BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE CITY EMPLOYEES NO. 284, COUNCIL 40, AFSCME, AFL-CIO

and

CITY OF EAU CLAIRE

Case 292
No. 69634
MA-14683

(Bargaining Unit Work Grievance)

Appearances:

Mr. Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 824 Yout Street, #2, Manitowoc, Wisconsin appearing on behalf of Eau Claire City Employees No. 284.

Mr. Stephen G. Bohrer, Assistant City Attorney, City of Eau Claire, 203 S. Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin, appearing on behalf of City of Eau Claire.

ARBITRATION AWARD

Eau Claire City Employees No. 284, Council 40, AFSCME, AFL-CIO, hereinafter "Union" and City of Eau Claire, hereinafter "City," requested the Wisconsin Employment Relations Commission assign an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The parties initially requested Richard E. McLaughlin be assigned the instant dispute, but on March 5, 2010 requested the case be reassigned to Lauri A. Millot to hear the instant dispute.

On July 6, 2010 the City's attorney, Steve Bohrer, sent the following e-mail to the Union's Representative, Mark DeLorme and the Arbitrator:

> I propose that the parties agree Article 13, Section 4(a) is not involved in this dispute (Grievance 2008-16, management performing start-up procedure for O'Brien ice rink). If that's the case, then the City is ready to go with the arbitration hearing on July 13, 2010.

> If the Union does not agree, then I ask for a telephone conference so as to explain City's (sic) position and to request a continuance. I am generally available for a telephone conference today and tomorrow.

Mr. DeLorme concurred with Mr. Bohrer's proposal in an e-mail dated July 6, 2010 which read as follows:

> The Union agrees that the paragraph concerning operating of the ice resurfacing machine as covered in the section referenced by the City is not applicable to the instant dispute. With that understanding, I believe we can move forward with the arbitration on Tuesday.

The hearing was convened on July 13, 2010, in Eau Claire, Wisconsin. At hearing, the City brought forth an argument which the Union argued was never offered before and the Union requested a continuance. The City objected to the continuance. The Undersigned granted the Union's continuance.

The hearing was reconvened on October 21, 2010. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which was received by December 2010.

On December 29, 2010, the Union filed an objection to the arguments contained in the City's reply brief. That correspondence read as follows:

> Dear Arbitrator Millot:
>
> The Union objects to the City's reference to CITY OF EAU CLAIRE, MA-146812 (Houlihan, 11/24/10) in section 6 of its reply brief and ask that you disregard it. The City went to great pains to ensure that Article 13, Section 4(a) was not applicable to the instant case. The parties entered into a stipulation by e-mail and again at hearing. This stipulation was made to avoid implicating a section of the contract currently being interpreted by Arbitrator Houlihan in City of Eau Claire. In fact, if a stipulation was entered into, the City indicated it would ask for a continuance until after the Houlihan decision was issued. On July 6, 2010, the City wrote by e-mail:
>
> > I propose that the parties agree Article 13, Section 4(a), is not involved in this dispute (Grievance 2008-16, management performing start-up procedure for O'Brien ice rink). (sic) If that's the case, then the City is ready to go with the arbitration hearing on July 13, 2010.

> If the Union does not agree, then I ask for a telephone conference so as to explain City's position and to request a continuance. I am generally available for telephone conference today and tomorrow.

The issue proposed by the City in the Houlihan case was, "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?" In the decision, Arbitrator Houlihan makes a clear distinction between Article 13 and Article 31, which is relevant to the instant case.

> 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, Section 7, par.3.

As the parties agreed when they entered into the stipulation, Article 13 and Article 31 are distinct provisions concerning management performing bargaining unit work. The decision in City of Eau Claire solely addresses the interpretation of Article 13, which the parties agreed was "not involved in this dispute."

The Union requests that the Arbitrator enforce the stipulation of the parties and disregard section 6 of the City's reply brief.

/s/
Mark DeLorme, Staff Representative

The City was afforded the opportunity to respond to the Union's objection. The City responded to Union's objection in an e-mail which read as follows:

In response to Mr. DeLorme's objection, it is clear the City stipulated that the interpretation of Article 13, Section 4(a) is not involved in the case before you. This was because Arbitrator Houlihan had closed the record in that case, but he had not yet made a decision interpreting that provision.

Had there not been a stipulation, the City would have moved to postpone the matter before you until after Houlihan's decision was made. Obviously, it would have been no use to the parties to have two cases, simultaneously under review, with possible opposite interpretations to Article 13, Section 4(a).

The stipulation was that you not interpret Article 13, Section 4(a). However, the stipulation did not limit or preclude you from looking to Houlihan's Award. That award is between the same parties in this case and it deals with a related matter. To the degree that Houlihan's Award is helpful, it should be utilized.

Having received the City's reply by February 7, 2011, the record was closed.

Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union frames the issues as:

> Did the City violate the Agreement when the Hobbs Ice Arena Manager flooded the O'Brien Rink on September 25, 2008?
>
> If so, what is the appropriate remedy?

The City frames the issues as:

> Did the City violate the parties' 2008-2009 collective bargaining agreement when Stu Taylor, manager of Hobbs Ice Arena, worked on building the ice at the O'Brien rink on September 25, 2008?
>
> If so, what is the appropriate remedy?

Given the stipulations in this case, I cannot accept either the Union or City's framing of the issues and instead frame the issues as:

> Whether the City violated Article 31, Section 7 of the collective bargaining agreement when the Hobbs Ice Arena Manager flooded the O'Brien Ice Rink on September 25, 2008?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

. . .

ARTICLE 3 – UNION SECURITY AND MANAGEMENT RIGHTS

. . .

Section 2. The rights, power, and/or authority claimed by the City are not to be exercised in a manner that will cease to grant privileges and benefits, limited to mandatory subjects of bargaining, that the employees enjoyed prior to the adoption of this agreement and that will undermine the Union or as an attempt to evade the provisions of this agreement or to violate the spirit, intent, or purpose of this 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.

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 a.m. to 4 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 14 – OVERTIME

Section 1. Employees shall receive one and one-half (1 ½) times their regular hourly rate of pay for all hours worked in addition to their regular standard work day and/or the standard work week, and a minimum of one (1) hour shall be paid for all overtime. For the purpose of computing overtime pay, vacation, holidays, sick and injury leave shall be considered as time worked.

Section 2. All non-shift employees shall receive two (2) times their regular hourly rate of pay for all hours on a holiday or Sunday. Shift employee shall receive two (2) times their hourly rate for hours worked on a holiday and on non-scheduled Sundays.

Section 3. Employee required to work after 4:00 p.m. on the 24th of December and after 4:00 p.m. on the 31st of December will be paid at double time, except for shift workers or regularly scheduled work.

Section 4. All overtime shall be distributed as evenly as possible among all employees. A reasonable response time is required, depending upon the urgency of the situation. The employee shall provide only one telephone contact number for the purpose of voluntary overtime call-ins.

Section 5. Employees who are recalled to work after the completion of their regular work day shall receive a minimum of two (2) hours pay for each call.

. . .

ARTICLE 29 - GRIEVANCE PROCEDURE

Section 1. A grievance is a complaint, dispute, or controversy in which it is claimed that the collective bargaining agreement has been violated and which involves either a dispute as to the facts involved or a question concerning the meaning, interpretation, scope, or application of this agreement, or both.

Section 2. The parties to this agreement recognize that the grievance should be settled promptly as close to the source as possible. Both parties will endeavor to present all facts relating to the grievance at the first step in the grievance procedure.

. . .

Section 6. The Arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this agreement. The decision of the Arbitrator shall be based solely upon his/her interpretations of the "express language" of the agreement.

. . .

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 unit personnel exists after following agreed-upon procedures.

. . .

BACKGROUND AND FACTS

This case was filed on behalf of Local 284 which represents bargaining unit employees in the following work groups: Streets; Sewer and Water Utility; Engineering; Parks, Recreation and Cemetery; Building Maintenance; Central Equipment and Store Agency and Transportation Services Division.

The City is responsible for the operation, management and maintenance of the Hobbs Municipal Ice Center (hereinafter, "Hobbs"). Hobbs has three ice rinks, O'Brien, Akervik and Hughes available for skating use by the public. Hobbs is managed by Stu Taylor who has held that position for 17 years. In addition to Taylor, Hobbs is staffed by an Assistant Manager Stuart Hines and two Local 284 bargaining unit employees. At all times relevant herein, the bargaining unit employees at Hobbs were Nicholas Kurth and Bryan Myers. At the time of the grievance filing, Kurth had been employed at Hobbs for two years while Myers was in his fifth year.

The work schedule for 284 bargaining unit employees assigned to Hobbs is four days per week for ten hours per day although there is only one employee working on any given day. One Hobbs employee works Monday, Tuesday, Friday and Saturday. The other Hobbs employee works Wednesday, Thursday, Sunday and a split shift on Saturday. Their work day starts at either 12:30 p.m. or 1 p.m. and end at either 10:30 p.m. or 11 p.m. The Hobbs management employees work the day shift with Taylor starting at 8 a.m.

During the week of September 22, 2008, the ice was put in for the O'Brien indoor ice rink. Taylor created a schedule which indicated that they would "Make Ice" Monday, September 22, 2008 through Friday, September 26, 2008. Tuesday was specifically identified to "Paint Ice."

The process of putting in ice is a progressive one in that layer upon layer of ice is applied to the rink until the final ice sheet contains between 12 and 15 layers. Each layer is applied with either a garden hose or fire hose dependent on the desired thickness and available freezing time. The process is time sensitive and meticulously scheduled. The City devotes four days to complete this process. On day one, the floor is cooled. On day two the ice is painted and days three, four and five are dedicated to the continuous applications of water to create ice layers.

The City contracts with R & R Specialties, which is an ice painting business, to paint the ice. Paint is applied by R & R and then R & R employees, management and bargaining unit personnel collaborate and seal the paint with hose flooding. There are either two or three floods for sealing purposes applied on paint day. Paint is applied to identify official hockey lines and other logos. After the ice is painted and sealed, layers of ice are continually applied for the next three days.

On September 25, 2008, the bargaining unit became aware that Hobbs Manager Stu Taylor had applied a layer of ice during the morning. Neither Kurth nor Myers was called in to do the work. On that same date, the Union filed a grievance alleging that "[m]anagement flooded the O'Brien rink at the Hobbs ice center" in violation of Article 3, Section 2 and Article 31, Section 7. The remedy sought was for the City to cease and desist and make the Local 284 employee's whole.

The City denied the grievance on October 29, 2008 in a letter which read as follows:

Dear Bjorn:

This letter is in response to the Grievance No. 2008-16, relating to the Hobbs Municipal Ice Center and flooding of a rink.

The Issue With Management:

* Management flooded the O'Brien Rink at Hobbs.

Review of Grievance:

* On Thursday, September 25, 2008, Stu Taylor, Hobbs Ice Arena Manager, used a hose to flood the O'Brien ice surface at Hobbs. This was done during the initial seasonal start-up of the ice surface, after the logos and lines were painted on the surface.

Decision:

The flooding of rinks with hoses during the initial seasonal start-up of the ice sheets is a past practice that involved having the Hobbs Manager and/or Assistant Manager, assist other staff in the process. The goal is to build up ice surface as quickly as possible so it can be skated on. The performance of the Arena Manager flooding rinks is keeping with past practice.

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 to be offered to the public, and exercise control and discretion over its organization and operations."

No Local 284 employee sees reduced hours, wages or benefits as a result of the Ice Arena Manager or Assistant Manager, assisting with the flooding of rinks at Hobbs.

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

Sincerely,

/s/
Phil Fieber
Director

The grievance proceeded to Step 3 and the City responded as follows:

Dear Mr. DeLorme:

This responds to the 3rd Step hearing on October 1,2009, and with respect to the above-referenced grievance. It concerns the start-up flooding procedure of Hobbs ice rink on September 25, 2008. The union alleges a violation of Article 3, Section 2, and Article 31,Section 7,of the parties agreement.

Because there was a shortage of bargaining unit personnel on the day in question, and because the parties have allowed this decades-old procedure

allowing supervisors to perform this specific type of work along with bargaining unit personnel, I do not find a violation. Therefore, I respectfully deny this grievance.

Sincerely,

/s/
Mike Huggins
City Manager

Additional facts, as relevant, are contained in the **DISCUSSION** section below.

ARGUMENTS OF THE PARTIES

Union

The City violated Article 31 of the collective bargaining agreement when the Hobbs Ice Arena Manager flooded the ice rink on September 25, 2008.

The exceptions contained in Article 31 are not applicable to the facts giving rise to this grievance. Flooding the Hobbs Ice Arena rink is work that is "normally performed by bargaining unit personnel." It was neither an emergency nor was there a shortage of bargaining unit personnel Supervisor Taylor flooded the rink.

The City knew that flooding was bargaining unit work when it attempted to find Parks Department employees on September 25, 2008. Taylor told Al DeSouza that he had called the Parks Department and asked for someone to come and flood the rink. DeSouza testified that Taylor told him that Parks agreed to send an employee, but no one showed up, which frustrated Taylor. The Union challenges the credibility of Taylor's testimony at hearing noting that his memory two years after the conversation appeared to be much better than his testimony one year after the conversation.

Assuming *arguendo* that supervisors have flooded the rink in the past, the number of floods they have performed does not negate the fact that bargaining unit personnel "normally" do the work. There was testimony the rinks are flooded four times per year and that a minimum of 15 layers is applied. That calculates to 75 layers of ice. Taylor testified that he or another supervisor laid between eight and twelve layers. That amounts to less than fifteen (15%) percent of the ice layers. It is reasonable to conclude that bargaining unit personnel "normally" perform ice flooding work since they complete the work more than eighty-five (85%) percent of the time.

A binding past practice of allowing supervisors to flood the rink does not exist. At no time were bargaining unit personnel aware that supervisors were flooding the rink. Without knowledge, there can be no assent.

City

The City has retained the management right to assign supervisors to hose flood indoor ice rinks. Article 3 provides the City the right to "exercise control and discretion over its organization and operations," including the right "to direct its employees" and to "determine the methods, means and personnel by which the [City's] operations are to be conducted." These are broad rights and the City's decision for supervisors to perform morning hose flooding is consistent with these terms.

The City's right to hose flood is not specifically limited by the collective bargaining agreement. Article 3, Section 2 provides that the authority retained by the City is "not to be exercised in a manner that will cease to grant privileges and benefits" that employees previously enjoyed. This language does not specifically limit the City's management rights because the bargaining unit has not previously enjoyed indoor hose flood work that is exclusive to them.

Hose flooding is not bargaining unit work. Article 31, section 7 prohibits supervisors from work that is "normally performed" by unit employees. A plain reading of this phrase means that work which is "normally performed" by unit employees would be work that is typically done by unit members. Management and the bargaining unit have historically performed the hose flooding responsibilities. Moreover, since the Union acquiesced to management assisting bargaining unit employees in performing the work of hose flooding, then the Union is precluded from claiming that it is solely bargaining unit work.

There is no contractual right to overtime in Article 14 of the collective bargaining agreement. The absence of guaranteed overtime makes it clear that management has retained the right to determine whether or not to offer overtime. The Union's interpretation and remedy would create mandatory call in of bargaining unit employees when hose flooding is necessary. Not only is this not required by the contractual terms, but it would also be cost prohibitive. The City's use of supervisors for morning hose floods is supported by legitimate reasons free of arbitrariness, capriciousness or improper motives.

The City differentiates between the work of operating the Zamboni to resurface the ice and the work of hose flooding indoor ice rinks. The Union's comparison between hose flooding and calling in Parks Department employees to perform Zamboni work is misplaced. Putting in an indoor ice rink is a unique process. It is different from resurfacing and the fact that the City calls in Park employees is not relevant to this dispute.

The City disputes the Union's claim that it did not know that management was hose flooding during the mornings. Taylor's testified that he announced numerous times over 17 years that he was going to "hit it" meaning hose flood the rink the following morning and that he was "very surprised" that employees did not know he was performing flooding work. Taylor is a more credible witness than those with conflicting testimony.

Union In Reply

The Union maintains that a past practice does not exist whereby the flooding work is normally performed by both bargaining unit and supervisory personnel. The bargaining unit normally performed this work. Supervision only performed this work in the dead of the night. Knowledge of the City's actions cannot be implied from these clandestine layers of ice.

The Union respectfully asks the Arbitrator to find in favor of the Union.

City in Reply

The City disagrees with the Union's assertion that there is a practice of regular employees at Hobbs or outside Parks employees being called in to perform work at the Hobbs Municipal Arena. While this may be true so far as calling Parks employees to operate the ice resurfacing machine, it is not the case for indoor morning hose floods. Facility manager Stu Taylor's unrebutted testimony establishes that management has always performed the morning hose flooding.

Article 31, Section 7 has not been violated. Union and management have cooperatively worked together to build ice. The Union has admitted that management is present during ice building and further, that management works along with the bargaining unit employees. The Union cannot claim the work is normally performed by bargaining unit employees when the work is also performed by management.

As to the Union's claim that management is only "assisting" bargaining unit employees when they are jointly hose flooding, this is an unsupported assertion. Management and Union employees work side-by-side. Management schedules, implements and leads the process of ice building. Management has been equally involved in hose flooding for 17 years and claims that their involvement is assistive is incorrect.

With regard to DeSouza's testimony that Taylor was angry when he could not get someone from the Parks Department to flood a rink, DeSouza misunderstood Taylor. Taylor did not request Parks Department employees on September 25 to assist with hose flooding. Rather, Taylor was requesting an employee for the Parks Department to operate the ice resurfacing machine.

The Union's calculations are in error. Not only did management flood during the morning shifts, but it also flooded during the ten-hour bargaining unit members' shifts. Moreover, the issue in Article 31, Section 7 is not what percentage of hose floods constitutes "normal,' but rather is whether hose flooding is work that is "normally performed" by bargaining unit employees.

Finally, Arbitrator William Houlihan recently issued a decision which addressed another Union claim of wrongdoing by the City. CITY OF EAU CLAIRE, MA-14682 (Houlihan,

11/24/10). Although the facts of that case are different, the Union similarly claimed it was unaware of the City's actions. Arbitrator Houlihan implicitly found that management acted properly regardless of whether the Union was aware.

The City asks that the grievance be denied.

DISCUSSION

The issue in this case is whether the work performed by City Hobbs Ice Arena Center Manager Stu Taylor is bargaining unit work. The work in question is the application of water to the ice rink with a hose to create a layer of ice. The City does not dispute that Taylor performed this work at the O'Brien ice rink during the September 2008 ice surface creation.

I start with the Article 3, Management Rights. This Article provides that has the exclusive right 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 further provides that the City shall "…determine the methods, means, and personnel by which the agency's operations are to be conducted…" As such, unless there is language which limits management rights, then the City has exercised its rights consistent wit the labor agreement.

I next move to Article 31, Section 7 which is the language in dispute. This Section provides that:

> 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 unit personnel exists after following agreed-upon procedures.

This language is clear and unambiguous and limits the City's Article 3 rights as it relates to the performance of work that is "normally performed by bargaining unit employees." The language negates the right of supervisors to perform bargaining unit work except when there is an emergency, training, or if there is a "shortage" of Local 284 employees after following agreed-upon procedures.

The first question is whether hose flooding an ice rink is work that is "normally performed by bargaining unit employees?" If it is not bargaining unit work, then it was well

within the City's rights for Taylor to hose flood the rink. Conversely, if it is work that is "normally performed by bargaining unit employees," do any of the exceptions apply?

The Union asserts hose flooding is bargaining unit work while the City maintains that it is not bargaining unit work because the parties have a binding past practice which allows supervisors to assist in putting in the ice. The City asserts two different tasks were performed by supervisors which establish a past practice of the Union agreeing to management's assistance in putting in ice including supervisory involvement on painting days and Taylor and/or the Assistant Rink Manager's performance of hose floods during the a.m. hours when bargaining unit employees are not at the rink.

It is well-recognized that while the written word of the parties' collective bargaining agreement serves as the basis for the parties' relationship, variances can be created through binding past practices. The parties can create implied terms of agreement through custom or practice if there is strong proof of its existence. To be binding on the parties, a practice must be "(1) unequivocal; (2) clearly enunciated and acted upon; [and] (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. p. 608 (2006).

The record establishes that that on painting days, supervisors and bargaining unit employees worked side-by-side with outside contractor to complete the paint application and sealing process. It is unclear from this record exactly what each party did, but suffice it to say that they were agreeable to the division of work and further, the Union fully accepted the work that the supervisory personnel was fulfilling. This cooperative process was followed for at least 32 years, spanning Kourtney and Taylor's employment, and although it is unclear exactly what work management performed, there is no question that it was done with the Union's agreement Given the time span, the knowledge by both parties and the undeniable agreement, there is a binding past practice accepted by the parties of management assisting the Union with flooding associated with the painting and paint sealing process.

Moving to the a.m. floods, there was a considerable amount of testimony relevant to this issue.

- David Kourtney was employed at Hobbs for 27 years until his retirement in 2005. Kourtney testified that the Rink Manager "helped" the bargaining unit employees make ice including on one occasion either Taylor or Wally [Assistant Rink Manager] flooded the rink when the Kourtney had to leave for a short time and then he [Kourtney] returned to finish the job. Kourtney testified that management did not flood the rink before or after the bargaining unit employees' shifts.

- Ron Thompson worked at Hobbs for seven years until his retirement in 2008. Thompson testified that he never saw management flood the ice and that it was "unlikely" that management flooded the ice when he

wasn't there because "they would need to come in at 2 a.m." in order for it not to be wet when he arrived at 1 p.m. for his shift. Thompson did not recall Taylor ever telling him that he [Taylor] was going to make ice in the middle of the night.

- Brian Myers was employed at Hobbs from 2005 until March of 2009. Myers's was not at the rink between 8 a.m. and 1 p.m. Myers testified that he participated in flooding the rinks and that he did not recall ever seeing management flooding the ice. Myers did not have knowledge of management ever flooding the rink at night.

- Nicholas Kurth replaced Thompson in 2008. Kurth agreed that Taylor and the Hines worked alongside Hobbs bargaining unit employees when painting the ice. Kurth testified to his knowledge, there was never an occasion where management flooded an indoor ice rink without a Local 284 employee being present although there was one occasion when the assistant rink manager finished a flood that Kurth had started.

Four bargaining unit employees who had direct knowledge of the customs and practices at the Hobbs Ice Arena Center were called to testify. All four that they were unaware of any instances or occasions where Taylor or other supervisory personnel performed hose flooding duties in the absence of a bargaining unit employee. While it is true that their testimony is self-serving, the same can be said for Taylor.

Taylor testified that he applied "light floods" in the morning and that he verbally informed employees that he was "going to hit it in the a.m. before you get here." Taylor stated he "occasionally" told Local 284 employees that he was going to flood, but he also explained that he and the Hobbs staff talked about the process and the schedule for putting in the ice. However, given the conflict between Taylor's recollection and those of the bargaining unit members, I cannot find that the Local 284 Hobbs employees were aware that Taylor was hose flooding a layer of ice when unit members were not present.

Just as there is inconsistency in the testimony of Taylor and the unit members, there is also internal inconsistency in Taylor's testimony. If this was indeed a practice to which the parties agreed, then presumably all a.m. floods would be performed by management, but that is not what happened. Kurth testified that he was called in on his day off, therefore earning overtime, to hose flood; Kurth's employment began in 2007. Kourtney testified that "if [a rink] needed to be flooded and we were not there, they called us in and then they turn on the water;" Kourtney was employed between 1974 and 2005. Ron Thompson who worked for the City from 1978 to 2008, testified that he also was called in on overtime to perform flooding. Finally, Taylor was asked if he ever called in Local 284 employees on overtime to flood with a hose and he responded "not outside the two Local 284 employees that were assigned to work at Hobbs." This establishes that it was not the "practice" for Taylor or other supervisory personnel to perform floods in the absence of bargaining unit personnel.

This record supports the conclusion that while Taylor has performed limited hose flooding duties in the absence of bargaining unit personnel, the City also called in bargaining unit personnel, on overtime, to perform hose flooding work. It further establishes that the Union did not observe Taylor or other supervisors perform hose flooding nor were they privy to the fact that Taylor was individually performing a.m. floods. Given the lack of consistency, the lack of knowledge by the Union and therefore the lack of agreement as to the performance of hose flooding by supervision alone, I do not find a binding past practice.

There is a distinct nuance to the City's argument in that it asserts there is a binding practice of management "assisting" Local 284 with ice creation responsibilities. That may well be true, but that is not what led to this grievance. A practice "no broader than the circumstances out of which it has arisen" and it can be said without contradiction that management and Taylor specifically have "helped" put in the ice. Id. At 608. The Union's challenge here is to Taylor's individual application of ice on September 25, 2008, not to having worked in concert with unit employees on other occasions. This is a single supervisor applying ice in the absence of bargaining unit personnel and there is no binding past practice to this action.

Having found that there is no past practice which negates the clear language of the parties' collective bargaining agreement, I move to the exceptions contained therein. There was no claim that this was an emergency situation nor that it was being utilized for training purposes. As such, the first two exceptions contained in Section 7 are not applicable.

Looking to exception number three in Section 7, the language provides that the when there is a shortage of personnel, the parties will follows "agreed upon procedures." The City asserted in its third step grievance response that there was also a shortage of personnel, but at hearing did not argue that there was a shortage of personnel and did not present any evidence to this effect. A party claiming an exception to a general rule bears the burden of proving that it qualifies for that exception. On the state of the record, it is impossible to conclude that this work falls under any of the exceptions to the ban on supervisory performance of unit work contained in Article 31, Section 7.

Building the ice at the City's indoor ice rinks is bargaining unit work. The record establishes that there is a past practice of allowing supervisors to work in concert with bargaining unit employees in building the ice, but that there is no mutual practice of allowing supervisors to perform this work without the involvement of bargaining unit employees. Moreover, this work does not fall within any of the listed exceptions to the general rule against supervisors performing unit work. It necessarily follows that the City violated the collective bargaining agreement and the grievance is therefore granted.

AWARD

1. The City violated Article 31, Section 7 of the collective bargaining agreement when the Hobbs Ice Arena Manager flooded the O'Brien Ice Rink on September 25, 2008.

2. The appropriate remedy is for supervisors to cease and desist from performing bargaining unit work and to make the affected Local 284 employee whole for Stu Taylor's performance of bargaining unit work on September 25, 2008.

Dated at Rhinelander, Wisconsin, this 10th day of May, 2011.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

LAM/gjc
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