

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 LOCAL 1749-B, AFSCME, ELECTRICAL : Case 34
 DEPARTMENT, WATER AND SEWER : No. 46612
 DEPARTMENT AND ADMINISTRATIVE : MA-7020
 DEPARTMENT EMPLOYEES UNION :
 :
 and :
 :
 CITY OF PLYMOUTH :
 (ELECTRICAL DEPARTMENT) :
 :

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40,
 AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, Wisconsin, 53083, on
Mr. Paul C. Hemmer, Godfrey & Kahn, S.C., Attorneys at Law, 605 North

behalf
Eighth

ARBITRATION AWARD

According to the terms of the 1989-91 collective bargaining agreement between the Utility Commission (hereafter Utility or Employer) and Local 1749-B, (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator to hear and resolve a grievance involving the assignment of underground cable "locating" duties. The undersigned made full written disclosures to which no objections were raised. Hearing was held at Plymouth, Wisconsin on March 5, 1992. No stenographic transcript of the proceedings was made. The parties submitted their initial briefs by May 6, 1992 which were then exchanged by the undersigned. The parties advised, by May 14, 1992, that no reply briefs would be filed. The parties waived the Article XXIII, Step 4 requirement of an arbitration panel and agreed to have the undersigned issue a final and binding award.

ISSUES:

The parties were unable to stipulate to the issues to be determined in this case, but they agreed to allow the undersigned to frame the issues herein. The parties suggested the following issues.

The Union's suggested issues were:

- 1) Did the Employer violate the labor contract when it failed to post the locating duties formerly done by the Lineman?
- 2) If so, what is the appropriate remedy?

The Utility suggested that the following language be deleted from issue 1), above, "formerly done by the Lineman." The remainder of the Employer's proposed issues would read the same as those suggested by the Union.

Based upon the relevant evidence and argument in this case, I find that the Utility's proposed issues more fairly describe the dispute between the parties in this case. 1/

RELEVANT CONTRACT LANGUAGE:

ARTICLE I

MANAGEMENT RIGHTS RESERVED

The Union recognizes the exclusive rights of the City to operate and manage its affairs in all respects and in accordance with its responsibilities, including but not limited to the following: The management of the work and direction of the work forces, the right to hire, promote, transfer, demote, or suspend; the right to discipline or discharge for just cause, assign or transfer employees to other jobs; to establish the methods and processes by which such work is performed.

The right to establish reasonable rules and amend the same from time to time are vested exclusively in the City, subject to all other provisions of the Agreement.

. . .

ARTICLE XXII

SENIORITY

It shall be the policy of the Utility to recognize seniority.

. . .

B. Promotions: Whenever any vacancy occurs due to a retirement, quit, new position or for whatever reason, the job vacancy shall be posted. The vacancy shall be posted on bulletin boards for a minimum of five (5) work days. The job requirements and qualifications shall be a part of the posting. If no regular employee makes application for this job by signing the posting, it shall be given to the temporary employee applying (signing) who has the most seniority, subject to the right of the Employer to determine whether the employee applying for said position has the

1/ As noted infra, the Union failed to prove that only Linemen had performed locating prior to 1991.

proper qualifications to perform the job.

. . .

FACTS:

This dispute involves the Union's claim that the Utility's 1991 assignment of underground cable locating duties away from the Lineman Classification (where the Union asserted the assignment had consistently been placed before 1991) to the Tree Trimmer/Groundman II position, constituted the creation of a new job which required that the "job" be posted and filled pursuant to Article 22B of the labor agreement. In this context, the parties offered the effective job description for the Tree Trimmer/Groundman II as follows:

TREE TRIMMER/GROUNDMAN II

GENERAL STATEMENT OF DUTIES: Performs a variety of manual and clerical tasks involved in the trimming and removal of trees to prevent interference with electric lines and stations, also performs tasks involved in the construction and maintenance of the electric distribution system. Does related work as required.

DISTINGUISHING FEATURES OF CLASS: The employee(s) in this class is in a position which demands the ability to work safely both by themselves and as a member of a crew. Work is performed in close proximity of high voltage equipment. Work performed is of limited semi-skilled or semi-skilled nature which requires previous training or experience.

EXAMPLES OF WORK: (Illustrative only)
Performs all duties required of a Tree Trimmer/Groundman I;
Practices proper safety precautions;
Trims and removes trees;
Climbs and trims from trees;
Maximizes clearance of electric lines;
Operates trenchers, trucks, manlifts, and other equipment;
Assembles distribution hardware;
Sets poles and anchors;
Recognizes equipment and materials used in electric distribution;
Works overtime and in emergencies when required;
Remains available for callout;
Does related work as required.

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES: Must be able to perform work safely both alone and as a member of a crew; understand and follow oral and written instructions; respond effectively to citizen complaints; work diligently with little supervision; learn new skills rapidly; perform strenuous tasks under all weather conditions. Must have good mechanical aptitude. Must maintain good physical condition. Good knowledge of the safety precautions necessary in tree trimming and electric distribution work. Skill in the use and care of tools and equipment used.

ACCEPTABLE EXPERIENCE AND TRAINING: Some experience in performing general mechanical work and completion of a standard high school course; supplemented by classroom and on the job training as a tree trimmer or groundman, or an equivalent combination of experience and training which has provided evidence of the required knowledge, skills and abilities.

ADDITIONAL REQUIREMENTS: Possession of a valid Wisconsin Class A commercial driver license (CDL) for air brake and combination trailer.

The parties also offered job descriptions for Apprentice Lineman I, II, III and IV. These descriptions differed in that the upper level jobs (III and IV) described more responsible work as well as work with higher electric voltages (up to 7,200/12,400 volts) than did the lower classifications (I and II). All of these descriptions had the following language in common:

GENERAL STATEMENT OF DUTIES: Performs a variety of manual and clerical tasks involved in the installation, maintenance, and repair of both overhead and underground electric power distribution and transmission systems.

. . .

REQUIRED KNOWLEDGE, SKILLS AND ABILITIES: Must demonstrate ability as a lineman to consistently: perform work safety both alone and as a member of a crew; understand and follow oral and written instructions; work diligently with little supervision; perform strenuous tasks under all weather conditions. Must maintain good physical condition. Knowledge of the safety precautions necessary in electric power distribution work; knowledge of methods and materials used in electric power distribution work.

. . .

ADDITIONAL REQUIREMENTS: Possession of a valid Wisconsin Class A commercial driver license (CDL) for air brake and combination trailer. Must maintain status as an indentured apprentice lineman.

Although the "Examples of Work" section of each Lineman job description differs due to the increasing complexity of the work and the number of volts worked with from Class I to Class IV, the Apprentice Lineman II job description, for example, lists the following:

DISTINGUISHING FEATURES OF CLASS: The employee(s) in this class is in a position which demands the ability to work safety by themselves and as a member of a crew. Work performed is of semi-skilled nature which requires previous experience, or training as a lineman. Work is performed on equipment energized at up to 300 volts. The work is normally performed under the instructions of a lineman in charge.

EXAMPLES OF WORK: (Illustrative only)

Performs all duties required of a Apprentice Lineman I;
Practices proper safety precautions for performing electric power distribution;
Installs, replaces, and repairs street lights;
Installs and removes meters;
Installs, replaces, and repairs secondary and service conductors;
Repairs, maintains and constructs substation equipment energized at 300 volts or more;
Climbs poles for work on equipment up to 300 volts;
Works overtime and in emergencies as required;
Remains available for callout;
Does related work as required.

Each Lineman job description lists the requirements of working overtime, remaining available for callout and doing related work as required in each job description under "Examples of Work".

Prior to 1986, the Plymouth Utility performed cable locating upon the request of customers who wished to dig holes in their property where underground electric cables might lie. Prior to 1986 and until the Summer of 1988 when he retired, former Electrical Superintendent Robert Howard performed locating duties for the Utility. Howard was not qualified as a lineman or apprentice lineman. In the twelve years prior to the 1991 construction season 2/ the only other employees who performed locating duties were Linemen.

In 1986, the Utility became a member of the "Diggers Hotline". This service, provided in cooperation with Wisconsin Public Service/Wisconsin Power and Light and various private sector and municipal utilities, allows homeowners, construction contractors and others to call one central telephone number, the Hotline, and request that underground electrical cables and water and sewer lines be located and marked so that digging can be done safely on property. The Hotline provides each member with a computer modem and P.C. so that each morning the member utility can run a print-out of requests made for locating which were received by the Hotline the previous day, and which Diggers Hotline operators have entered in the central computer. The Plymouth Utility provides a separate leased telephone line and telephone jack to receive information from the Hotline.

The number of locating requests received by the Utility in 1990 was 1,883 and the number of such requests rose to 1,962 in 1991. Current Electrical Superintendent, James McCabe stated that in the four years prior to the hearing, Hotline Cable locating requests rose from 4 to 5% annually, but there was never enough locating work to fill a 40 hour week for one employee. Grievant Steven Rortvedt (who admittedly did not work on locating during 1991 and who was not present during the locating work performed in 1991), stated that from his analysis of Gary Wooker's time cards during the periods that Wooker performed locating during 1991 (listed below), it appeared that Wooker had performed 461.25 hours of locating work. Superintendent McCabe also stated that up to the date of the instant hearing, approximately 10 work hours per week had been devoted to locating in 1992.

Much evidence was put on the record detailing what is involved in performing cable locating. In general, the task of locating underground cables depends upon the type of electrical enclosure that sits on top of the ground. Generally, this work requires that the employe put on safety gloves before opening the above-ground enclosure, that he/she then uses "C" clamps and radio signals to locate the cable underground and then the employe marks the paths of

2/ As a general rule, the building construction season runs from April through November each year.

the cable with red paint and warning flags. Much evidence was also submitted regarding safe procedures for performing locating. In this regard, it appears that rubber gloves must be used whenever an employe opens an enclosure. The Utility has issued rubber gloves to its Linemen and its Tree Trimmers and it trains all of its employes in safety procedures.

The Utility also has a safety manual applicable to all of its employes. The Safety manual does not require that any particular classification perform cable locating duties for the Utility. Other communities in the Plymouth area, such as Kaukauna and Menasha, use draftsmen/clerical employes to perform locating. Wisconsin Power and Light uses a contractor without electrical experience to perform locating. The Sheboygan Falls Electrical Superintendent performs that Utility's locating.

In the Spring of 1991, the Utility asked Tree Trimmer/Groundman II, Gary Bournoville to perform locating work during the 1991 construction season. Bournoville agreed to do the locating on a trial basis. Bournoville performed locating duties from April 9 through 16, 1991 but he decided at that time that he did not wish to continue performing locating. Electrical Superintendent McCabe did not object to Bournoville's request to cease locating. McCabe asked Tree Trimmer/Groundsman II Gary Wooker to perform locating duties. Wooker then performed locating from April 21 through July 27, 1991. McCabe assigned Journeyman Lineman David Reitz to perform locating from July 27 through September 23, 1991, but he reassigned Wooker to perform locating from September 23 through October 1991. Starting in November, 1991, McCabe reassigned locating work to Journeyman Lineman employes. 3/

While performing cable locating, in 1991, Wooker was taken off the tree trimming crew and assigned various other duties during the 1991 construction season. These additional duties included putting away stock and materials which had been delivered to the Utility loading dock, taking customer complaints, taking and assessing unsafe conditions phoned in by customers, making service drops into houses which might require cutting off tree limbs to clear wires around the home, making monthly inspections of equipment at the Utility substations and delivering materials to Utility employes in the field upon request. Notably, other Tree Trimmers have been assigned to take out and put away stock and materials and to perform general material handling over the years. Tree Trimmers have also been taken off their tree trimming crews in the past and assigned to other work such as installation of underground cable and enclosures.

The parties raised questions regarding a prior grievance that the Union filed on the precise point in issue here. The facts showed that the Union filed a grievance which it did not pursue when the Utility reassigned locating to Lineman Reitz as of July 27, 1991. The Utility indicated at the time that it was making the assignment "without prejudice to management's right to assign locating duties in the future." The Union specifically objected to and disagreed with this position. As a result, when the Utility reassigned locating to a Tree Trimmer as of September 23, 1991, the Union filed the instant grievance.

The Utility also submitted evidence that it was much less expensive to assign a Tree Trimmer to perform locating work. In this regard, Superintendent

3/ Steven Rortvedt, also a Tree Trimmer/Groundman, filed the instant grievance herein. Rortvedt, Wooker and Bournoville were the Utility's Tree Trimmer/ Groundman employes employed at the time of the instant hearing. Rortvedt is the only Tree Trimmer who has not performed locating for the Utility to date.

McCabe stated that the Lineman's higher skill and ability as well as the more expensive equipment/trucks used by Linemen are largely wasted if the Lineman is assigned to do the simple, repetitive task of locating. Also, the Utility can perform locating for less money if it uses the lower paid Tree Trimmers for that work. In addition, in 1991 the Utility had a great deal of new street lighting to install and McCabe chose to use Linemen for this work, leaving the Linemen less available for locating. McCabe stated that for 1992 he was unsure how much new street lighting the Utility would have but that the Utility needed flexibility to assign the available locating work. McCabe noted that the Utility has always retained and used its flexibility to assign work during his four year tenure.

POSITIONS OF THE PARTIES:

Union:

The Union contended that prior to the Summer of 1991, the Employer had assigned all underground cable locating duties to employees in the Lineman classification. In the Summer of 1991, the Union asserted, the Employer, without posting any job or seeking negotiations with the Union, assigned locating duties to Tree Trimmer/Groundsman II, (TT/G II) employees, Bournoville and Wooker. This, the Union urged, violated Articles XXIII and XXII of the effective labor agreement. In this regard the Union noted that the locating duties constituted a "new position" under Article XXIII due to the amount of locating and the Employer's creation of additional inventory stocking work for Wooker, not normally performed or related to his TT/G II position. Thus, the Union asserted that the Employer was required to post the locating job as a vacancy and award it, based upon seniority principles enunciated in Article XXII.

In addition, the Union contended that because locating requires a familiarity with electricity and the dangers and proper procedures for handling electricity, the job of locating should have simply remained with the Linemen who, the Union claimed, had traditionally performed all locating prior to the Summer of 1991. The Union noted that locating duties do not fit into the Tree Trimmer/Groundsman II position description as it existed at the time of the hearing. Furthermore, the Union observed that the Employer treated locating duties differently from an ordinary job assignment, by asking Tree Trimmer Bournoville to perform them and when he refused, allowing Tree Trimmer Wooker to perform them.

The Union noted that the locating duties performed after the Summer of 1991, were not minimal. The Union relied upon records kept by employe Rortvedt having indicated that a total of 383 1/4 hours were worked by Wooker between April 21 and July 27th with an additional 42 hours of locating having been done by Wooker between September 23 and October 3. The Union stated that these records indicated that more than 50% of Wooker's work time during the period in question had been spent doing locating (excluding July 1 through July 13). The Union also asserted that the Employer's locating time records were inaccurate.

The Union asked the Arbitrator to consider that the instant case was the second of two grievances on the subject of locating duties; and that the Union had "won" the first grievance when the Employer returned the locating duties to the Lineman position as of July 18, 1991. The Union argued that the combination of locating duties and inventory duties constituted a new position, subject to the language of Article XXIII and XXII, and that the grievance should therefore be sustained. As a remedy, the Union sought an award ordering the Utility to post the new job and fill it pursuant to Article XXIII.

Utility's Position:

The Employer argued that the assignment of underground cable locating duties to Tree Trimmer Groundmen during the Spring of 1991 did not amount to the creation of a new position, a new job or a job vacancy. In this regard, the Utility urged that locating is simply a work task or one duty of the Tree Trimmer/Groundman position; that the task of locating is not a separate job or classification; that the locating work assigned to the Tree Trimmer/Groundman in 1991 was within the scope of the responsibilities of that job as they existed in the Spring of 1991 and it is not substantially different, more dangerous or more complex than tree trimming or assisting a Lineman.

The Utility pointed to record facts which showed that the locating duties in 1991 were seasonal and constituted less than 50% of the Tree Trimmer's job duties during the construction season of 1991. The Utility emphasized that although the locating work had previously been assigned to employees occupying Lineman positions, this assignment had not been consistently done by Linemen: the facts showed that former department head, Robert Howard, who was not a Lineman, had also performed locating duties during his tenure. In addition, at the end of the 1991 construction season the Employer, for efficiency reasons, reassigned locating duties to the Lineman position which the Employer claimed also demonstrated that locating was merely a task or duty rather than a separate job. Finally, the Employer observed that when locating was assigned to the Lineman position in the past, the Union never claimed that that assignment had resulted in the creation of a "Lineman/Locator" position.

The Utility gave general definitions for "job", "position", "vacancy" and "classification." Notably, the Employer observed, these definitions indicated that the locating assignment would not fall within any of the definitions: Locating was not an "uninhabited unit in a classification", not a "single task classification", and not a "grouping or bundle of job tasks" combined for assignment to an employe under a job classification or title.

The Utility asserted that no real issue regarding safety was raised by the Union here. Rather, the facts of record showed that cable locating can be safely accomplished by occupants of the Tree Trimmer/Groundman position, given their training and the safety equipment issued to them for performing locating and their other duties. The Utility noted that its safety manual and procedures are applicable to all of its employes who are trained in these safety procedures.

The Utility also contended that its assignment of Journeyman Lineman to perform locating duties from July 26 through October 2, 1991 to perform locating duties did not constitute an admission that the work should appropriately be assigned to the Lineman classification. Reassignment of the locating tasks to the Linemen during this period was expressly done "without prejudice to management's right to assign locating duties in the future".

The Utility argued that Article I Management Rights of the labor agreement reserves to the Employer the right to assign work such as locating to a Tree Trimmer/Groundman. In this regard, the Utility proffered evidence to show it needed and utilized all of its Linemen on a large street lighting project during the 1991 construction season. Also, the Employer's practice had been to assign each Linemen to a 10 ton F-600 line truck, each of which carry advanced tools and equipment not needed for locating. The assignment of locating to a Lineman would therefore have resulted in not only the under-utilization of the Linemen's abilities and skills but also the under-utilization of his/her truck and equipment. Due to the fact that locating work was not only seasonal but also less than full-time even during the construction season, the Employer asserted, it made economic sense for it to add similar duties for the Tree Trimmer/ Groundman to fill his time while performing locating duties in 1991. These duties, which included special tree trimming,

material handling and stocking, responding to customer calls and to calls from employes in the field for delivery of equipment and materials to the field and obtaining monthly readings from substation meters, the Employer urged, were more appropriately and efficiently performed by a Tree Trimmer than by a (more highly skilled) Lineman.

In sum, the Utility contended that the Union did not contest that the assignment of locating duties to the Tree Trimmer/Groundman was reasonable and improved efficiency and productivity of the Utility. The Utility noted that there was no evidence proffered to show that the Utility made the disputed assignment based on discriminatory reasons or with any other unlawful/improper motivation. The Utility therefore sought denial and dismissal of the grievance in its entirety.

DISCUSSION:

The initial question arising in this case is whether the locating and other work performed during the 1991 construction season constituted a ". . . vacancy due to retirement, quit, new position . . ." (Article XXII B). Under the above-quoted language, which I find to be clear on its face, the locating and other disputed work involved in this case did not constitute such a "vacancy". In this regard, I note that no evidence was proffered in this case to show that any retirement or quit had occurred or that a new position had formally been created. Nor was any evidence submitted to show how openings or vacancies may have been created in the past.

The last phrase of the relevant portion of Article XXII B, upon which the Union relies heavily, refers to "any vacancy . . . for whatever reason . . ."

I disagree with the Union that this phrase must necessarily be read to mean that any work or task automatically becomes a vacancy for whatever reason. Rather, under generally accepted principles of contract construction, the phrase "for whatever reason" must refer back to reasons why the vacancy may have occurred which reasons must be similar to those mentioned previously (i.e. the creation of a new position, a retirement or a quit). Notably, Section B does not refer to "work", "tasks" or "job duties," which would clearly evidence the parties' intent to include in "vacancy" all work which is less than a regular, distinct opening. The peculiar history of locating work as a task performed by both Linemen and others under the Utility's Safety Manual, its seasonal nature and the less than full-time frequency of the work, even during the construction season, tend to support a conclusion that the performance of locating work is not a true vacancy -- an opening or a vacant or unoccupied place or position. Finally, no separate job description or guidelines for a "locator" have been promulgated by the Utility.

In all of the circumstances here, I find that the evidence failed to demonstrate that Article XXII B in fact required the Utility to post the locating work performed in 1991. In the past, as the Utility noted, the Union never complained when locating duties were assigned to Linemen. In addition, an analysis of the Linemen and Tree Trimmer/Groundman job descriptions indicates that in these descriptions the Utility has left room for employes of either classification to be properly assigned to perform locating work.

The Union failed to prove that Linemen had consistently performed locating duties prior to the 1991 construction season. The fact that Superintendent McCabe asked Bournoville and later asked Wooker to perform locating duties during the Spring and Summer of 1991 does not require a conclusion that these duties constituted a "vacancy" subject to job posting. Nor do the number of hours Bournoville and Wooker spent locating during 1991 necessarily mean that locating duties should have been posted and filled pursuant to Article XXII.

I note that in 1991, the Utility, as an experiment, took one step toward

creating a separate locator position by adding stocking and material delivery and handling and substation meter reading to the work regularly done by the person performing locating. This fact does not require that the grievance be sustained, however due to other evidence herein which showed that in the past other employes in the Lineman and Tree Trimmer classifications have done stocking, material delivery and handling and meter reading. Furthermore, the record showed that that in the past the Utility has from time to time taken Tree Trimmers off their tree trimming crews to handle the work available. 4/

Finally, as noted above, if the parties had intended to apply Article XXII B in the restrictive manner urged by the Union, they should have included specific language demonstrating their intent to do this. The parties did not do this. In this regard, I note that Article I reserves to management the right to manage the work and direct the work forces. This language, therefore, generally supports the Utility's right to assign locating duties to Tree Trimmer/Groundman employes or to Linemen as it has done in the past. The undisputed evidence also showed that it was more efficient, a more productive use of equipment and manpower and less expensive for the Utility. Hence, based upon this record, the Utility's actions were reasonable and not based upon any improper motives.

Based upon the relevant evidence and argument in this case, I issue the following

4/ Were it not for this evidence of past practice regarding work assignments, it would be easier to conclude that the locating and other duties performed during the 1991 construction season constituted a separate (albeit seasonal) position.

AWARD

The Employer did not violate the labor contract when it failed to post locating duties.

The grievance is therefore denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 7th day of July, 1992.

By _____
Sharon A. Gallagher, Arbitrator