

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

THE CITY OF MARSHFIELD

and

MARSHFIELD CITY EMPLOYEES LOCAL 929, AFSCME, AFL-CIO

Case 174
No. 69018
MA-14442

Appearances:

Houston Parrish, Staff Representative, 1457 Somerset Drive, Stevens Point, Wisconsin 54481, appeared on behalf of the Union.

James R. Korom, von Briesen & Roper, Attorney for the City of Marshfield, 411 East Wisconsin Avenue Suite 700, Milwaukee, Wisconsin 53202, appeared on behalf of the City.

ARBITRATION AWARD

Marshfield City Employees Local 929, AFSCME, AFL-CIO, herein referred to as the "Union," and City of Marshfield, herein referred to as the "City" or "Employer" jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Marshfield, Wisconsin, on November 17, 2009. The parties each filed a post-hearing brief and reply brief, the last of which was received February 8, 2010.

ISSUES

The parties agreed to the following statement of the issues:

Did the City violate the collective bargaining agreement by failing to post the EOII Heavy Truck Driver position?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 3 – SENIORITY – JOB LISTINGS

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Section 3. All vacancies or newly created positions in job classifications shall be posted by the City on the union bulletin board located near the time clock for a period of five (5) consecutive working days overlapping two (2) weeks (exception to five (5) consecutive working days shall be posting which is posted on a Monday morning shall not be removed until the end of the workday of the following Monday). All vacancies shall be posted within ten (10) working days after being vacated by the incumbent. The posted notice shall contain ample space for interested employees to attach their names thereto. The employee with the most seniority, who can qualify, shall be assigned to the position. The Union shall be provided with a photocopy of the posting immediately following the removal of the posting from the board. The City shall advise the Union in writing in the event it deletes a position from the table of organization covering the bargaining unit.

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Section 6. When any employee is laid off due to a shortage of work, lack of funds, or the discontinuance of a position, such employee may take any other position for which he/she may qualify and that his/her seniority will permit the employee to hold. Each laid off employee and bumped employee shall have two (2) work days from receipt of notice of layoff or bumping to designate which position they will bump.

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Section 8. An employee shall not be replaced by another employee on a posted position when the employee who holds the posted position is at work or available for work unless due to absences or other reasonable circumstances where the Employer's normal business activities would be interrupted due to the lack of other qualified personnel available to perform the required duties.

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ARTICLE 4 – TEMPORARY CLASSIFICATION

Section 1. When employees are temporarily assigned to a higher paid classification than their regular job, such employees shall receive their higher rate of pay for such job while performing these duties.

Section 2. When employees are temporarily assigned to lower paid classifications than their regular job, such employees shall receive the higher rate of pay for such job while performing these duties.

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ARTICLE 22 – MANAGEMENT RIGHTS

Contracting and Subcontracting

A) The Union recognizes that the management of the City of Marshfield and the direction of its working forces is vested exclusively in the City, including but not limited to the right to hire, suspend or demote; discipline or discharge for just cause; adoption of reasonable work rules; to transfer or layoff because of lack of work or other legitimate reasons; to determine the type, kind and quality of service to be rendered to the City; to determine the location of the physical structures of any division or department thereof; to plan and schedule service and work programs; to determine the methods, procedures, and means of providing such services; to determine wage substitutes, good and efficient City service; subject to the terms of this Agreement. Any unreasonable exercise of the management's rights by the City as set out in this paragraph may be appealed by the Union through the grievance procedure.

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BACKGROUND

The "Classification" list in Article 23-Wage Schedule of the current collective bargaining agreement includes Equipment Operator I and Laborer (EOI Laborer), Equipment Operator II (EOII), Equipment Operator III (EOIII), and Equipment Operator IV (EOIV). Under each of these Classifications are listed specific pieces of equipment or tasks with an assigned rate of pay.

The City has posted positions in which employees who qualify are able to use seniority to obtain an assignment to specific pieces of equipment; thereby assuring that, if they were available, they would be the ones to perform any work involving that equipment. Employee "S", an EOII who drove tri-axle Truck 66, held one of these posted positions.

In late 2008, employee "S" was terminated from his position. In a memo dated November 18, 2008, the City's Human Resources Manager notified that Union that it did not intend to fill this position. At or about the time of this notification, the City created an additional EOI Laborer position and hired a new employee to fill that position.

On or about December 5, 2008, the Union filed a grievance alleging that the City had violated Article 3, Section 3; Article 22 and “All other Articles of CBA and State Statutes” that may apply by eliminating the EOII position held by “S.” This grievance, which was denied at all steps, was submitted to grievance arbitration.

At hearing, the parties stipulated that this grievance is properly before the Arbitrator. Additionally, the parties stipulated that they are not requesting the Arbitrator to apply state statutes or submitting state statutes to the Arbitrator’s jurisdiction for interpretation.

POSITIONS OF THE PARTIES

Union

The Union acknowledges the City’s right to eliminate positions. In 2007, the City eliminated a heavy truck driver position due to a retirement. No new employee was hired to fill that position or any other position. The Union did not grieve because, unlike the current situation, the City eliminated an employee.

The City claims to have eliminated the heavy truck driver position in dispute. The City, however, continues to use the heavy truck consistent with its use when employee “S” last occupied the position, but now a laborer is performing the work.

Although the Union does not contest the City’s right to assign employees to different jobs, the City is routinely assigning laborer’s to the work of higher paying classifications, while assigning more senior members of the bargaining unit to less desirable work. By failing to post the EOII position in dispute, the City deprives senior employees of a desirable, higher-paying position.

The City has the obligation to post positions when the equipment is used a great deal. Otherwise, there would be no reason for the contractual posting provision. Contrary to the City’s position, most of the DPW positions are posted. Positions are not posted when the specific piece of equipment is not operated enough to justify a full-time posting.

The Union does not agree with the City’s argument that there is not enough work for the heavy trucks. The hours that laborers have spent in large trucks has increased significantly; the usage of the heavy truck in dispute indicates that it was on track to log its annual 10,000 miles; and other large trucks were on track to log mileage similar to, or greater than, prior years. What has changed is that the City no longer has to pay \$19.80 per hour to fill the position.

The City ignores the fact that, as new construction has diminished; other truck work has been taken on. As the City’s truck fleet swells, incongruently the number of posted truck positions continues to decrease.

Outside of arbitration, the City provided justification to the Union that is different from that provided at arbitration, *i.e.*, “flexibility.” The “flexibility” being sought by the City is to gain assignment rights sought, but not obtained, in contract negotiations.

Despite the City’s claim that it started transitioning away from new construction as far back as 1990, it continued to post truck positions (four from 2000 to 2005) and maintain the percentage of truck driving responsibilities. If the amount of truck operation had decreased, then the job description of “S’s” position would have reflected that fact. The number of hours that common laborers spend in higher-grade equipment skyrocketed by 1,500 hours after the City eliminated “S’s” position.

The City’s reliance upon the percentages it chooses to use in the job descriptions is equally unconvincing. It failed to establish that anyone in the department has ever worked those numbers. It is commonly understood that a job description is a general outline, nothing more.

The City’s reference to “past practice” is misplaced. The Union made no claim of past practice. The City alleges a past practice of allowing it to ignore the posting provision. The Union has respected management’s right to determine the number and allocation of positions. It has gone too far in this case. There is no evidence of the Union waiving its right under the agreement.

The City has not actually eliminated an EOII position. The City is chipping away at bargaining unit positions and undermining the contractual posting provisions. Inasmuch as the position continues to exist, it should be posted.

City

Witness testimony establishes that there have been substantial changes in the City’s operations over their careers with the City. At one point, the unit included 34 employees, now it has 27. Many of the positions in the wage schedule have been eliminated or not filled.

Since the 1990’s, the City has been transitioning away from building new streets to maintaining existing streets. At the same time, the City has been changing its fleet of trucks from smaller single-axle trucks to larger tri-axle trucks.

Because the larger trucks carry more material, the number of hours unit employees spend actually driving trucks has declined markedly. The total mileage of all of the tri-axes trucks has been steadily declining over the years with the exception of the heavy snowfall in 2008.

All six trucks typically are working at the same time. While a truck is at a work site, it may make only one or two runs a day. Otherwise, it is being loaded or unloaded.

The large truck drivers perform nowhere near the percentage of driving reflected in their position descriptions. Panzer testified that, exclusive of snow removal, which involved approximately 15%, "S" spent only a few hundred hours driving. This is also true for all large truck drivers.

The City assigned the work formerly performed by "S" to a variety of people. The fact that the number of out-of-class pay hours went down in the year following his departure indicates that "S" did little driving work.

Past practice supports the City's position. The City has repeatedly eliminated positions without objection by the Union.

The Union's argument with respect to bargaining history is incorrect. The City's proposal related to assigning work within the same level to other similar pieces of equipment.

The Union cited two articles of the agreement in support of its case, Article 3, Section 3 and Article 22. The final sentence of Article 3, Section 3, clearly authorizes the City to delete positions from the table of organization.

Under Article 22, the Union bears the burden of proof to establish that the City's actions were unreasonable. The Union has failed to show that the City's action violated the collective bargaining agreement.

The Union's real reason for bringing this grievance was senior employees' dissatisfaction with having to do the more routine tasks associated with road repair. While the City is willing to discuss these rights in bargaining, this arbitration is not the place to address those concerns. The City asks that the grievance be dismissed in its entirety.

DISCUSSION

The parties agree that the City has broad rights under the management rights provisions of Article 22 to determine the number of employees it will have and the number of positions in each classification it needs. The last sentence of Article 22 states, "Any unreasonable exercise of the management's rights by the City as set out in this paragraph may be appealed by the Union through the grievance procedure." The Union, contrary to the City, argues that the City exercised its management rights in an unreasonable manner by not posting the Truck Driver position vacated by "S."

In support of its position that the City has a contractual obligation to post the position vacated by "S," the Union cites Article 3-Seniority-Job Listings. Article 3 states that "All vacancies or newly created positions in job classifications shall be posted by the City on the union bulletin board located near the time clock for a period of five (5) consecutive working days" Article 3 also states, "The City shall advise the Union in writing in the event it deletes a position from the table of organization covering the bargaining unit."

It is undisputed that the City advised the Union, in writing, that it would be deleting the EOII Truck Operator position. The City argues that it had no contractual obligation to post the position vacated by "S" because, as provided for in Article 3, the City deleted this position from its table of organization.

The Union maintains that, unlike prior position eliminations not grieved by the Union, "S's" position was not eliminated, but rather, the position continues with "S's" work being assigned to laborers. The City responds that, because of changes in operations and circumstances, the work of "S's" position no longer resembled the duties listed in his job description and that "S" was performing significant laborer functions. The City further responds that, to the extent that laborers are performing work that had been performed by "S," this performance is consistent with the City's Article 4, Section 1, right to temporarily assign employees to a higher paid classification.

The record establishes that, since at least the early 1990's, bargaining unit work has transitioned from road construction to road repair. The City has also transitioned from smaller trucks to larger tri-axle trucks. As a result, Truck Operators who previously would spend most of the day during construction season operating a truck to move materials, now spend two or three hours per day moving materials; with the remainder of the time working with a crew performing manual type maintenance work.

Operators of tri-axle trucks, such as "S", have the right to operate their assigned truck during snow and ice removal operations. The overtime opportunities attached to this right, which vary from season to season, is one of the reasons why the Union is aggrieved by the loss of the opportunity to post as operator of Truck 66.

City Exhibit #3 reflects that Truck 66 had the following annual mileage: 2004-14695; 2005-10772; 2006-10410; 2007-10988 and 2008-13524. As of November 2009, the 2009 mileage for Truck 66 was about 8200. Street Superintendent Panzer credibly testified that the spike in 2008 miles was due to an unusually heavy snowfall in December 2008.

After the initial decrease in 2005, the mileage on Truck 66 has remained relatively stable. Street Superintendent Panzer credibly testified, however, that, including snow and ice removal operations, "S" had been operating his truck with a frequency range of 40 to 45%; with snow and ice removal accounting for approximately 20 to 30%.

The record establishes that the City has given work formerly performed by "S" on an as-needed basis to a wide variety of other employees, paying them the higher wage rate where applicable. The record further establishes that the bulk of that work, including operating Truck 66, was not assigned to laborers. The record evidence does not warrant the conclusion that the newly hired laborer, or any other laborer, is occupying the Truck Operator position held by "S."

The Union argues that, in assigning laborers to perform some of the work previously performed by "S," the City has gained what it failed to obtain in contract negotiations. The record, however, provides a reasonable basis to conclude that the City has been assigning work out of classification in the same manner as it has assigned such work in the past.

A comparison of "S's" position description with the other position descriptions entered into evidence shows that the distinguishing feature of "S's" position is the percentage of time apportioned to hauling construction and waste materials. It is evident, that, at the time that "S" vacated his position, he was hauling significantly less than this percentage.

Conclusion

Street Superintendent Panzer credibly testified that he decided not to fill the position vacated by "S" because the City no longer needed this truck operator position. Street Superintendent Panzer's conclusion that there is insufficient truck operation work to warrant posting a vacancy in the position held by "S" is supported by the record evidence.

The City exercised its management rights in a reasonable manner when it decided to eliminate the truck operator position that had been held by "S." Given the City's elimination of this position, the City does not have a contractual obligation to post a vacancy in this position.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following:

AWARD

1. The City did not violate the collective bargaining agreement by failing to post the EOII Heavy Truck Driver position.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 27th day of October, 2010.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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