BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 113

and

FOREST HOME CEMETERY

Case 9
No. 70657
A-6454

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Matt Robbins**, Box 12993, 1555 N. RiverCenter Drive, #202, Milwaukee, Wisconsin 53212, for the labor organization.

Godfrey & Kahn, by **Daniel J. Finerty, Jon E. Anderson** and **Rufino Gaytan III**, One East Main Street, P.O. Box 2719, Madison, Wisconsin 53701-2719, for the employer.

ARBITRATION AWARD

Laborers' International Union of North America, AFL-CIO, Local 113 ("the union") and Forest Home Cemetery ("the employer") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On March 8, 2011, the union made a request, in which the cemetery concurred, for the Wisconsin Employment Relations Commission to assign a commissioner or staff member to hear and decide a grievance concerning the interpretation and application of the terms of the agreement relating to the assignment of work. The commission assigned Stuart D. Levitan, a member of its staff, to serve as the impartial arbitrator. Hearing in the matter was held in Milwaukee, Wisconsin, on May 17, 2011. The parties filed written arguments and replies, the last of which was received on July 25, 2011.

ISSUE

The parties stipulated to the following statement of the issue:

"Did Forest Home violate Articles I, II(J), II(L), V, and VI of the collective bargaining agreement by having non-bargaining unit employees perform bargaining unit work beginning on December 31, 2010? If so, what is the remedy?"

RELEVANT CONTRACT LANGUAGE [1]

Art. I - UNION RECOGNITION

(A) The Union is recognized as the sole collective bargaining agent for all of the employees of the Cemetery who are classified in Articles II New employees called to work during the life of this agreement shall not be considered as coming under this agreement until they have completed a probationary period as specified in this agreement. Employees not classified herein shall not be considered affected by this contract.

(B) The members of the Union shall have the right to seek to enroll as members of its Union, any employees with in the classification specified in Art.II of the Cemetery not a member of said Union, provided no force, violence, intimidation or threat thereof is used in persuading him/her to become a member of said Union. The Cemetery shall not directly or indirectly attempt to persuade any members of the Union to cease paying dues or violate any of its rules or regulations. The Cemetery believes that employee voluntary affiliation with the Union encourages a stable work force and a healthy collective bargaining relationship.

. . .

ART. II - DEFINATIONS OF A STEADY WORKER -CLASS A/CLASS B

(A) Class A Steady Worker

A Class A Worker is one who carries on the regular work of the Cemetery and is listed as such by the Cemetery. He/She shall be possessed of sufficient experience, skill and ability to perform all of the usual and regular types of work carried on in the Cemetery in accordance with the established work standards. His/her proficiency in the foregoing shall entitle him/her to special

[1] The language quoted in this section appears as in the Agreement. The language that appears in [brackets] and in ~~strikethrough~~ font represent handwritten changes agreed to by the parties.

status in the matter of wages, fringe benefits and continuity of employment provided herein.

(1) Wage Schedule for Class A Steady Workers

EFFECTIVE APRIL 1, 2010

Heavy Equipment Machine Operator (ONLY FOR HOURS WORK ON THIS EQUIPMENT) (Operates diesel, caterpillar, grader, heavy roller, etc)	$22.45
Mechanic	$22.45
Standard Rate Class A Steady Worker- FHE (Operates all other equipment including Crematory)	$21.90
Minimum Rate	Current class B rate plus $.50/hr Add $.55 April 1, 2011 Add $.55 April 1, 2012

(B) Class B Steady Worker

A Class B Steady Worker is one who carries on the routine work of the Cemetery, but not including operation of large equipment such as back- hoe or front-end-loader. He/She shall be possessed of basic experience, skill and ability to perform all of the basic and regular types of work carried on in the Cemetery in accordance with established work standards, including assisting Class A Steady Workers in the set-up for funeral Services. His/her proficiency in the forgoing shall entitle him/her to special status in the matter of wages, fringe benefits and continuity of employment provided herein.

(1) Wage Schedule for Class B Steady Workers
EFFECTIVE APRIL 1, 2010

Standard Rate	$~~16.17~~ 14.63
Minimum Rate	$8.90/hr
	[Add .40] ~~Add $.55~~ April 1, 2011
	[Add .40] ~~Add $.55~~ April 1, 2012

(C) **PREMIUMS**

. . .

3. Supervisory premium: The Cemetery agrees (to) pay a premium of one dollar ($1.00[)] per hour to any steady worker assigned the

temporary responsibility of supervising seasonal employees only during the hours actually worked on such assignment. This does not include delivering materials not (sic) locating lots for order processing be (sic) seasonal employees. In these cases, the Steady Worker shall be held responsible only for his/her own work performance.

(E) The Cemetery agrees to pay on behalf of all Steady Worker full-time employees the monthly cost of Health & Hospital Insurance for such employees, including the family plan if the employee covered so desires. However, if the cemetery deems it necessary to charge employees in other departments of the cemetery for any portion of the cost of Health and Hospital Insurance, the company reserves the right to reopen the health insurance issue to negotiate this benefit.

(F) The Cemetery agrees to arrange for a minimum of $5,000.00 term life insurance or $10,000.00 accidental death insurance policy for those who can qualify, the cost of said insurance to be paid by the employer.

. . .

(I) The Cemetery may very (sic) the size of the existing crew of steady workers. In the event that the number of steady workers is to be increased, or a vacancy is to be filled, the Cemetery may hire from Class B to increase Class A, or from Seasonal Crew to increase Class B any worker who it may deem will satisfactorily perform the duties of a steady worker. The Cemetery may also hire from the outside. The Cemetery agrees to post notice of any new opening for the position of steady worker seven (7) days before hiring. Any such employee hired shall be on probation for the following time:

ANY EXISTING WORKER PROMOTED TO A HIGHER CLASS who has already served a full probation period – 60 days;

ANY NEW WORKER HIRED FROM THE OUTSIDE into any classification at the cemetery – 90 days.

These probation periods shall also be the probation periods for a worker to voluntarily join the union.

During the probation period, the Cemetery shall make a judgment as to the workers capacity to perform all duties of the classification of Steady Worker. Should such judgment be adverse, the new worker will be discharged, and if he/she was originally a seasonal worker, he/she reverts to the previous seasonal

status. Should such judgment be favorable, the seniority of such employee shall extend from the date of his/her original employment as a steady worker, and he/she shall be entitled to the wages and benefits of a steady worker as of the conclusion of the stated probationary period. Probationary Steady Workers shall be paid at least the minimum rate for that classification while on probationary status.

(J) Any steady worker shall perform any and all work within the Cemetery, as long as such assignment is not inconsistent with his/her safety or with the provisions of Art.II, previously set forth. Where practical, the Cemetery shall make regular job assignments in accordance with the provision of Art.VI, Paragraph C following, but in any instance where, in the judgment of the Cemetery because of work quotas, training programs or for any other reason, any such job assignment on such basis shall be impractical, the provision of this section shall govern.

(K) Any steady worker unable to handle the full range of regular assignments because of age or disability, under circumstances which would not permit the Cemetery to retire him/her, be given preference for whatever light work there is available. Such assignment shall be for a definite period, and during such time the employee shall be paid at the rate of one dollar ($1.00) per hour less than his/her regular rate.

(L) Management shall not perform bargaining unit work, except in the case of training employees, maintaining safety policies of the company, giving a helping hand to a worker performing a regular task, or where otherwise reasonable under all the circumstances.

. . .

ART. III – HOURS OF WORK FOR A STEADY WORKER (BOTH CLASS A AND CLASS B WORKERS)

. . .

(H) Overtime work on Saturdays will be distributed and divided among both Class A and Class B Steady Workers as equitably and equally as possible. A crew consisting of a minimum of two (2) workers, at least one of which is a Class A Steady Worker, will be called in when funerals are held on a Saturday. The Cemetery will notify the employees of scheduled Saturday overtime work by the preceding Thursday evening, if the Cemetery knows that Saturday overtime work will be required by that time.

(I) When funerals are scheduled on Saturday, workers will be called in according to the following manning schedule and rate of payment:

NO. OF FUNERALS	NO. OF WORKERS	MINIMUM NO. OF HRS. PER WORKER @ 1-1/2 TIMES REG. RATE
1	2	4
2	2 or more*	5
3	2 or more*	8
4 or more	4 or more*	8

*Management decision depending on the timing of funerals or other factors. When called in, workers will be asked to report one hour before the start of each scheduled funeral and may leave as soon as the normal work after each is finished. Saturday overtime work other than servicing funerals will be scheduled where deemed necessary by management. In this case, the normal starting time will apply, and workers shall work a minimum of four (4) hours.

ART. V - SEASONAL WORKERS

(A) Definitions ***(deleted)***

Section 1. When asked to perform tasks normally performed by Class A Steady Workers, they shall be paid at the minimum rate for Class A steady Workers.

Section 2. The Cemetery may recall a seasonal worker before the general recall date of the declaredes seasonal year, require him/her to work in any unusual situation where he would not normally be scheduled to work or give consideration to the promotion of a seasonal worker to Class A or Class B Steady Worker, pursuant to Art.II, Paragraph 1 of this agreement.

ART. VI - SENIORITY-ALL STEADY WORKERS

(A) DEFINITION -Seniority shall consist of uninterrupted service as a Steady Worker since the date of his/her last hire as such by the Cemetery. Seniority shall not apply to executives, office workers, sales counselors or foreman/ superintendent.

(B) LAYOFF AND RECALL- Should it become necessary for the Cemetery to accomplish a reduction in the number of steady workers, the steady worker with the lowest seniority in Class B shall be laid off first. After

all Class B steady workers, the steady worker with the lowest seniority in Class A shall be laid off next. Recall from layoff shall be in the reverse order to layoff.

(C) Regular assignments shall be based on ability, qualifications and seniority. Where ability and qualifications are equal, seniority shall prevail. The provisions of this section shall, however, be specifically subject to the provisions of Art.II, Paragraph A hereinbefore set forth.

(D) Any steady worker laid of solely because of a reduction force shall be given first consideration should it become necessary to increase the number of seasonal workers.

. . .

(G) A steady worker shall lose his/her seniority rights with the cemetery:

1. If s/he is discharged for cause;
2. If s/he fails to report for work a period of five (5) days;
3. If s/he shall be laid off for the period of one (1) year;
4. If s/he voluntarily terminates his/her employment.

ART. VIII - MISCELLANEOUS

. . .

(D) This agreement shall supersede all previous agreements, either verbal or written. This agreement shall become in full force and effect on the first day of April 1, 2010 and shall continue until the last day of March 31, 2013 and thereafter from year to year until terminated, modified or amended as herein provided. Should either party desire to terminate this agreement on March 31, 2013 such action may be taken provided (30) days notice in writing has been given to either party or parties. If no such notice is given, this agreement will continue in effect for another twelve (12) month.

BACKGROUND

Forest Home Cemetery is a venerable institution located on about 200 acres in Milwaukee, Wisconsin, southwest of downtown. It provides burials, cremation, internments and entombments, under a collective bargaining agreement with the Laborers' International

Union Local 113. This grievance concerns the distribution of work done by bargaining unit members, "Class A Steady Workers," to the superintendent, Mike Kintop, to non-unit seasonal employees, and to employees of outside contractors, with most of the reassignment of duties happening at the same time as the lay-off of two of the three Class A Steady Workers on December 31, 2010.

Cemetery president Tom Kursel testified to the cemetery's worsening economic conditions: In the early 1990s, Forest Home performed more than a thousand burials each year, and employed seven Class A workers, each with a Class B worker to assist him. In recent years, their number of burials has been declining, with only 55 burials in the first four and one-half months of 2010. [2] At the start of 2010, Forest Home employed three Class A steady workers, [3] and no Class B workers.

As the number of burials has declined, the number of cremations has increased, going from about 5% of the cemetery's activities in the 1990s to about two-thirds of its activities now, with about 100 cremations in 2011 up to the time of hearing. The cost to consumers of a cremation is about a third or so of a burial, with a corresponding reduction in revenue and profit to the cemetery. Although the actual costs and expenses are not in the record, Kursel testified without rebuttal that the increased revenue from more cremations has not offset the loss of revenue resulting from fewer burials.

Other than Kursel's testimony about this reduction in revenue, there is no evidence in the record about the cemetery's economic condition (e.g., its operating budget, assets, etc.).

Both company and union witnesses agreed that the steady workers' highest tasks are using the back hoe to dig graves and deep foundations for large markers, and to operate the crematory, for which they hold the required licensure. They also serve as mechanic, and perform the full range of burial services, from installing and operating the lowering device and sealing the vault to removing the greens and sodding the ground. They also have ongoing grounds-keeping duties, including mowing, plowing, planting, trimming, chipping, and cutting. In addition to the back hoe, their normal assignments require them to use the front-end loader, a wood chipper, dump truck, bobcat, snow plow and tractor. It is the steady workers who routinely winterize the cemetery's irrigation system.

There are four pay grades within the Class A Steady Worker job title: *Heavy Equipment Operator* and *Mechanic*, both at $22.45; *Standard (operating all other equipment including Crematory)*, $21.90; and *Minimum*, set at the Class B rate plus $.50, or $15.13 on January 1, 2011. [4]

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[2] There is nothing in the record to explain the decline in burials, when the decline began, or whether this decline is unique to Forest Home or industry-wide.

[3] Thomas W. Schultz (hired 1987), Angel L. Gonzales (hired 1999) and Ronald L. Andrews (hired 2005).

[4] The employer's brief was inconsistent in its references to steady worker pay, citing $21.90 (Br., p. 8), $22.40 (Br., p. 11) and $22 (R.Br., p. 2). The record refers to payroll data summaries, but does not include actual pay records for

The cemetery also employs seasonal employees, who perform most of the tasks as steady workers, other than operating the back hoe, the crematory, and winterizing the irrigation system. The cemetery maintains time sheets for the seasonal workers, showing how many hours they worked, but not the specifics of their assignment. Seasonal workers make between $7.75 and $9.15, without benefits. Prior to 2011, they worked from April to November, and as needed for snow removal, and collected unemployment compensation over the winter until they were recalled the following spring.

In 2003, the parties deleted the definitional paragraph from the article relating to seasonal workers, but retained several sections pertaining to their wages, hours and conditions of employment.[5]

The decline in revenue from the drop-off in burials has led to layoffs. In 2008, the cemetery laid off three non-union positions (office administrator, event coordinator and horticulturalist). It laid off a fourth, another office administrator, in 2010. The cemetery also did not replace a retired Class A steady worker who performed mechanic's duties, and laid off a Class B steady worker in December 2008. The union did not grieve any of these actions.

In April, 2010, the parties agreed to a three-year extension of their collective bargaining agreement, effective April 1, 2010. There is nothing in the record about the negotiations that led to the agreement, other than its outcome.

In 2010, operating the back hoe and crematory accounted for about 1500 hours of work, or about 75% of a full-time position. The back hoe and crematory work was divided among the three Class A workers, leaving each with a workload that was about 25% back hoe and crematory work and the rest other assignments. The cemetery considers all assignments other than the back hoe, crematory and winterizing the irrigation system as "seasonal work." Regardless of their assignments, all three steady workers were paid an hourly wage of $21.90 to $22.45, plus benefits.

An in-ground burial involves delivering the vault to the gravesite, installing it, setting up the lowering device, lowering the casket into the vault, sealing the vault, laying out and collecting the landscaping "greens," removing the equipment, and sodding and tamping the ground. [6] Most of the burials at Forest Home involve vaults which are provided by one of the area vault companies, which work through funeral directors and follow various business models. Some vault companies include in their contract with the customer the cost of vault company personnel to perform all the burial services. A majority of funerals at Forest Home follow this model. Some vault companies charge customers for the services but leave the work

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the steady workers. This award would have benefitted from evidence as to actual hours worked, assignments and pay rates, but it was not provided.

[5] This conundrum is discussed below.

[6] I call these tasks "burial" or "funerary" services.

to the cemeteries, putting Forest Home and other cemeteries in the difficult position of having to provide a service without compensation, or risk alienating their customers by charging for a service they thought they had already paid for. It is becoming standard for vault companies to provide and charge for the personnel necessary to conduct the funerals. When Forest Home provides the vault, steady workers perform the burial services, with some assistance from seasonals.

Forest Home also provides for cryptic entombments (the insertion of a casket into a wall, which may require a raising device and two-to-three workers) and niches (placing an ash-filled urn into a concrete box set in the ground or in the wall). Steady workers perform these services as well, again with some assistance from seasonals.

At some point, the employer determined that the way to address the imbalance between revenue and expenses caused by the decline in burials was by turning the seasonal employees into year-round employees, and assigning them most of the work the steady workers were doing, and simultaneously laying off two of the three steady workers.

The cemetery also sought to ensure that it would generally not be responsible for burial services, except for funerals when it had sold the vault, through the following correspondence, which Kursel sent on December 30, 2010:

> To: Milwaukee Area Funeral Directors
>
> Re: Vault Company Product & Services
> Forest Home Cemetery & Greenwood Cemetery
>
> Forest Home Cemetery has been very satisfied with the vault product and services you have contracted with through Milwaukee's top providers Wilbert, North Shore and Lake Shore over the past years. With that in mind, we have notified each of these companies that effective January of 2011 Forest Home Cemetery now will fully adopt the process whereby the Vault Company provides the full set-up procedure for their product for all burials. This would include the lowering device, lowering of the casket, chairs and greens, and sealing vault. We realize this is not a new process to you, as most cemeteries in Milwaukee use this procedure; however, we wish to communicate as effectively as possible with you and your staff so our end-customer has a seamless process with both our companies for all burials that take place at Forest Home Cemetery.
>
> Please be understanding that if during the coming weeks, our staff confirms with you on the phone that your chosen Vault company is aware they are to provide complete set-up for all the services at Forest Home just as they do at other cemeteries.

> Once again, we, like you, are very confident of the product and services demonstrated by Milwaukee's vault companies and will adopt the standard industry procedure in January of this year. If you have questions, or special circumstances, please don't hesitate to contact me or Mike Kintop, our Superintendent. Thank you for your time, we value our relationship with your firm and the families we serve.

Also on December 30, 2010, Kursel sent the text of this letter to Jon Olson at the North Shore Vault Company, and his counterparts at Lake Shore and Wilbert, with an introductory paragraph, as follows:

> Dear Jon,
>
> Below is a letter we have sent to Milwaukee area Funeral Directors informing them that when they purchase a vault from your company they should also plan to secure your full services and products to complete the vault arrangement. We look forward to seeing the professional services and products you provide at Forest Home Cemetery. If there are any questions regarding this arrangement, please contact me.

There is no evidence in the record that Kursel proposed to the vault companies that they stop charging for work they were not performing, or that he otherwise attempted to negotiate with them or area funeral directors on this point. The record is also silent on how many funerals were held on Saturdays in 2010, or the staffing and overtime involved.

The historic Forest Home has extensive and distinctive grounds, which the cemetery has continued to enhance. In addition to a generally high level of gardening, Forest Home also has several distinctive landscaping and horticultural features, maintained by Kenneth J. Brath, doing business as "A Gardener in the City." In 2010 the cemetery paid Brath $25.00 an hour for 25-30 or so hours a month.

On March 21, 2011, Kursel wrote Brath:

> From our meeting today:
>
> Grotto/Alcoves are strip beds to have wood chips, add Coleus in select locations, existing ground cover.
>
> Entrance beds: Ribbon of color going along the fence. Yellow or something with strong drive by impact.

27th and Forest Home corner: Two mounds on either side of current planting for floral and color ribbon integrated. Must be visible for 60 yards. Mike looking at lighting.

Office entrance: Ribbon of color of “mass” the color of flowers for extra visual impact.

Fountain area. Tulips must rule, add crescents of floral color at edge of Turf to add impact for Memorial day.

Halls entrance: add 2 or 3 floral containers w/ bushes to add color.

Mike working with Ken to confirm material and Mike to prepare areas for planting.

Thanks for the meeting.

On May 9, 2011, Brath wrote Kursel:

Finished Planters:

16 saucers – grotto
16 orange plastic – abbey
10 squares – east of crypts
6 tall urns – VG
2 thin urns – office entrance
2 large grey – top of stairs across from office
3 low white urns – fountain
2 new squares – full sun to part shade
2 new round blacks – part shade
2 green hanging – halls of history
1 orange hanging - chapel
I did not have the S hooks for the hangers.
Are you getting the special portulaca for the 3 Abbey hangers?

My goals for next weekend are to plant the entrance boxes, abbey hangers maybe, and a few extra contains for the abbey gardens.

Please confirm you received this email.

Any questions?

I am very happy with the plants, look great.

The cemetery laid Gonzales and Andrews off on December 31, 2010. In their place, the cemetery recalled members of the Seasonal Crew, and began assigning them all work except for operating the back hoe and the crematory.

From January 1, 2010 through April 16, 2010, Forest Home says it used 2,403 hours of labor – 1,807 performed by the three Class A steady workers, and 596 by seasonal workers.

From January 1, 2011 through April 15, 2011, following the layoffs of Gonzales and Andrews, the cemetery says the ratio was reversed – seasonal workers with 1,566 hours of the 2,103 total, Schultz accounting for 537 hours, operating the back hoe and the crematory. [7]

The first seasonal workers recalled, Phillip Hartline and Edward Widmer, began work on December 31, 2010. Over the next four months, they worked at least the following hours per week: [8]

	Widmer	Hartline
Jan	18, 26, 8, 8	8, 15, 39, 16
Feb	35, 36, 16, 12	8, 32
March	40, 40	39, 40,
April	38, 40	37, 38, 40

Four other seasonal workers had the following weekly hours:

* - Overtime	Buth	Blasier	Szabo	Ritzow
Jan			11	
Feb	19	21, 34, 21,	36, 7	
Mar		35	24, 40	40, 24
April	40, 40	40, 45*, 44*	40	46*
May		32		

In addition, four other employees worked a total of 131.25 hours in the week ending February 26, 2011.

Kursel testified that, even with the additional workload, the number of season mployees did not increase. The task routinely listed on the seasonals' timesheets was "general

[7] These workloads are as stated by the employer in its brief. The actual payroll records for steady workers are not in evidence.

[8] These two tables are based on employer exhibit 3, and total 1,268 hours. The parties do not address the discrepancy. For the ensuing discussion, I accept the figure of 1,566 hours, as the employer states in its brief.

maintenance," at a standard rate of $9.00, with many weeks including premium pay at $10.00. During three weeks in April, two seasonal workers were paid overtime for working more than 40 hours. There are no entries showing equipment used or any involvement in the crematory.

On January 10, 2011, James Annis, Business Representative for the union, sent the following letter to Kursel:

> Dear Mr. Kursel:
>
> Please consider this a grievance pursuant to Art. 8 of our Labor Agreement.
>
> The Cemetery is in violation of Art. 1, Art. 5, Art. 6 and the Labor Agreement as a whole by subcontracting and/or assigning bargaining unit work to non-bargaining unit employees.
>
> As a remedy for this grievance, we want the affected bargaining unit employees to be made whole for all losses in wages and benefits as well as reinstated.
>
> Naturally, as in the past, we would like to resolve this matter in an amicable way. Pursuant to Art.8, Section (B), we request a meeting to discuss this matter. Please provide me with dates you have available to meet.

On February 16, Kursel wrote to Annis as follows:

> Dear Jim:
>
> As you may be aware, Doug Drake, a mediator with the Federal Mediation and Conciliation Service, contacted me on Tuesday, February 15, 2011, at the Union's request. Mr. Drake wanted to discuss the possibility of arranging a mediation with FMCS in an attempt to resolve the Union's current grievance with Forest Home Cemetery.
>
> In the grievance and our discussions, the Union has taken the position that Class A workers are entitled to perform all work "inside the fence" of the cemetery, including seasonal and any other work, at Class A wages.
>
> As we discussed at our last meeting, we cannot find any support in the language of the collective bargaining agreement for this argument. Further, there is language in the collective bargaining agreement that outlines separate worker classifications, separate job duties and separate rates of pay for different work. The Union's argument completely disregards this language of the collective bargaining agreement, which was drafted and agreed to by the Union less than one year ago. This argument is also untenable and unreasonable from an economic perspective, as we simply cannot afford in the current economic climate with the reduced number of burials that we are handling each year to

> pay Class A wages for seasonal work. The Union's argument is simply not premised on any reasonable interpretation of the collective bargaining agreement and, if accepted, would put our continued operation in financial jeopardy. This is a general summary of the Cemetery's position and we do not waive any rights or further arguments going forward.

After hearing the Cemetery's position on the grievance during our second meeting, the Union simply walked out. As a result, we find that we are constrained from further bargaining or even mediating with the Union because we simply don't understand the basis or support for the Union's position. A response from the Union to our position stated in our last meeting and this letter could allow the Cemetery and the Union to engage in further bargaining or, if necessary, mediation of the grievance.

If the Union would like to discuss this matter further or explain its position, the Cemetery is ready, willing and able to listen. Thank you.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

> Under the collective bargaining agreement, it is mandatory that the steady workers perform the work within the cemetery grounds, supplemented between April and November by seasonal workers. In contrast, there is no management rights clause giving the employer the unilateral authority to remove work from the bargaining unit.
>
> That the collective bargaining agreement provides that seasonal workers may be called back under "unusual circumstances" highlights that work outside the season is to be performed by steady workers. The agreement also excludes seasonal workers from seniority, and provides that seniority is to be followed for layoff and recall. Given that the steady workers have the skills to perform all of the available work, they should have been retained while other workers without seniority should have been laid off. It is clear that the employer has seasonal workers performing the work that had been performed by steady workers.
>
> The parties presumably negotiated in good faith the wages and benefits contained in the labor agreement, which has a recognition clause and broad description of all of the work covered. For the employer to simply eliminate all of the positions covered by the agreement would make the agreement a meaningless document.

> The employer has shown bad faith in attempting to justify its actions. The employer has candidly admitted it eliminated the unit positions because it could get the work done cheaper by seasonal workers who did not have the protection of the collective bargaining agreement. But six months prior, the employer negotiated the new agreement with the union, and did not seek to have work removed from the unit or to have a management rights clause which would give it the right to do so. Instead, the employer actually negotiated a wage increase – and now justifies eliminating the entire unit by saying the wages are too high. That is the opposite of good-faith dealing.
>
> And on the day it laid off the steady workers, the employer arranged to have vault companies perform the work associated with interments, especially with funerals. This was simply a version of subcontracting without the formality of directly paying the vault companies, letting the employer save money by having work performed by non-unit employees.
>
> It is also clear that the superintendent is performing work previously done by steady workers, in further violation of the agreement.
>
> Less than a year after negotiating a new agreement which provided for a pay raise and no management rights clause, the employer destroyed the bargaining unit, having work performed by seasonal workers who receive less than one-half the wage rate it negotiated with the union. This is a clear violation of the labor agreement. The affected employees should be reinstated and make whole for all losses.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

> No violation of the agreement occurred because the disputed work has always been shared work, not exclusive to the Class A workers. Because seasonal workers and the superintendent had previously performed the work at issue, Forest Home was reasonably exercising its management right to control and direct the workforce in the most efficient manner. In the absence of an express restriction prohibiting the transfer of job functions from the bargaining unit, the employer is free to make such transfers as long as they are in good faith. The agreement at issue has no subcontracting restrictions, and there is no dispute that the duties were shared among Class A workers, seasonal employees, management and subcontractors.
>
> An employer is allowed to change the manner in which work is assigned where the changes reflect a reasonable exercise of management's discretion in response to economic conditions.

The employer acted in good faith by continuing to assign the disputed work to seasonal workers after the bargaining unit employees were laid off and assigning the typical Class A work to the one remaining bargaining unit employee. The assignment of work did not result in a layoff, displacement or loss of pay to the remaining union employee. His work hours have remained constant, while the amount of Class A work he has performed has tripled, showing that the employer simply does not have need for three Class A workers.

The changes were a necessary response to changing economic conditions, namely the declining number of burials, which weighs heavily in the cemetery's favor.

The "zipper clause" in the collective bargaining agreement evidences that the employer has maintained its inherent management right to control and direct the work force as it sees fit. The prior assignment of "filler work" to Class A workers did not create a binding past practice. Inherent management rights are reserved to management, whether expressed or not, because they are central to the employer's ability to operate its business. A past practice argument cannot exist where the labor agreement contains a zipper clause that supersedes all prior agreements.

The labor agreement does not limit Forest Home's ability to assign shared work. Any such restriction on the employer's inherent right to assign work must be clearly and unambiguously expressed; there is no such limitation in the agreement. In contrast, the agreement expressly recognizes Forest Home's right to assign Class A work to employees who are not Class A workers, which directly contradicts the union testimony. The agreement does not restrict the type or extent of work the cemetery can assign to seasonal workers, but rather only provides how seasonal workers are to be paid. The agreement expressly provides for the sharing of work, contrary to the union testimony that such work was "exclusive." The agreement also expressly permits the superintendent to perform Class A work as well.

In contrast, the agreement does not guarantee work to the union, nor assign seasonal work to the Class A workers to make sure they get 40 hours of work per week, or require that a Class A worker be allowed to bump a seasonal employee. The agreement only requires the employer to give laid off Class A workers "first consideration" when increasing the seasonal employee workforce. There has been no such increase.

Because the agreement contains no restriction on subcontracting, the employer committed no violation by having the landscape contractor perform certain duties.

The union did not show that Kintop performed any duties outside of the authority provided in the agreement.

The employer's actions were specifically authorized by the agreement, which authorizes it to vary the size of crews of steady workers. The union has not grieved the layoffs, or the employer's right to determine the proper amount of labor needed.

The bargaining history is also at odds with the grievance and does not support the argument that the parties intended certain duties to be exclusively Class A work. Logically, when the parties agreed to remove seasonal workers from the agreement, the work which they performed (to the extent it could be clearly delineated) was transferred outside the unit as well. It would be contrary to the bargaining history to conclude that seasonal work recently removed from the agreement by mutual agreement can now be reclaimed through an arbitration.

The labor agreement does not restrict the employer's ability to assign shared work or limit the employer's ability to subcontract work. Instead, it expressly authorizes the superintendent and seasonal employees to perform duties typically performed by Class A workers. The company also has the inherent management right to assign and direct the work force, and the zipper clause prevents the union from suggesting any alleged past practices. The grievance should be denied.

In response, the union posits further as follows:

The employer errs by citing cases where the labor agreements had management rights clauses. Here, there is no such clause, but there are clauses providing that steady Class A workers "shall perform any and all work with the Cemetery," that limit the work done by management, and that limit the recalls of seasonal workers.

The employer's reliance on PEET PACKING is particularly misplaced, because that case involved broad structural changes to an entire industry, which did not occur here. What happened here was an employer deciding to violate the labor agreement because of its economic problem, which itself was not the result of the collective bargaining agreement. The agreement specifically provides that work on the grounds is to be performed by steady workers unless that is impractical, and contains a very specific seniority clause. The employer violated the agreement by eliminating two of the three unit jobs, not because of technological changes but due to its desire to evade the wages and benefits it negotiated. Even under a balancing test, the employer has engaged in a gross violation of the labor agreement.

The company further violated the agreement by effectively subcontracting vault work, which it did solely for the purpose of eliminating bargaining unit work.

And it did this on the very day it eliminated 2.5 of the 3 bargaining unit positions. Under any balancing test, this violates the labor agreement. Given the strong work assignment language and the absence of a management rights clause, it is a violation of the agreement to have any non-unit persons performing bargaining unit work on cemetery grounds.

The employer further errs by misplaced reliance on a “zipper clause,” which as included in this agreement does not eliminate prior practices. Testimony by three long-term employees supported the language in the agreement that steady workers should, and did, do all the work within the cemetery grounds, unless practical considerations prevailed. The agreement does not contain a separate clause barring consideration of past practices, and this practice is consistent with the collective bargaining agreement.

Although the employer now claims to have economic problems, it did not seek changes in the contract when it negotiated the wage increases in the 2010 agreement. It did not seek a management rights clause or subcontracting clause. Six months later it eliminated two of the three steady workers’ jobs, and had the work done by seasonals, subcontractors and a supervisor. This was a bad faith attempt to evade the wages and benefits it had only recently agreed to. The grievance should be sustained and the employees reinstated and made whole.

In response, the employer posits further as follows:

Even in the absence of an expressed management’s rights provision, the “reserved right” doctrine provides that the cemetery’s inherent management right to assign and direct the workforce cannot be overridden by single words in the labor agreement, which must be construed as a whole. Management’s discretion to run the business may not be curtailed unless there is a specific and unambiguous restriction and the union can either demonstrate a violation of that restriction or establish that management’s exercise of its rights was arbitrary or capricious. Because the union cannot establish either a violation of a specific contract restriction or that the employer acted to undermine the parties’ relationship, the grievance should be denied.

The agreement contradicts the testimony that bargaining unit members had a right to and always performed certain work, which the evidence showed was actually shared work.

> The union's argument that the one word "shall" should solely guide interpretation cannot be sustained; the provision should be construed as a whole, taking into account the rest of Art. II.
>
> The union further errs in its reliance on Art. VI (C), because the agreement's seniority provision does not override the employer's right to assign shared work or provide the union with exclusive jurisdiction over shared work. To violate this provision, the cemetery would have had to lay off a senior bargaining unit member before laying off a member with less seniority; the cemetery did not do that, but laid off the two junior workers while retaining the most senior. Seniority does not provide a basis to claim certain work or the right to bump seasonal employees.

DISCUSSION

This grievance alleges that Forest Home Cemetery violated various articles in the collective bargaining agreement by having non-bargaining unit employees (seasonal workers, the superintendent, and outside employees) perform work properly assigned to Class A Steady Workers represented by Laborers' Local 113.

The union's case begins with the agreement, which uses "bargaining unit work" and six other terms to describe the duties of the steady workers:

> **ART. II (A)**
> A Class A Worker is one who carries on <u>the regular work</u> of the Cemetery and is listed as such by the Cemetery. He/She shall be possessed of sufficient experience, skill and ability to perform all of the <u>usual and regular types of work</u> carried on in the Cemetery in accordance with the established work standards.
>
> **ART. II (B)**
> A Class B Steady Worker is one who carries on <u>the routine work</u> of the Cemetery, but not including operation of large equipment such as back- hoe or front-end-loader. He/She shall be possessed of basic experience, skill and ability to perform all of the <u>basic and regular types of work</u> carried on in the Cemetery in accordance with established work standards, including assisting Class A Steady Workers in the set-up for funeral Services.
>
> **ART. II (J)**
> Any steady worker shall perform <u>any and all work within the Cemetery</u>, as long as such assignment is not inconsistent with his/her safety or with the provisions of Art. II, previously set forth.

ART. II (K)
Any steady worker unable to handle the full range of regular assignments because of age or disability, under circumstances which would not permit the Cemetery to retire him/her, be given preference for whatever light work there is available. Such assignment shall be for a definite period, and during such time the employee shall be paid at the rate of one dollar ($1.00) per hour less than his/her regular rate.

ART. II (L)
Management shall not perform bargaining unit work, except in the case of training employees, maintaining safety policies of the company, giving a helping hand to a worker performing a regular task, or where otherwise reasonable under all the circumstances.

Thus, the union notes, the agreement itself defines as bargaining unit work the "regular," "routine," "usual," "basic" work of the cemetery, and declares that steady workers "shall perform any and all work within the Cemetery." Applying the clear text of Art. II (J), the union concludes it is "mandatory that the steady workers perform the work within the Cemetery grounds." [9] (Br., p. 4) The union also asserts that Art. VI (C), grants steady workers seniority rights to the work over the seasonals, and that the superintendent is doing work which Art. II (L) prohibits. The union also challenges the assignment of work to the outside gardener and the vault companies as improper subcontracting.

The employer responds it has the inherent management right to assign work, that almost all the work has always been shared among union and non-union workers, and that it needed to transfer work formerly performed by steady workers to non-unit personnel to remain economically viable.

Without addressing whether economic distress would authorize actions which otherwise would violate the labor agreement, I have determined that the employer failed to make a compelling case of economic hardship. It established that its revenues were down, and had been so for a few years, but without any evidence in the record about the cemetery's economic condition (e.g., budget, assets, etc.), its claim of economic hardship was unsubstantiated.

The union contends that the mandatory nature of Arts. II (J), II (L) and VI (C) are self-evident from the text. The employer implores me to not let the word "shall" "override the rest" of the labor agreement, citing ASSOCIATED FUR MFG., INC., 85 LA 810, 811 (Kramer, 1985) for the holding that arbitrators should not "pu(t) a wholly unnatural premium upon excessive technicality and ignor(e) the manifest intent of the contract's restrictions."

There are two problems with this argument. The first is that the word "shall" is not an "excessive technicality," but is one of the most basic and fundamental words that a labor

[9] The parties stipulate that the work in question does not include office or administrative work.

agreement can contain. It is a short and simple word of command and compulsion, identifying that which is mandatory, and has universally been understood as such for millennia. [10]

The difference between the direct mandate, "shall," and something which actually *is* an excessive technicality is in fact exemplified by the case the employer cites, but not for the point the employer seeks to make. In ASSOCIATED FUR arbitrator *sustained* the grievance and ordered the employer to either evict its non-union sub-lessee or surrender all its space under the lease. Id., at 812. While the *sentence* which Forest Home quotes supports its theory, the *case* from which the sentence is taken does not. [11]

The Application of Management Rights

Implicitly acknowledging that it has little explicit authority in the text of the agreement to transfer or subcontract work, the employer relies heavily on inherent management rights. It does so without an underlying management rights clause.

The union asserts this omission is meaningful, and weakens the company's claim of reserved power to transfer the work to non-unit personnel; the company replies the omission is irrelevant, and that it retains all inherent rights and powers customarily held by management.

The employer maintains that, even in the absence of an expressed management rights clause, it has certain reserved and inherent rights to operate the business and control the labor force, and cites FAIRWAY FOODS, INC. 44 LA 161 (Solomon, 1965) for the proposition that:

> The right of Management to operate its business and control the working force may be specifically reserved in a labor agreement. However, *even in the absence of such a specific reservations clause, as is the case here,* those rights are inherent and are nevertheless reserved and maintained by it and its decisions with respect to the operations of the business and the direction of the working forces may not be denied, rejected, or curtailed unless the same are in clear violation of the terms of the contract, or may be clearly implied, or are so clearly arbitrary or capricious as to reflect an intent to derogate the relationship. Id., at 164 (*emphasis* added).

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[10] See, e.g., Exodus 20:2-17.

[11] In ASSOCIATED FUR, the labor agreement provided that "no employer shall share any loft or other premises" with any other industry entity which did not have a contractual relationship with the union. The company leased space on the 15th and 9th floors of a building in New York City, sub-leasing the 9th floor space to a contractor which did have a contract with the union. That sub-lessee then relinquished the premises, which were taken over by a non-union contractor, leading the Furriers' Joint Council to grieve. The employer argued that since the 9th and 15th floors were not contiguous, there was no sharing of the premises. Noting that the labor agreement and federal labor policy both sought "to outlaw certain evil practices which have long plagued the 'needle trades,'" such as non-union subcontracting, and that it was not uncommon for a firm to be the master lessor of non-contiguous space, the arbitrator rejected the employer's argument as putting "a wholly unnatural premium upon excessive technicality and ignor(ing) the manifest intent of the contract's restrictions."

FAIRWAY FOODS does indeed stand for the proposition that the employer propounds; however, I do not think FAIRWAY FOODS itself stands on firm ground, at least not on the precedents it relies upon for that assertion.

In support of his declaration, Arbitrator Solomon cited ENTERPRISE WHEEL & CAR CORP., 28 LA 844 (Livengood, 1957) and TIN PROCESSING CORP., 15 LA 737 (Klamon, 1950). Both cases, however, involved agreements which explicitly *did* contain a management rights clause. 28 LA 846, 15 LA 737. I do not understand the arbitrator's use of these cases in this regard.

The employer cites WILLIAMS PIPE LINE CO., 80 LA 338, 341 (Ross, 1983) for the proposition that, "these inherent management rights (to control and direct the workforce) are reserved to management, *whether or not expressed in an agreement,* because they are central to an employer's ability to operate its business." (Br., p. 32, *emphasis* added.). I do not find the italicized clause expressed in that decision, which interpreted a labor agreement which, again, *did* include a detailed management rights clause. Indeed, the arbitrator explicitly explained that the company argued its position "under the broad management clause." Id., at 340, 341. In fact, based on its text and internal citations, I draw from WILLIAM PIPE LINE a holding and citation that *supports* this grievance: that the employer *cannot* subcontract or transfer work outside the unit when doing so would subvert the labor agreement or seriously weaken the bargaining unit. [12] This concept returns at the end of this section.

Other cases, however, do support the holding of FAIRWAY FOODS. In ILLINOIS BELL TELEPHONE CO., 15 LA 274 (Davis, 1950), the union specifically argued that in the absence of a management rights clause detailing the general rights and authority claimed by the company, the company possessed only the rights and authorities detailed in the agreement. The arbitrator acknowledged there was no management rights clause, but rejected the union's analysis:

> In any company-employee relationship situation prior to the appearance of a union and before the existence of a collective bargaining agreement, every authority, power and responsibility of management is vested in the company and its authorized officials. The only restrictions upon the company in the area of labor-management relations are those imposed by federal, state and local legislative enactments or ordinances. Aside from such restrictions, the company is in complete possession of all authority and power over its workers in so far as employment is concerned. When a union is formed and a collective bargaining agreement is signed, the original power and authority of the company is modified only to the degree that it voluntarily and specifically relinquishes facets

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[12] In the absence of contractual restrictions, management can subcontract or transfer work "as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in a subversion of the labor agreement*, and it does not have the effect of seriously weakening the bargaining unit or important parts of it."* SHENANGO VALLEY WATER CO., 53 LA 741, 744-745 (McDermott, 1969). (*emphasis* added)

> of its power and authority. This principle is today firmly established in labor-management relations and in arbitration. Id., at 280.

In NATIONAL LEAD CO., 43 LA 1025 (Larkin 1964), there was likewise no management rights clause. Citing, and closely paraphrasing, ILLINOIS BELL, the arbitrator held:

> When a union is formed, and a collective bargaining agreement is entered into, the original power and authority of the company is modified only to the extent that it voluntarily relinquishes facets of its power and authority. This principle is firmly established today in labor-management relations and arbitrations. In short, the Company does not have to bargain with the Union to get "rights" which are inherent in the management function; but it may relinquish certain of those rights in the course of bargaining with the union. Id., at 1027.

As the employer asserts, most arbitrators hold that employers have primary rights, and may act unfettered except as by law or agreement. In our capitalist economy, after all, it is capital, exercised through ownership and management, subject to government regulation as appropriate, which creates, maintains and directs the private sector enterprise.

However, I take arbitral notice that it is now standard for a labor agreement to have a management rights clause, and highly unusual when it doesn't. Such provisions "appear to be widely favored by management," and have been found in 60%-80% of labor agreements in various surveys. *How Arbitration Works*, 6th edition, Ruben, ed., (BNA Books, Washington D.C. 2003), p. 660. [13] That is, the collective judgment of employers is to have a management rights clause, which means such a clause has value to management. Its absence must therefore mean a loss of value to management. Also, since most collective bargaining agreements include a management rights clause, the general understanding of the reserved rights of management is based on contracts which do include them. The lack of a management rights clause in the labor agreement here under review weakens the employer's claim of inherent authority, and will prove significant when considering the relevance and importance of prior cases which do involve such a provision.

One of the employer's core arguments is that most of the disputed work had already been shared among unit and non-unit personnel, so management had the right to make it effectively all non-unit (seasonal) work. The employer separates the cemetery's total workload ad Class A duties and seasonal work. To the employer, the only assignments legitimately reserved for steady workers are the back hoe, operating the crematory and winterizing the irrigation system; the employer considers all other general duties -- mowing, plowing, planting, trimming, chipping, cutting, etc. – as "seasonal work."

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[13] As a mandatory subject of bargaining, employers may insist that the agreement contain a management rights clause. NLRB V. AMERICAN NAT'L INS. CO., 343 U.S. 395 (1952).

I agree that the seasonals had already been performing most, if not all, of the steady worker tasks before 2011. But that does not mean the employer can simply designate certain duties as "seasonal" and reassign them from steady workers to the seasonals -- especially since most of the awards which the employer cites can easily be distinguished on the facts, starting with the terms of the respective collective bargaining agreements.

I also find the employer's argument as to the import of the zipper clause [Art. VIII (D)] to be inconsistent. On the one hand, it cites the purported history of the routine work being shared as evidence it is not exclusive bargaining unit work; on the other hand, it asserts the zipper clause excludes all past practices and limits arbitral attention to the text of the agreement. I think these two legal theories are mutually exclusive.

Given the prevalence of management rights provisions, it is not surprising that almost all the cases which the employer cites feature just such a clause, and that frequently the clause is critical to the outcome. In STEWART-WARNER CORP., 22 LA 547 (Burns, 1954), the unit of machinists grieved the transfer of its work to the unit of electrical workers. [14] Although the cases share a critical fact – the documented decline in part of the respective company's workload – the company in STEWART-WARNER enjoyed written management rights, which the arbitrator pointedly cited in holding for the employer. Id., at 551. An award which explicitly relies on the management rights clause is not the most persuasive precedent in a case where there is no such clause.

The employer cites PEET PACKING CO., 55 LA 1288 (Howlett, 1971), wherein the arbitrator held the employer had the right to transfer distribution from driver/salespersons who were in the bargaining unit to non-union salespersons and delivery persons. The cemetery cites this award as standing for the proposition that changes "in the manner in which work is assigned are permissible where the changes reflect a reasonable exercise of management's discretion in response to economic conditions." (Br., p. 26.)

However, as the union correctly notes, there are significant factors which distinguish PEET PACKING from the instant case. First, again contrary to the current controversy, in PEET PACKING there was a strong management rights clause, which vested the "method and means of production and distribution ... exclusively" in the employer. Id., at 1291. Further, there had been "a substantial change in purchasing methods of Peet Packing's customers over the past several years," an industry-wide change to which the employer was attempting to respond. Id., at 1292. In the instant case, there is no evidence tying Forest Home's current economic troubles to structural changes throughout the funeral industry. PEET PACKING is thus not persuasive precedent for the employer's argument. [15]

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[14] Represented, respectively, by the International Association of Machinists and the International Brotherhood of Electrical Workers.

[15] The Peet Packing Co. was purchased in 1993 by former Detroit Tigers pitching great Denny McClain, who closed it in 1995. In 1996, McClain was convicted of looting the 200 laid-off workers' $2.5 million pension fund, and served six years in prison.

The difference between a structural change in the way a company does business and merely substituting lower-paid, non-union employees for higher-paid, unionized personnel is exemplified by another case the employer cites, AIR REDUCTION CO., INC., 51 LA 660 (Hebert, 1968). In that case, a manufacturer of industrial gases adopted a new marketing system which contributed to a layoff of unit personnel.[16] Finding that the change was necessary for the employer to save time, transportation costs and improve market accessibility; that the action was not anti-union subterfuge; that the employer had rejected union demands during negotiations that conversion stations be included within the labor agreement, and that this did not constitute contracting out, the arbitrator denied the grievance. Like the situation in PEET PACKING (which itself cites AIR REDUCTION), these are structural, operational changes that describe a fundamental shift in the way the company did business; in contrast, the only operational change at the cemetery was the layoff of bargaining unit employees and the assignment of their work to lower-paid, non-union personnel. Unlike the situation in PEET PACKING and AIR REDUCTION, the work at Forest Home remained the same – only the workers changed.

I also reject the cemetery's citation of CLEVELAND ELECTRIC ILLUMINATING CO., 105 LA 823 (Frankiewicz, 1995), wherein the transfer of mail delivery duties happened only after the incumbent performing those duties retired, the employer enjoyed an explicit management rights clause, and the changes took place in the context of a reorganization of the internal mail delivery system. In the case before me, the cemetery's transfer of duties was essentially simultaneous with, and made necessary by, the involuntary layoff of two of the three bargaining unit employees. Thus, the employer's citation of CLEVELAND ELECTRIC for the proposition that its assignment of work was permissible because it "did not result in a layoff, displacement or loss of pay" to the one remaining Class A unit employee, is somewhat discordant.

The employer cites OHIO MODULE MFG. CO., 126 LA 307, 312 (Szuter, 2008) for the proposition that "the union recognition clause only applies to work which has been performed historically by the bargaining unit on an exclusive basis," and that a varied history of work assignment as between management and the unit without complaint by the union compels the conclusion that the disputed work cannot be deemed to be exclusively bargaining unit work. However, the quoted language, which the company contends (R. Br., p. 14) represents the holding of the award, is in fact *not* part of the award reflecting the arbitrator's discussion and opinion, but is instead from that part of the award stating "the company's position." Indeed, the arbitrator granted one element to the grievance and denied one element. Id., at 320.

The employer cites MATANUSKA ELECTRIC ASSOCIATION, 111 LA 596 (Landau, 1998) in support of its contention that because work was historically shared among steady workers

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[16] The new system involved distributing the product in liquid form rather than gaseous form in cylinders, with conversion stations installed at the distributor's place of business. This led to the layoff of personnel who had previously distributed the cylinders.

and others, it was not exclusive to the steady workers. "Perhaps the most persuasive evidence of the contractual intent of the parties regarding the scope of bargaining unit work is past practice of performing the work." Id., at 601. Similarly, it cites SLOAN VALVE CO., 68 LA 479 (Cohen, 1979) for the proposition that a varied history of work assignment between unit and non-unit personnel without complaint by the union compels the conclusion that the disputed work cannot now be claimed as exclusively bargaining unit work. However, the employer has also aggressively argued, as noted above, that "all past practices are expressly rejected" by the agreement's "zipper clause," I am not sure how it can then make this seemingly contrary argument. (Br., p. 32)

The employer cites DANIEL SCHARLIN & ASSOCIATES, INC., 69 LA 394 (Lucas, 1977), in which the union stipulated that the employer had a right to have a confidential secretary outside the unit, but grieved when the employer transferred his former secretary, who was a member of the union's negotiating committee and an active participant in a recent strike, because it feared her shorthand and typing skills would atrophy in her new position, potentially diminishing her contractual seniority rights. The employer cites this case for the proposition that, "in the absence of an express restriction that prohibits the transfer of job functions (assuming they can be defined as such) from the bargaining unit, the employer has a 'free hand' to make such transfers as long as it does so in good faith." Even if DANIEL SCHARLIN could be broadly interpreted to have that holding, which I do not find in its text, that case is easily distinguished from the one before me because the agreement then under consideration, unlike the one in the instant matter, did not have a work jurisdiction clause, which the arbitrator explicitly noted in his discussion. Id., at 398.

The union accurately cites and quotes NEW BRITAIN MACHINE CO., 8 LA 720 (Wallen, 1947), where a grievance challenged the transfer of certain security duties from watchmen, who were in the bargaining unit, to armed guards, who were not. Although the labor agreement *did* include a strong management rights clause, and did *not* include any explicit restrictions on the employer's ability to transfer work, the arbitrator sustained the grievance because he found the transfer of bargaining unit work to non-unit personnel was "an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes." Ordering the laid-off watchmen be restored to their jobs and made whole, the arbitrator continued:

> If one of the purposes of the contract as a whole, and of the seniority provisions in particular, is to assure the bargaining unit employees a measure of job security then such measures would be meaningless if the Company's view were to prevail. For it would mean that without regard to prior custom or practice as to the assignment of work, the Company could continuously narrow the area of available job opportunities within which the seniority clause functions by transferring duties performed by bargaining unit employees to employees not covered by the agreement. Not only the seniority clause but the entire agreement could thus be vitiated. Id., at 722-23.

Similarly, in SVERDRUP TECHNOLOGY, 121 LA 1056 (Hewitt, 2005), the company was found to have violated the collective bargaining agreement when it transferred and/or shared some of the unionized artillery-testers' work with non-unit engineering technicians. Acknowledging that an earlier arbitrator had found that the management rights clause granted the employer a free hand to assign unit work to non-unit employees, the arbitrator explained that while "it is unusual for an Arbiter to disagree with another Arbitrator's finding ... such a finding (as the earlier one) would negate the Union's Recognition as without work there would be no Union." Id., at 1063.

Taken in conjunction with WILLIAMS PIPE LINE and SHENANGO VALLEY WATER, I find NEW BRITAIN MACHINE CO and SVERDRUP TECHNOLOGY to be more persuasive than the cases which the employer cites, most of which are readily distinguishable on the facts and the labor agreements in question.

The union alleges that bargaining unit work was improperly transferred to four kinds of non-bargaining unit employees -- the seasonal and supervisory employees of Forest Home, the contract gardener, and the employees of the vault companies.

Transfer of work to the Superintendent

The union asserts that the employer violated Art. II (L) whenever the superintendent, Mike Kintop, engaged in any bargaining unit work.

The labor agreement is clear. It explicitly bars management from doing bargaining unit work, except in enumerated instances. As noted, "bargaining unit work" consists of the "regular" and "routine" work of the cemetery. To the extent that Kintop performed any of the "routine" or "regular" work of the cemetery, other than when he was training employees, maintaining safety policies, giving a helping hand to a worker performing a regular task, or acting in a manner otherwise reasonable under all the circumstances, he would have violated Art. II (L).

In arguing why it was proper for Kintop to perform bargaining unit duties, the employer cites CITY OF MIAMI, 122 LA 237 (Sergent, 2006) for the holding that an employer's "operational necessities also justify an employer's exercise of (the) right" to direct and control the organization. (Br., p. 35-36.) That case involved a senior auditor who grieved his transfer to a menial clerical job as being punitive and constituting discipline without just cause. Despite the broad statutory and common law authority public employers in Florida already enjoyed to operate unilaterally and to freely restructure their organizations, which the arbitrator noted, the grievance was sustained. I do not believe the substance of this award aids the cemetery's argument.

The employer also cites KELSEY MEMORIAL HOSP., 88 LA 406 (Pincus, 1986), for the proposition that where the parties "have 'operationalized' a supervisor's performance of certain work by contract, the Union must show that the supervisor 'performed work in excess of the

norm,' which has not been established here." (Br., p. 37.) However, the relevant contract language there under review was significantly different from that before me. The agreement that I am to interpret ensures that management "shall not perform bargaining unit work," except under specified enumerated circumstances. In distinct contrast, the language before Arbitrator Pincus explicitly provided that supervisors and other non-unit personnel "may continue to perform work in the bargaining unit provided they do not perform additional work which would specifically cause the layoff of a bargaining unit employee." Again, given the language of the respective collective bargaining agreements, I do not believe the substance of this award materially aids the cemetery's argument.

Notwithstanding the doubtful benefit to its cause of CITY OF MIAMI and KELSEY MEMORIAL HOSP., however, I do accept the employer's central defense on this charge, namely that the union failed to meet its burden. As the employer correctly notes, the union has the burdens of proof and persuasion. The testimony indicates that Kintop did occasionally perform tasks normally performed by steady workers. However, the union did not offer evidence or testimony sufficient for me to conclude that the level at which he did so was not reasonable "under all the circumstances."

Subcontracting

Two other groups of "non-bargaining unit employees" come from outside contractors – the employees of the vault companies, and the gardener – so the analysis turns to subcontracting.

The cemetery contends it did not subcontract burial work to the vault companies. I find it did. Former steady worker Gonzales testified that his regular duties included the full range of burial duties, from setting up the service to seeding the sod afterwards, including installing the lowering device, lowering the casket, putting the lid on, sealing the vault, and so on – precisely the work undertaken by the employees of the vault companies. [17] Moreover, the labor agreement provides for minimum staffing and guaranteed overtime for all Saturday funerals, two exceptional benefits. [18] Burial work is bargaining unit work.

By its letters of December 30, 2010, the employer undertook to have an outside contractor perform tasks which otherwise would be performed by the steady workers. Having

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[17] Such activities are herein summarized as "burial" or "funerary" work or services.

[18] Art.II, Sections (H) and (I) require that at least two workers, at least one of whom is a Class A worker, "will be called in when funerals are held on a Saturday," and paid at overtime rates. This is a clear mandatory minimum staffing requirement, which should have been easy to track and easy to enforce. There is, however, no evidence as to the number of funerals held on Saturday in 2010 or 2011, nor any argument by the union that the cemetery had failed to comply with these terms. Accordingly, I will not consider these provisions any further, other than to note this constitutes a significant overtime benefit which was largely taken away by the employer's action.

an outside contractor assume duties which your employees had been, and would otherwise perform, constitutes subcontracting, even if the costs are going to be assumed by a third party (the customer).

And while gardening is not specifically referenced in the labor agreement the way burial work is, it too is within the normal duties of the steady workers, so that the relationship with Brath, d/b/a "A Gardener in the City," constituted subcontracting as well.

A veteran arbitrator has called subcontracting "one of the most fundamental and controversial issues" in industrial relations, and declared after an exhaustive analysis of subcontracting grievances that he was "in a state of even greater confusion than he was at the beginning" of his analysis. DIEBOLD, INC., 42 LA 536, 542 (Klein, 1964).

It is "generally accepted that where a collective bargaining agreement is silent as to management's rights and as to subcontracting, management retains a residual right to subcontracting, subject to its covenant of fair dealing." FEDERAL WHOLESALE CO., 92 LA 271 (Richard, 1989). As this labor agreement is silent as to both management's rights in general and subcontracting in specific the employer has explicitly acknowledged that, even within what it considers its "inherent right to assign work as it sees fit," it can do so only "so long as it does so in good faith." (Br., p. 3)

The distinguished arbitrator Anthony V. Sinicropi has suggested a set of questions to determine whether an employer's decision to subcontract was in good faith. Here's how I fit the facts of the outside gardener and the vault companies to the Sinicropi matrix: [19]

Any special skills, experience, or techniques required to perform the required work.

An employer may subcontract work its employees are not capable of performing. SINGER CO., 71 LA 204 (Kossoff, 1978). The correspondence between cemetery staff and Brath establishes the quality of gardening the cemetery sought. The cemetery was obviously relying heavily on Brath to design, implement and maintain a series of landscaping features; in its ongoing effort to attract and retain market share, this was a critical, high-profile assignment, far more intricate and important than the "certain planting and care of garden beds" the union describes. The steady workers were experienced gardeners who could tend properly to the arrangements, but none was the master gardener that the cemetery determined it needed. Because the steady workers did not have the special skills necessary for this needed work, the cemetery was justified in subcontracting the gardening work to Brath. [20]

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[19] Sinicropi, *Revisiting An Old Battle Ground: The Subcontracting Dispute,* in ARBITRATION OF SUBCONTRACTING AND WAGE INCENTIVE DISPUTES, Proceedings of the 32nd Annual Meeting, National Academy of Arbitrators, ed. James L. Stern, (Washington: BNA Books, 1980), 140-141, adapting DIEBOLD, INC., and HARRIS SERGBOLD CO., 62 LA 421 (Klein, 1974). To facilitate the presentation, I have considered some of the questions out of their original order.

[20] This resolves the grievance as to the subcontracting of the gardening duties, and thus that aspect will feature no further in this discussion.

The steady workers did, however, have all the skills and experience needed to provide burial services.

The similarity of the required work to the work regularly performed by bargaining-unit employees.

Steady workers had been performing the precise work transferred to the employees of the vault companies. The collective bargaining agreement explicitly references this duty, providing at Art. II (B) that among the "basic and regular types of work" assigned to Class B Steady Workers is "assisting Class A Steady Workers in the set-up for funeral Services." Burial work is bargaining unit work, both by the terms of the labor agreement and established practice.

Any layoffs resulting from subcontracting. (Were regular employees deprived of the work?)

Gonzales and Andrews were deprived of the burial work, so the subcontracting helped support their layoff. But because there is no evidence detailing how many hours of ongoing work were eliminated by Kursel's letter, there is no way to know how significant the subcontracting was for the layoffs.

The effect or impact that subcontracting will have on the union and/or bargaining unit. (Was the required work part of the main operation of the plant?)

The subcontracting helped the cemetery handle the layoffs of two of the three bargaining unit employees, which jeopardized the very existence of the bargaining unit. This subcontracting thus had an effect on the unit, although a lighter impact than did the transfer of other duties to seasonal employees.

Possession by the company of the proper equipment, tools, or facilities to perform the required work.

Steady workers had all the tools they needed to perform the required work.

Was the required work an experiment into a specialty line?

The reassignment of burial work from steady workers to the vault company employees did not involve any new or specialty lines.

Past practice in the plant with respect to subcontracting this type of work.

Prior to Kursel's letter of December 30, 2010, the cemetery had not undertaken a comprehensive effort to have all vault companies include burial services in their bids to funeral directors.

The existence of any emergency conditions. (Were properly qualified bargaining-unit employees available to complete the work within the required time limits?)

There were no emergency conditions, and properly qualified bargaining-unit employees were available to do the work.

Was the required work included within the duties specified for a particular job classification?

The required work was included within the duties specified for the Class A Steady Workers.

The discussion or treatment, if any, of the subject of subcontracting during contract negotiations.

There is no evidence the parties discussed subcontracting burial services during negotiations for the contract they signed in April, 2010. For the employer to do what it did in December, they should have.

In the spring of 2010, Forest Home knew its overall economic situation, its non-union layoffs, and the possibility of future, union layoffs. It knew the personnel practices of the area vault companies, including the fact that some used their own employees for burial services. It knew that it could effectively eliminate one aspect of bargaining unit work, and thus reduces the need for bargaining unit workers, by requiring all vault companies to perform the burial work.

The "good faith" of the employer in subcontracting the work. (Was the decision to subcontract motivated by anti-union bias? Was it designed to discriminate against the union?)

There is no evidence that the employer was discriminating against the union, or that its motivation was anything but economic. The employer laid off several non-union employees before laying off Gonzales and Andrews, which would not have been the case if the bias charge were true. Certainly, the employer's motivation was to avoid the wages called for in the union contract, but I do not believe that is the same as having an anti-union bias. Notwithstanding the bad bargaining discussed above, I do not find the employer to have shown bad faith anti-union bias.

Any compelling business reasons, economic considerations, or unusual circumstances justifying the subcontracting. (Was the work subcontracted out performed at a substantially lower cost?)

The cemetery cites several compelling business interests to justify its action, including labor costs, customer relations, and industry practice.

The cemetery claims it faced a dilemma whenever a vault company didn't provide its own workers for burial services: either have its own workers do the work and charge the grieving family an unexpected fee, or have a cemetery worker do the work and not charge. One course would alienate a customer at a sensitive time, risking future business; the other would incur costs without revenue, risking future budgets.

If there were indeed only three options – doing the work for free, charging for work that customers thought was included, or having it included in the vault company bid to the funeral directors -- the last listed is obviously best for the company.

There was, potentially, a fourth course – inform the vault companies and funeral directors that henceforth the *cemetery* would provide, and charge for, personnel to operate the funeral machinery. That would obviously be better for Forest Home – generating revenue for the company and pay for the workers.

The steady workers were certainly qualified to provide those services, and continue to do so when the cemetery sells the vault. There were no complaints from vault companies or customers about the way steady workers performed their burial duties.

The cemetery had a legitimate business need to stop the vault companies from taking the pay and passing on the work. There were two ways to do so – insist that the work be performed by the vault companies, or insist that the work be given to its own workers.

Could Kursel have insisted on that final option? There are weaknesses to both sides of the argument.

As with the transfer of work to the seasonal employees, the employer's rationale for the subcontracting the burial work was economic; however, as noted above, the record lacks the evidence necessary to evaluate its claims. The record does not reflect how many hours the steady, seasonal, and subcontracted employees worked on burial services in 2010, or in January – May, 2011, or the costs attributed to that work. Other than Art. III (I), which provides for four hours burial pay for two employees each for a Saturday funeral, there is no specific accounting for funeral time, either for steady workers or vault company employees.

The record is also without no evidence on the economic balance of power among Forest Home and the area funeral directors and vault companies, or whether the relationships were such that Kursel could have insisted on keeping the work in-house. Kursel testified, and wrote

to the funeral directors, that it had become widely accepted, even expected, for the vault companies to provide the full burial services. Indeed, several factors, including technology, efficiency and economy, all suggest this would likely be so. Kursel further testified without rebuttal that there are some vault companies that insist on performing the work themselves, which again is to be expected.

There are certainly economic considerations and unusual operational circumstances involved in the assignment of burial duties. It is unclear from the record whether or not those considerations and circumstances are fully compelling. However, there is nothing in the record to invalidate those concerns. The union has thus failed to meet its burden of persuasion on this element of its grievance.

Transfer of work to seasonal workers

The most difficult part of this grievance involves the transfer of bargaining unit work to the seasonal employees, whose unique status presents an unusual challenge.

As noted above, the parties in 2003 agreed to remove seasonal workers from the unit, and so excised the definitional paragraph, Art. V (A). [21] But even so, they retained the article entitled "Seasonal Workers," and its sections 1 and 2:

> Section 1. When asked to perform tasks normally performed by Class A Steady Workers, they shall be paid at the minimum rate for Class A steady Workers.
>
> Section 2. The Cemetery may recall a seasonal worker before the general recall date of the declaredes seasonal year, require him/her to work in any unusual situation where he would not normally be scheduled to work or give consideration to the promotion of a seasonal worker to Class A or Class B Steady Worker, pursuant to Art. II, Paragraph 1 of this agreement.[22]

At that time, the parties also retained Art. VI (D), defining the seasonal workers' job security. In 2010, the parties reaffirmed the 2003 amendment, as well as the retention of these three sections, along with the declaration of Art. I (A), that "(e)mployees not classified herein shall not be considered affected by this contract."

That is, after providing *in the recognition clause* that employees "not classified herein shall not be considered affected by this contract," the contract has three separate sections

[21] The text of that paragraph is not in the record.

[22] This paragraph also cites a section -- "Art.II, Paragraph 1" -- that does not exist. This appears to be only a typographical error, and should read "Art.II, Paragraph I." I am also confused by the employer's assertion that the position of Class B Steady Worker was "eliminated years ago from the Agreement." While I understand that there are no Class B workers currently employed, I question whether the position itself has been eliminated, given that the text of the labor agreement, at Art. II (B), clearly provides for the wages and conditions of employment of Class B Steady Worker.

dealing with the wages, hours and conditions of employment of seasonal workers, including provisions that directly affect the steady workers. This poses a fundamental quandary.

The cemetery acknowledges that Arts. V, secs. 1 and 2, and VI (D) are all still in force. In fact, it cites Art. V, sec. 1 as evidence that the work had always been shared, and cites Art. VI (D) to prove how little job security the steady workers really have.

The parties had to have had a reason for maintaining these provisions even after removing the seasonal workers themselves from the labor agreement. It must be because the wages and hours of the seasonal workers help define the ease or difficulty with which the cemetery could transfer the work to them, and thus directly affect the wages and hours of the steady workers. Even though no seasonal worker has the right under the agreement to allege a violation of these sections, the union does, because the limitations those sections place on the use of seasonal workers protect the interests of its members.

The union asserts that seniority, embodied in Art. VI, Sec. (C), grants the steady workers further jurisdiction over the work. The relevant part of that section provides, "Regular assignments shall be based on ability, qualifications and seniority. Where ability and qualifications are equal, seniority shall prevail."

Since seasonal workers have no seniority, the union reasons, steady worker seniority "shall prevail," and govern the assignment. The employer responds that it honored seniority by laying off the two junior steady workers, Gonazales and Andrews, and retaining the most senior, Schultz. The employer also asserts that seniority rights provide no protection for existence of the job itself, and exist only in relation to other employees under the agreement, with no relevance regarding non-unit personnel.

As with the rest of the agreement, this section was written at a time when the workforce was predominantly steady worker, and thus competition for preferred assignments was among them, without concern for seasonal workers. Thus, it is only to be expected that the parties would have meant for this provision to address assignments among unit personnel, rather than between steady workers and seasonals. However, the text is clear and comprehensive, and supports the union's interpretation.

The employer cites GREIF BROTHERS CORP., 114 LA 554, 561 (Kernis, 2000), citing AXELSON MFG. CO., 30 LA 447 (Prasow, 1958), as holding that seniority does not protect an employee "in relation to the existence of the job itself." [23] In GREIF BROTHERS, the employer eliminated the union position of Storeroom Attendant and posted a new, hired-rated union position of Stockroom Attendant/Shop Machinist. The incumbent, the union vice president and former long-time union president, grieved. The labor agreement under review contained a strong management rights clause, plus specific authority for management to create or abolish positions. The arbitrator, noting that the employer had a legitimate need for computer and

[23] The quoted phrase is actually found at 114 LA 560.

machinist skills which the incumbent admitted he lacked, that the incumbent had rejected management's earlier offer for computer training, and that the incumbent had bumped into a Tractor Operator position that was higher-rated than his existing job, denied the grievance. GREIF BROTHERS does not materially aid the employer's case.

In rebutting the union's assertion that the seniority clause required the employer to retain the steady workers and lay off the seasonals, the employer relies on AXELSON MFG. for the proposition that seniority "protects and secures an employee's rights in relation to the rights of other employees in his seniority group; it does not protect him in relation to the existence of the job itself." Id., at 448.

In AXELSON MFG., the employer laid off maintenance mechanics and transferred their duties to higher-rated machine tool rebuilders who had less seniority. Finding that the company had a legitimate and good faith need for machine tool rebuilders, that maintenance mechanics were not capable of doing that job, and that the machine tool rebuilders were paid a higher wage than the maintenance mechanics, the arbitrator denied the grievance. As all positions involved were within the bargaining unit, and there is no assertion before me that the steady workers were not qualified to perform the tasks, I again find the employer's reliance misplaced.

Even on its surface, AXELSON MFG. should be seen as contrary to the employer's position, as the arbitrator explicitly found there was "no argument over rates of pay and there is no charge that the Company is re-assigning work duties in order to reduce wages." Id., at 447. In the instant case, of course, that is exactly the charge at the heart of the grievance, a charge the employer does not deny.

Notwithstanding this critical caution on page 447, the employer finds this case so important, and the text so persuasive, that it quotes AXELSON MFG. at length, a 201-word, 2-paragraph block from page 448, about the employer's right to create, change, or abolish job classifications. (R. Br., at p. 12). However, on that very same page, another pointed warning from the arbitrator:

> If the motive behind job content changes or reassignment of work duties is to discriminate against certain employees, to evade obligations under the agreement, *or to gain advantage in wage rates*, then the action would be improper." (*emphasis* added). 30 LA 448.

Whether or not the employer is considered to have sought to "evade obligations," there is no doubt that the reassignment of duties was expressly and explicitly done to gain advantage in wage rates. One of the primary cases on which the employer relies thus declares that such a motive makes the employer's action improper.

The employer further argues that concepts of seniority do not support the union's cause by citing Art.VI (D), which provides that a laid off Class A or B steady worker gets "first

consideration should it become necessary to increase the number of seasonal workers." However, Art. II (A) describes Class A and Class B workers as having particular "proficiency," and grants them "special status in the matter of … continuity of employment provided herein." That is, Art. II (A) defines Class A workers as *more* qualified and *more* entitled to special job security status, while Art. VI (D) gives them *less* job security than the non-unit seasonals. "Special status in … continuity of employment" is not satisfied by providing only first consideration if the pool of "non-unit" seasonal employees expands, putting Articles II (A) and VI (D) into irreconcilable conflict. I believe the definitional nature of Art. II (A) takes precedence over the supplemental nature of Art. VI (D).

Article V, sec. 1 provides that seasonal workers will at times be "asked to perform tasks normally performed" by Class A steady workers. The employer cites this as further evidence that even "Class A" tasks – which the employer defines as the back hoe, crematory and winterizing the irrigation system -- have been shared work.

But in so doing, the employer also commits to honoring the rest of that section, explicitly acknowledging that whenever seasonal workers perform a task "normally performed by Class A Steady Workers," they "shall be paid at the minimum rate for Class A steady Workers." As suggested above, this clause is meant to provide an economic disincentive for the employer to assign seasonal workers tasks normally performed by steady workers.

The extent of that disincentive is difficult to discern, however, as this single sentence presents two confusing clauses. First, the phrase "normally performed" is ambiguous, given that *all* work at the cemetery is work which the steady workers normally perform. And the reference to "the minimum rate" for Class A steady workers seems to imply a range of pay grades which the parties have apparently not followed.[24]

Relying on the distinction of duties noted above, the cemetery contends that the phrase, "tasks normally performed by Class A Steady Workers," means operating heavy equipment, the crematory and winterizing the pipes. The union's understanding of the term is broader, and all-inclusive.

The employer tries to advance its argument by asserting that the collective bargaining agreement "defines the Class A Steady Workers as 'Heavy Equipment Machine Operators,' whose proficiency in the operation of heavy equipment entitles them to 'special status' wages and benefits." (R. Br., p. 6). I believe that is a misreading of the agreement, where the only reference to "Heavy Equipment Machine Operator" is only in the pay scale, with no more definitional value than the three other listed assignments.

[24] As noted above, the labor agreement specifically identifies the "Minimum" Class A rate (for assignments which do not involve motorized equipment) as the class B rate plus $0.55. Although there is no actual steady worker payroll data in the record, the parties agree that the effective minimum rate was either $21.90 or $22.45.

Quite contrary to the cemetery's claim -- Art. II (A) explicitly states that it is the steady workers' "ability to perform all of the usual and regular types of work carried on in the Cemetery" that entitles them to the special status "in the matter of wages, benefits and continuity of employment," *not* their proficiency in just the operation of heavy equipment. [25]

Although its primary argument is that steady workers did not have jurisdiction over the so-called "seasonal work," the employer must also address allegations that seasonal workers performed work that even it said was exclusively Class A. Steady worker Schultz testified that seasonals had begun operating the back hoe. Kintop testified that operating the back hoe to dig a foundation for a marker, when necessary, was "typically" Class A work. By acknowledging in its brief that Schulz only performed "most" of the Class A duties, the employer effectively affirmed his testimony and conceding that seasonal workers were performing Class A duties. Art. V (A) sec. 1 requires that such work to be paid at the Class A steady worker minimum.[26]

The payroll records in evidence show seasonal workers being paid $9.00 ($10.00 for premium work). There are no entries of seasonal workers being paid the Class A Steady Worker minimum.

By acknowledging that Art. V sec. 1 remains in force, the employer also necessarily validates Art. V sec. 2, which empowers it to do three things: "recall a seasonal worker before the general recall date of the declaredes seasonal year; require him/her to work in any unusual situation where he would not normally be scheduled to work, or give consideration to the promotion of a seasonal worker to Class A or Class B Steady Worker, pursuant to the terms" of the labor agreement.

I believe the union misinterprets Art. V, Section 2, which it asserts limits the early recall of seasonal workers to "unusual" situations. The reference in the second conditional clause is entirely apart from the early recall, and refers to things like an unusually heavy snowfall

The first, most critical, conditional clause in Art. V, sec. 2 contains three concepts – that there is a seasonal year, that the seasonal year has a specific start date, and that the employer can recall a seasonal worker early.

Cemetery president Kursel testified that the "seasonal year" ran from April to November, with an annual specific start date, and that seasonals were also used during winter on an as-needed basis for snow removal. [27] This process was so routine that the laid off seasonal workers collected unemployment compensation each winter. The job to which they were recalled was the seasonal support position.

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[25] The clear meaning of Art. II (A) is drawn from its use and placement of the word, "foregoing."

[26] "Steady worker minimum" means $21.90 in practice, $15.03 under the text of Art. II (A)(I).

[27] The union elsewhere agrees this is an example of an "unusual situation" which justifies an early recall.

As written, the ability to “recall a seasonal worker before the general recall date” means the employer could start a single worker in his support position earlier than April. Read broadly, it might even allow the employer to recall two or three. But the ability to “recall a seasonal worker” does not authorize the return of the full Seasonal Crew – especially since the position itself was being changed from a *seasonal support* position to a *year-round primary* position. The seasonal employees were not recalled to their seasonal year – they were given new jobs which abrogated their seasonal year.

By its own accounting, the cemetery assigned 1,566 hours of work to the seasonal workers in the first ten weeks of 2011, 970 more hours than in 2010. The total hours represent almost four year-round, full-time positions; the increase alone represents more than two year-round, full-time employees. [28] There were twenty-four work weeks in which one or more of six seasonal employees worked a full-time assignment, even including three weeks with overtime. I do not believe that such a work schedule is what the parties meant by agreeing that the employer could “recall a seasonal worker” before the general recall date.

The employer maintains that the work it transferred was “seasonal” work which was not exclusive to the steady workers and which was not worth steady worker pay.

The employer is right that seasonal workers have been performing most, if not all, of the steady worker duties. But since *all* the outdoor work is bargaining unit work, it naturally follows that when assisting steady workers, the seasonal workers would be doing the same tasks.

The employer maintains that the agreement does not give the union jurisdiction over what the employer terms “the shared work,” and that the labor agreement “does not contain a clear and unambiguous provision” regarding jurisdiction (R. Br., pps. 12, 13). I disagree. I find that Art. II (A) and (J) give the union jurisdiction over “any and all” outdoor work.

And the employer is right that general grounds-keeping should be at a lower pay grade than operating heavy equipment. I believe that is why the labor agreement has the four pay grades.

But the employer is wrong when it asserts that there is “seasonal work” which it can unilaterally decide is not bargaining unit work, to be transferred to non-bargaining unit employees. The agreement makes no such distinction between unit and non-unit work.

The rest of Art. V (A) sec. 2 is also relevant. The power to “require (a seasonal worker) to work in any unusual situation where he would not normally be scheduled to work” is a far more limited power than making these increased, year-round hours and duties the new normal schedule.

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[28] Ten weeks is 19% of the year. Nineteen percent of 2,080 hours (52 weeks of 40 hours per week) is 400 hours.

Finally, the labor agreement indicates the parties did not intend for seasonal workers to assume Class A duties. Article II (I) provides the cemetery "may hire from Class B to increase Class A. or from Seasonal Crew to increase Class B," or "may also hire from the outside." That is, the parties explicitly provided for hiring from the outside for Class A, and for promoting Class B to Class A – but not for seasonal workers to become Class A.

With no management rights clause, the employer has limited inherent power in seeking to transfer bargaining unit work to non-unit employees, laying off two of the three unit workers and effectively eliminating the union. In contrast, Article II (J) gives the union jurisdiction over "any and all" out-door work, while Art. V Sec. 2, provides explicit restrictions on seasonal workers.

The employer asserts it "believes the layoffs are outside the scope of the grievance." (R. Br., p. 10) However, it earlier stated that, "the Union filed a grievance with Forest Home over the layoffs." (Br., p. 6). The grievance alleged that the cemetery had violated the labor agreement "by subcontracting and/or assigning bargaining unit work to non-bargaining unit employees," and sought as remedy "the affected bargaining unit employees to be made whole for all losses in wages and benefits as well as reinstated." I believe that the employer was given adequate notice that the employment status of Gonzales and Andrews was at the heart of the grievance. While the employer is correct that it did not violate the seniority rights of Gonzales and Andrews in regards to Schultz (since they were the two most-junior employees), that was not the issue; the issue was whether the employer violated their seniority rights in regards to the seasonal workers.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

1. That the employer did not violate the collective bargaining agreement when cemetery superintendent Mike Kintop performed tasks normally performed by Class A steady workers;

2. That the employer did not violate the collective bargaining agreement when it required that vault companies provide full burial services, as reflected in cemetery president Tom Kursel's letter of December 30, 2010.

3. That the employer did not violate the collective bargaining agreement when it retained Kenneth J. Brath, d/b/a "Gardener in the City";

4. That the employer violated Art. V Sec. 2 when it recalled the entire Seasonal Crew in January-February, 2011;

5. That the employer violated Arts. II (A) and II (J) when it transferred the routine and regular outdoor work of the cemetery to seasonal employees;

6. That the employer violated Art. V (A), Sec. 1 whenever it directed a seasonal employee to perform tasks normally performed by a Class A Steady Worker without paying the minimum steady worker rate;

7. That Art. II (A) (1) provides that steady workers are paid at the Minimum Rate for assignments which do not involve motorized or electrical equipment.

As remedy, the employer shall reinstate Angel L. Gonzales, Ronald L. Andrews and make them and Thomas W. Schultz whole for lost wages and benefits. I shall retain jurisdiction until the parties mutually agree that I should relinquish jurisdiction.

Dated at Madison, Wisconsin, this 26rd day of March, 2012.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

SDL/gjc
7796