

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**SUPERIOR CITY EMPLOYEES UNION LOCAL #244, AFSCME,
OF THE AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO**

and

CITY OF SUPERIOR

Case 210
No. 69185
MA-14518

Appearances:

James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8480 East Bayfield Road, Poplar, Wisconsin 54864, for Superior City Employees Union Local #244, AFSCME, of the American Federation of State, County and Municipal Employees, AFL-CIO, which is referred to below as the Union.

Cammi Koneczny, Human Resources Administrator, 1316 North 14th Street, Suite 301, Superior, Wisconsin 54880, for the City of Superior, which is referred to below as the City or as the Employer.

ARBITRATION AWARD

The Union and the City are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of "Union employees". Evidentiary hearing, which was not transcribed, was held on January 13, 2010, in Superior, Wisconsin. The parties filed briefs and reply briefs by February 23, 2010.

ISSUES

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

Did the Employer violate the terms of the Collective Bargaining Agreement and the long standing past practice when it failed to award a temporary Working Foreman position to a senior employee?

And if so: the appropriate remedy is for the Employer to make the most senior employee whole for any and all lost wages and benefits due to the senior employee not being awarded the temporary Working Foreman position. Furthermore, the Employer to cease and desist from awarding the temporary Working Foreman to less senior employees.

The City states the issue thus:

Did the City violate the AFSCME Union contract when Paul Graden was appointed as Working Foreman on the dates April 27, 2009 – May 1, 2009?

I adopt the City's view as that appropriate to this record.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3 – MANAGEMENT RIGHTS

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

- A) To direct all operations of the City. . . .
- C) To . . . promote and assign employees to positions . . .
- F) To maintain efficiency of City operations. . . .
- J) To determine the methods, means and personnel by which City operations are to be conducted. . . .

ARTICLE 7 – SENIORITY AND EFFECT OF SENIORITY ON FRINGE BENEFITS

. . .

ARTICLE 8 – PROMOTION

8.01 Promotions, according to the terms of this Agreement shall be made strictly in compliance with seniority among qualified employees. In the event a vacancy occurs it shall be posted on the bulletin boards for a period of seven (7) calendar days within each division. The vacancy will be filled according to seniority, provided the senior employee is interested in the position and can qualify as set forth hereinafter.

The divisional units with the Public Works Department for the purpose of this Article are as follows:

1. Street Division – including the Landfill
2. Construction, Maintenance and Sign Shop Division
3. Parks and Recreation Division
4. Environmental Services Division – Operations
5. Environmental Services Division – Collection System
6. Central Equipment Division

8.02 The following rules regarding promotions shall apply:

- A) Promotion within the Division: First consideration shall be given to employees in the division in which the vacancy occurs. In the event employees are not considered qualified by the Employer or if the employee wishes, he/she may be returned to their former position without loss of seniority rights. In this event, the next senior employee in that division, if interested, will be offered the position. In qualifying for the new position, employees shall serve a probationary period of up to ninety (90) calendar days to demonstrate their ability to perform the work. During said period they shall be paid five percent (5%) less than the base rate for the position.
- B) Promotion Considering Unit-Wide Seniority: The above procedure shall prevail until the position is filled. In the event no employee within the division is considered qualified, unit-wide seniority will prevail among qualified employees in filling that position.
- C) In the event no City employee is considered qualified by the Employer, the Employer may then advertise publicly . . .

- 8.03** A) Employees of Local 244 may exercise their divisional seniority on a daily basis in bidding for jobs for that day, providing said employees are qualified to fill that particular position in question.

. . .

- 8.04** In the event a dispute arises regarding the qualifications of any employee, the matter may be submitted to the grievance and arbitration procedure of this Agreement.

. . .

APPENDIX "A"

. . .

Working Foreman: . . . In the event an employee works in the capacity as a Working Foreman, he/she shall receive 100% of the Working Foreman's rate of pay regardless of the employee's present rate or years of service. . . .

APPENDIX "B"

Working Foreman (Master Mech +6.5%) . . .
Master Mechanic . . .
Certified Mechanic . . .
Mechanic*: . . .
 Step 4 - 95%: . . .
 Step 3 - 90%: . . .
 Step 2 - 85%: . . .
 Step 1 - 80%: . . .

*Mechanic steps are a percentage of Certified Mechanic, rate. Steps refer to years of employment with the City as a Mechanic. . . .

2. The number of Working Foremen and Master Mechanics, will be determined by the City. The basis for promotion to an opening in these positions will be:
 - a) Certifications as described below;
 - b) Qualified to repair the full range of City heavy equipment and automotive equipment;
 - c) Seniority;
 - d) Management skills

3. A Mechanic may be assigned to any equipment and shall be paid the rate for the position he/she fills regardless of the type of equipment he/she is assigned to work on. . . .

4. To obtain certification for the positions of Certified Mechanic, Master Mechanic, and Working Foreman: a Mechanic must:
 - a) Be grandfathered as certified, OR;
 - b) Complete four years of employment as a City-employed Mechanic;
 - c) Obtain certification as follows:
 1. For Mechanics:
 - (a) N.I.A.S.E. Tests . . .
 - (b) Welding and Burning Test to be administered by a

Central Equipment Agency Supervisor and a
Union Representative

...

BACKGROUND

The grievance form, dated May 5, 2009 (references to dates are to 2009, unless otherwise mentioned), alleges that “a less senior employee was given a working foreman position (for 1 week) over more senior employees.” The form cites “Article 8” as the governing provision, and states “cease and desist” as the “corrective action desired”.

The City employs mechanics on two shifts. The day (first) shift runs from 7:00 a.m. through 3:30 p.m., and the afternoon (second) shift runs from 3:30 p.m. through 12:00 a.m. Len Moen is the City’s Fleet Manager, and filled the position of Working Foreman on the day shift from April 27 through May 1 with Paul Graden. The February seniority list for the Central Equipment Agency reads thus:

<u>Name</u>	<u>Division</u>	<u>Hire Date</u>
Patrick Cleary	(Fire Dept.)	10/29/75
Ronald Lundberg	(School District)	02/21/77
Mike Rainaldo		03/21/77
David Nelson		04/15/70
Peter Moe		07/05/83
Paul Graden		03/16/92
Donald Anderson		04/20/92
Gary Kittelson		12/04/96
Gilbert Davidson		12/30/02
Nicholas Selin		09/04/07
Alan LaLuzerne		06/30/08

The City maintains a position description for Working Foreman, which spans several divisions. The position description for the Central Equipment Division does not expressly address the first shift but states the following for “Central Equipment-Second Shift”:

1. Supervises the repair, service and maintenance of automotive and related motor equipment.
2. Assigns work to employees and prepares work schedule.
3. Checks repairs upon completion and tests operating condition of the vehicles and equipment.
4. Maintains records and reports involving preventative maintenance, repairs, parts used and repair costs.
5. Plans repair and maintenance schedule for all vehicles and equipment.

6. Prepares recommendations and reports on types of equipment needed.
7. Oversees repair and maintenance of snow plows, sewer cleaners, squad cars, buses and construction equipment.
8. Prepares work orders for repairs and scheduled maintenance activities.
9. Does mechanical and welding repairs as needed.
10. Identify parts needed for repairs and may order parts for completion of job assigned.
11. Performs related work as required.

Neither the position description nor the contract specifically addresses how to fill the Working Foreman position on a temporary basis.

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

Gary Kittleson

Kittleson, a Mechanic, has served the City for thirteen years, all on the second shift. He is a Union Steward and has served as temporary Working Foreman on several occasions. Peter Moe serves as the permanent second shift Working Foreman. The City does not use a permanent Working Foreman on the first shift.

In Kittleson's experience, the most senior Mechanic fills temporary vacancies in the Working Foreman position. This is reflected in his experience on the second shift, where more senior employees would fill-in as Working Foreman until they left City employment, when the fill-in work would flow to the next most senior employee. Kittleson's limited experience with fill-in work reflects this, as his seniority has risen and more senior employees have left. In his experience, there has never been any question that senior Mechanics were qualified to do the fill-in work and no problems that resulted from their performance of the fill-in work. First shift fill-in Working Foreman work is more limited because of the increased presence of supervisory personnel.

In Kittleson's view, Cleary should have been offered the late April fill-in work, but because he specializes in work at the Fire Department, he does not wish to be asked. Because of this, the City should have offered the work to Lundberg, who works at the City Garage facility, but services school district equipment. Lundberg's predecessor in that position served on numerous occasions as Working Foreman. The fill-in work requires no special skills, and any Mechanic could delegate work with which they are unfamiliar or are not qualified to perform. Employees who have not reached Certified Mechanic status have served as Working Foreman on a temporary basis. Moe worked on a temporary basis as Working Foreman before assuming those duties on a permanent basis. Kittleson did not think the fill-in work had to be offered to employees who are uninterested in it, like Cleary, or to employees who work a different shift than that of the absent Working Foreman.

In response to Moen's testimony, Kittleson noted that Rainaldo could have performed the work assigned to Graden. That Moen assigns a non-Mechanic to perform those duties reflects that specialized skills of a Mechanic are not a prerequisite to performing fill-in work.

Donald Anderson

Anderson has worked for the City for over seventeen years, and has served in a number of Union roles, including Steward and Negotiating Team Member. Virtually all of Anderson's work has been second shift. In his memory, the work of Working Foreman on a temporary basis has been assigned by seniority. To his knowledge, no employee filling that role had any difficulty doing so. Each was a Certified Mechanic. In his estimation, any Mechanic could fill the role competently.

In his experience, only Moe has crossed shifts to perform as temporary Working Foreman. Moe covered the absence of a supervisor who took funeral leave.

Ronald Lundberg

Lundberg, a Certified Mechanic, has worked for the City since 1977. He has specialized in work on school district equipment for the past twenty-one years. He has never been assigned to fill-in as Working Foreman. He would consider accepting assignment to Working Foreman, depending on his workload and the condition of school buses. To the extent such work exposed him to duties he had limited experience with, he would delegate them. Supervisors on the first shift who lack the skills of a Certified Mechanic have performed the duties of Working Foreman.

In response to Moen's testimony, Lundberg noted that his mechanical experience travels well from school district to City fleet equipment. He assigns work and performs paperwork as a function of his specialized duties, in a manner akin to that done by the Working Foreman. That the school district garage is located at some distance from the City fleet cannot obscure that they use the same facility. Lundberg is no less qualified than his predecessor was to work on a fill-in basis.

Len Moen

Moen has served as Fleet Manager for roughly four and one-half years. Prior to that, he served for roughly fourteen years as Assistant Fleet Manager. Prior to that, he worked on the second shift as a Mechanic.

In his view, Section 2 of Appendix B sets forth, in order of importance, the criteria that define the Working Foreman qualifications. This is underscored by the Union's opposition, in the most recent round of contract negotiations, to a City proposal to renumber Section 2d) "Management Skills" as Section 2c). The effect of the proposal was to renumber the current Section 2c) "Seniority" as Section 2d). Section 2 addresses a permanent promotion to the

position, but a temporary fill-in must meaningfully meet these qualifications to be able to perform the duties of the position.

Assessment of qualifications is a City management function, extending throughout the job assignment process, which includes the assignment of Working Foreman fill-in work. The ultimate mechanical knowledge required of mechanics is similar across first and second shifts, but the shifts have a different focus. The second shift's focus is primarily on preventive maintenance work. The first shift must respond to ongoing repair issues involving vehicles which need to be in service during normal working hours. Moen routinely assigns a temporary Working Foreman when Moe is unavailable. The assignment of a temporary fill-in on the second shift typically reflects seniority, since all of the employees are Mechanics and all are qualified to fill-in for Moe. On past occasions, Moen has used non-certified employees to fill-in for a Working Foreman, but such assignments reflect the absence of a Certified Mechanic to serve as fill-in. Moe crossed shifts once to fill-in for Moen, but this assignment reflected the use of funeral leave and Moen's desire not to provoke a grievance. To his knowledge, no employee without Certified Mechanic status has served as a fill-in for a Working Foreman on the first shift.

When given the opportunity to plan for an absence, Moen considers the length of his absence; the amount of work that he can assign in advance of the absence; and the specific qualifications of the available employees. This poses far more issues regarding a first shift absence than a second shift absence. Regarding the absence questioned by the grievance, Moen did not consider Cleary or Lundberg to afford reasonable options. Both perform specialized work, and Cleary's absence from the Fire Department could be disruptive to departmental operations. Lundberg had more than enough work to handle with school district equipment. He has, in any event, performed his specialized work so long that he lacks familiarity with City fleet work. Lundberg's predecessor was a Master Mechanic, who worked on City vehicles periodically. He, unlike Lundberg, had sufficient familiarity with City fleet issues to serve as a Working Foreman. Rainaldo had specialized experience at the golf course, which is now closed, and was close to retirement at the time of the vacancy. Rainaldo lacked experience with the City fleet. None of the employees senior to Graden had any experience in performing the work of a Working Foreman. Graden was the most senior, qualified employee to fill the late April absence. Moen has assigned Graden to fill that role on several occasions. The Union did not grieve any such assignment until the grievance posed here. Moen typically looks to Clarence Mattson, Jr. to cover Moen's absences, even though Mattson lacks Mechanic skills.

That second shift fill-in assignments track seniority establishes only that the personnel are all qualified, leaving seniority to govern the assignment. To his knowledge, no assignment of first shift Working Foreman fill-in has ever been made exclusively on the basis of seniority.

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

THE PARTIES' POSITIONS

The Union's Brief

The Union notes that "Article 7 - Seniority and Article 8 - Promotion" are "the controlling sections of the contract with regards to the issues in this arbitration case." Section 8.03A underscores the "importance of seniority" by imposing "the contractual obligation to follow seniority to daily bidding for particular job assignments".

After a review of the evidence, the Union contends that, "Seniority has always been a controlling factor regarding the assignment of work within this bargaining unit." Witness testimony establishes that seniority has always been the determining factor "when it came to the assignment of the working foreman duties on a temporary basis", whether or not the vacancy occurred on "the day shift or the afternoon shift." The City offered no rebuttal on this point. The Union has been vigilant over time in policing seniority as well as the wage rate appropriate to unit member performance of Working Foreman fill-in work.

Any of the "senior mechanics could and have easily performed the duties of temporary Working Foreman." Even if the mechanics have different skill sets, "all mechanics know each mechanic's abilities and know the particular skills each mechanic possesses." Witness testimony establishes all afternoon shift openings "were always filled based upon seniority." Given the absence of supervisors on the second shift, this practice involves more supervisory duties regarding second shift fill-ins.

The grievance seeks "to uphold seniority rights of represented employees." The alternative is favoritism or the perception of favoritism. The most senior mechanic should be made whole for the duties the City failed to offer based on seniority. Beyond this, the City should be ordered "to cease and desist from not following seniority in the future assignments of temporary Working Foreman."

The City's Brief

As a procedural issue, the City, "takes issue with the Union's request for a monetary payment . . . as an award for this grievance", since the request first appeared at the arbitration hearing. Turning to the evidence, the City notes that the Union's arguments and some testimony belittle the issue of qualifications to become a Working Foreman.

The contract governs those qualifications in detail at Appendix B, Section 2, which reflects that "qualifications were negotiated by the parties". Seniority is one of those bargained qualifications, and testimony establishes that the Union "firmly rejected" a City proposal, for the 2009 contract, to move "Management skills" above the "Seniority" criterion in the listed qualifications. Union arguments also ignore that the "Working Foreman position is paid a 6.5% higher wage than the highest paid mechanic." In sum, qualifications clearly

play a role in selecting a Working Foreman, and the assertion that seniority is the sole criterion has no contractual basis. The terms of Article 8 offer little support for the Union, since it “does not relate to the grieved issue of the week long temporary Working Foreman assignment made by the Employer”. The posting procedures clearly relate to a vacancy in a permanent position, not to periodic absences of an incumbent.

The grievance has little better footing in the facts. The Union’s assertion of strict seniority to fill the Working Foreman position is not reconcilable to its assertion that “a more senior Mechanic should not be taken from a different work shift to serve as a temporary Working Foreman.” That non-certified Mechanics have served as Working Foreman on a temporary basis on the second shift says more about the different work requirements of Mechanics on those shifts than about qualifications to fill the Working Foreman position. Moen’s testimony establishes that the City evaluates qualifications on either shift. The presence of non-certified Mechanics performing temporarily as Working Foreman on the second shift reflects no more than the unavailability of certified Mechanics. Appointment of a non-certified Mechanic on the second shift reflects nothing beyond the selection of the most senior, qualified employee available. The decision still demands a City determination of qualifications.

Work performed by the shifts varies widely. The second shift primarily performs “preventive maintenance on City equipment.” First shift “carries more responsibility because the rest of the City employees are working during this time and there are typically breakdowns that occur during the day shift where decisions need to be made about what caused the breakdown, what needs to be fixed, whether to fix the equipment in the field or tow it in, whether the equipment needs to be or can be repaired immediately or if it must wait, what Mechanic should and can be assigned to do the repair, and communicating the equipment status to the appropriate supervisor.”

Factual issues surround the Union’s view of the grieving employees. Lundberg has worked over twenty-one years servicing school district equipment. He has not chosen to work on any city fleet vehicles during that time, even though Appendix B, Section 3 affords him the opportunity. Graden’s experience stands in stark contrast, including prior service as temporary Working Foreman. Lundberg has no such experience. That Lundberg’s predecessor served as temporary Working Foreman fails to support the grievance. Koski was a Master Mechanic and chose to work on City fleet vehicles “during overtime opportunities so he maintained a familiarity of the City’s equipment.” Neither Rainaldo nor Nelson are qualified as Certified Mechanics and neither has experience as a temporary Working Foreman.

However important seniority may be to the Union, “it can not be the only factor considered for a promotional assignment to Working Foreman.” A qualifications determination is necessary and the contract authorizes the City, not the Union, to make that determination. Even if it did, the Union’s failure to assert a make whole remedy prior to the arbitration hearing precludes the remedy it seeks. Viewing the record as a whole, the City concludes, “The grievance should be denied.”

DISCUSSION

I have adopted the City's statement of the issue as that appropriate to the record. Both statements question the application of the labor agreement broadly. Unlike the City's, the Union's questions the role of past practice. This is appropriate, whether the grievance seeks to resolve contractual ambiguity or to establish a stand alone benefit. The reason for preferring the City's is that it is more focused factually. The Union's statement points to the precedential force of strict seniority. I am not persuaded that the grievance permits broader application than the resolution of the dispute posed by the fill-in work between April 27 and May 1.

The breadth of the parties' statements of the issue highlights the difficulty of defining the grievance's contractual focus. The parties point to Articles 3, 7, 8, Appendix A and Appendix B. The reason for denying the grievance is that the grievance lacks a persuasive contractual basis and that past practice evidence is insufficient to establish a stand-alone benefit of assigning Working Foreman fill-in work based only on seniority.

The contractual basis of both party's arguments is tenuous, but affords greater support for the City's view. The sections of Article 3 cited above establish a City right to assign, but afford less than clear guidance on the point. Article 7 addresses seniority, but none of its subsections have any evident bearing on the assignment of a Working Foreman. The Union's arguments reflect this, by citing Article 7 as a whole, rather than any specific section. Sections 8.01 through 8.03 establish the interpretive dilemma, which is to reconcile the City's authority to assign based on qualifications to the role of seniority.

Article 8 affords less than definitive guidance on this. None of the cited sections apply to a temporary assignment. Sections 8.01 and 8.02 apply specifically to permanent, posted promotions. Section 8.03 applies to bidding for daily duties. None refer to seniority without a parallel reference to qualifications. Against this background, the most that can be said of the role of Article 8 is that City authority to determine qualifications must account for the role of seniority. As the parties' arguments establish, the contractual process that governs permanent promotions has a bearing on the process for temporary promotions.

The wage appendices afford a bit more specificity. The second paragraph of the "Working Foreman" section of Appendix A establishes the pay for temporarily performing as Working Foreman. Outside of Section 2 of Appendix B, the Appendices are silent on the selection process. That section establishes the "basis for promotion to an opening in" the positions of Working Foreman and Master Mechanic. The section applies more clearly to a permanent promotion than to a temporary promotion. It is not evident how a temporary promotion to "Master Mechanic" is possible in light of Section 3. This cannot obscure that Section 2 of Appendix B is the most applicable provision to the issue posed by the grievance.

At a minimum, the provisions of Article 8 read in light of the wage appendices establish that the City has the authority to assess the qualifications of an employee to serve as Working Foreman. Those provisions make it unpersuasive to accept the Union's assertion that the City

must fill temporary vacancies in the Working Foreman through strict seniority. There is no contractual provision to support this view, and Section 2 of Appendix B makes it impossible to separate the “qualifications” determination from the application of “seniority”, much less to elevate the role of seniority over qualifications.

However, neither the contract nor the evidence of practice will support the assertion that the City has an unfettered right to determine qualifications. Even though Section 2 fails to clearly address promotion to temporary openings, Moen’s testimony persuasively asserts that the qualifications to fill Working Foreman on a permanent basis must have a bearing on filling that position on a temporary basis. However, Moen acknowledged that he has used Mechanics short of Certified Mechanic to fill the position on a temporary basis. Against this background, it is impossible to apply Section 2 literally to Working Foreman fill-in work.

Thus, review of City assignment of an employee to fill the position of Working Foreman on a temporary basis must turn on a case-by-case review of the City’s application of the criteria noted at Section 2 of Appendix B. More specifically applied to the grievance, the issue is the reasonableness of the City’s application of the role of qualifications and seniority regarding the late April vacancy. The qualifications determination cannot be applied reasonably if it undercuts the contractually significant role of seniority.

Moen’s testimony establishes that he reviewed the qualifications of the employees more senior than Graden. There is no effective rebuttal to the reasonableness of his review. The thrust of the Union’s position is that any Mechanic is qualified to assume the Working Foreman position. This argument is contractually flawed, because it is irreconcilable to the references to qualifications in each of the cited sections of Article 8; the selection criteria of Section 2 of Appendix B; and to the wage differential stated by Appendix A and B. The similarity of Lundberg’s view of his selection to Moen’s is striking. Lundberg acknowledged that before accepting an offer of the position, he would consider his workload as well as the condition of school district buses. This essentially tracks Moen’s thought process. If Lundberg’s assessment of the issue is reasonable, and it is, then there is no basis to overturn Moen’s.

It does not, however, follow from this that the Union’s reading of the contract is unpersuasive. It has significant factual support. If, for example, Moen’s thought process is taken to be that Lundberg cannot, under any circumstance, be considered qualified, then it loses its reasonableness. The vacancy at issue was a full week, which makes Lundberg’s school district workload and his familiarity with the City fleet meaningful considerations. Moen’s determination becomes less reasonable if the fill-in work was a shift or less. More significantly, Moen acknowledges that he has assigned fill-in duties to employees who do not strictly meet the criteria of Section 2. This establishes the persuasive force of the Union’s position as a matter of fact under the contract. Thus, the reasonableness of a City assignment of fill-in duties for a Working Foreman must be addressed on a case-by-case basis. More to the point here, there is no persuasive showing that Moen’s assignment of the duties covered by the grievance was anything other than reasonable.

The Union has asserted that past practice can establish the benefit it asserts through the grievance. The evidence will not, however, support the assertion. Arbitrators have stated in varying ways what constitutes evidence sufficient to establish a binding practice. At root, the evidence must be sufficient to warrant inferring agreement. Arbitrator Jules Justin stated one of the most frequently cited standards:

‘(P)ast practice,’ to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties.”
CELANESE CORP. OF AMERICA, 24 LA 168, 172 (Justin, 1954).

The evidence offered by the Union will not meet these criteria. The grievance settlements offered to establish the practice point to the pay rate now set forth in Appendix A, but afford limited guidance on whether strict seniority produced the assignment. The testimony indicates seniority has governed the assignment of fill-in Working Foreman work over a considerable period of time on the second shift. The testimony is equivocal, however, because it is no less consistent with Moen’s assertion that the qualifications/seniority criteria blur on the second shift than with the Union’s assertion of strict seniority. Past use of Graden to fill-in as Working Foreman without any grievance similarly makes the evidence of past practice equivocal. Beyond this, the clarity of the practice is debatable. Shift crossing is rare, but has occurred. More difficult to reconcile with strict seniority is the Union’s assertion that Cleary’s specialized work can authorize exempting him from the process. Lundberg’s testimony indicates that his own view of his workload can exempt him from the application of strict seniority, but Moen’s cannot. This is difficult to reconcile to the assertion of a practice supporting requiring the application of strict seniority. In any event, there is no persuasive evidence to support a conclusion that City conduct in assigning fill-in work reflects agreement that strict seniority governs the filling of any Working Foreman fill-in work, much less the filling of such work on the first shift.

In sum, the language of the agreement, viewed against the parties’ practices, establishes that the City must consider employee qualifications in addition to seniority when filling temporary absences of a Working Foreman. Review of such assignments must be case-by-case, to determine whether City application of the qualifications/seniority criteria is reasonable. Broadly speaking, the case-by-case reasonableness review operates as a check on City assessment of qualifications. Under this review, seniority operates as a check against favoritism. As the Union points out, City assertion that past assignments outside of seniority can constitute “qualifications” risks, at a minimum, the perception of favoritism. However, in this case, the Union has not shown that Moen’s use of Graden to fill-in from April 27 through May 1 was unreasonable, and there is no evidence that Moen’s assessment of qualifications regarding a one-week absence undercut seniority.

AWARD

The City did not violate the AFSCME Union contract when Paul Graden was appointed as Working Foreman on the dates April 27, 2009 – May 1, 2009.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 31st day of March, 2010.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator