

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

LOCAL 76, AFSCME, AFL-CIO

and

CITY OF TWO RIVERS

Case 77  
No. 50780  
MA-8379

Appearances:

Mr. Gerald Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Mark L. Olson, Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of the City.

ARBITRATION AWARD

The Union and the City named above requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear the grievance of George Luebke regarding the denial of a vacation day. The undersigned was appointed and held a hearing in Two Rivers, Wisconsin, on November 30, 1994. The parties completed filing briefs by May 3, 1995.

ISSUE:

The issues are:

Is the grievance timely? If so, did the City violate the 1992-94 collective bargaining agreement when it denied Grievant George Luebke his request for a vacation day for January 26, 1994? If so, what is the appropriate remedy?

CONTRACT LANGUAGE:

ARTICLE IX - GRIEVANCE PROCEDURE

...

D. Step 1: The employee, alone or with his/her representative, shall orally explain his/her grievance to his/her immediate Supervisor (e.g., Electric Distribution Supervisor, Park Cemetery and Recreation Director, Public Works Supervisor and Water and Sewerage Supervisor) no later than twenty one (21)

calendar days after the Union knew or should have known of the cause of such a grievance. In the event of a grievance, the employee shall perform his/her assigned work task (unless his/her health or safety is endangered), and grieve his/her complaint later. The immediate supervisor, within five (5) working days, shall orally inform the employee and the Union representative of his/her decision.

#### ARTICLE VII - VACATION

. . .

E. Scheduling: Vacation time shall be at the mutual convenience of the City and the employee, in order that the business of the City is not disrupted by the absence of vacationing employees. Not more than five (5) days vacation may be carried over into any subsequent year.

#### ARTICLE XIV - PAY POLICY

. . .

G. Night Shift Premium Pay: . . . Throughout the year, relief operators are required to do shift work to cover regular operators who are off duty because of vacations or sickness. . . .

#### BACKGROUND:

The Grievant, George Luebke, has been a certified plant operator in the City's water filtration plant for more than five years and has worked for the City more than 11 years. On December 23, 1993, Luebke requested a vacation day for January 26, 1994. Luebke was scheduled to work from 11:00 p.m. to 7:00 a.m. starting on January 26th. His vacation request was denied, and he filed this grievance.

Luebke made his request to the Superintendent of the Water and Wastewater Treatment Plants, Raymond Schultz, who told him that he would try to get a relief person to fill in for the vacation request. Luebke told Schultz that if he could not get any part-time help to fill in, Schultz should tell the certified plant mechanic, Ron Johnson, to fill in. According to Luebke, Schultz said he would not ask Johnson to fill in because Johnson had in the past gone over Schultz's head to the Utility Director when he was asked to provide relief help.

When Luebke made his request, there was a shortage of operators because one of them, William Follmer, died on December 1, 1993. Follmer's replacement had not been chosen at that time, and there were three full-time operators -- Luebke, Aaron Petri, and Craig Kowalski -- plus

the mechanic, Johnson.

Schultz told Luebke by January 20, 1994, that his vacation request was denied because there were no relief operators available to fill his position at that time. Luebke again told Schultz that he should tell Johnson to work that shift.

According to Johnson's time slips, he worked eight hours on January 25th, performing various duties, such as servicing the plant, changing light bulbs, hauling garbage, picking up lab supplies, and repairing a leaking pipe. Luebke noted that the pipe was not a major pipe, or the plant would have been shut down, and it was not. There are only four operators, and they keep each other informed about whatever is going on in the plant. On January 26, 1994, the day that Luebke wanted to be off, Johnson worked eight hours, cleaning all surface wash jets and one of the filter beds, covering up a hole in the floor in the settling basin, checking a reservoir, and doing general maintenance in the filter plant. The following day, January 27th, Johnson shoveled snow, installed a push bar on the chlorine room door, and painted the repaired floor in the settling basin room. Luebke believes that none of Johnson's work for the 25th, 26th, or 27th of January was emergency work or work that had to be done immediately, and that he was available to fill in as relief operator for Luebke.

One of the plant operators, Petri, was working in the settling basin on January 25th when he fell into a hole in the floor and bruised his leg. Johnson's time slips for the following day, January 26th, show that he was fixing the hole in the floor to prevent a recurrence of such an accident. The City believes the repair to the floor was in the nature of emergency work.

Johnson's normal shift is 7:00 a.m. to 3:00 p.m. His job description states as one example of work that he performs relief duties as plant operator when necessary. If Johnson filled in for Luebke on January 26th, he would have worked two shifts back-to-back -- Luebke's 11:00 p.m. to 7:00 a.m. shift, and his own 7:00 a.m. to 3:00 p.m. shift. Schultz felt that it was difficult to balance Johnson's 40 hour week if he filled in for Luebke on the 11:00 p.m. to 7:00 a.m. shift.

Luebke worked on January 26, 1994, and the next day told Schultz that he was going to grieve the vacation denial. This was the first step in the grievance procedure, and Schultz responded right away that there was no relief operator available to fill in for Luebke's vacation. The grievance was appealed to Step 2, and Utilities Director William Pappathopoulos responded on February 8, 1994 as follows in part:

Since you are grieving the City's failure to grant your December 23, 1993 request for vacation on a future date, we believe proper interpretation of the contract would place the date of the alleged infraction at the time your request was denied (on or about December 30, 1993) rather than January 26, 1994, the date for which the vacation had been denied. Although this grievance would be accordingly classified as being untimely at the time of its Step 1 filing on January 27, 1994 under Article IX Section D(1) of the Labor Agreement, we

will respond on a non-precedential basis as a courtesy to you.

After reviewing this matter it is my belief that the City's denial of your vacation request for January 26, 1994 was necessary to avoid disruption of the business of the City during your absence, and therefore in full compliance with all applicable requirements of our current Labor Agreement. For this reason, the grievance is hereby denied.

Pappathopoulos stated that if Follmer had not died, the City would have been in a better position to grant the vacation request.

Luebke pointed out that the denial could not have been made to him on December 30, 1993, because he was not working on that date. His own notation on his vacation request slip shows that the denial was given January 20, 1994.

The third step in the grievance involved the City Manager, Stephen Nenonen. His response, dated March 21, 1994, is the following:

Given the circumstances of being one operator shore (sic) due to the untimely death of one operator and the unusually severe weather experienced in January with water service freeze-ups, the denial of vacation as requested was reasonable under the circumstances. The delay in giving notice of denial was caused by an attempt to find a way to grant the vacation day.

Follmer was replaced by Mark Chatenka. Chatenka was awarded Follmer's position around January 17 and started working there on January 24, 1994. He was working for the City at the wastewater plant and transferred to the water filtration plant. New operators have to be trained and generally do not work alone for a couple of weeks. Follmer's replacement had not been chosen when Luebke made his vacation request, so the plant had three full-time operators in late December of 1993, as well as most of January of 1994.

The advance schedule for January 1994 shows that Follmer would not have been scheduled to work on January 26 or 27, 1994. Follmer's replacement would have been placed in the same line up on the schedule, and therefore, Chatenka would not have been scheduled to work. He would not have been sufficiently trained to work alone by that time, either.

Therefore, on January 26, 1994, there were three full-time operators and one trainee, instead of four operators. The trainee was not scheduled to work on the 26th, and no one else was off. If the City had granted Luebke's vacation request, it would have had to have the other operators, either Petri or Kowalski, work a double shift or have Johnson fill in for Luebke's shift. If someone had called in sick on that date, it would have severely strained the available manpower.

In addition to Johnson, the plant operators have been relieved by part-time personnel, such as Jason Hein, Kim Weshel, Todd Dvorak and Neil Franzen. They have generally filled in during the summer months but have filled in other times of the year, too. Schultz asked Hein if he could work January 26th, but he was in school. Schultz did not ask Weshel, Franzen was in school in Milwaukee, and Dvorak did not start until the summer of 1994.

On January 24, 1994, Johnson was scheduled to fill in as a plant operator, instead of his regular mechanic duties. He was relieving Luebke on that date for a first shift. He is scheduled in advance to fill in as plant operator about one day per week. In addition to the regularly scheduled relief work, Johnson provides relief for vacation and holidays. Schultz stated that he did not ask Johnson to substitute for Luebke because of the shortage of help in December and January, and that he had no idea what would be broken down in late January. Schultz avoids asking Johnson to fill in as relief on the second or third shift.

In order to staff the plant following Follmer's death, the employees doubled up on the shifts and called in some part-time operators. Johnson did not fill in for Follmer, but Luebke and the other plant operators did. Hein joined the operators in doubling up on shifts after Follmer died. Hein has provided relief during the summer months or on weekends when operators wanted time off.

There are three utility service employees plus a working foreman, but these employees are not generally available to fill in as relief operators because the outside crew has a heavy work load in the winter. Severe cold creates additional work for services outside of the water plant, when there are water freeze-ups, breaks in water mains, etc. The utility service people have provided relief for the water filtration plant operators in the past. Actually, Tom Clark is the only employee on the service crew who can fill in and provide relief at the water filtration plant. Clark has provided relief in the filtration plant several days in the winter, primarily on the day shift.

A telephone log of incoming trouble calls shows that there were no service calls or trouble calls on January 25 or 26, 1994. Luebke noted that severe weather does not effect the plant operations, because the plant keeps running and has to produce water, no matter how cold it gets.

The City has a practice of having no more than one operator on vacation at a time during the winter months and has denied vacation requests in the past on that basis. The Union has not grieved such denials in the past.

Another employee, Jim Bartow, died in June of 1993, at a time when several employees had scheduled vacations. More than one employee was on vacation during that time in the summer, when part-timers filled in.

Union Steward Chris Behrendt made notes following a meeting on January 5, 1994, at the filtration plant. There was a general discussion about changing the schedule. Behrendt asked Pappathopoulos if an operator put in his vacation request 30 days in advance, wouldn't the City be

able to honor it by scheduling the relief person in order to accommodate the vacation request, and Pappathopoulos agreed. Pappathopoulos stated that he did not mean that to be a blanket response covering all contingencies.

Nenonen testified that the water quality provided to the City's residents and others is dependent upon the operators' ability to operate the plant effectively and efficiently. An error in operating the plant could cause health hazards for the community, and result in injuries to the public, subsequent litigation and fines administered by the Department of Natural Resources.

Luebke did not lose a day of vacation, he was allowed to take it at another time, but not on January 26, 1994, as he preferred for his birthday.

#### THE PARTIES' POSITIONS:

##### The Union:

The Union contends that the City's refusal of Luebke's vacation request was arbitrary and capricious, and the City abridged Luebke's right to use benefits in a manner which affords the greatest use to him without disrupting the City's business. Luebke gave reasonable lead time, but the City refused to try to use a designated relief operator, a part-time employee, or double up other operators.

The Union asserts that its grievance was timely, as Luebke initiated the grievance on January 27, 1994, the day after his requested vacation day. Luebke was not informed of the denial of vacation until January 20, 1994, not December 30, 1993, as the City claims. Thus, the grievance was filed seven days after the denial. Schultz's recall of the denial date is faulty.

While Schultz denied the vacation request due to the lack of available relief operators, he never asked Johnson, the mechanic and relief operator. At Step 3 in the grievance process, the City then contended that the reason for the vacation denial was due to a death of an employee in the filter plant, severe weather conditions, and water freeze-ups. The employer changed its story.

Follmer's death was not a factor, as he was replaced on January 24, 1994, by Mark Chatenka. Johnson did not fill in for Follmer's vacancy, and the operators doubled up on shifts and part-time operators filled in. Thus, Follmer's vacancy had no effect on Johnson, who was available to provide relief as usual. Additionally, Follmer was scheduled to be off on January 26th. Severe weather was not a factor, either, says the Union, and there were no service calls for January 25 or 26, 1994. Severe weather does not affect the operation of the filtration plant.

The Union contends that relief was available, and that it is Johnson's job to provide relief, as noted in his job description. Johnson's tasks performed on the date Luebke wanted to be off could have been postponed. None of the tasks that Johnson did between January 24-27 were important to the efficient operation of the plant. Johnson provided relief for an operator on January 24th. Schultz refused to even ask Johnson to fill in for Luebke on January 26th. Schultz did not ask Weshel to work either, and she may have been available.

Schultz admitted that he was not short an operator on January 26th. Chatenka was scheduled as a fourth operator during the day for training. The plant has had operators double up to allow another operator to be off. There was no one off duty on January 26th. Schultz also acknowledged that if Luebke were gone, they would either double up or put Johnson in there.

The Union maintains that the Employer did not act in good faith. Vacations should be approved if at all possible for a day which is useful to the employee. The contract provides for mutual convenience and defines such as that the business of the City is not disrupted by the absence of vacationing employees. The Employer's lack of diligence in finding a replacement is apparent. It had at least two alternatives in Johnson and Weshel, but explored neither.

The Union asks that the City be ordered to cease and desist from denying vacation to employees under these or similar circumstances by making a good faith effort to use available resources for relief.

#### The City:

The City argues that the grievance is untimely because Luebke made his request on December 23, 1993 and Schultz informed him on or about December 30, 1993, that his request was denied. The 21 day Step 1 notice provision was triggered on December 30, 1993, and the Grievant was obligated to notify Schultz of a dispute no later than January 20, 1994. The grievance was not initiated until January 27, 1994.

The City asserts that granting the Grievant's vacation request would have disrupted the City's business. Luebke wanted a single day of vacation during the middle of the third week in January, a time of unpredictable and severe weather which often results in equipment emergencies. The filtration plant was understaffed, with one operator having recently died. Seasonal, part-time employees were away attending school. Only three operators were working at the time and they had to double up on shifts to fill Follmer's vacancy. The City acted in the best interests of its citizens so as not to disrupt the plant's operations.

The City notes that the labor contract calls for the mutual convenience of the City and employee in scheduling vacations, and the standard for denying a vacation request is in order to avoid disrupting the business of the City by the absence of an employee. The impact of Follmer's untimely death was compounded by the time of year in which it occurred. Water service

personnel cannot fill in at the filtration plant during winter when water main breaks and freeze-ups occur. The winter of 1993-94 was unusually severe.

Schultz contacted part-time seasonal employees, but none was available. While he could have used Johnson to fill in for Luebke, Johnson would have had to work two consecutive shifts, something undesirable in a non-emergency setting. If another operator called in sick, the City would need Johnson to fill in for that operator. Also, Johnson would not have been able to perform his regular duties. An employee stepped into a hole in the floor of a catwalk the day before Luebke wanted a vacation day. If Johnson filled in for Luebke, he would not have been able to repair that problem. At the time the City denied the vacation request, it did not know if it would have an operator in training or available for January 26th and would not have placed an operator in training in charge of the facility. The fact that no emergency occurred has no bearing, as the City has a responsibility to plan ahead for foreseeable situations.

The City has a past practice of not allowing more than one operator to have vacation during the winter months, because of historical problems associated with winter weather. Schultz has denied requests for vacation based on the policy, and the Union has not grieved the denial of a vacation request based on that policy. With the absence of Follmer, the denial was based on the same rationale -- that the City could not afford to operate the plant in the winter with more than one operator gone.

The City asks that the grievance be dismissed.

#### DISCUSSION:

##### Timeliness:

The grievance is timely. Although Schultz believes he denied the vacation request in the last part of December of 1993, the final denial of the request was on or about January 20, 1994, when Schultz told Luebke that he could not get a relief operator to replace him. In fact, as of January 20, 1994, Luebke still held out some hope that he could get the time off, because he told Schultz on that date that Schultz should tell Johnson to work for him. It may have been possible for the City to grant the vacation request as late as January 26, 1994, although it is not known whether Luebke would have accepted a last minute notice or not.

When an employer announces its intention to do a given act but does not do that act until a later date or the adverse effect does not occur until a later date, arbitrators often hold that the "occurrence" for the purposes of applying time limits is the later date. The City could have changed its position any time from the request on December 23, 1993, to the desired vacation date of January 26, 1994, thereby avoiding the dispute altogether. It would have been premature for Luebke to grieve Schultz's denial in late December because it was uncertain at that time whether a relief operator could fill in for Luebke. The time to file a grievance starting running by either

January 20 or January 26, 1994, the dates when it became most certain that the vacation request was denied. The Union made a timely filing, using either date.

Merits:

The contract language, always a good starting point, says: "Vacation time shall be at the mutual convenience of the City and the employee, in order that the business of the City is not disrupted by the absence of vacationing employees." In this case, management determined that its business could be disrupted by the absence of a vacationing employee, because of an unusual set of circumstances.

The City has valid reasons. First, there was the unexpected death of an operator, Follmer. This unfortunate event left the City with three experienced operators instead of its usual complement of four. Although Chatenka transferred over from the wastewater treatment plant to the filter plant shortly before the day Luebke wanted off, he was still in training and would not have been left alone to operate the filter plant by January 26, 1994. Chatenka actually started working at the plant on January 24, 1994, although he was awarded the position on January 17, the week before.

The fact that the City was one person short was really the major consideration here. Pappathopoulos stated that, without question, the City would have been in a better position to grant Luebke's vacation request had Follmer been available. Presumably, the same would be true if Follmer's replacement, Chatenka, had been fully trained by that time.

Further, the City worries about its staffing levels in the winter time for three reasons. First, employees tend to have more illnesses and colds in the winter. Secondly, cold weather can cause water main breaks and freeze-ups, and the utility service crew needs to be available for those problems, and consequently, unavailable to fill in for the operators at the filter plant. Only one of the utility service crew members was apparently providing relief anyway. Third, the part-timers the City has available in the summer or around holiday times are generally students who are not readily available during the worst of the winter in January and February. Accordingly, the City has had a practice of having no more than one operator off in the winter. It was reasonable for the City to consider these factors in determining its staffing needs in denying Luebke a vacation day at that time, particularly with one operator (Follmer) gone and his replacement not fully trained.

It is irrelevant that there were no emergency calls and no one called in sick on January 26, 1994. It is 20/20 hindsight to say that because nothing went wrong, the City should have granted the vacation before it knew that there would be no emergencies or illnesses. The City is entitled to take reasonable measures to make sure its water filtration plant is adequately staffed. In operations which have to be staffed 24 hours a day, seven days a week, it may be difficult to meet every employee's preference for time off as well as maintain an adequate staffing level.

The Union notes that Follmer was not scheduled to work on January 26 and his replacement would not have been scheduled to work on that date either. That's part of the problem, actually. Follmer's replacement, Chatenka, could have been asked to fill in for Luebke but for the fact that Chatenka was still in training. The only way that the City could cover Luebke's absence was to have the regular operators work double shifts, find a part-timer who could provide relief, or have Johnson work it. The part-timers were unavailable, with most of them having gone back to school or being out of town. The Union notes that Schultz never asked one part-timer, Weshel, to work, but Schultz did not think she was in town at the time.

The Union seems particularly concerned that Schultz would not ask Johnson, the plant mechanic, to fill in for Luebke. Johnson does fill in as a relief operator and is regularly scheduled to do so. The Union cites Article XIV, Section G, which states: "Throughout the year, relief operators are required to do shift work to cover regular operators who are off duty because of vacations or sickness. These relief operators will receive shift premium pay for all

such hours worked ..." Nothing in this language creates a right of an employee to tell managers when to assign a relief operator to cover a regular operator who is off due to vacation or illness. The point of this language is to guarantee shift premium pay for those relief operators when performing shift work to cover regular operators. The granting of vacation time is still governed by Article VII, not Article XIV. Schultz was concerned that if Johnson worked the Luebke's third shift, he would then have to work a back-to-back shift in order to get in his regular hours. It is not clear why Johnson could not work the 11:00 p.m. to 7:00 a.m. shift for Luebke on the 26th of January, then break off and work later in the day on the 27th. Why would Johnson's shift have to be 7:00 a.m. to 3:00 p.m. on the 27th? Why could it not be 3:00 p.m. to 11:00 p.m.? The plant is open and operating 24 hours, and if Johnson is not filling in specifically for someone, why couldn't his hours be adjusted in order that he not work back-to-back shifts? The other operators were apparently working some back-to-back shifts, or double shifts, to cover for Follmer's absence. Moreover, it seems that if Luebke had asked for a day shift off, he was more likely to get it, and that Schultz would not have as much trouble asking Johnson to work a day shift as relief operator.

Nonetheless, it was reasonable for the City to want to have Johnson available for his regular work or to fill in for an emergency. If Luebke were gone and Johnson filled in for him, there would be no back up available if someone had called in sick. The City had a legitimate concern that it not be too short staffed during the time when it did not have a full complement of four experienced operators on duty.

The Union seems to take offense at the City bringing up Follmer's death as a supporting reason for its denial as late as Step 3 in the grievance procedure, and says that the Employer has changed its story. The City just gave a fuller explanation for its initial response, that it did not have a relief operator. After all, Follmer's death created the shortage of staff which in turn would create shortages of relief operators.

It is always preferable that an employer give an employee as much information as possible when denying vacation time, in order for the employee to have a complete understanding of the situation. However, the fact that the City did not tell Luebke that the death of Follmer was a factor in the denial of vacation time until later in the grievance process at Step 3 does not mean the City's position was unjustified. A further explanation is often forthcoming in later steps of a grievance procedure. Just as the City could have changed its position between December 30, 1993 and January 26, 1994, the Union and the Grievant could have changed their positions between Step 1 and arbitration of this grievance, based on information gleaned through the process. That's why there are steps before arbitration.

Under all the circumstances, the City's denial of Luebke's vacation request was reasonable, where one employee died and that employee's replacement had not been fully trained, and where part-time relief was not available. The City could not commit anyone from the outside crew to fill in due to the necessity of keeping that crew available for emergencies, particularly in the winter months. The City was not obligated to put the mechanic, Johnson, on as a relief operator in order to grant a vacation day off, where it had concerns about its ultimate ability to staff for other contingencies as well as a vacation request.

AWARD

The grievance is arbitrable and is denied.

Dated at Elkhorn, Wisconsin this 18th day of May, 1995.

By Karen J. Mawhinney /s/  
Karen J. Mawhinney, Arbitrator