

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF EAU CLAIRE

and

LOCAL 284, AFSCME, AFL-CIO

Case 291
No. 69633
MA-14682

Appearances:

Mr. Steve Bohrer, Assistant City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin 54702, appeared on behalf of the City.

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 824 York Street, #2, Manitowoc, Wisconsin 54220, appeared on behalf of the Union.

ARBITRATION AWARD

On March 1, 2010 Local 284, AFSCME and the City of Eau Claire filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on June 15, 2010 in Eau Claire, Wisconsin. No formal record of the proceedings was taken. Post-hearing briefs were filed and exchanged by July 16, 2010.

This Award addresses the question as to whether the City can use supervisory personnel to resurface the ice at the City owned Hobbs arena.

BACKGROUND AND FACTS

The City of Eau Claire operates an ice arena, Hobbs Municipal Ice Arena, which is open for rental from 5:00 a.m. to 11:30 p.m., Monday through Friday and from 7:00 a.m. to 11:30 p.m. Saturday and Sunday. The Hobbs Arena has three ice rinks, and is staffed by a Manager, Stu Taylor, an Assistant Manager, John Bast, and two full time skilled Laborers. The Manager and Assistant Manager positions are management positions, and are not in the

bargaining unit. At the time of this dispute the Laborers were Tom Toske and Bryan Myers. There are a number of other part time employees assigned to the Hobbs Arena, who are not relevant to this dispute.

Under the terms of the collective bargaining agreement the two skilled Laborers are assigned four 10 hour shifts. The skilled Laborers perform a variety of tasks at the Hobbs Arena, including the resurfacing of the ice. There are times when the ice needs to be resurfaced and neither of the two skilled Laborers are available. The norm is that the employer calls in other bargaining unit employees to perform the work. There are a number of bargaining unit employees, who are not assigned to Hobbs Arena, who are trained and capable of resurfacing the ice. It takes about 10-15 minutes to resurface a rink. The various rinks are resurfaced an average of 6 times per day cumulatively. It was the uncontradicted testimony of Stu Taylor that either he or his assistant manager resurface the rinks 1-2 times per month, and have done so for over 10 years. Various Union witnesses, including those who work at the facility, testified that they were unaware of supervisors resurfacing the rinks.

Prior to 1998 all ice resurfacing, with the exception of emergencies, was performed by bargaining unit employees. There were times the City had to turn away paying customers because it could not prepare the ice timely. As a consequence the City sought flexibility in the assignment of the resurfacing of the ice. Article 13(4)(a), set forth below, was created in the course of the 1998 negotiations. Dale Peters, Director of Human Resources, was a member of the management bargaining team in 1998. It was his testimony that the purpose of Article 13(4)(a) was to permit management to resurface the ice so as not to lose business, as had been the case. He testified that the reason the clause was created was to expand the circumstances under which management could resurface the ice beyond the already existing emergency situations.

It was the testimony of Bob Horlacher, who was the long time President of Local 284, and a member of the Union bargaining team in 1998 that the creation of Article 13(4)(a) was not intended to open a book for management to run equipment. He indicated that the clause was not to take away overtime or compromise the scheduling of hours. It was his understanding that supervisors would only be allowed to run the equipment under emergency circumstances. Horlacher testified that the staffing levels, overtime, hours of all Local 284 employees, not just those assigned to Hobbs, were to be preserved. He testified that the contractual reference to "adversely impact" is a reference to any and all positions within the Local, and is not limited to the staff at Hobbs Arena.

The events giving rise to the grievance in this matter arose on October 2, 2008. Tom Toske had posted and transferred to Hobbs Arena on October 1. That day, he was trained in the operation of the Olympia ice resurfacing machine, by Bryan Myers. Meyers was on vacation from October 2-6. On October 2, Toske advised Taylor that he wanted to return to his prior position. Taylor asked if Toske would work through the weekend. Toske initially indicated that he would, or would consider doing so, but subsequently called Taylor to indicate that he did not feel comfortable continuing to work at Hobbs. Taylor agreed that Toske should return to his prior position.

Hobbs Arena was scheduled to be used in the early morning and again twice in the evening on October 2. The ice was resurfaced during the day by a bargaining unit employee. Taylor decided not to groom it between the two evening sessions. There was a group tentatively scheduled to come in at 5:30 a.m. on Friday, October 3. It was Taylor's testimony that he was initially unsure as to whether or not the Friday group was going to take the ice. When the reservation was finalized, or he felt comfortable that the Friday group was confirmed, Taylor directed Bast to resurface the ice, the evening of October 2.

A grievance was filed on October 7, 2008. The grievance was denied by letter dated October 29, 2008. The October 29 denial sets forth the perspective of the City, and provides the following:

Bjorn Olson
Chief Steward, Local 284
City of Eau Claire
203 S. Farwell
Eau Claire, WI 54701

Dear Bjorn:

This letter is in response to Grievance No. 2008-17, relating to the Hobbs Municipal Ice Center and operation of the ice resurfacing machine.

The Issue With Management:

- A non-284 employee operated the Zamboni at Hobbs Ice Arena.

Review of Grievance:

On Wednesday, October 1, 2008, Tom Toske began work as a Hobbs A-40 Skilled Laborer accepting that job from an internal posting. Mr. Toske was working as a building custodian, sharing time between the Library and City Hall.

Mr. Toske worked on Wednesday, October 1, 2008 from 1:00 pm to 10:00 pm with current 284 employee Brian Myers. Mr. Toske was trained on operation of the ice resurfacing machine (Olympia not Zamboni), given a tour of the facility and was instructed in the duties of the new job. His next scheduled day of work would be Friday, October 3, 2008, as Thursday had no ice rentals scheduled.

On Thursday morning, October 2, 2008, a group (Hockey Profs) called to rent ice time for later that same day. Mr. Taylor accommodated the last minute rental.

At approximately 12:00 pm on Thursday, Stu Taylor, Ice Arena Manager, was contacted by Mr. Toske. Mr. Toske indicated that he appreciated the opportunity but felt he would not be comfortable in the Hobbs position and was returning to his previous custodian position. Mr. Toske was aware that Mr. Myers was on vacation Thursday, October 2, 2008 through Monday, October 6, 2008. Mr. Toske stated that if Mr. Taylor needed some help from him he would honor his original work schedule at Hobbs for Friday, October 3, 2008 through the weekend. Mr. Taylor informed Mr. Toske that he would expect him to work on Friday, October 3, 2008 and through the weekend.

Later that same day Mr. Toske called Mr. Taylor and asked if there was any way he could get out of working at Hobbs over the weekend. Mr. Taylor instructed Mr. Toske to turn in the keys he was issued the previous night. He did so Thursday afternoon. Mr. Taylor thanked him for being up-front and honest about the position and the issues surrounding his return to his previous job.

Now late in the day on Thursday, having neither Hobbs 284 employee available to work on the next day, Mr. Taylor and Mr. Bast, Assistant Ice Arena Manager, decided that Friday, October 3, 2008 practices, scheduled at 5:30 am on one rink and 8:00 am on the other rink, might be rescheduled to later dates/times. They attempted to contact those groups to see if new accommodations could be made, however, their attempts were unsuccessful.

As of Thursday night, the last option for resurfacing ice prior to Friday, October 3, 2008, was for Mr. Bast to resurface the ice either Thursday night or Friday morning. Mr. Bast and Mr. Taylor agreed it would be most efficient for Mr. Bast to resurface the ice himself on Thursday night, rather than report at 5:00 AM on Friday.

Friday, October 3, 2008 was spent figuring out a plan to cover the weekend. Applications were again reviewed and Mr. Nick Kurth, a former temporary Hobbs employee, was offered the full time position. Mr. Kurth accepted and began work on Saturday, October 4, 2008.

Decision:

It appears that the management of Hobbs made significant efforts to staff Hobbs with 284 employees and also attempted to reschedule ice rentals to accommodate staff. Customers of the Hobbs facility should not be expected to reschedule events to accommodate staff needs.

Per the current City/Local 284 agreement, "Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the

agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.”

Per the current contract Article 13 Section 4 (a.) “When Local 284 employees assigned to Hobbs are not present, the Hobbs manager or assistant manager shall be allowed to operate the ice resurfacing machine.” At the time of this grievance, neither the two full-time, permanent employees assigned to Hobbs, were present.

No Local 284 employee saw reduced hours, wages or benefits as a result of the Assistant Ice Arena Manager resurfacing a rink at Hobbs.

The City is following the terms of the existing labor contract and therefore the grievance is respectfully denied.

Sincerely,

Phil Fieber /s/
Phil Fieber
Director

Cc: Dale Peters
Stu Taylor
Phil Johnson
Steve Bohrer

There were two grievances filed over ice resurfacing in 2005. The management responses described them as follows:

This letter is in response to a grievance (2005-14) dated December 30, 2005, relating to the Hobbs Ice Center Assistant Manager resurfacing the ice at Hobbs on Wednesday, December 14, 2005.

The issue with management:

- Management (Hobbs Assistant Manager) operated the ice resurfacing machine rather than calling in for a union employee.

Description of the grievance:

On Wednesday, December 14, 2005, Brian Myers, one of the two regularly scheduled skilled worker maintenance employees at Hobbs Ice Center, was

scheduled to work from 1:00 P.M. to closing at 11:00 P.M., a ten-hour day. At approximately 1:30 P.M., Brian Myers was snow blowing the entrance to the Hobbs Ice Center, hit a raised portion in the sidewalk with the snow blower, and injured his back. Brian remained at work until approximately 6:00 P.M., when he determined he was physically no longer able to perform his usual duties because of the injury.

Upon Brian Myer's decision to leave work, Stu Taylor, the Ice Arena Manager began attempting to contact Ron Thompson, the other regularly scheduled full-time maintenance employee by telephone. After an unsuccessful hour of repeated calling to see if Ron Thompson could finish the shift vacated by Brian Myers, Stu Taylor then assigned the resurfacing duties to Mike Link, a Hobbs Ice Arena Assistant Manager for the remainder of the shift for December 14, 2005, as afforded by the *Local 284 Contract - Article 13 - Section 4, Paragraph a.*

Contemporaneously, a second related grievance was filed:

This letter is in response to a grievance (2005-15) dated December 30, 2005, relating to the Hobbs Ice Center Manager resurfacing the ice at Hobbs on Wednesday, December 15, 2005.

The issue with management:

- Management (Hobbs Ice Arena Manager) operated the ice-resurfacing machine prior to the arrival of a Local 284 employee.

Description of the grievance:

On Thursday, December 15, 2005 Luke Mahol arrived at 5 PM to cover hours that were originally assigned to Brian Myers by management. Brian Myers left work on December 14, 2005 at approximately 6:00 PM with a back injury. Ron Thompson was not scheduled to work nor was he available to substitute for Brian Myers on December 15, 2005. Luke Mahol had just completed a full day of work with the Forestry Division, working from 8:00 AM to 4:00 PM.

Luke Mahol observed Stu Taylor, Ice Arena Manager, in the process of resurfacing the O'Brien rink.

Luke Mahol also observed that the Akervik rink was already resurfaced when he arrived at work.

The matters were initially appealed to arbitration. However, as a part of discussions relating to the staffing of the Hobbs Arena, the grievances were withdrawn without prejudice.

ISSUE

The parties could not stipulate to the issue.

It is the view of the City that the issue is:

Did the City violate Article 13, Section 4(a), of the parties' collective bargaining agreement when on October 2, 2008, management operated the Olympia machine to resurface the ice at the Hobbs Municipal Ice Center?

If so, what is the remedy?

The Union believes the issue to be:

Did the City violate the Agreement when it did not assign a bargaining unit member to resurface the ice at the Hobbs Ice Center on October 2 or 3?

If so, what is the appropriate remedy?

As a practical matter the issues posed have no meaningful differences. This award will address both statements of the issue.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 3 – UNION SECURITY AND MANAGEMENT RIGHTS

...

Section 3. Management Rights. It shall be the exclusive function of the City to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.

It shall be the right of the City to direct its employees, take disciplinary action, relieve its employees from duty because of lack of work, or for other legitimate reasons, and determine the methods, means, and personnel by which the agency's operations are to be conducted. But this should not preclude employees from raising grievances about the impact that decisions on these matters have on wages, hours, and working conditions.

...

Article 13 – HOURS

Section 4. The regular hours of non-shift work will be 8:00 a.m. to 4:00 p.m. except as provided herein.

a. During the Hobbs Municipal Ice Center usage times the employees assigned to this facility can be scheduled to work four (4) ten (10) hour work days per week.

When Local 284 employees assigned to Hobbs are not present, the Hobbs manager or assistant manager shall be allowed to operate the ice resurfacing machine. This provision is not intended to adversely impact on Local 284 staffing levels, hours, schedules or shift times at Hobbs as they existed on July 1, 1998. A violation of this provision is grievable; the remedy is to be determined by the arbitrator. One possible remedy, if the City's conduct is deemed flagrant, is to void this provision regardless of Article 29, Section 6.

...

Article 31 – GENERAL PROVISIONS

...

Section 7. Supervisors shall not perform any work normally performed by bargaining unit employees, or serve as non-supervisory employees of a work crew except under the following circumstances:

1. During an emergency, when it is necessary in the interest of public safety to complete emergency tasks, to avoid injury and/or damages.
2. For training purposes.
3. When a shortage of bargaining personnel exists after following agreed-upon procedures.

POSITIONS OF THE PARTIES

It is the position of the City that Article 13, Section 4(a) provides the express right for managers to resurface the ice when the two Local 284 employees are not present. The City reads the paragraph to authorize the managers to operate the ice resurfacing when the employees assigned to Hobbs are not present. The City reads the second sentence in the paragraph to also refer to employees assigned to Hobbs. And so, the reference to “adversely impact” is a reference to the staffing levels, hours, schedules or shift times at Hobbs.

In this dispute the two employees assigned to Hobbs were not present.

It is the position of the City that the Union's interpretation of Article 13 to only permit emergency operation of the equipment is not supported by the contract. The City points to Article 31, Section 7 and contends that the provision deals specifically with emergency situations. If the Union's construction is correct it would render the language of Article 13 meaningless.

The City points to the testimony of Peters in support of its position. It further points to the dropped grievances as Union acquiescence to the City's position.

It is the view of the Union that the City had ample time to schedule a bargaining unit member to do the resurfacing. The rentals were on the schedule well in advance. It is the view of the Union that the first sentence of the disputed paragraph, "When Local 284 employees assigned to Hobbs are not present, the Hobbs manager or assistant manager shall be allowed to operate the ice resurfacing machine.", supports its position in this dispute. It is the view of the Union that any Local 284 employee can be assigned to Hobbs. The contract does not use the terms regularly or always assigned. There are a number of employees in the Parks department who are assigned to work at Hobbs, many of whom are called upon to resurface the ice.

The Union contends that Taylor's testimony confirms that the employer has administered the language in conformity with the interpretation advanced by the Union in this proceeding. The Union points to the testimony of Horlacher in support of its view as to the intent and meaning of the language.

It is the view of the Union that the staffing level at Hobbs has been eroded since 1998. The Union points to testimony that there was a surge in use at Hobbs around 1998. Since that time more rinks have been built, but the staffing at Hobbs has remained stagnate at two employees. It is the view of the Union that what has resulted is an understaffing at Hobbs. It is in this context that the City seeks to allow managers to perform bargaining unit work.

It is the view of the Union that the second sentence of the disputed paragraph, which references adverse impact, is intended to apply to all employees of Local 284. At a minimum, the overtime opportunities for bargaining unit members have been diminished.

DISCUSSION

On its face, the first sentence in the disputed paragraph, "When local 284 employees assigned to Hobbs are not present, the Hobbs manager or assistant manager shall be allowed to operate the ice resurfacing machine.", supports the City position. I feel the plain meaning is a reference to the two employees regularly assigned. The Union's interpretation results in a circular and meaningless sentence. It is the position of the Union that in the absence of the two bargaining unit employees assigned to Hobbs, the City is required to call in other bargaining

unit employees. If the Union is correct there will be few, if any, times when there are no Local 284 employees present. If the parties intended the term “assigned to Hobbs” as a reference to those regularly assigned and also to those who are called in to resurface, the use of the phrase “are not present” is an odd way to reference the need to exhaust a call in process.

The sentence that follows is somewhat ambiguous. The Union says that it refers to the staffing levels and hours of all Local 284 employees. The City argues that the reference is to the working conditions of the employees assigned to Hobbs. The last clause refers explicitly to the “schedules or shift times at Hobbs as they existed on July 1, 1998.” It is the view of the union that the sentence should be divided such that the first portion of the sentence refers to the bargaining unit, and the second portion of the sentence refers to Hobbs employees. The City’s interpretation of the sentence makes more sense. It is hard to contemplate how a manager running an ice resurfacing machine at Hobbs would impact the staffing levels in other departments. It is not at all difficult to imagine how a manager operating ice resurfacing equipment could impact how Hobbs is staffed.

Article 13, Section 4(a) appears to be a contractual provision which addresses Hobbs. That is the context in which the language appears. This reinforces the conclusion that the references to staffing levels and hours are specific to those assigned to Hobbs.

I agree with the City argument that all provisions of the contract need to be considered and given meaning. Article 31, Section 7 allows the City to do bargaining unit work under emergency situations. Among the specified emergencies is a shortage of bargaining unit employees. The obligation to exhaust bargaining unit employees before supervisors can perform bargaining unit work is what the Union would require of the City under Article 13. Such a construction would render Article 13 meaningless. If Article 13 requires that the City exhaust the roster of bargaining unit employees capable of operating the ice resurfacing machine before managers are allowed to perform the work, it seems functionally identical to Article 31, Sec. 7, par. 3.

It was in the context of the City’s limited right to perform unit work that the 1998 negotiations produced Article 13. It was the testimony of City witnesses that the City was losing business because it couldn’t get the ice resurfaced, and came to the bargaining table seeking contract changes which would allow managers to do some ice resurfacing in the absence of Hobbs staff. The resulting language seems compatible with that testimony. The employer is given some latitude to have managers do some ice resurfacing where there are no unit employees around, in exchange for a commitment that the level of staffing, at Hobbs, will not be diminished. The Union’s construction of the negotiated agreement is that Article 13 merely repeats Article 39. That seems unlikely.

Article 13 goes on to provide that if the City violates “this provision”, and the arbitrator regards the City’s conduct as “flagrant”, the arbitrator would be empowered to void the provision. This is an extraordinary grant of authority to an arbitrator. It at least suggests that the parties regarded Article 13 as authorizing something beyond Article 31, which would survive the voiding of Article 13.

The City appears to have administered the clause as it contends the clause was intended. The norm is that Hobbs employees do all resurfacing when they are working. When they are not working, other bargaining unit employees are called in to resurface. On occasion, 1-2 times per month, a manager resurfaces to accommodate an incoming group. Union witnesses testified that they were unaware that managers were resurfacing. The practice of managers resurfacing for a period of 10 years without that even being known to the Union speaks to the frequency and volume of work performed by managers. It appears that there are 10-30 minutes of work per month involved.

Under all of the foregoing circumstances set forth above, I do not believe the City has violated the contract.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 24th day of November, 2010.

William C. Houlihan /s/

William C. Houlihan, Arbitrator