

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 130, AFSCME, AFL-CIO

and

CITY OF KAUKAUNA

Case 86
No. 52320
MA-8917

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
appearing on behalf of the Union.

Mr. Bruce K. Patterson, Employee Relations Consultant, appearing on behalf of the City.

ARBITRATION AWARD

The Union and City named above requested that the Wisconsin Employment Relations Commission appoint an arbitrator to hear a grievance regarding rates of pay. The undersigned was appointed and held a hearing in Kaukauna, Wisconsin, on April 26, 1995, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by June 7, 1995.

ISSUE:

The parties ask:

When the City assigned employees to clean catch basins using the mobile vacuum and did not pay the Collective Bargaining Agreement rate of pay for "Sewer Crew," was it in violation of Article VI, (A), Section 4 of said Agreement? If so, what should the remedy be?

CONTRACT LANGUAGE:

ARTICLE VI

PAY POLICIES

A. Wage Schedule and Job Classifications

Section 1. Employees shall be classified according to their major work assignment and in accordance with the following job classifications, and shall be paid the appropriate rate of pay on a year around basis for said job classification; see attached Table of Organization and Wage Schedule, Appendix "A".

Section 4. Employees who perform work in a higher classification for eight (8) consecutive hours shall receive the rate of pay of the higher classification for the hours worked.

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In a Memorandum of Understanding between the Union and the City dated November 16 and 22, 1993, the parties agreed to the following language:

AFSCME Local 130 and the City agree that the language in Article VI, A, Section 4, of the 1993-95 labor agreement shall be replaced with the following language and shall become part of a successor agreement.

A. Wage Schedule and Job Classification

Section 4. Employees who are assigned and perform work in a higher classification for two (2) consecutive hours per day shall receive the rate of pay of the higher classification for the hours so worked. Employees who perform work in a lower classification shall receive their regular rate of pay while so assigned.

APPENDIX A

WAGES

Classification (Wages omitted)

Heavy Equipment Operator (Grader, Loader, Backhoe), Mechanic, Sweeper, Two Man Garbage Truck Driver

Garbage & Tandem Trucks

Sewer Crew, Skilled Laborer

Janitor

Small Truck Driver

Parkman

Laborers

Bridge Operator

Chief Bridge Operator

BACKGROUND:

This grievance is over the rate of pay for the work of cleaning leaves out of catch basins leading to storm sewers. Catch basins are part of the storm sewer system, where storm water enters from street grates and drains to a river or ravine. The method used to clean the catch basins has changed over the years.

In the early part of the 1970's, employees would go into the catch basins with a 12-foot wooden-handled spoon that had a flat scoop with a 10-inch diameter on the bottom. They dug out matted leaves, sticks, toys, anything that got into the basins, with the spoon. They even devised home-made tools to get some materials. Employee Robert Glasheen, who started working with the City as a laborer 25 years ago, is now part of the sewer crew. He believes that he was paid the sewer crew wage rate when he did the spooning work while he was still a laborer. Employee Dave Conrad, a truck driver now with more than 26 years with the City, recalled that he was paid the sewer crew wage rate when he did the spooning work. However, Bruce VandenBerg, who started as a laborer for the City 27 years ago and is now a street foreman, believes that he got whatever rate of pay of his classification, whether laborer or truck driver, when doing the spooning work.

The City received a machine called a sewer jetting machine sometime around 1978. Between the fall of 1979 and 1994, the jetting machine, or jetter as the parties call it, was used for flushing leaves out of the catch basins. The jetter is used for the sanitary sewers as well as storm sewer work, and the crew using it could be called to take care of problems in the sanitary system when working on the catch basin. Employees operating this machine are required to have a commercial driver's license with a tanker endorsement.

The crew flushing the catch basins with the jetter would just flush them as long the basin took the water. If there was a blockage, someone on the crew would have to open up a manhole, move the equipment and clean toward the catch basin. In cleaning catch basins with the jetter, the leaves are not removed but are flushed down the line. Employee Ken Eiting, a laborer, thinks he got paid the sewer crew rate when working on the jetter, but he is not sure.

In the fall of 1994, the City started using a mobile vacuum leaf loader to clear leaves from the catch basins. In this process, the leaves are sucked out of the basin with a vacuum hose. The machine has an arm that can raise the grates unless they are frozen. If frozen, the grates would be lifted off manually, like the crew did when using the jetter. The truck driver often used a long-handled fork to break up matted leaves in order for the vacuum hose to suck them up. Employees working on the mobile vacuum leaf loader also visually inspected the basins and grates and reported any problems. VandenBerg told employees that when they pull the cover off the basin, they should report anything that's wrong, and that it is always common sense as well as part of the job to report anything wrong.

The mobile vacuum leaf loader is also used to clear leaves from the terraces. Eiting

worked with the leaf loader and got a laborer's rate of pay whether clearing leaves from terraces or catch basins. The leaf loader equipment remains basically the same for both jobs, except for a hose and arm that are changed for the basins. Conrad estimated that he worked on the leaf loader about 16 days last fall. Glasheen only worked on it the first day to see if it would work. Then he was working on sanitary maintenance unless he got called regarding a problem in a particular basin.

When employees grieved not being paid sewer crew rate for cleaning catch basins with the leaf loader, the grievance was denied by John Sundelius, Street Superintendent since 1992. In his opinion, the different methods used with the different equipment changed the nature of the task. In both cases, the leaves are removed, but in the jetting method, the storm sewer line was also being cleaned out. This typically required access to a manhole in the street and someone needed to know when the jet head reached the manhole. With the jetting method, the crew could determine whether there were any holes in the pipe, because the person in the manhole would see gravel and dirt. When a storm or sanitary sewer was blocked up, the jetter was the first thing to be called out. The mobile vacuum leaf loader is different, because the only thing it can do is suck out the leaves. There is no way to determine if there are holes or problems deeper in the storm sewer pipe. If there is a back up in the storm sewer, the sewer crew has to be called out. Also, the sewer crew may enter sewers below the street level, while those working with the leaf loader stay above the street.

Sundelius also reviewed job descriptions in determining that out-of-class pay was not warranted. The job description for sewer crew is as follows:

SEWER CREW

NATURE OF WORK

This is skilled work in sanitary and storm sewer maintenance activities.

Employee is responsible for maintenance and repair of the city's sanitary and storm sewer systems during regular hours and in emergency situations. Sewer systems includes collection lines, manholes, lift stations, and catch basins. Employee is also responsible for the safe operation and maintenance of all sewer related equipment. This equipment includes, but is not limited to, sewer jetter/truck, bucket machine, rodder, mobile pumps, and safety equipment.

Employee is also responsible for locating and marking sewer locations and record keeping of work performed.

Much of the work is performed independently within established policies, procedures, and standard equipment operation techniques. Regular supervision is provided by the Street Superintendent and/or Street Foreman or their authorized representative.

ILLUSTRATIVE EXAMPLES OF WORK

Check and maintain sanitary and storm sewer system. Inform supervisor of problems in operation.

Clean sanitary and storm system with jetter, bucket machine, rodder, sewer spoon, or manually.

Repair and adjust manholes and catch basins using masonry skills. Installs pipe for new or relay sewer lines. Perform heavy lifting while performing such tasks.

Perform emergency sewer work. Subject to call-in at any time of day or night.

Work in all types of weather and severe conditions which include flooding, residential sanitary sewer backups, night, and in high traffic streets. Severe conditions include foul smelling manholes and wet wells and also deep manholes.

Use air quality monitors, safety harness, tripod, and any other safety devices/methods to insure safety.

Read and interpret plans and as-built drawings to determine location of sewer facilities for contractors. Verify locations by field observations and field marks locations.

Perform other duties as assigned.

REQUIREMENTS OF WORK

Previous experience in sanitary and storm sewer maintenance and repair.

Must have a valid Commercial Drivers License with air brake and tanker endorsement.

C.P.R. certified.

Knowledge of electrical and plumbing operations.

Ability to interpret sewer plans and drawing and maintain written records.

Ability to maintain effective relationships with the public in a courteous and tactful manner.

Ability to repair and understand all lift station controls and operation (electrical and mechanical).

Ability to operate and maintain all sewer related equipment.

Ability to withstand a variety of temperatures, weather and working conditions and be in good physical condition.

Ability to demonstrate and perform safe working procedures and practices.

Must be able to pass a written and/or oral test to display competency in this type of work.

The job description for Collector - Laborer is considerably shorter and was developed some time ago. Sundelius did not know when it was established. It reads as follows:

NATURE OF WORK

This is manual labor in the performance of unskilled and semiskilled tasks of a very physically demanding nature.

Work involves responsibility for performing heavy manual labor including walking, lifting, bending, etc. Work is assigned by Street Superintendent or street foreman.

EXAMPLES OF WORK

Garbage, trash collection, loads trucks and packers, paints, shovels crosswalks, sweeps streets, cleans sewers, cuts weeds, trim trees, shovels asphalt and blacktop, picks up leaves and rakes terraces. Will be required to drive trucks and help in general street maintenance. Will perform all related jobs in emergency situations.

DESIRED KNOWLEDGES, ABILITIES, AND SKILLS

Ability to perform heavy manual work and lifting for extended periods in all kinds of weather.

Able to write, read, and understand instructions.

REQUIRED EDUCATION AND EXPERIENCE

High School education.

Some truck driving experience desired.

THE PARTIES' POSITIONS:

The Union:

The Union's primary argument is that the payment of sewer crew rate to any laborer or other lower classified employee working on a sewer crew operation is a long term practice going back as far as current employees can remember. Glasheen testified that this pay practice has been in effect for at least 23 years. Glasheen, Conrad and Vandenberg were assigned to clean the catch basins using sewer spoons before the sewer jetter came along, and all of them testified that they were paid the higher rate of pay for performing this work. The spooning method was not more technical or difficult in comparison to the sewer jetter.

The end result of using the mobile leaf loader was the same as the spooning and jetting methods of cleaning catch basins. The same job of keeping the storm sewer open was accomplished. Therefore, the Union believes that employees working the catch basins in 1994 should receive the higher sewer crew rate of pay for the hours they did that job, just as employees performing the job in the past received that rate. The employees working with the leaf loader also had to inspect the basins to determine whether repairs were needed, which was an integral part of the earlier methods of cleaning basins. This aspect of the job is one of the reasons that the sewer rate of pay was given to employees.

The Union takes issue with the City's attempt to diminish the importance of the catch basin operation and the skill levels needed to perform the job. It asserts that the issue is really whether a less complicated piece of equipment means that the specific nature of the operation and its end result have changed. It believes the answer is no. The job descriptions show that work involving catch basins is one duty among many for which the sewer crew is responsible. The Union notes that the undated job description for "Collector - Laborer" is not current, and does not address the rate of pay for cleaning sewers. The rate of pay is governed by Article VI, A, Section 4. The laborer job description also says that laborers are required to drive trucks, a job that has always fallen in a higher classification.

While the City argues that the job with the leaf loader is less skilled than the job description for the sewer crew, it did not make the individuals perform all possible tasks on the sewer crew job description as a condition of receiving the higher rate of pay. Laborers were not simply cleaning sewers -- they were carrying out tasks necessary to perform the catch basin

operation using a different technique.

The Union contends that it is significant that Glasheen was assigned to jobs involving the sanitary sewer system in 1994, after using the leaf loader only once. The catch basin work was part of Glasheen's normal job duties, as was working in the sanitary sewer system. It made no difference to him whether the catch basin work was more or less technical than in the past. Had there been no sanitary sewer work for Glasheen, he could have filed a grievance over other people performing work within his classification.

In conclusion, the Union maintains that the past practice concerning this work over the years regardless of the techniques used has to continue under the new method. The work is part of the sewer crew's job description and responsibility. Those working on the catch basins are performing a complete job assignment that is part of the sewer crew's work. The Union asks that employees working on catch basins in 1994 be made whole.

The City:

The City believes that the enhanced technology of being able to use the mobile vacuum leaf loader to clean catch basins significantly changes the character of the work and the skill level required to perform the job. The use of the sewer jetter constituted an actual cleaning of the sewer line because the jetter would propel water with high pressure into the storm sewer system and clean the storm sewer line. The sewer jetter requires skill which is recognized in the wage classification structure at the rate of pay for sewer crew.

The City asserts that the work performed with the current method, the leaf loader, is not of the same skill level needed when using the sewer jetter. The job description of the Collector/Laborer provides direction that the position is to be involved in cleaning sewers and picking up leaves. City Exhibit #4, prepared by Superintendent Sundelius, summarizes the parallels between removing leaves from terraces and removing leaves from catch basins, with both functions performed using the leaf loader.

The cleaning of catch basins and storm and sanitary sewer lines with the sewer jetter is a different operation. It requires a more sophisticated piece of equipment and a higher level of job skill, as well as a tanker endorsement to the commercial driver's license.

The City notes that VandenBerg testified that employees were not paid the sewer crew rate when they used the spooning method for cleaning catch basins. The City believes that the record clearly shows that technology has changed the requirements to perform the job and the corresponding skill level of employees in order to perform the work. The City asks that the grievance be dismissed.

DISCUSSION:

The Union's main argument fails to carry the day, because in order to establish a past practice of higher class pay, the Union needs to demonstrate that there is a clear and unequivocal practice over a period of time. The record, however, does not show that the practice was clear and unequivocal. The record is at best mixed -- some employees appeared to get sewer crew rates of pay, some did not. The only clear record is that the sewer crew got the sewer crew rate of pay during the time that the sewer crew used the jetting machine to clean out catch basins. However, before that time, it is less than clear as to who got paid what. It is not even clear whether laborers got the sewer crew rate of pay during the time the City used the jetting machine to clean the basins.

Before VandenBerg became a street foreman, he was a laborer and truck driver, and even president of the Union for several years. He recalled cleaning catch basins with the wooden spoons, but he did not testify that he ever got a higher rate of pay for that work. His testimony was that he got whatever rate of pay that he was at -- whether a laborer or a truck driver.

Then, to the contrary, Glasheen testified that he got the sewer crew rate when he performed the work with the spooning method. He said he got the higher rate when he was a laborer and did the work, before he became part of the sewer crew. Conrad also testified that he got paid the sewer crew rate when performing the work with the spooning method. Eiting is a laborer with four years of history at the street department, too new to have lived through the days of spooning out matted leaves from catch basins. He has worked with the sewer crew performing the jetting method of cleaning basins, as well as the leaf loader. He was not sure what rate of pay he got when working with the jetter -- he thought it was the sewer crew rate of pay. He did not get the sewer rate of pay when cleaning catch basins with the leaf loader. He got his laborer's rate of pay for the basins, as well as for picking up leaves on terraces.

If the City had paid the sewer crew rate when employees used the spooning method to clean catch basins, it would indicate that the City itself deemed that the task performed warranted the out-of-class higher pay, and that the method or technology used was not as important as the task performed. Or if the Union could clearly establish that the laborers and truck drivers or any employees other than the sewer crew were always paid the sewer crew rate when cleaning catch basins, regardless of the method used, the City's argument that the technology changed would be irrelevant. Certainly the technology changed between the spooning method and the jetting method. The jetting method changed the procedure and accomplished more than just getting the leaves and other material out of the catch basins. The jetting method accomplished more than the vacuum method with the leaf loader. The fact that employees may have been paid sewer crew rates when using the spooning method, which accomplished more or less the same as the vacuum leaf loader method, is significant. The spooning method required less skill than the jetting method, and possibly less skill than the vacuum method. There was no equipment to be operated - - just a long wooden-handled spoon with a scoop to dig out the leaves.

However, it is the Union's burden to bring forth convincing evidence of a past practice. The record fails in this respect. VandenBerg says no higher rate was paid, Glasheen and Conrad say a higher rate was paid, Eiting is not sure. Neither party introduced payroll records to confirm or deny the testimony. So the Arbitrator is left with testimony which is mixed. There must be solid evidence or proof of a past practice in order to give it the effect of a binding past practice.

The job descriptions, while potentially outdated and probably not negotiated, show that the catch basin cleaning work may fall within two categories as overlapping duties. The job description for the sewer crew includes, as an illustrative example of work, the cleaning of storm sewers with various methods -- from the jetter to the manual method. The job description for collector-laborer also includes cleaning sewers as an example of work. 1/ The laborers have assisted in cleaning catch basins in the past, and the work in dispute has not been performed exclusively by the sewer crew. As long as the work is reasonably related or incidental to the regular duties of the laborers, there is nothing improper about assigning such work to them where there is no contractual restriction on the right of management to assign or reallocate duties as reasonably required by technological changes. It appears that there is no need for the sewer crew to perform the work where the jetting machine is no longer needed to do the job, and the laborers operating the leaf loader are already using that machine to pick up leaves from the terraces as well as pick up leaves out of the catch basins. However, that does not answer the question of whether the assignment of cleaning catch basins warrants the pay rate of the sewer crew under Article VI.

In looking at grievances for out-of-class pay, arbitrators have often spoken of the key or core parts of a job, or the central core of a classification. For example, in Wilson Jones Co., 51 LA 35 (1968), Arbitrator Daugherty stated:

" . . . (1) In all such cases the critical questions are (a) What are the key or core elements of the jobs involved which distinguish one job from the other(s) and justify the wage rate differentials between (among) them agreed to by the parties, and (b) did the aggrieved employee(s) perform actual work that 'invaded' said core elements? (2) In many such cases there are substantial areas of overlap in the operations specified for two or more jobs. That is, an employee in one job is authorized to do some of the work that another employee in another classification is also permitted to do. But in such case an employee in one job cannot properly be said to have taken over the work in another job until and unless he has been

1/ This job description appears to be older than the job description for the sewer crew. It is not dated. No one claims that any of the job descriptions were negotiated.

required to perform operations that the parties have agreed are key and relatively exclusive to the latter classification."

Similarly, Arbitrator Seligson in Union Carbide Nuclear Co., 37 LA 411 (1961), referred to the core of the work:

"To summarize: this ruling holds that before an employee in a lower rated classification can be said to be doing the work of a higher rated classification, in order to receive the higher rate of pay provided for in Section 7, Article 7, he must have been engaged in work which forms the central core of that higher rated classification, not just an isolated, marginal, relatively insignificant duty. To hold otherwise, would result in undermining and blurring the distinctions between classifications and wage rates so carefully negotiated by the parties."

The labor contract in this case refers in Article VI, Section 1, to the "major work assignment" which is similar to the concept of the central core of the work. It does not appear that the laborers invaded the core work of the sewer crew or took over a major work assignment belonging exclusively to the sewer crew. The employees using the leaf loader did not go into the manholes and check the storm sewer system to see if there were any breaks in the sewer pipes. They stayed above ground, going into the top of the catch basins to vacuum out the leaves. The sewer crew, when using the jetting machine to flush leaves, may have been reaching into the core functions of the laborers' work, particularly where the laborers previously used the manual spooning method of cleaning basins. However, this was nothing more than the overlapping and intermingling of duties that occurs in many instances without triggering Article VI's out-of-class pay.

In Alaska Dept. of Transportation, 78 LA 999 (1982), Arbitrator Tilbury reviewed 40 years of arbitration decisions on the subject of making a proper job classification and found the following 27 factors (footnotes omitted):

- (a) Are the physical demands and the risks encountered in the task he is asked to perform similar to those encountered by those who have the higher classification?
- (b) What are the comparative working conditions? Are they similar to those in which those who are classified at a higher classification work?
- (c) Are employees in the lower class routinely called upon to perform such tasks, or is it extraordinary even though there may be some over-lapping with those in the higher classification?
- (d) Does the work he is asked to perform require greater responsibility and mental skill than that required normally of those

who work in the lower classification?

- (e) What procedures are used to evaluate other employees in determining their proper wage rates?
- (f) Are separate work areas provided for each classification?
- (g) Is the work which is being evaluated more hazardous, burdensome, or a "major change in the nature of an existing job"?
- (h) Does the work he is asked to do in this instance result in a new function or increase the capacity from that stated in the contract?
- (i) What are the applicable contract provisions?
- (J) What is the degree of change from the normal activities?
- (k) Is the job they are requested to do a primary function of the higher classification or only a secondary one?
- (l) What is the basic intent of the parties?
- (m) What has been the employee's prior work experience? If, for example, the employee brings considerable prior experience and skill to the job he is asked to perform, even though temporarily, this would strengthen this claim to be paid at the higher rate.
- (n) Was the assignment simple or complex?

(o) How much time is required to do the assigned work? If it does not take much time, then it is less likely to be classified as one in the higher classification.

(p) What has been the past practice at that particular plant, etc.? If, for example, the union acquiesced on grieving the lower pay for the work in the past, this should be considered.

(q) What degree of supervision is provided for the new work assignment?

(r) What degree of discretion and judgment is necessary to complete the job satisfactorily?

(s) What are the job fundamentals?

(t) What evaluation has been made of the work by management? This factor is not a controlling one. Nevertheless, most arbitrators do consider it as a factor on the theory that management should be allowed some reasonable discretion in setting job criteria.

(u) Does the job call for the independent use of an operator's personal skills, or is it a job where the operator merely directs a machine to apply those skills?

(v) Were the job descriptions drawn unilaterally or negotiated ones?

(w) Is there added responsibility in doing the assigned work?

(x) Is there a greater degree of dexterity required to do the new work, as compared with the work he has been doing?

(y) What is the comparative educational background of the grievant vis-a-vis those who are receiving a higher rate of pay for the work he is called upon to do?

(z) Were the jobs in their present form at the time the last collective bargaining agreement was drawn or has it changed in any way?

(aa) Are there any binding past practices and mutually accepted interpretations which apply?

Arbitrator Tilbury noted that the above is not a complete list of all factors, but some of the more salient ones. Not all of the factors can or need be applied to this case. A few are worthy of note.

Factors (a) & (g) -- the leaf loader operation is neither particularly physically demanding, nor does it encounter the same risks as the jetting machine operation. The crew using the jetter may be encountering greater risks as those employees go into manholes when using the jetter to flush the storm sewer. Those using the leaf loader do not go into manholes.

Factor (d) & (w) -- the work of cleaning catch basins with the leaf loader requires no greater responsibility and mental skills than the work performed in the laborers' and truck drivers' routine work of removing leaves from terraces.

Factor (j) -- there is no real change from the normal activities when the employees are in the process of removing leaves -- either from terraces or catch basins.

Factor (k) -- the work is not a primary function of the higher classification but only a secondary one. The sewer crew did not work at all on cleaning catch basins once the leaf loader became available to suck the leaves out of the basins. The sewer crew was not idle, and none of its work was taken over by the employees operating the leaf loader.

Factor (n) -- the work was simple, and it was simpler than what the sewer crew did with the jetting machine.

Factor (x) -- there is no more dexterity required compared to the regular work of the laborers and truck drivers.

Factor (y) -- there is no different education needed.

Factor (aa) -- there are no binding past practices and mutually accepted interpretations.

In conclusion, I do not find that there is a right to the higher classification pay for the work in dispute, based on the contract language, the many factors mentioned above in this discussion section, and the lack of a clear and unequivocal past practice.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin, this 3rd day of August, 1995.

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