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Redacted for Publication
OPINION AND AWARD
IN ARBITRATION PROCEEDINGS
PURSUANT TO A
COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between)	
)	
East Bay Municipal Utility District, Employer)	Water Distribution Crew Foreman Job Duties Grievance
and)	
<u>AFSCME Local 444, Union</u>)	CSMCS Case No. ARB-15-0041

APPEARANCES:

For the Employer: Lourdes Matthew, Attorney
East Bay Municipal Utility District
375 Eleventh St.
Oakland, CA 94623

For the Union: Manuel Boigues, Attorney
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway
Alameda, CA 94501

PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was selected as the arbitrator by mutual agreement of the parties from a list of arbitrators provided by the California State Mediation and Conciliation Service. The matter was heard on December 10, 2015 and February 1, 2016 in Oakland, California.

The Employer raised a threshold issue of arbitrability, asserting that the grievance was not filed and / or processed by the Union in a timely manner. Notwithstanding this assertion, the parties agreed to proceed with a hearing on the merits of the grievance after the presentation of their evidence and positions on the timeliness issue. The parties granted the arbitrator the authority to render a decision on the arbitrability issue. If the arbitrator determined that the matter was indeed arbitrable, then the parties gave the arbitrator the authority to render a decision on the merits of the grievance as well.

The parties also stipulated that the arbitrator retains jurisdiction for the purpose of the implementation of the remedy in the event that the arbitrator grants in whole or in part the remedy sought by the union.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. The parties chose to conclude their presentations by written briefs, which were received on or before May 2, 2016.

ISSUES

The parties were unable to reach agreement on a statement of the issues in this matter. The Employer proposed the following two-part issue:

1. Was the grievance filed timely and, if not, should it be dismissed?
2. Did the district violate the contract when it required water distribution crew foremen to process work orders which has been the job of the clerks represented by Local 2019?

The Union did not submit a proposed statement on the timeliness issue. On the merits, the Union proposed the following:

Did the district violate the MOU or rules or regulations governing personnel practices or working conditions in the manner it implemented on or about August 6, 2014, a

requirement that water distribution crew foremen process GWO (general work orders), paving, concrete, and meter orders? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Memorandum of Understanding Between East Bay Municipal Utility District and Local 444 American Federation of State, County and Municipal Employees AFL-CIO – April 22, 2013 – April 16, 2017

Article 3 – District Rights

3.1 Definition of Rights

3.1.1 The rights of the District include, but are not limited to, the exclusive right to determine the missions of its constituent departments and divisions; set standards of services...direct and assign its employees; maintain the efficiency of District operations; determine the methods, means and personnel by which District operations are to be conducted; determine the content of job classifications...and exercise complete control and discretion over its organization and the technology of performing its work; provided, however, that the exercise of such District rights shall not conflict with the express provisions of this Memorandum.

3.1.2 District and Union mutually intend and agree that District may unilaterally exercise any and all rights reserved by this Article without further meeting and conferring with the Union. It is further mutually agreed that Union and District have met and conferred on all matters reserved to District by this Article and Union does expressly waive any and all rights to further meet and confer on such issues, or any of them, during the period of this Memorandum. Any dispute concerning the interpretation or application of District's rights shall be deemed a grievance and must be processed under Article 22.

3.1.3 The District agrees to apply the rights reserved by this Article in a prudent and reasonable manner; furthermore, the District shall consider the impact that the application of these rights may have on the work force, before applying these rights. The District agrees to make reasonable efforts to mitigate any significant impacts arising out of the application of any and all rights reserved by this Article.

Article 6 – Salary and Wage Schedule

6.1.1 Pursuant to Civil Service Rule IV Classification, Section 7 Classification Study Request, the District will evaluate the need for a revision to class description, based on the alleged changes in position duties and responsibilities on the following classifications:

Water Distribution Crew Foreman

6.5 New Classifications. The Union recognizes the right of the District to establish new job classifications and to amend existing class descriptions to reflect changes in assigned duties and responsibilities. In the event a substantial change is made in the description of a class represented by the Union, the District will advise the Union of such a change and of the salary for the class. Upon request of the Union, the parties shall meet and confer on the salary for the classification

within ten working days prior to presentation to the Board of Directors. Establishment of salary is not subject to the grievance procedure as contained in this memorandum.

Article 22 – GRIEVANCE PROCEDURE

22.2 Definitions

22.2.1 Grievance

22.2.1.1. A grievance is any dispute between the District and an employee or group of employees concerning the interpretation or application of this Memorandum; or the interpretation or application of rules or regulations governing personnel practices or working conditions; or the practical consequences of a District Rights decision on wages, hours and other terms and conditions of employment.

22.5 Procedural Steps

22.5.1 Step 1. Informal Discussion / Filing of Grievance Statement

22.5.1.1 The Employee who has a grievance...may, with or without the assistance or a representative, discuss the matter informally with his/her immediate supervisor. If the grievance is not settled through informal discussion and the employee desires further review, a completed and written Form PE-105, "Statement of Grievance", must be submitted to the employee's immediate supervisor within twelve (12) workdays from the initial date he/she knew, or reasonably could know, of the act or omission causing the grievance...

Article 31. Other Terms and Conditions

31.2 No Implied Waiver. If at any time the Union or the District shall not elect to assert its rights under any provisions of this Memorandum in the event of a breach thereof, such lack of action in this respect shall not be construed as a continued waiver or any rights under the provisions of this Memorandum.

Job Descriptions and Performance Plans

Water Distribution Crew Foreman Class Description

Revision Date: July 23, 2013

Definition Under direction, plans, coordinates, directs and evaluates a utility crew in the installation and repair of water distribution pipelines and related facilities; performs skilled work as a crew member on an as needed basis as assigned; and performs related work as required.

Distinguishing Characteristics The work of this class involves responsibility for the planning, oversight, and direction of all work of an assigned crew...engaged in installing or repairing pipelines and related facilities...Scope of responsibility ranges from pre job planning and scheduling through completion of jobs and evaluation of overall crew and individual work performance...

Examples of Duties (Illustrative Only)

12. Prepares and maintains accurate records and generates reports such as crew time and attendance, labor, equipment and materials used, contractor hours and work completed, vendor delivered materials, work measurement data, and other related information.

CLASSIFICATION REQUIREMENTS

Knowledge, Skills, and Abilities

Ability to: ...keep accurate records and prepare reports...

Performance Plan: Water Distribution Crew Foreman

Job Management / Execution

11. Review, evaluate and document work activities in progress and on completion...

Administrative

1. Complete work related paperwork completely and accurately. Submit for processing within two business workdays of completion.
5. Document significant events in daily diary, repair orders or other District documentation.

Administrative Clerk Class Description

Revised: 10-31-94

Definition Under general supervision, performs a variety of general clerical-administrative duties, including the operation of office equipment; and performs related work as required.

Examples of Duties (Illustrative Only)

2. Proofreads and checks typed material, records and reports for grammatical, clerical and arithmetical accuracy, completeness, and for compliance with established standards and procedures; makes corrections as required.

Performance Plan: Administrative Clerk

Office Procedures

5. Learn and maintain proficiency in the use of WMS, POS, GWO, TDE, MMIS and other Maintenance-related computer systems. Able to retrieve information and compile reports as needed.

Civil Service Rules

Rule IV – Classification

Section 4. Interpreting Class Descriptions. Class descriptions are to be considered descriptive and explanatory and not restrictive. They are intended to be illustrative of the kinds of positions allocated to the various classes and should not be construed as limiting assignments which may be made to a particular position. Typical duties outlined shall be representative of work performed but are not intended to prescribe all duties of positions in the class, or to exclude duties of similar kind or level...

FACTS

General Background on the Employer, the Bargaining Unit, and Water Distribution

Maintenance: The Employer is a public entity providing water delivery and wastewater treatment services to customers in Alameda and Contra Costa Counties. It is classified as a special district under California labor law, falling under the rubric of the Meyers Milias Brown Act.

The Union represents a broad bargaining unit, consisting of dozens of “blue collar” classifications and classification series. The unit includes supervisory and non-supervisory classifications. A sister local, AFSCME Local 2019, represents clerical and technical classifications at EBMUD.

The classification involved in this grievance is Water Distribution Crew Foreman (WDCF). There are currently 27 WDCFs employed. They are responsible for planning, coordinating, directing and evaluating a utility crew in the installation and repair of water distribution pipelines and related facilities. They are “working foremen”, in that their job description calls on them to perform work with their crew on an as-needed basis.

WDCFs work out of four yards: North, South, East, and Construction and Maintenance Services (CMS). The issues that lead to the instant grievance took place at CMS and at South Yard.

General Work Orders (GWOs) and How They Have Evolved with Changing Technology:

The work performed by WDCFs usually originates from a third-party or employee report to the District’s dispatch center that there is a water leak in the system. The District sends out an investigator, typically a water distribution plumber III, also a member of the Local 444 bargaining unit. The investigator determines if there is a leak in the Utility’s water delivery system. If there is, then an order is created that is passed along to the assistant superintendent with responsibility for the geographical location of the problem. The assistant superintendent (not in the Local 444 bargaining unit) assigns the work to a WDCF. The WDCF assembles the crew needed for the work, and goes out into the field to direct the crew in the performance of the repair work.

The manner in which pipeline and other water asset repair work is documented has evolved over the years. Prior to the mid-1990s, maintenance work was documented on carbon-copy forms. In 1996, the District introduced a computer-based program for repair work. It was called the General Work Order (GWO) system.

[Employee A] is a manager of operations and maintenance planning for the District. She has been called the “mother” of the GWO system, since she designed it in the mid-1990s. [Employee A] testified that the source of information for GWOs has always been the investigators, first, and then the WDCFs. She testified as follows about the WDCFs and their historical role:

...it’s their responsibility to capture the information of what is needed to do the repair, and what materials were used, and how much time it took, and who was involved, and exactly what happened in the field.

[Employee A] further described the historical role of the administrative clerk, represented by AFSCME Local 2019. “Their role was to take the completed paperwork that the foremen were doing and basically transcribe the information into the computerized system.” That changed, she testified, as technology evolved:

...with the introduction of the internet and web-based applications and more computers throughout the district, both desktops, laptops and iPads, anybody can get to a web browser and...if they have the proper role input information onto the general work orders.

Testimony indicated that GWOs have been created in various ways since their inception in 1996. In some cases, they were initiated by administrative / clerical staff. In other cases, they were created by assistant superintendents (also known as supervisors.)

Over the years, generations of new technology were introduced into District field operations. Laptop computers were issued to WDCFs. Testimony varied about the extent to which the laptops were actually utilized by this classification.

In June 2011, the District purchased iPads for a pilot program to test their usefulness as a field tool. No WDCFs were involved in the initial program. In April 2012, the pilot program was expanded. Two WDCFs were included.

After the completion of the pilot program, District management went to the District’s governing board. [Employee B], manager of the maintenance and construction department, testified as follows:

[we went to the] finance committee and we presented them the findings of our two pilot studies. We gave them a demonstration of the iPads as well, and we explicitly told them all the things that we would be doing with it, including opening and closing work orders.

[Employee B], in direct testimony, made the business case for the iPad as follows:

...giving [the foremen] the iPads will allow them to enter the information in the field, save the information, close out the work orders in the field. They would also have access to information from the work order system if they're out there in the field to see what other work was done out there in a particular area. It also gave information back to the district because we inform our customers about main breaks, for instance, and take information from the GWOs and post that on our website. So the timeliness of the information was very important, as opposed to collecting it on paper, bringing it back to the office, and entering it. We can get the information to our customers faster, as well as provide information to the foremen, to the superintendent, to the assistant superintendent.

The Board authorized purchase of iPads for the foremen, and in May 2013 they were issued to all of the WDCFs. They were given training on how to use the devices for processing GWOs and for other tasks.

When asked on direct examination about whether the use of the iPads to close GWOs was considered "optional," [Employee B] answered as follows:

The idea of using the iPads was to improve our efficiency out in the field and to use the iPads where it was most appropriate, which is why we did the pilot. We wanted to find those classifications that would most benefit from them, and we found those classifications that would most benefit from the iPads.

The extent to which the iPads were actually utilized varied from yard to yard. Construction and maintenance superintendent [Employee C] stated that WDCFs at the East yard were issued iPads and had been using them with "no problems."

When [Employee C] arrived at CMS as superintendent in July 2014, however, the WDCFs were not consistently using iPads (or desktops, for that matter) to close GWOs. Some of them were handing paper GWOs to the dispatch call center representative (DCCR), a member of the AFSCME Local 2019 bargaining unit, for closing the work order.

When he took over at CMS, "...there was a general directive to me from my superiors to encourage the use of this technology," [Employee C] testified. One of the WDCFs, [Employee D], had an unusually high number of open GWOs with no "open tasks." Those GWOs should have been closed, according to [Employee C]'s testimony. In some cases, the DCCR would not have time to get to the GWOs to close them. In others, the assistant superintendent would close out the GWO for the WDCF.

WDCF [Employee E] testified at the hearing. According to [Employee E], the prior superintendent at CMS was [Employee F].¹ She was in charge of CMS at the time of the issuance of the iPads to the WDCFs. [Employee E] testified as follows:

...when she handed us the iPad, she said “I am not telling you guys to use this iPad, because this is ridiculous. Until we get people and equipment, I’m not going to have you guys do this - - this thing on this thing, and don’t even ask me how...to use it because I don’t even know how to use it.” She says “You can explore.”

Until [Employee C] arrived, according to [Employee E], “we just fill in the blanks and throw [the GWO] into a box for the clerical staff to do.” He testified that he tried to use the iPad to close GWOs during this time period. And he also stated that he had learned to use a desktop to close GWOs. On the desktop “I could see it better,” he testified. “I can’t see the iPad.” He added that [Employee C] had been extremely helpful in assisting he WDCFs with the electronic processing of GWOs.

[Employee D] also works as a WDCF at CMS. “Prior to August of 2014, I would write the information down, turn it over to the TRO [telephone radio operator] and they would process the GWO after that,” he testified. He added that sometimes the assistant superintendent would close his GWOs. He also testified that it took him approximately five to ten minutes on the average to fill out his GWO sheet by hand. “I wasn’t...very good at closing GWOs...I could fill them out, turn them in; I couldn’t close them,” he stated. He stated that he tried to close a GWO using an iPad, and was not successful.

[Employee D] also stated that former superintendent [Employee F] had made the use of the iPad optional. There was the following exchange on direct examination:

Q: Were there any instructions regarding using the iPads for the GWOs?

A: She didn’t say to us that we had to close the GWOs with the iPad. She said for us to fool around with them, check them out. Because to be honest with you, I asked [Employee F] the same question I asked [Employee C].

Q: What did you ask [Employee F]?

A: If you want us to close GWOs, just give us the directive and we’ll take the proper action.

Q: And what did she say?

¹ [Employee F] did not testify at the hearing.

A: And she said “No, I’m not telling you that.” I said “Put it in writing.” She said “That’s not what I’m saying to you. Take them and fool around with them.”

[Employee G] is a WDCF who works at the South yard. He testified that, until early 2015, it was optional for WDCFs to use the iPad or desktop computer to complete the GWOs. When he had finished marking his printed GWO with a pen, he would turn it in to his assistant superintendent. If the assistant superintendent found any errors, “he would put a red mark on it and he’d give it back... The next morning you’d see it and you would fix whatever.”

[Employee G] testified that he had received an iPad. He used it “for maps and taking pictures” on the job sites.

[Employee C], who had been assistant superintendent at East yard at that time, was asked on direct examination about the status of iPad usage at East when he was there. “There was a specific directive, no, I don’t recall, other than it was just a... work practice in progress, if you will.”

The Superintendent Meets with the WDCFs at CMS in August 2014 and Instructs Them to Close GWOs: On August 4, 2014, superintendent [Employee C] met with the WDCFs at CMS. He directed them to use the iPads in the field to close out GWOs. “It was a clarification, actually, or a continuing directive, I guess I’d say,” [Employee C] stated.

There was the following exchange between [Employee C] and the District’s counsel on direct examination:

Q: ...when you assign work, is that different from directing work?

A: Well, no. A distinction would be a direct order is a very specific cadence, if you will. And actually, there’s probably three major parts: “I’m your supervisor, this is a lawful order, your failure to obey, blah, blah, blah.” That...the technical - - my understanding - - of a direct order. However, in this particular circumstance, the terminology was, “I’m directing you.”

Q: In what particular circumstances?

A: Well, in the circumstance I’m talking about...at CMS, at the foremen’s meeting, where the issue was becoming confused as to whether or not it was an option to do this. I was making it clear that it was not an option. It was a directive to use the GWO - - to use the iPads at every convenience.

Q: Was it ever an option to use the iPads for any of the foremen?

A: Well, an option, in terms of which platform, technological platform...because part of the confusion became “Can we not use the desktops for this function?” So, and I clarified

that in terms of “You can always, if the circumstances warrant coming back into the yard and using the desktop to perform the same function, then that is acceptable.” However, it was to be the exception, not the rule. The rule was to use the iPads in the field if you could.

WDCF [Employee E] recalled that the subject of closing GWOs came up at the first foremen’s meeting with [Employee C] as superintendent, in July 2014. He recalled asking [Employee C] to “give us the direct order or give us a letter stating that we’re supposed to do it, and then we’re going to file a grievance.” At that July meeting, [Employee E] recalled, no such directive was given.

However, at the August meeting, [Employee C] did instruct the WDCFs to “start doing it... to close out all that stuff on the iPads.” [Employee E] testified as follows:

And we said “Well, where’s the letter? Tell us in writing to do it.” He said “There isn’t one. I’m giving you a direct order.” And then we were advised that you can’t disobey a direct order.

[Employee E] testified that this change in how GWOs were handled generated additional work for the WDCFs, particularly in the area of paving orders. He testified:

...before, I would drop [the GWO sheet] into the clerk’s...box there. Now, it says, do I need to get a permit? Okay. Well, in order for me to generate his order, I should call the new business office, get a permit number. Or if it was Caltrans, a state highway, like San Pablo Avenue or Ashby Avenue, I have to call Caltrans, I have to get an encroachment permit...Then I have to talk to the specific city inspector in charge of paving...and say “Hey listen, I got this paving job...So now I’m negotiating with the city inspector now about who’s going to pay for the paving...

“All that stuff was done by the assistant superintendent before,” [Employee E] added. He conceded, on cross-examination, that, prior to the change, he would receive calls from assistant superintendents if they needed clarification on a paving order problem.

WDCF [Employee D] testified that, after the meeting with [Employee C], he began closing all his GWOs. He noted that, by closing the GWO, he becomes the “person of record” for the follow-up paving and concrete orders that go out after a repair is made.

[Employee E] also testified that he raised safety concerns about the ordered procedure of using the iPads in the field. He told [Employee C] “It takes me away from...overseeing the safety of the job.”

I asked [Employee C] “What if you can’t get reception, or what if you’re in an area that you don’t want to be vulnerable to sit in the truck fixated on” - - you know.

[Employee E] recalls that [Employee C] then replied “Then ask your shift supervisor permission to use the desktop in the yard, and tell him why.” [Employee E] recalls that one of the union stewards then called “downtown” and asked why the foremen could not use their desktops. This resulted in division manager [Employee H]² coming to a meeting and agreeing that the WDCFs could use their desktops. “Try to use the iPads in the field. If you want to close them on the...desktop, close them on the desktop.”

[Employee E] also raised concerns at the hearing in regard to the potential effect of the changed job responsibility on the WDCF’s performance appraisal. He testified:

[Prior to the August 2014 meeting] as long as we submitted [the GWO paperwork] within 48 hours for them to process it to the other department...the burden was on them. So now that burden and responsibility has shifted to the foremen. Because now when the list [of open GWOs] starts growing, the superintendent now has the talk with us, not the clerical staff. And the timeliness of processing the work now can have repercussions on your appraisal.

The Union Files a Grievance, Claiming that Closing GWOs is Outside of the Job

Description of the WDCF:

On August 11, 2014, Union representative Felix Huerta sent an email to the District’s labor relations office, noting [Employee C]’s instruction to the WDCFs and demanding that the District cease and desist this “unilateral change in condition of employment.”

On behalf of the District, Senior HR analyst Winnie Anderson responded that same day that there had been no change, and offered to discuss the matter further with the Union.

On August 18, Union shop steward Cheryl Franklin filed a grievance, stating that “the WDCFs in CMS are being required to process WO which has been the job of the clerks represented by Local 2019. WDCF is represented by Local 444.” Ms. Anderson called Ms. Franklin, and Ms. Franklin then wrote the following follow-up email to Ms. Anderson: “As per our conversation this morning, the Union is willing to put this issue in abeyance for two weeks in order for both sides to research the issue and to meet for an informal discussion of the grievance and at that time decide how best to proceed.”

² [Employee H] did not testify at the hearing.

There is no record of any meetings on this issue taking place between August 18, 2014 and January 20, 2015. On that date, the Union filed a revised grievance on this same matter. A Board of Adjustment was held on May 5, 2015. On May 14, 2015, the District wrote a “Deadlock Letter” stating that the parties were unable to resolve the grievance and that the parties were deadlocked. The Union then moved the grievance to arbitration, and that is the matter that is now before the arbitrator.

The May 14, 2015 memo, and all other correspondence in the record from the District to the Union on this matter, includes no District assertion that the grievance was not timely filed.

EMPLOYER’S POSITION

The Employer asserts that the grievance was not filed in a timely manner. The WDCFs have always been assigned to enter information on the GWO, and had been required to use the iPad for nearly a year prior to the filing of the grievance. The Union did know, or should have known, that the WDCFs would be required to use iPads for this purpose as soon as they were issued.

The Employer argues that the District has been harmed by the Union’s tardy filing. The District has invested time and resources in the purchase, dissemination, and training on how to use the iPads. The proper time for the Union to grieve this, at the latest, would have been when the devices were distributed in 2013.

As to the merits of the grievance, the Employer contends that management has acted within its rights in this matter. The MOU gives the District the exclusive right to determine the methods, means and personnel by which the business of the District will be conducted. The District has a legitimate business reason to streamline the processes.

The Union, the Employer asserts, has presented no evidence the District’s decision was unreasonable or imprudent. And Article 3 of the MOU makes it clear that there is no obligation on the part of the District to meet and confer over these changes.

UNION’S POSITION

The Union contends that there is a strong policy favoring the hearing of a grievance on its merits. The Union asserts that, in fact, the grievance was timely filed. There is no evidence that, prior to the August 6, 2014 meeting, the WDCFs were ever required to close out GWOs. Even if the arbitrator finds that there was an earlier requirement to do so, then this was a “continuing violation” and should be deemed timely because of that.

Moreover, the Union asserts, the Employer waived the timeliness issue because it did not refer to timeliness again after initially claiming an untimely filing in August 2014.

On the merits, the Union disputes the Employer’s assertion that Article 3 gives it the right to unilaterally modify job descriptions without meeting and conferring with the Union. The entire agreement – including Article 1 Recognition, Article 6 Work-out-of-Classification and the New Classifications clause must be taken into account. In addition, the Union argues that the District’s actions violate the Meyers Miliias Brown Act in California law.

DISCUSSION

I. The Issues: The parties did not reach agreement on the formulation of the issues in this matter. They ceded to the arbitrator the authority to decide the issues as part of his award. As such, the issues are as follows³:

1. Is the grievance properly before the arbitrator?

If the answer to question one is “yes,” then the second issue to be decided is the following:

2. Did the Employer violate the CBA when it required Water Distribution Crew Foremen to close out General Work Orders? If so, what is the proper remedy?

II. The Arbitrability Dispute: The Grievance Was Timely Filed

The grievance in this matter was filed on August 18, 2014. The CBA requires that a grievance must be filed “within twelve (12) workdays from the initial date he/she knew, or reasonably could know, of the act or omission causing the grievance.”

The Employer is correct in pointing out that WDCFs had begun using iPads and desktop computers to close GWOs in 2012 or even earlier. Hence, the District asserts that the Union was “sitting on its rights” by not protesting earlier.

However, the meeting on August 4, 2014, was a new triggering development. For the first time, WDCFs were directed to close out work orders. [Employee C] conceded that, at earlier times, the use of

³ When the grievance was initially submitted to the arbitrator, it had been given a title of “iPad Use.” When it was originally filed, the grievance cited the requirement that WDCFs “process” work orders. After the two-day hearing, it became clear that a more accurate way to summarize the dispute was whether the District violated the agreement when it required the WDCFs to close out work orders. Hence, this is the issue as formulated by the arbitrator.

the technology by the WDCF's was a "work practice in progress." He believed that he needed to meet with the WDCF's to clear up "confusion" about a "continuing directive."

In fact, the WDCF's at CMS requested that [Employee C] address the issue of closing GWOs for the explicit reason that they believed it violated the agreement and they wanted a triggering event as the basis on which to file a grievance. They told [Employee C] this. He complied with this request, and gave the order. The record stands un rebutted that the CMS-based WDCF's complied with his directive, did as they were instructed to do, and filed the grievance.

[Employee C] gave the directive on August 4. The grievance was filed on August 18. With the intervening weekend, this was clearly within the 12 business days specified in the CBA.

Even had the grievance been filed untimely, the Union is correct in pointing out that the Employer would be obligated to notify the Union in its written response to the grievance that it considers the grievance untimely and non-arbitrable. In the instant case, the Employer's written response indicated that it believed that the assignment of the disputed duties was not a new development, but something that had "always been processed" by the foremen. This is not the same as a claim that the grievance was not timely filed. This written response did not put the Union on notice that the Employer would be disputing arbitrability.

For these reasons, the undersigned finds that the grievance was timely filed and is properly before the arbitrator.

III. The Merits of the Grievance

The Language in the CBA Gives Clear Guidance to the Arbitrator in the Instant Case: The parties have negotiated extensive and robust language in their agreement that bears on the particulars of this dispute. Article 6.5 reads:

The Union recognizes the right of the District to establish new job classifications and to *amend existing class descriptions* to reflect changes in assigned duties and responsibilities. In the event a *substantial change* is made in the description of a class represented by the Union, the District will advise the Union of such a change and of the salary for the class. [Italics added]

The key phrase here, in relation to this grievance, is that the District has a right to “amend existing class descriptions to reflect changes in assigned duties and responsibilities.” Only in the event of a “substantial” change must the District advise the Union.

That same article of the CBA incorporates by reference civil service rules. In relevant part, they read:

Class descriptions are to be considered *descriptive and explanatory and not restrictive*. They are intended to be *illustrative of the kinds of positions* allocated to the various classes and should not be construed as limiting assignments which may be made to a particular position. Typical duties outlined shall be representative of work performed but are *not intended to prescribe all duties* of positions in the class, or to exclude duties of similar kind or level. [Italics added]

Read in tandem, these provisions give the district the right to a) assign duties to a classification of a “similar kind or level” to what the class is already performing, and b) to make non-substantial changes to job descriptions without notifying the Union.

The District Rights article of the CBA also directly addresses job classifications. It gives the district the right to “determine the content of job classifications” and goes on to say that the District may “unilaterally exercise” this right “without further meeting and conferring with the Union.”

However, that same article includes an important qualifier:

The District agrees to apply the rights reserved by this Article in a *prudent and reasonable manner*; furthermore, the District *shall consider the impact that the application of these rights may have on the work force*, before applying these rights. The District agrees to make *reasonable efforts to mitigate any significant impacts* arising out of the application of any and all rights reserved by this Article. [Italics added]

These provisions give the Employer broad rights to assign job duties within classes without an obligation to meet and confer with the Union. However, those assignments must be “prudent and reasonable,” and they must make “reasonable efforts to mitigate any significant impacts” stemming from these changes. It is those aspects of a job duties dispute that are subject to arbitral review.

It is the view of the undersigned that the impartial arbitrator in this case must first determine whether or not there was a change in job duties. Then, if the determination is that there was such a change, the arbitrator must decide the extent to which the Employer complied with the requirements specified in the District Rights Article 3.1.3.

In the instant dispute, the Article 6 language cited above is not as directly on point as the Article 3 language. The reason for this is that the District did not, in fact, “amend the existing job description” for WDCF to reflect the new work process. Article 6 would have become directly relevant to this dispute only if the District had decided to amend the description. In that case, the Union would have had to prove that it was a “substantial” change before a notice obligation would have been triggered.

The District Modified the Content of the WDCF Job Classification: The preponderance of the evidence is that the District modified the WDCF job duties when it required the foremen to close out GWOs. While it did not propose a change in the job description itself, the duties in fact evolved with the introduction of new technology.

The WDCF and Administrative Clerk Performance Plans, read in conjunction with testimony about how the WDCF duties changed over the years, is persuasive on this point. These documents and related testimony spell out a division of labor more typical of an era in which typists finished forms and documents for other supervisory and managerial employees.

The Employer made a strong business case for having the WDCFs close out their own work orders with the advent of new technology. Timely and accurate entry of information into the system and accountability of foremen for the completion of their duties are legitimate operational reasons for making this change. And the WDCF job description itself is broadly construed, such that it easily encompasses the move to have WDCFs close their own GWOs.

Nonetheless, there was an identifiable change of work assignments when WDCFs could no longer drop a form in an administrative clerk or superintendent’s box and have little further responsibility. This change took place over many years, and via many various forms of technology. It culminated with the August 4, 2014 meeting at CMS.

The District Was Under No Contractual Obligation to Meet and Confer With the Union Over This Change: By explicit direction of the CBA, the District was not obligated to meet and confer with the Union over this change. It has a unilateral right to make this kind of change, as negotiated in the District Rights section of the agreement.

The Union, in its closing brief, argues that the District violated the terms of California state law in assigning these duties to WDCFs without meeting and conferring. In this instance, the CBA does not address the issue of whether or not a grievance can be filed over violation of a state statute. No evidence

was in the record that the parties have agreed to give the arbitrator the authority to make such a determination.

Without explicit authority granted by the parties, the undersigned is unwilling to opine on whether the Employer has violated the Meyers Milius Brown Act in assigning these duties to the affected classification. This arbitration decision does not reach any conclusion in that regard.

The Union Has Failed to Meet Its Burden That the Assignment of Closing Duties was Not Done in a Prudent and Reasonable Manner: As in any allegation of contract violation that is non-disciplinary, the Union bears the burden of persuasion in this case. The Union did not bring forth into the record evidence of imprudent and unreasonable implementation by the District.

The evidence suggests the contrary. The District took many years to roll out this change. It utilized various forms of technology - including desktops, laptops and tablets – to implement the change. It instituted training for the WDCFs on many occasions and in various ways. And it transitioned the change by making it voluntary at first before insisting that WDCFs comply. Superintendents personally worked with WDCFs to assist them in learning the new methods.

The District Made Reasonable Efforts to Mitigate Any Significant Impacts Arising Out of This Change: Some significant health and safety issues arose out of the implementation of this change. WDCFs were concerned that job sites could go unsupervised while WDCFs sat in their trucks trying to process GWOs using their tablets. WDCFs also raised a concern that, in some neighborhoods in the District's service area, it was unsafe to sit alone in a District pickup truck working on a tablet while the crew worked. Doing so would potentially expose the foreman to harm from a passerby wanting to harm or steal from the District employee.

WDCFs also raised complaints about the difficulty of seeing and manipulating the program on a tablet, as opposed to a larger desktop screen.

These safety and work process concerns were raised by the Union, on behalf of the WDCFs. The concerns were brought to the highest levels of management, and management responded. The Division Manager told the WDCFs that they did not have to complete their GWOs in the field, but could wait until they returned to the office and complete the GWOs on their desktop computers. The impacts were thus mitigated.

In the Union's presentation, testimony hinted at other impacts of this change in work process. A witness testified about possible impacts on the WDCF in the area of work hours, inferring that WDCFs

did not have sufficient time to complete these duties. That same witness also testified to potential detrimental effects on the WDCF in performance appraisals. Since the WDCF now had responsibility to close GWOs, he postulated, then poor performance in this duty could result in a below standard evaluation.

The problem for the Union in this portion of the evidence is that it is too speculative to have probative value. No evidence was introduced that closing GWOs has in fact impacted WDCF working hours. And no evidence was in the record that any WDCF's performance appraisal has been negatively impacted by this change in work process.

Again, the burden is on the Union to bring forward detrimental impacts. The Employer is not required to demonstrate mitigation unless the initial impacts are brought forward.

As of the first day of this arbitration hearing, the WDCFs had been fully processing GWOs for over a year. By their own admission, they fully and completely complied with management's directive to close GWOs, either using a tablet or desktop. No evidence to the contrary was presented. With this amount of time having lapsed, the Union had adequate time to develop a list of impacts. It also had adequate time to demonstrate how the District had acted unreasonably and had not sufficiently mitigated impacts. Absent these findings, the Union has not met its burden to persuade the arbitrator that the CBA has been violated.

AWARD

1. The grievance was timely filed and is properly before the arbitrator.
2. The Employer did not violate the CBA when it required Water Distribution Crew Foremen to close out General Work Orders. The grievance is denied.



Paul D. Roose, Arbitrator

Date: June 2, 2016