.

All employees assigned to the fully automated collection system shall possess and maintain a valid Commercial Driver's License.

Rotation within the four man crew will be established by said crew.

The employees within the collection system may alternate assignments by mutual consent with the concurrence of the Department Head.

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J. WAGE RATE FOR ONE MAN COLLECTION UNIT

All employees who are assigned to the one man collection unit shall receive Operator I pay plus the incentive of One Dollar per hour (\$1.00/Hr.). All employees, regardless of their classification, shall receive this rate of pay. Temporary assignment by an Operator in a higher classification to the one man collection unit shall not result in reduction in base hourly rate. The incentive rate shall be paid only when an average of 900 carts per day are collected in a work week.

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ARTICLE XXXVII – WORKING CONDITIONS AND WORK RULES

The parties agree that the working conditions in effect as of the date of agreement, which are mandatory bargainable shall remain in effect unless changed by mutual agreement in writing. The City shall have the authority, however, to establish reasonable work rules where necessary to operate City government.

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BACKGROUND

Grievant Dennis Schmidt works for the City's Department of Public Works, in the classification of Equipment Operator I.³ The position description for the Equipment Operator I classification provides, in part, as follows:

EQUIPMENT OPERATOR I

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ESSENTIAL FUNCTIONS:

- 1) Sweep streets.
- 2) Tar and sand roads.
- 3) Perform all required street maintenance.
- 4) Clean and rebuild catch basins, manholes, and sanitary sewers.
- 5) Paint striping on streets and walkways.
- 6) Maintain storm culverts.
- 7) Plow and remove snow.
- 8) Shovel snow.
- 9) Sand, salt streets and sidewalks.

³ Although described in the present tense for readability, the factual details set forth here are reflective of circumstances as they existed in 2007, the period of time relevant to this case.

- 10) Dig trenches.
- 11) Collect trash and recyclables.
- 12) Cut grass.
- 13) Repair streetlights.
- 14) Act as flagman.
- 15) Clean and maintain all department facilities.
- 16) Drive trucks.
- 17) Operate roller, lawnmower, tractor, air compressor, stump cutter, paint striper, tree sprayer, pumps, chipper, and other related miscellaneous equipment.
- 18) Do landscaping.
- 19) Operate pneumatic hammer.
- 20) Repair alleys and sidewalks.
- 21) Plant trees and shrubs.
- 22) Trim, cut and remove frees.
- 23) Insure that all tools and equipment are in a safe operating condition.
- 24) Make concrete repairs.
- 25) Maintain a high standard of safety and good housekeeping.
- 26) Complete any and all necessary forms following established practices.
- 27) Perform any and all related duties as assigned.

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EQUIPMENT USED:

- 1) Calculator, telephone, and copy machine.

- 2) Automobile, truck and other motorized equipment.
- 3) Measuring devices.
- 4) Hand tools, power tools, chain saws, shovels, pick axes, and brooms.
- 5) Heavy equipment including but not limited to tractors, paver, cement mixer, air hammer, mower, snowplow, backhoe, Vac-All, Hi-Ranger, front-end loader, paint striper, air compressor, roller, chipper, sweeper, concrete saw, etc.
- 6) Confined space entry equipment.
- 7) First aid equipment.
- 8) Breathing apparatus, steel tip shoes, and hearing and eye protection.

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The rate of pay for the Operator I position is \$21.3622 per hour.

Even though he is classified as an Operator I, Schmidt's actual job responsibilities alternate on a bi-weekly basis. On one week, Schmidt performs various Operator I tasks as they are assigned to him. Every other week, however, Schmidt's time is dedicated to performing a refuse collection assignment, in which Schmidt drives an automated, one-man refuse collection truck. This truck has a mechanical arm with jaws on it that picks up a garbage container and empties it into the vehicle's collection bin. The City has two refuse collection trucks. Four Department of Public Works employees are assigned to the refuse collection system, allowing two employees to do the work each week.

Schmidt received the one-man refuse collection assignment in approximately 1997⁴, and he enjoys the position for various reasons. The work is done in four ten-hour days, allowing for Fridays off. Further, although the refuse collection shift ends at 4:00 p.m., the work is sometimes completed early, leaving an employee with discretion as to what he will do while he waits to punch out. Schmidt acknowledges that he has used that free time in the past to read the newspaper or to scavenge items from the City's recycling yard. Finally, the refuse collection position earns the Equipment Operator I rate of pay plus an extra, incentive dollar per hour. Thus, every other week, when Schmidt operates the refuse collection truck, he earns \$22.3622 per hour.

⁴ The Agreement, at Article XXXIII, Section H, allows a Department of Public Works employee with the most seniority to post into a refuse collection position if desired. In the event that the City's refuse collection positions are not filled through this voluntary posting procedure, the Agreement allows the City to appoint the Department of Public Works employee with the least seniority to an unfilled position. Schmidt received the refuse collection assignment through the latter procedure, apparently as the employee in the Department with the least seniority at the time.

In 2007, an equipment Operator II position in the Department of Public Works was vacated by an employee who transferred to the City's Water Department. Pursuant to the terms of the Agreement between the City and the Union, the City posted the vacancy. The position was open to members of the City's classified service, including Schmidt. Schmidt completed and submitted an application for the position. The position description for the Equipment Operator II classification provides, in part, as follows:

EQUIPMENT OPERATOR II

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ESSENTIAL FUNCTIONS:

1. Performs all Laborer, and Equipment Operator I duties.
2. Operates backhoe, caterpillar, stump cutter, Hi-ranger, paint striping machine, roller, hydro-crane, and other equipment as assigned.
3. Assures that work assignments of work crews are accomplished.
4. Demonstrates proper work methods for work crews.
5. Ensures that proper tools and supplies for particular jobs are available to the crew.
6. Inspects work of crews while it is in progress and when work is completed.
7. Ascertains whether supervisor's instructions on work sequence, procedures, methods and deadlines have been met.
8. Ensures that employees remain on the job site until the task is completed.
9. Carries a pager as required by the current labor agreement.
10. Directs and guides other employees of same or lesser labor classification in the performance of any and all required work tasks.
11. Completes any and all necessary forms following established practices.
12. Insures that all tools and equipment are in a safe operating condition.
13. Maintains a high standard of safety and good housekeeping.

14. Performs any and all related duties as assigned.

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EQUIPMENT USED:

1. Calculator, telephone and copy machine.
2. Measuring devices.
3. Hand tools, power tools, chain saws, shovels, pickaxes, and brooms.
4. Car and truck.
5. Heavy equipment including but not limited to tractors, paver, cement mixer, air hammer, mower, snow plow, hydrocrane, backhoe, vac-all, grader, hi-ranger, front-end loader, paint stripper, air compressor, roller, etc.
6. Confined space entry equipment.
7. First aid equipment.
8. Breathing apparatus, steel tip boots, and hearing and eye protection.

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The rate of pay for the Operator II position is \$21.8078 per hour.

The City's Department of Public Works has thirteen Operator I positions and six Operator II positions. As the position descriptions for these classifications suggest, certain tasks undertaken in the Department require the operation of heavy equipment, such as a backhoe, stump cutter, Hi-ranger, paint striping machine, roller, and vac-all. Although the positions descriptions for the Operator I and the Operator II classifications both require the ability to use such equipment, the reality in the Department is that the Operator II employees are primarily responsible for operating the heavy equipment. For the City's Department of Public Works to accomplish its work, the Operator II employees have to be able to devote their time on a year-round basis, with the exception of the winter time, to the operation of heavy equipment.

At the time that Schmidt applied for the Equipment Operator II position, Michael Clark was the general manager of the City's Department of Public Works. As such, Clark was responsible for overseeing the posting and filling of the Equipment Operator II position. After receiving the applications, Clark and a City foreman reviewed them and determined that

Schmidt was the most senior, qualified applicant for the position. Therefore, consistent with Article VII of the Agreement, Clark offered Schmidt the position.

When Clark offered the Equipment Operator II position to Schmidt, Clark indicated that the position was full-time and that Schmidt would, therefore, have to give up his bi-weekly refuse collection work if he accepted it. Schmidt had never intended to be removed from his refuse collection assignment. He had applied for the Equipment Operator II position believing that he would be able to continue to perform his refuse collection duties every other week. Schmidt indicated to Clark that he would only take the Equipment Operator II position if he could also continue to operate the one-man refuse collection truck every other week. Upon hearing that, Clark considered Schmidt to have withdrawn his application from consideration for the Equipment Operator II position. Clark awarded the position to the next most senior, qualified applicant.

Schmidt grieved the fact that he was not allowed to fill the Equipment Operator II position. That grievance resulted in the present case.

DISCUSSION

Generally stated, the City's position in this case is that it is authorized by the terms of the Agreement between itself and the Union to have made the determination that only employees in the Operator I classification are eligible to hold the bi-weekly refuse collection job. The Union's position is that the terms of the Agreement compel the City to allow a Department of Public Works employee of any classification, including Schmidt's desired classification of Operator II, to perform the refuse collection work.

At the outset, it is necessary to address an objection raised by the City as to which provisions in the Agreement will be considered in deciding this case. Article XXXIII of the Agreement addresses the subject of solid waste collection work. While the grievance forms filed by the Union with the City specifically identified Section J as the allegedly violated portion of Article XXXIII, the statement of the issue proposed by the Union at the arbitration hearing also made reference to Section H of that Article. The City objected to a consideration of Section H as an alleged violation of the Agreement, because the Union had not specifically identified that provision in any of the pre-arbitration steps of the grievance procedure, including the hearing before the City's personnel committee. I have concluded, nevertheless, that it is appropriate to consider the evidence and the post-hearing arguments by the parties related to Section H. In the written grievance originally filed with the City, the violations claimed by the Union refer not only to Section J of Article XXXIII, but also to "any other applicable provisions of the current labor agreement." This statement was reiterated in the grievance appeal form which was filed with the City after the personnel committee hearing and which indicated that the Union intended to go to arbitration. It is a statement that should have been sufficient to put the City on notice that other provisions from the Agreement with some relevance to this matter could be invoked at the arbitration stage. Moreover, the City's

objection here to a consideration of Section H does not seem to be based on any claim that the introduction of that provision prejudiced the City by altering the scope or nature of the issue to be arbitrated. Indeed, Section H appears to be integrally related to the dispute as it has existed between the parties all along.

A close reading of the Agreement does not persuade me that the parties intended to limit the refuse collection assignment to the Operator I classification. To be sure, the Agreement contains no statement that expressly places such a limitation on the work. Beyond that, Section H of Article XXXIII, pertaining to the guidelines for posting into or assigning the refuse collection work, contains the following sentence:

Any Department of Public Works employee may post for any such position in the collection system.

Though this statement appears early in Section H, between two sentences addressing the initial filling of the one-man collection vehicle system, it appears to also apply to subsequent fillings, which are discussed immediately thereafter, in the same paragraph. It is difficult to imagine a sentence that could more clearly establish, on its face, the general rule that employees of all classifications are eligible to fill the City's refuse collection positions. Moreover, the City does not propose an alternative reading, and Sections H and J of Article XXXIII are cluttered with statements that appear to reinforce it.

Section H, for example, goes on to set forth the method by which refuse collection jobs are to be filled in the event that no Department of Public Works employee voluntarily posts for the position, as follows:

For the initial and subsequent postings for assignment, if few applicants, or qualified applicants do not post for the assignment, then filling of the positions shall be through management assignment of all DPW employees. Starting first with Operators with the lowest Department seniority. [*Sic.*] The employee shall retain his basic classification as Operator for all purposes other than the collection system. The labor contract for the Operator position shall apply for all other work performed by these classifications.

By referring to "all DPW employees", to "Operators", and to "classifications", as the broad categories that represent the pool of applicants from which refuse collection assignments are to be made, this provision also supports the inference that the parties did not intend to limit the refuse collection work to the Operator I classification.

Section H also provides the following specific guidelines as to how refuse collection positions will be vacated:

The employees currently assigned to the one man collection system shall notify the General Manager of the desire to transfer by February 1 of each year. A

vacancy will occur only if employees presently assigned notify the General Manager of the desire to transfer.

This provision is relevant, because it does not indicate that an employee will automatically forfeit a currently held refuse collection assignment by posting into a non-Operator-I position. Rather, it expressly limits the circumstances in which an employee will surrender such a position to an instance in which the employee, apparently at his or her own discretion, notifies the General Manager of the Department of the desire to do so.

I also find support for the outcome of this case in Section J of Article XXXIII, entitled “wage rate for one man collection unit”. That Section reads, in pertinent part, as follows:

All employees who are assigned to the one-man collection unit shall receive Operator I pay plus the incentive of One Dollar per hour (\$1.00/Hr.). All employees, regardless of their classification, shall receive this rate of pay. Temporary assignment by an Operator in a higher classification to the one man collection unit shall not result in reduction in base hourly rate. ...

The City asserts that the fact that the parties agreed that refuse collection workers would receive Operator I pay should be understood to indicate that they intended that only Operator I employees would perform the refuse collection work. I disagree with this interpretation. As its heading and plain meaning would suggest, Section J has the narrow purpose of setting out the rate of pay for refuse collection work. Its terms do not link eligibility for the work with any specific classification. Indeed, the provision acknowledges that employees of other classifications might perform refuse collection work, by mandating the Operator I pay rate for all refuse collection workers “regardless of their classification”. If the parties had intended that only Operator I employees would perform refuse collection work, it seems that the provision would serve little purpose, as all of the employees performing the work would automatically receive the Operator I rate of pay.

The City further contends that the last sentence set forth above indicates that the parties intended that non-Operator-I employees would perform refuse collection work only on a temporary basis. Again, I disagree. As discussed, the apparent purpose of Section J is limited to establishing rates of pay for refuse collection work. The fact that the parties established pay rates for the instances in which employees of higher classifications perform refuse collection work on a temporary basis cannot fairly be read to imply that they intended that such employees would only be allowed to do such work on a temporary basis.

The analysis of these provisions is not altered by the City’s observation that refuse collection work is only specifically identified as a job duty in the Operator I position description. It is true that the Operator I position description identifies “collect trash and recyclables” as an essential function and the Operator II position description does not specifically refer to such a duty. It bears noting, however, that the Operator II position

description provides, as a first essential function, that an Operator II is expected to perform all Operator I duties. Thus, rather than undermining the plain meaning of Sections H and J of Article XXXIII, the fact that the duties set forth in the position descriptions are completely overlapping in this manner reinforces the notion that it would have been considered appropriate for an employee of any classification to take on the refuse collection assignment.

The City asserts that this case must be analyzed under the management rights clause set forth at Article IV of the Agreement. That provision expressly reserves to the City the discretion and right to assign work. The City argues that the fact that the Agreement bestows onto Department of Public Works employees the option of posting into the refuse collection job should not be understood to mean that the City has relinquished its basic, contractual right to assign work within classifications.

The need to harmonize Articles IV and XXXIII leads to the conclusion that the City's overall right to assign work is limited by the selections employees make with regard to the refuse collection work. Just as a passage quoted in the City's post-hearing brief recognizes, a collective bargaining agreement can carve a specific area out of the rights otherwise reserved to management:

The effective use of employees is also a management function necessary for the successful operation of the enterprise. ...*Absent a limitation in a contract*, management should not be denied an opportunity to employ workmen in a manner best suited to his end.

MICHIGAN CONSOLIDATED GAS CO. 42 LA 385 388, Howlett, 1964 (emphasis added). Here, the plain meaning of Article XXXIII, which allows employees from any classification to post for the refuse collection work, represents such a limitation. Through Article XXXIII, the City has surrendered its right to decide that only employees in the Operator I classification will perform the refuse collection work. Thus, in this particular instance, the City does not have the right to force Schmidt to choose between the Operator II position and his refuse collection assignment. Rather, the provisions in the Agreement compel the City to resolve any incompatibility that exists between Schmidt's contractually conferred right, as the most senior, qualified employee, to post into the Operator II position, and his contractually conferred right to retain the refuse collection assignment.

Nor am I persuaded by the City's argument that there is a past practice consistent with its interpretation of the interplay between the refuse collection provisions and the management rights clause. It appears that the City is relying on two factors to support its past practice argument. First, one City employee, Don Kolbow, was told in 2007 that he would have to give up his refuse collection work to post into an Operator II position, and he agreed to do so. Second, Clark testified that, in the course of his fifteen-year tenure with the City, he has never known an employee who has held an Operator II position and the refuse collection assignment

at the same time. Though this evidence is un rebutted on the record, the single instance involving Kolbow, even when combined with Clark's general observation, is simply not the strong proof required to establish a past practice.⁵

The City urges me to recognize that Schmidt's refuse collection assignment is particularly incompatible with the Operator II position in this instance, because the Operator II position is full-time. Clark's testimony established, however, that all positions in the City's Department of Public Works are full-time. There is no evidence before me suggesting that a full-time Operator I position somehow automatically allows for time on alternating weeks to perform refuse collection work. When Schmidt becomes an Operator II, the City will be compelled to rearrange his new full-time Operator II workload to accommodate the refuse collection assignment, just as it has done since 1997 with his full-time Operator I position. It is evident from the record that it may be more difficult for the City to shift work away from an Operator II position, because there are only six Operator II positions in the Public Works Department and they must devote their full-time attention to the operation of heavy equipment or the Department's work will not get done. The fact that the Agreement as applied in this instance has some apparent disadvantages for the City, however, does not alter its plain meaning.

The City further asserts that sustaining the grievance in this case will result in a situation where any employee, at any time, regardless of classification, could elect to work on refuse collection and, in effect, choose his own work and work schedule. The fallout, according to the City, would be that the City would be unable to manage its workforce and outside contractors would need to be utilized. In reality, the terms of the Agreement place limitations on when refuse collection positions become available and who can fill them. With those limitations in place, the chaos the City predicts seems speculative and overstated.

On the basis of the foregoing, I make the following

⁵ Because I am not persuaded that the Union is attempting to thwart or change the manner in which the City exercises its management rights in this area, I do not accept the City's argument that the Union's position here constitutes a violation of Article XXXVII of the Agreement, wherein it is established that working conditions shall remain in effect unless changed by mutual agreement of the parties.

AWARD

The grievance is sustained. The Grievant shall be allowed to post into the Operator II position while maintaining the refuse collection assignment. Further, the Grievant shall be made whole for any violation of the Agreement. The undersigned will retain jurisdiction over this matter for a period of sixty days for the sole purpose of resolving any disputes related to the implementation of this award.

Dated at Madison, Wisconsin, this 26th day of February, 2010.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator