Before the Arbitrator

In the matter of the Arbitration between CITY OF CHICAGO (WATER MANAGEMENT) and TEAMSTERS LOCAL 700	Work Jurisdiction Grievances Gr. Nos. 08-09-008-004, 05, 08, 09, 10, 23, 24 & 25

APPEARANCES: MARA S. GOERGES, Corporation Counsel, by MELISA SOBOTA, Assistant Corporation Counsel, appearing on behalf of the City.

KEVIN P. CAMDEN, General Counsel, appearing on behalf of Teamsters Union 700.

JOE HEALY, Assistant Business Manager and Attorney, appearing on behalf of Intervener, Laborers Local 1092.

OPINION AND AWARD

The City of Chicago, Illinois, hereinafter referred to as the City or Employer, and Teamsters Local 700,[1] hereinafter referred to as Teamsters or Local 700, are parties to a collective bargaining agreement (Agreement). The Agreement provides for arbitration of grievances involving the meaning and application or interpretation of its provisions. The parties were unable to resolve eight grievances alleging that the City was violating the Agreement by assigning certain work to employees represented by Laborers Local 1092, hereinafter referred to as the Laborers or Local 1092, and selected the undersigned, to resolve the dispute. Pursuant to Section 14.3 of the Agreement, the City notified Local 1092 of the existence of the dispute and Local 1092 elected to intervene in the proceeding, as provided in that section. Hearings were held in Chicago, Illinois on June 16 and 29, 2010, at which time the parties presented their evidence. A verbatim transcript of the hearings was prepared and all parties filed written arguments. Full consideration has been given to the evidence and arguments presented, in rendering this Opinion and Award.

[1] The terms of the Agreement were negotiated by Local 726. Local 700 is the successor to Local 726.

ISSUES

All three parties to this proceeding were able to agree that the eight grievances raise the following issues:

> Did the Employer violate the Collective Bargaining Agreement or the September 18, 2006 Side Letter and Settlement Agreement that it has with Teamsters Local 700
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> when, on January 16, 2009, it assigned a laborer to drive pick-up truck WSD 3203;
> when, on January 16, 2009, it assigned a laborer to drive pick-up truck 3220;
> when, on January 16, 2009, it assigned a laborer to drive pick-up truck WSD 3210;
> when, on January 17, 2009, it assigned a laborer to drive a pick-up truck [not identified];
> when, on January 17, 2009, it assigned a laborer to drive a pick-up truck [not identified];
> when, on March 4, 2009, it assigned a laborer to drive a pick-up truck [not identified];
> when, on March 8, 2009, it assigned laborers to drive pick-up trucks WD 3210 and 3220;
> when management assigned a laborer to drive van WD 3306 on a daily basis?
>
> If so, what is the appropriate remedy?

At the hearing, Local 700 sought to present evidence in support of its claim that the City is also violating the Agreement by assigning laborers to drive "saw trucks." The City objected, taking the position that said claim is not covered by the eight grievances and that it was not raised until the day before the first day of hearing. The arbitrator allowed the presentation of evidence on Local 700's claim, with the understanding that he would not rule on the matter if the City's objections are sustained. Thus, the City notes, the following issues are also presented:

> Whether the arbitrator has the authority to hear the Teamster's saw truck claims?
>
> If so, whether the City violated the CBA by assigning laborers to drive saw trucks?
>
> If so, what is the appropriate remedy?

THE GRIEVANCES

The eight grievances allege that the City violated of Article 14, Section 14.2 and read as follows:

> Grievance No. 08-09-088-0004
>
> **Statement of Grievance:** On 01-17-09 Laborer Otilio Serrano[2] was driving Plumber Louie Sigalos in a pickup truck to various job locations. Pickup had tools on truck. This pickup should have had a M.T.D. driving plumber not a laborer. This is traditional work of a Motor Truck Driver. These employees worked a total of 16 hours of overtime.

[2] The parties stipulated that Serrano was assigned to drive a pickup truck on January 17, 2009.

Remedy Requested: That M.T.D. Timothy Kelpsch be paid in overtime for the hours that Laborer Othilio Serrano worked doing M.T.D. traditional work driving plumber to various locations for a total of 16 hrs at time and a half. That management obey the agreement Local 726 made with Commissioner Spatz back on September 18th 2006 that non bargaining unit employees will not haul supplies and material in any vehicle.

Grievance No. 08-09-088-0005

Statement of Grievance: On 01-17-09 Laborer Robert Wronski[3] was driving Caulker T. Moskal in a pickup truck to various job locations. Pickup had tools on truck. This pickup should have had a M.T.D. driving the caulker not a laborer. This is traditional work of a Motor Truck Driver. These employees worked a total of 16 hours of overtime.

Remedy Requested: That M.T.D. Y. Mora be paid in overtime for the hours that Laborer Robert Wronsky worked doing M.T.D. traditional work driving caulker to various locations for a total of 16 hrs at time and a half. That management obey the agreement Local 726 made with Commissioner Spatz back on September 18th 2006 that non bargaining unit employees will not haul supplies and material in any vehicle.

Grievance No. 08-09-088-0008

Statement of Grievance: On 01-16-09 M.T.D. David Tummillo was assigned to drive WSD 3203. Laborer on truck was called and was told the truck would be staying out for overtime. The driver was told he was not getting the overtime and to go home at 3:30 p.m. A laborer instead took truck out.[4] The truck had tools, propane tank and a bale of straw. This is traditional work of a M.T.D. These employees work a total of 16 hours of overtime.

Remedy Requested: That M.T.D. David Tummillo be paid in overtime for the hours that the laborer worked on truck. Laborer worked to 11:00 p.m. for a total of 7½ hrs OT. Also that management obey the agreement Local 726 made with Commissioner Spatz back on September 18th 2006 that non bargaining unit employees will not haul supplies and material in any vehicle.

Grievance No. 08-09-088-0009

Statement of Grievance: Laborer Joe Cortese[5] was driving Plumber Louie Sigales on overtime Friday 01-16-09. He was driving WSD 3210 with tools. He was driving the plumber to various job locations. This has always been traditional work of a M.T.D. They both worked a total of 7½ hrs.

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[3] The parties stipulated that Wronski was assigned to drive a pickup truck on January 17, 2009.

[4] The parties stipulated that a laborer (name unknown) was assigned to drive pickup truck WSD 3203 on January 16, 2009.

[5] The parties stipulated that Cortese was assigned to drive pickup truck WSD 3210 on January 16, 2009.

Remedy Requested: That management pay M.T.D. Vidor Tancoin overtime for the hours that Laborer Joe Cortese worked doing a job of M.T.D. that is the traditional work of a M.T.D. driving a plumber to various locations. For a total of 7½ hrs at time and one half. That management obey the agreement Local 726 made with Commissioner Spatz back on September 18th 2006, non bargaining unit employees will not haul supplies in any vehicle.

Grievance No. 08-09-088-0010

Statement of Grievance: On 01-16-09 Laborer L Modesti[6] worked overtime on pickup 3220 driving Plumber R. Cooks to various locations. Truck also had tools on truck. This has always been traditional work of a M.T.D. They both worked a total of 7½ hrs.

Remedy Requested: That M.T.D. Mike Volpe be paid in overtime for the hours that Laborer L. Modesti worked doing the traditional job of a M.T.D. driving plumber to various locations. For a total of 7½ hrs at time and one half. That management obey the agreement Local 726 made with Commissioner Spatz back on September 18th 2006 that non bargaining unit employees will not haul supplies in any vehicle.

Grievance No. 08-09-088-0023

Statement of Grievance: Management every working day Monday through Friday 7:00 a.m. to 3:30 p.m. shift in the North Dist. lets a laborer drive truck WD 3306 along with a plumber on the truck. This truck leaves the North Dist. loaded with tools and supplies every day to do various jobs thru out the day. Management continues to allow this even though they know they are violating the contract Local 726 has with the City of Chicago. This is traditional work of the M.T.D. This is for the week of 03-03 to 03-07-09.

Remedy Requested: That management obey the contract that Local 726 has with the City of Chicago, as well as the agreement that was reached on Sept. 18th 2006 with Commissioner Spatz that non bargaining unit employees will not haul supplies and materials in any vehicle they operate.

Grievance No. 08-09-088-0024

Statement of Grievance: On 3-4-09 M.T.D. Bruce Randazzo took the day off from his normal shift 3 pm to 11 pm. on the night investigation truck out of the North Dist. Instead of going off the M.T.D. overtime list to replace Mr. Randazzo management told Plumber Robert Gonzales and his laborer to take a pickup truck out for the night, which they did. Vehicle was taken out with tools on the truck.[7] This has been the traditional work of a M.T.D. & should remain so.

Remedy Requested: That M.T.D. David Tummillo be paid in overtime for the hours Mr. Gonzales and his laborer worked which was from 3:30 to 11:30 pm for a

[6] The parties stipulated that Modesti was assigned to drive pickup truck 3220 on January 16, 2009.

[7] The parties stipulated that a laborer (name unknown) was assigned to drive a pickup truck on March 4, 2009.

total of 7 ½ hrs. We ask that management stop letting the plumber and laborer from taking a pickup truck out with tools to do various jobs. Agreement with Commissioner Spatz and Local 726 clearly states that this is a job of a M.T.D.

Grievance No. 08-09-088-0025

Statement of Grievance: On 3-8-09 due to heavy rains management called out for overtime two subforemans Gregory Davis and T. Kwidzinski and two laborers Lou DowiBasko and Donald Sonnenberg. Each subforeman took a laborer with him. Both subforemans took pickup trucks WD 3210 and WD 3220.[8] They were seen leaving yard with tools those pickup trucks. Management said they were just doing visual inspections for water in basements and water on streets. Our question then is what was the need for a laborer on the truck. It takes two people to do a visual inspection? This has always been traditional work of a M.T.D.

Remedy Requested: That the following M.T.D.'s David Griffith and Paris Morales be paid in overtime for the hours the subforemans and laborers worked on 3-8-09 which was from 2:00s pm to 11 pm for a total of 9 hours at double their rate of pay which is $30.70 per hr. We ask that management stop this immediately and obey the contract Local 726 has with the City as well as the agreement Commissioner Spatz made with Local 726 clearly states that this is a job of a M.T.D.

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 2
MANAGEMENT RIGHTS

The Union recognizes that certain rights, powers and responsibilities belong solely to and are exclusively vested in the Employer, except only as they might be subject to a specific and express obligation of this Agreement. Among those rights, powers, and responsibilities, but not wholly inclusive, are all matters concerning or related to the management of the Employer's operations and the administration thereof, and the direction of the working forces, including (but not limited to) the right to...hire, classify, transfer and assign work ...maintain order and efficiency...schedule the hours of work...determine the services, processes, and extent of the Employer's operation, the types and quantities of machinery, equipment land materials to be used, the nature, extent, duration character and method of operation...determine the number of employees and how they shall be employed...and work required to insure maximum efficiency of operations.... All of the provisions of this Article are vested exclusively in the Employer, except as expressly abridged by a specific provision of this Agreement.

* * *

[8] The parties stipulated that subformen Gregory Davis and T. Kwidzinski and laborers Lou Dowibasko (sp?) and Donald Sonnenberg were assigned to drive a pickup truck numbers WD 3210 and WD 3220 on March 8, 2009.

ARTICLE 11
DISCIPLINE AND GRIEVANCE/ARBITRATION

Section 11.3 Grievance and Arbitration

Except as in disciplinary provisions of Section 11.1 and 11.2 above, a difference, complaint or dispute (hereinafter called a grievance) between the Employer and the Union or any of the employees of the Employer it represents, arising out of the circumstances or conditions of employment, shall be exclusively settled in the following manner.

* * *

Step I – IMMEDIATE SUPERVISOR

A. The employee or the Union shall put the grievance in writing on the form to be supplied by the Employer upon request, but in the absence of such a form, employee or the Union may submit the grievance in letter form, within twelve working days of either the employee or the Union having knowledge of the event which gives rise to the grievance. The employee or the Union will indicate what section and part of the Agreement is in violation, a brief description of the facts underlying the grievance, and requested remedy, and submit the grievance to the employee's immediate supervisor. It is understood that if the employee has knowledge of the grievance more than twelve working days than the Union, the Union shall not thereafter file any grievance concering that same issue with the Employer.

Step III – ARBITRATION

If the matter is not settled in Step II the Union or the Employer, but not an individual employee or employees, may submit the dispute to arbitration....

* * *

An arbitrable matter must involve the meaning and application or interpretation of a specific provision of this Agreement or a document incorporated by reference thereto. The provisions of this Agreement and any other document incorporated by reference in this Agreement shall be the sole source of any rights which either party may assert in arbitration. Questions of arbitrability shall be decided by the arbitrator. The arbitrator shall have no power to amend, add to, subtract from, or change the terms of this Agreement, and shall be authorized only to interpret the existing provisions of this Agreement and apply them to the specific facts of the grievance or dispute.

The decision of the arbitrator shall be based wholly on the evidence and arguments presented to him by the parties in the presence of each other. No arbitration hearing shall be held unless both parties are present. The decision of the arbitrator shall be final and binding on all parties to the dispute, including the employee or employees involved. Where timeliness is in dispute, it shall be decided by the arbitrator.

ARTICLE 14
MISCELLANEOUS

Section 14.2 – Traditional Work

Any work which has been traditionally performed by employees who are represented by the Union shall continue to be performed by said employees, except where non-unit employees have in the past performed unit work, or in emergencies, to train or instruct employees, to do layout, demonstration, experimental, or testing duties, to do troubleshooting or where special knowledge is required, provided however, where employees do not report to work because of vacations, or other absences or tardiness, or for personal reasons during the course of the day, or because all of the employees are or will be occupied with assigned duties, or to complete a rush assignment, employees of any other unit represented by another union will not perform the work of said employees. For example, if a Motor Truck Driver is on vacation, a Plumber shall not be assigned as a replacement Motor Truck Driver. The Employer shall not arbitrarily extend the period of any emergency beyond the need for that emergency.

* * *

Section 14.3 – Jurisdictional Disputes

In the event that the Union files a grievance claiming that the Employer has violated the terms of this Agreement by assigning certain work to City employees represented by another union, or where the Employer receives a grievance from another union protesting the assignment of work to employees covered by this Agreement, the Employer shall serve written notice to the Union, and on the other affected union(s), of the existence of said dispute. This notice shall describe the nature of the work in dispute.

In the event this dispute remains unresolved and is submitted to arbitration, the provisions of Article 11 herein regarding arbitration of grievances shall apply, except that in addition to the Employer and the Union, the other affected union(s) shall have the opportunity to participate in the hearing and to present evidence, but shall not be bound to the results of that arbitration unless all parties so agree in advance of the hearing.

* * *

RELEVANT PROVISION OF SETTLEMENT AGREEMENT
Dated September 18, 2006

The following reflects the agreements reached by the parties at our meetings over the past several months:

* * *

2. Non-bargaining unit employees will not haul supplies and materials in any vehicle they operate, or by use of a trailer, with the exception of barricades and generators, unless there is a bona fide emergency which prevents the department from using a driver. (Grievance nos. 08-05-

088-0126, 131, 132, 133, 08-06-088-0003, 6, 7, 12, 15, 19, 20, 22, 23, 27-31, 33, 34, 35, 37, 38, 43, 45, 52, 55, 56, 59, 63, 64).

* * *

The agreements set forth above resolve the grievances as noted. These agreements are not to be construed as an admission of liability by or an admission of the legal position of any party, shall not in any way be construed as setting any precedent, and shall not be used, referred to or cited in any arbitration, court or administrative proceeding except as may be necessary to enforce specific provisions of this agreement.

BACKGROUND

Prior to 2003, the City maintained a Water Department and Sewer Department as separate departments. In 2003, the City began taking the steps necessary to merge the two departments to form the Department of Water Management. Prior to the merger, the Water Department did not utilize any pickup trucks to carry out any of its functions. The Sewer Department did utilize pickup trucks to carry out certain of its functions.

In the 1970's the Sewer Department owned four, 4-door pickup trucks that were driven by motor truck drivers (MTDs) represented by the Teamsters. The 4-door pickup trucks were used to transport crews, tools, equipment, supplies and materials needed to answer complaints, rod catch basins, clean out gutter boxes, and respond to citizen complaints. In the mid 1980s, the Sewer Department disposed of the 4-door pickup trucks and purchased larger, more sophisticated 4-door trucks, known as Advanced Complaint Trucks (ACTs) for use in performing those functions. MTDs were assigned to drive the new ACTs and they are still driven by MTDs. The operation of ACTs is not in dispute in this case.

Starting in 1998, the Sewer Department began to purchase 2-door pickup trucks, hereinafter referred to simply as "pickup trucks." The new pickup trucks were used to perform functions that were different than the functions that had been performed by the 4-door pickup trucks, now performed by the ACTs. Initially, the Sewer Department purchased and began using four pickup trucks as "Barricade Trucks" to haul barricades to and from worksites[9] Laborers were assigned to drive the Barricade Trucks.

Beginning in 2000, the Sewer Department started utilizing pickup trucks for other purposes. The use of pickup trucks for those other purposes continued and expanded after the merger. In particular, the newly created Department of Water Management began using pickup trucks in order to carry out its newly introduced, "Rapid Response Program."

Under the Rapid Response Program, the Department assigns a laborer from the "sewer side" to drive a pickup truck, referred to hereinafter as a "Rapid Response truck," accompanied by a plumber or

[9] Prior to the merger, the Department of Water contracted out the performance of that function.

caulker from the "water side." The Rapid Response trucks are dispatched to the site of a complaint, such as a flooded basement or street, where the two-person crew assesses the situation. The crew may attempt to correct the problem if it is a simple one and has not resolved itself. Otherwise they report back that the problem requires the dispatch of a regular crew on a specialized piece of equipment.

In recent years, the Department also began utilizing a much larger, strait truck, known as an "investigation truck," to respond to complaints. Investigation trucks are driven by a MTD and carry a crew needed to deal with serious water problems. Unlike the Rapid Response trucks, they carry the equipment necessary to shut down the water and perform temporary repairs.

In the North District, the Department has been utilizing a van (WD 3306) to function as a Rapid Response truck. The assignment of a laborer to drive that van is the subject of Gr. No. 23. All of the other grievances deal with the assignment of a laborer to drive pickup trucks.

The evidence indicates that, since they were first introduced, the pickup trucks utilized by the Department have been driven by laborers on most occasions. The central dispute in this case arises out of Local 700's claim that the Department's practice in that regard exceeds the terms of an agreement reached on September 18, 2006 (quoted above), settling numerous grievances, including approximately 30 dealing with the assignment of "non bargaining unit employees" to drive pickup trucks.

One of those grievances (08-06-088-0037) was introduced into evidence. It alleged violation of Section 14.2 – Traditional Work, and read in relevant part as follows:

> **Statement of Grievance:** On 5-18-06 around 10:15 am Truck WD 3209 that Laborer Carlos Torres was driving was seen in Water Management Pipe Yard F at 31st and Rockwell with the plumber that was with him. They were in the yard picking up supplies and left the yard with eight (8) hydrant heads for fire hydrants on the truck. This is a violation of the contract that Local 726 has with the City of Chicago.
>
> **Remedy Requested:** That management needs to obey the contract that the City of Chicago has with Local 726. If management wants to use pickup trucks to do this kind of work it must have a Motor Truck Driver driving pickup.

September 18, 2006 Settlement Agreement

In 2006, representatives of the Department met with representatives of Local 726 on a number of occasions, in a joint effort to resolve a backlog of grievances and other issues. The result was a two-page, side letter of agreement, consisting of nine separate paragraphs. Paragraph 2, quoted above is the only paragraph relevant to the dispute in this case.

John Spatz, then Acting Commissioner for the Department of Water Management, represented the Department during the negotiations. He was assisted by Assistant Commissioner Maureen Egan. Thomas Clair, then Secretary Treasurer of Local 726 represented the Teamsters. He was assisted by Ken Brantley and Bill McTigue, a Business Agent.

According to Egan the parties met on September 17, 2006, the day before Spatz and Clair signed the side-letter of agreement. She took notes of that meeting. According to her notes, Clair made a statement at one point, that she recorded as follows:

> "Laborers driving toolboxes, hauling materials is our job. We gave up pickups and vans. Barricade truck is problem – have drivers now."

Egan states that it is her understanding, based upon this statement, recorded in her notes, and her own recollection, that Clair was claiming that laborers were hauling toolboxes, materials and supplies, which was work that belonged to Local 726 drivers, while noting that Local had "given up," to the laborers, the driving of pickups and vans.

Egan states that the parties never discussed the meaning of the term "materials and supplies," and that she did not recall any discussion of "tools" as such. She states that the term "toolboxes" referred to large boxes of tools, with wheels, that are hooked on to the back of a truck and hauled to and from a worksite.

Egan states that she drafted the side letter, with input and assistance from Bentley and the attorney for Local 726, Jim Green.

On cross-examination Egan acknowledged that no representatives of Local 1092 were present during the negotiation of the terms of the side letter and that the side letter does not specifically state that Local 726 "gave up" the driving of pickups and vans. Egan states that, during the negotiations that preceded the 2003-2007 Agreement, the parties reached a separate agreement wherein Local 726 "gave up" the driving of vans. However, she acknowledged, that agreement is not among the four side letters attached to the current Agreement and she could not point to any written document that so states. When questioned by counsel for Local 1092, she agreed that the "more common practice" was to not incorporate side letters into the Agreement.

Testimony of Witnesses

The Department currently operates out of three Districts in the City of Chicago, now known as the North District, the Central District and the South District. All three parties called witnesses to testify concerning their understanding of the practices within the Department with

regard to the use of pickup trucks and the assignment of personnel. In addition, two of the City's witnesses testified more specifically concerning the practices within the Department in arranging for the transport of materials and supplies, equipment and tools.

The Teamsters called three witnesses: Robert Gaynor, an MTD who has generally worked (on the "sewer side") in areas now included in the Department's North District and signed all of the grievances; Patrick Johnston, an MTD who has spent his entire career in the areas now included in the Department's South District; and Pete Giannola, an MTD in the South District who has worked in various districts over the years.

The City called five witnesses in addition to Egan: John Rolssler, a Foreman of Construction Laborers with experience in the North District; James Tavolino, a Foreman of Construction Laborers with experience in the Central District; Brian Konkaleski, a Foreman of Construction Laborers with experience in the South District; James Howell, Materials Dispatcher; and Luci Cozzi, Assistant Commissioner in the Bureau of Operations and Distribution.

The Laborers called two witnesses: Theodore Flisk, Secretary Treasurer; and Carol James, Business Manager.

TEAMSTER'S POSITION

The Settlement Agreement

- The settlement agreement set out in paragraph 2 of the September 18, 2006 side letter addresses and resolves the dispute in this case in the Teamsters favor. That settlement makes explicit reference to multiple grievances dealing with non-Teamsters driving pickup trucks. The grievances were nearly all the same as Gr. No 08-06-088-0037. It alleged that the Employer violated the traditional work provision of the Agreement when a laborer, accompanied by a plumber, was observed in the Water Management Pipe Yard F at 31st & Rockwell "picking up supplies," and that they "left the yard with eight (8) hydrant heads for fire hydrants on the truck."

- The wording of Paragraph 2 is clear and unequivocal. It states: "Non-bargaining unit employees will not haul supplies and materials in any vehicle they operate, or by use of a trailer, with the exception of barricades and generators, unless there is a bona fide emergency which prevents the department from using a driver."

- The Employer may argue that the provisions of the side letter are of limited value because of the statement that its provisions may not be cited in any arbitration, ""except as necessary to enforce the specific provisions of this agreement." However, the testimony of Teamster witnesses establishes that the terms of the settlement agreement were violated on occasions when non-Teamsters were observed hauling materials, tools and equipment in pick up trucks. The Employer has continued and repeated the conduct that was the

subject of the grievances covered by the settlement agreement. To deny the agreement its effect, would undo the settlement and undermine the internal dispute settlement procedure. See *Practice and Procedure in Labor Arbitration*, 3rd Ed., Schoonhoven, BNA 1991, p. 103.

- In *City of East Cleveland and District* 925, 115 LA 1663 (2001), Arbitrator Thomas Skulina held that the employer violated a settlement agreement when, claiming that it had made an error, it failed to provide an employee with 160 hours of vacation benefits it had agreed to as part of the settlement agreement. The arbitrator held that the settlement agreement was binding since the employer's agent had the authority to enter into the agreement and it was not contrary to public policy or law.

- Grievance settlements ought not be disturbed in the absence of a conclusive showing of changed conditions. *How Arbitration Works*, Elkouri & Elkouri, 5th Ed., (1997 BNA), p. 292. When a grievance is settled by mutual agreement of the parties and the same issue that was involved in the settled grievance arises in the guise of another grievance, the prior settlement should constitute a binding precedent. *Id.*, see also, Volz at 91 LA 744 and McCoy at 49 LA 82.

- As an alternative defense, the City argues that there was a "bona fide emergency" due to weather conditions on January 16-17, 2009 and March 4-8, 2009. The City did not claim that the emergency exception was applicable when the assignments were made or when the grievances were filed, and it ought not be permitted to do so for the first time at the hearing. See Schoonhoven, at p. 94 and *Borg-Warner Corp and Allied Industrial Workers*, 27 LA 580, (Meltzer 1956) cited therein, where it was held that the union could not advance a new theory of the grievance for the first time at the hearing. The same reasoning should apply to the Employer in this case. It undermines the grievance process and gives the other party inadequate notice of the issue being raised.

- In this case the Employer is asking the Arbitrator to consider parol evidence in his interpretation of the settlement agreement. Through Egan, it offered evidence in an effort to give special meaning to the words "supplies and materials." Such evidence should be excluded from consideration. The language of the settlement agreement is clear and unambiguous. In the absence of evidence that the words chosen by the parties have some special, technical meaning, or that unreasonable consequences will follow, the words chosen by the parties should be given their ordinary meaning.

- In fact, Egan's testimony is not helpful. Based on her notes, Egan testified that Clair stated, "Laborers driving toolboxes, hauling materials is our job...." She testified that the "toolbox" Clair was referring to was a "toolbox on wheels that's hauled by another vehicle." On cross-examination she insisted that such a toolbox is different than a "trailer," but could not recall what the parties were referring to when they used the word "trailer" in the settlement agreement.

- Similarly, Egan could not offer any assistance in establishing when or how the Teamsters allegedly gave up driving pickups and vans. Egan testified on the first day of hearing. Fourteen days elapsed between the first day and the second day of hearing. During that time, she could have found any documents to support that claim and she failed to do so.

- If the Arbitrator finds that it is necessary to rely on parol evidence, the testimony of the Employer's Materials Dispatcher, Howell, is far more instructive. He testified that the term "materials" includes sand, bricks and stone, and that laborers do not drive trucks carrying materials. The instant grievances involve trucks carrying tools and materials. The "traditional work" of teamsters is to drive vehicles carrying tools and materials.

Prior Cases Interpreting and Applying Section 14.2

- On July 20, 1990, in a case arising in the Water Department involving the jurisdictional claim of Cement Masons' Local 502, Arbitrator Elliot Goldstein discussed the meaning of the reference to "traditional work" in Section 14.2. The case involved the assignment of certain cement finishing work to employees represented by Bricklayers Local 21. The evidence disclosed that the bricklayers had traditionally performed the cement finishing work in question. In that case, the arbitrator rejected the arguments of Local 502 that, instead of relying on the evidence concerning the historical practice in the Water Department, consideration should be given to evidence of the practice in the Department of Streets and Sanitation and the traditional craft jurisdiction and skills possessed by cement masons in the private sector. Arbitrator Goldstein held that "traditional work" is defined by the City's actual practice with respect to the assignment of specific work in the City department at issue and denied the claim of Local 502.

- In a second case decided by Arbitrator Goldstein on July 19, 2000, he applied the same definition. In that case, the City's Department of Transportation decided to assign the operation of Bobcats to break up sidewalks to employees represented by Cement Workers' Local 76. Prior to the introduction of the use of Bobcats to perform the work, employees represented by Local 76 had performed the task of breaking up old sidewalks using jackhammers, picks and sledgehammers. The Operating Engineers argued that the task of breaking up sidewalks with Bobcats should be assigned to them. Arbitrator Goldstein found the Operating Engineers' claim that they should be assigned to operate the Bobcats to be unconvincing, because traditional work claims are based on the historic performance of specific work rather than the use of a certain piece of equipment.

- In his 2000 decision, Arbitrator Goldstein identified three fundamental points in his analysis of traditional work: (1) traditional work is based on historical practice; (2) the determination of what is traditional work is based on a narrow grant of jurisdiction, not a broad-based craft analysis or even a department-wide analysis; and (3) the traditional work provision deals with the continuation of existing work assignment practices, not the assignment of work not previously performed.

- In the meantime, on May 20,1998, in a case arising in the Water Department involving a work jurisdiction claim of Teamsters Local 726, Arbitrator Herbert Berman likewise discussed the meaning of the reference to "traditional work" in Section 14.2. In that case, Teamsters Local 726 took the position that the task of operating snowplows at the Jardine Water Plant should be assigned to MTDs rather than members of Operating Engineers Local 399. Arbitrator Berman denied the claimof Local 726, based on his finding that employees represented by Local 399 had performed the work in question for at least 20 years, using small snowplows. He found that there was no need to find that the practice

was mutually established. The only question was whether the work at issue was historically performed by members of Local 399.

Application of Section 14.2

- Application of the principles established in these three, prior cases to the facts in this case, requires a finding in favor of Local 700. The evidence establishes:
  - Prior to the merger, Teamsters were driving whatever version of pickups the City was using. Tavalino was clear in his testimony that 4-door pickups were driven by Teamsters in the late '70s. When the ACTs were brought into the Sewer Department to replace the 4-door pickup trucks they were driven by Teamsters.
  - Johnston was clear in his testimony that "investigation trucks" were driven by Teamsters long before the merger.
  - Teamsters have been assigned to operate "complaint trucks," ACTs, "investigative trucks," and—at least in the North District—the new "saw truck."
  - It would appear that, as Giannola admitted in his testimony, laborers have been assigned to drive "barricade trucks" since the mid-90s.
  - While Employer witness Rossler testified that Teamsters never drove "saw trucks" in the Central Division, Tavalino testified that laborers only took saws out in emergencies, using "pie wagons."
  - While there was little testimony about the driving of "materials trucks," Gaynor's testimony about laborers driving loose sand around was unrebutted.
- The situation involving the use of vans and pickups for the Rapid Response Program is more difficult to understand:
  - In the case of vans, the witnesses all confirmed that Teamsters sometimes drive the vans, when another truck is down or to haul drivers. However, the testimony does not establish how often vans are used as Rapid Response trucks, or who does a majority of the driving.
  - Rapid Response trucks are a whole new classification of trucks, put into service in mid-2008 or 2009, according to Employer witness Cozzi. Prior to the use of pickup trucks as Rapid Response trucks for trouble-shooting or initial response, the "complaint trucks", ACTs, and "investigation trucks" performed the same jobs. Thus, the only way to determine the "past practice" regarding Rapid Response trucks, is to look at the assignment of work on the "complaint trucks", ACTs, and "investigation trucks." The evidence indicates that they were driven by an MTD, carrying a laborer, perhaps a sub-foreman and/or an engineer. Thus, following the "two-step" analysis employed by Arbitrator Berman, the work performed by the Rapid Response trucks in the past, i.e., investigation of complaints about water in the street, clogged catch basins, water in the basement, was performed by "complaint trucks", ACTs, and

"investigation trucks" and the work of driving the Rapid Response trucks belongs to the MTDs.

- This analysis is consistent with the chronology of events leading up to the dispute in this case. A settlement was reached in 2006, dealing with the Teamsters' jurisdiction over the driving of vehicles with tools and materials on them. The use of Rapid Response trucks and vans was implemented later, in mid-2008 or 2009, and gave rise to the grievances in this case. They were not covered by the settlement agreement and there was no historical evidence of jurisdiction over them. The operation of the pickups by laborers as Rapid Response trucks was grieved in 2009, perhaps inarticulately, when it became clear that Laborers were driving them.

- There is evidence of a continuation of the past practices as well. Teamsters have continued to drive "complaint trucks," ACTs, "investigative trucks," and (in the North District) the saw truck. Laborers have been and are continuing to drive the "barricade trucks."

- The settlement agreement "carved out" the operation of the "barricade trucks" and the "generator trucks." While the frequent references in the record to pickup trucks being driven by laborers might lead one to conclude that laborers "always" drive the pickup trucks, an analysis of the testimony shows that is not the case:

    - Teamsters historically have driven 4-door pickup trucks, crew cab pickups, complaint trucks, ACTs, investigative trucks, as well as the myriad of heavy trucks, i.e., 5 and 10-ton dump trucks, orange peels, vactors, etc.

    - There is no evidence that laborers have historically driven the Rapid Response trucks because the program is relatively new. On the other hand, the evidence supports a finding that the work of driving the Rapid Response trucks should be assigned to the Teamsters, because they historically have been assigned to drive "complaint trucks," ACTS, and "investigative trucks." Finally the task of driving the saw trucks should be assigned to an MTD, at least in the North District.

- The grievances should be sustained and the work in question should be treated as traditional work belonging to the Teamsters.

CITY'S POSITION

- Local 700 is alleging that the City violated the Agreement when it assigned laborers to drive pickup trucks on January 16 and 17, 2009, March 4 and 8, 2009, and when it assigned a laborer to drive van number 3306 on a daily basis. Local 700 bears the burden of proving those allegations and it has failed to meet its burden of proof. Specifically, Local 700 has filed to prove that the driving of pickup trucks or the driving of pick up trucks and vans being used as Rapid Response trucks is "traditional work" within the meaning of the Agreement.

- Local 700 has failed to meet its burden of proof, because none of the work at issue in this proceeding has ever been "customarily and consistently" assigned to MTDs "over a significant period of time." See Berman award, at p. 21. On the contrary, the evidence shows that the work has been "customarily and consistently" assigned to employees represented by Local 1092.

- Local 700 has also failed to prove that the City has violated the settlement agreement in Paragraph 2 of the September 18, 2006 side letter. In fact, during the negotiations over the terms of that settlement agreement, the Teamsters conceded any claim to jurisdiction over the driving of pickup trucks, except when they are being used to haul supplies and materials. None of the work at issue in this case involved the use of pickup trucks to haul supplies or materials.

- The Arbitrator should disregard Local 700's claim that the driving of "saw trucks" should be performed by MTDs. That claim was raised for the first time at the hearing. The driving of "saw trucks" is not covered by any of the grievances in this case, and may in fact be covered by other pending grievances.

Pickup Trucks

Section 14.2-Traditional Work

- As Arbitrator Daniel Nielsen observed in his recent award involving the grievance filed by Local 700 against the Department of Fleet Management, decided on August 15, 2010, the question of what constitutes traditional work and the scope of the exception where non-unit employees have performed the work in the past, are not "issues of first impression." Those questions have been dealt with in the prior decisions of Arbitrator Goldstein and Arbitrator Berman.

- It is undisputed that employees represented by the Teamsters traditionally drive vehicles that are used in the Department. However, the work at issue in this proceeding involves the driving of pickup trucks that are not hauling supplies and materials. It is a prime example of work covered by the exception included in Section14.2, where the work at issue has been performed by non-unit employees, in this case laborers.

- Arbitrators Goldstein and Berman have held that in order for work to be considered traditional work of a particular union, the exact work at issue in the case must have been traditionally performed by that union. The evidence discloses that the work of driving pickup trucks for purposes other than carrying supplies and materials (not including propane and barricades) has traditionally been performed by laborers.

- In his 1990 decision, Arbitrator Goldstein held that, in a case involving application of the traditional work provision, the focus of the analysis must be on the actual work performed by the employees not on the traditional boundaries of the work in the abstract. Arbitrator Berman defined traditional work as the kind of work the Employer has "customarily and consistently assigned to bargaining unit employees over a significant period of time." Arbitrator Berman also held that the occasional assignment of traditional work to non-

bargaining unit employees does not justify the continued assignment of that work to the non-bargaining unit employees. Finally, in his 2000 decision, Arbitrator Goldstein noted that the Teamsters agreed in that case that a nitch had been carved out of its traditional work of driving vehicles, for other trades to drive small vehicles to transport hand tools and small amounts of supplies and materials.

- In the 1998 case decided by Arbitrator Berman, Local 726 had argued that in the past, only MTDs had driven snowplows throughout the City. He held, "it is irrelevant whether the contested work falls within the traditional 'craft or jurisdictional lines' of employees in either bargaining unit...the only question relevant to resolution of this grievance is whether Operating Engineers have operated the small snowplows in question at the Jardine Plant." He found that employees represented by the Operating Engineers had traditionally operated the snowplows at the Jardine Plant and that the City did not violate its agreement with Local 726 by continuing to assign the work to employees represented by the Operating Engineers.

- In this case the Teamsters claim that the City violated Section14.2 by assigning laborers to drive pickup trucks WD 3203, 3220 and 3210 with tools in the trucks, which the Teamsters claim is traditional work of MTDs. However, the evidence establishes that laborers have traditionally driven the pickup trucks ever since they were introduced.

- The testimony at the hearing established that prior to the merger in 2003, the Water Department did not have any pickup trucks, but the Sewer Department did. In the Sewer Department, the pickup trucks were exclusively driven by laborers prior to the merger. After the merger, the Department of Water Management acquired additional pickup trucks for use in each district. Since then, the pickup trucks have been driven exclusively by laborers in all but the North District. In the North District, MTDs are occasionally put on pick up trucks WD 3203, 3220 or 3210, but only when the North District has more MTDs than it has work available.

- The fact that an MTD is occasionally assigned to drive a pickup truck in the North District does not require a different conclusion. Nor does it justify the continued assignment of that work to non-bargaining unit employees.

- The testimony of Teamster witnesses not only failed to prove that driving the pickup trucks was their traditional work, they acknowledged that the work had been performed by laborers for a long time. Johnston testified that driving the pickup trucks had always been done by laborers because the Teamsters did not need the pickup trucks.

<u>September 18, 2006 Settlement Agreement</u>

- The question of whether or not laborers are permitted to drive pickup trucks has already been discussed and was the subject of a settlement agreement in 2006. In the discussions that led to that agreement, the Teamsters conceded that they "gave up the pickups and vans." In the settlement agreement itself, the Teamsters in effect acknowledged that non-

bargaining unit persons were allowed to drive the pickup trucks and vans as long as they were not hauling supplies and materials (not including barricades and generators).

- Although the parties did not define what is meant by supplies and materials, the evidence established that they consist of items like large toolboxes that are hauled on a trailer to a job site, sand, stone, pipe, manhole covers, lids and the like. In fact, the Department does not transport supplies and materials in pickup trucks.

- In the grievances, the Teamsters contend that the City is violating the terms of the settlement agreement by allowing laborers to drive pickup trucks with "tools" in them. However, the issue that was covered by the settlement agreement was the hauling of toolboxes; it did not involve laborers driving pickup trucks with "tools" in them. Furthermore, at the hearing, the Teamsters failed to produce any evidence establishing what "tools" were referenced in the grievances or why they constituted "supplies and materials."

- For these reasons, Local 700 has failed to prove that the City violated the terms of the settlement agreement and the grievances should be denied in their entirety.

Emergency Exception

- Even if the Arbitrator were to conclude that the driving of pickup trucks is traditional work belonging to the Teamsters and that the "tools" referred to in the grievances were supplies and materials within the meaning of the settlement agreement, the Department did not violate the Agreement or the settlement agreement when it assigned laborers to drive pickup trucks on January 16 and 17, 2009 and March 4 and 8, 2006. Section 14.2 and the settlement agreement both make exceptions for work assignments in the case of emergencies. The evidence establishes that the City was faced with weather emergencies on all of those dates.

- On January 16 and 17, 2009 there was a deep freeze emergency. On those dates, the Department needed to send laborers out on pickup trucks to deal with an excessive number of complaints about problems caused by the cold weather. On March 4 and 8, 2009, the Department was faced with a rain emergency and needed to send laborers out on pickup trucks to deal with the resulting complaints.

Rapid Response Vehicles

- The Teamsters also failed to prove that the MTDs have traditionally driven the vehicles used in the Rapid Response Program, which includes van WD 3306. The driving of Rapid Response vehicles is not traditional work under Section 14.2, because Teamsters have never driven the vehicles used for that purpose.

- Arbitrators Berman and Nielsen have both stated that, in order for work to be considered traditional work of a particular union, the employees represented by that union must have traditionally performed the exact work at issue in the case. Since the work at issue in this

case (driving the Rapid Response vehicles) has always been performed by laborers, it falls within the exception in Section 14.2.

- In the alternative, even if it is concluded that the driving of Rapid Response vehicles is not traditional work belonging to employees represented by the Teamsters or the Laborers, it is "new work," and the City has the right to assign new work as it deems appropriate, so loan as it does not act arbitrarily or capriciously. In his decision in 2000, Arbitrator Goldstein held that Section 14.2 does not capture new work. He stated, "the assignment of tasks is generally considered a core managerial prerogative, and added, "absent evidence that the determination was arbitrary, capricious or unreasonable, there is no basis for the Arbitrator to second guess the decision."

- When the City assigned the task of driving the Rapid Response vehicles to laborers, it did so for reasons that were not arbitrary, capricious or unreasonable.

- The Department started the Rapid Response Program in order to quickly respond to 311 complaints. The City did not have the program, of anything like it, prior to the creation of the 311 system in 1999. The Department had a perfectly legitimate reason for assigning a laborer to drive the Rapid Response vehicles. The idea behind the program is to send out a laborer with Sewer Department knowledge and a plumber or caulker with Water Department knowledge to investigate complaints to determine what the issue is and inform the Department of what is needed to resolve the problem. Doing so is much more efficient than sending out a big truck and crew to investigate 311 complaints. This was especially true because there has been an increase in the number of 311 complaints since the merger. Each district has one Rapid Response vehicle assigned to it. The Rapid Response vehicles assigned to the Central District and the South District are pickup trucks; the Rapid Response vehicle assigned to the North District is a van (WD 3306).

- It is undisputed that, since the inception of the Rapid Response Program, laborers represented by Local 1092 have driven the vehicles used in that program. That includes van WD 3306, which is the subject of Grievance No. 08-08-088-0025. That grievance should be dismissed along with the others.

The Saw Trucks

- Local 700 claims that driving a pickup truck with a saw on it is traditional work under Section 14.2. That claim should be disregarded by the Arbitrator. It was not raised by Local 700 until the day before the hearing.

- None of the grievances makes reference to a pickup truck with a saw on it or a "saw truck." That is required by Step I A in Section 11.3 of the Agreement. It specifically states in relevant part that in the grievance, "the Union will indicate what Section and part of the Agreement is in violation, a brief description of the facts underlying the grievance...."

- In Elkouri and Elkouri, How Arbitration Works, (BNA 6th Ed. 2003), p 298, it is stated: "If a new issue arises at arbitration, an arbitrator ordinarily will refuse to consider the new matter over the objection of the other party." In addition, it is stated that arbitrators will generally only agree to hear new claims if they "involve only a modified line of argument, an additional element closely related to the original issue, refinement or correction of the stated grievance, or introduction of new evidence, as long as the opposing party has had a fair opportunity to prepare to meet the claims." In this case, Local 700 has raised a completely new issue on the eve of the hearing and the city did not have a fair opportunity to prepare.

- Further, the written statement of the issue presented to the Arbitrator for consideration makes no reference to saw trucks. Step III in Section 11.3 of the Agreement clearly states that the Arbitrator is only to interpret the existing provisions of the Agreement and "apply them to the specific facts of the grievance or dispute." Any evidence or arguments regarding saw trucks is well beyond the scope of the grievances and should be disregarded for that reason as well.

- In the alternative, even if the Arbitrator gives consideration to Local 700's claim regarding saw trucks, that claim should be rejected. As was the case with its other claims, Local 700 has failed to prove that driving saw trucks is work that has been "customarily and consistently" assigned to employees represented by Local 700, such that it should be considered traditional work. The evidence is overwhelming to the effect that laborers have customarily and consistently driven the pickup trucks, with or without saws on them. The occasional assignment of traditional work to non-bargaining unit employees does not justify the continued assignment of such work to non-bargaining unit employees. Thus, even if MTDs in the North District have recently been assigned to drive a pickup with a saw on it occasionally, that does not cause it to be traditional work belonging to MTDs. or justify the continued assignment of such work to MTDs.

- The Teamsters failed to provide any evidence to prove that the City violated the Agreement. Therefore, for all of the above stated reasons, the Arbitrator should deny the grievances in their entirety.

INTERVENER'S POSITION

- Driving the pickup trucks in the Department of Water Management is "traditional work" within the meaning of the Section 1.2 of the agreement between Laborers Local 1092 (and two other locals) and the City. Its terms are similar to the terms found in Section 14.2 in the agreement between Local 700 and the City.

- The provisions in Section 1.3 in the agreement between the Laborers and the City are similar to Section 14.3 of the agreement between Local 700 and the City and reads in relevant part as follows:

Section 1.6 Jurisdictional Disputes

...where the Employer receives a grievance from another union protesting the assignment of work to employees covered under this Agreement, the Employer shall serve written notice to the Union, and on the other affected union(s), of the existence of said dispute. This notice shall describe the nature of the work in dispute.

In the event this dispute remains unresolved and is submitted to arbitration, the provisions of Article 4 herein regarding arbitration of grievances shall apply, except that in addition to the Employer and the Union, the other affected union(s) shall have the opportunity to participate in the hearing and to present evidence, but shall not be bound to the results of that arbitration unless the parties so agree in advance of the hearing.

- The testimony at hearing establishes that, with few exceptions, members of Local 1092 have driven the pickup trucks since they were first introduced. Prior to the merger there were no pickup trucks in the Water Department. There were some pickup trucks in the Sewer Department before the merger, and they were driven by members of Local 1092. Since the merger, members of Local 1092 have driven all of the pickup trucks in the Department of Water Management.

- There are three reasons why the settlement agreement set out in Paragraph 2 of the side letter between the City and Local 700 does not apply to the dispute in this case. First, the trucks that are the subject of the grievances were not carrying supplies or materials. According to the grievances they were carrying "tools." Second, the evidence of past practice indicates that laborers have always driven pickup trucks with tools in the beds. And third, the terms of the side letter are not binding on the Laborers, because they were not a party to the negotiations.

Applicability of the Side Letter

- Local 700's reliance on the terms of the settlement agreement is misplaced. The Teamsters and the City cannot unilaterally agree to give work to another union.

- Section 1.1 of the agreement between the Laborers and the City states, "the Employer will not assign bargaining unit work including all work currently being done by members of the bargaining units to the jurisdiction of another bargaining unit (Local, Coalition, or City) without the mutual, written agreement of the Unions involved except as provided in Section 1.2." If the ruling in this case were to state that the City has violated the terms of the side letter, it will give rise to a cause for grievance by the Laborers, based on the "traditional work" provision (Section 1.2) and other provisions of the agreement between the Laborers and the City.

- In addition, the terms of the side letter do not support the Teamster's position in this case. In the grievances in this case covering the dates of January 16 and 17 and March 4 and 8,

2009, the Teamsters allege that there were "tools" on the trucks. Examination of the side letter discloses that Paragraph 2 does not address pickup trucks with tools on them. Further, Egan's testimony stands without contradiction to the effect that the Teamsters agreed during the negotiations leading up to the side letter that driving pickup trucks was the jurisdiction of the Laborers and that tools are different than supplies and materials.

- The grievances state that the pickup trucks had "tools" on them. They do not allege that they were carrying "supplies and materials." The testimony clearly demonstrates that "supplies and materials" consist of such items as sand, concrete, stone, etc. Items such as barricades, propane, shovels and other tools are not "material and supplies."

Efficiency

- Several of the grievances imply that a laborer should not be on the truck at all. The evidence demonstrates that the presence of a laborer on the truck is necessary, not just because driving pickup trucks falls within the traditional work belonging to employees represented by Local 1092. The laborer brings specific knowledge of the sewer system. That knowledge, combined with the plumber's knowledge of the water system is what allows the pickup tucks to efficiently and productively respond to complaints.

- Efficiency can be deemed a dispositive factor in deciding jurisdictional disputes between unions. Elkouri & Elkouri, *How Arbitration Works*, (BNA 6th Ed. 2003), p. 693.

- The evidence shows that MTDs are only assigned to the pickup trucks when there are extra MTDs present on a given day. If a MTD is assigned to a pickup truck, as sometimes happens in the North District, and there is a need for overtime, the laborer is assigned to drive the truck and the MTD is sent home. It makes sense for the Department to assign a MTD to the truck if there are an excess number of MTDs present on a given day. They are being paid for 8 hours' work, and it makes no sense to allow the MTD to sit around the office all day with nothing to do. However, the Department acts within its rights, and common sense, to handle the matter the way it did on September 16, 2009.

- Driving a pickup truck does not require a CDL, and the laborers drive them on a regular basis, as part of their traditional work in the Department. To put two employees on a pickup truck who are both capable of driving the truck involves an unnecessary and inefficient duplication skills.

- It is in the best interest of both unions and public employers to hold down unnecessary costs in providing public services. Adding extra workers to a crew whose presence does not add value to the crew not only leads to inefficiency and increased costs, it is a prime example of how to lose City work to private contractors. It is irrelevant what trade or union is involved, the efficient operation of the Department is a matter that is important to all employees in the Department.

Department's Choice

- In the absence of other considerations, an employer has the right to exercise its managerial prerogative under a management rights provision, to assign disputed work to one of two or more competing crafts, if its choice is reasonable. Elkouri & Elkouri, *How Arbitration Works*, (BNA 6th Ed. 2003), p. 693. That is what happened in this case.

- Prior to the creation of the Rapid Response Program, the Department had always used laborers to drive the pickup trucks. The Rapid Response Program was a new program, with new duties and functions. It was created in response to the influx of complaints received as a result of the installation of the 311 system. For that reason as well, it was well within the Department's prerogative, under the management right provisions of the two agreements, to use laborers to staff the pickup trucks.

Jurisdiction

- The Teamsters may argue that, because the Laborers did not file a grievance every time a member of the Teamsters drove a truck, the Teamsters have jurisdiction over the work. That argument is without merit. First, on those occasions when a pickup truck was driven by a MTD, the laborer was not taken off the pickup truck. Second, the MTDs were put on the pickup trucks because they were extra and had nothing else to do. Third, the Laborers believe in working with the Department to solve problems as best they can. However, there is no evidence that in doing so, the Laborers have forfeited their jurisdiction in this case.

- One of the differences between the trucks driven by members of Local 1092 and the trucks driven by members of Local 700, other than the obvious difference in size, is the trucks driven by laborers check complaints, while the trucks driven by MTDs have the capability of making major repairs. The pickup trucks are smaller and more mobile, allowing the Department of check many complaints.

- Laborers have likewise been assigned at times to drive trucks traditionally driven by MTDs. That does not mean that the Teamsters have forfeited jurisdiction over that work. This case does not involve an effort by the Teamsters to regain jurisdiction. It involves a concerted effort by the Teamsters to expand their jurisdiction over work they have never before had jurisdiction. Laborers drive pickup trucks in every City department where they work and in the private sector as well.

- The Teamsters have attempted to cloud the issue in this case through references to the 4-door pickup trucks and the testimony of Gaynor about a 2-door pickup truck that was driven by Teamsters in the 1980s. The 4-door pickups were replaced by the ACTs and Tavolino's testimony dispels the cloud regarding the 2-door pickup truck used in the 1980s. The truck in question was used to run for parts. It was assigned to an individual who was not a member of any bargaining unit and it was also driven by foremen, carpenters and members of other trades.

DISCUSSION

There are essentially three areas or levels of dispute in this case. The first and most general area of dispute involves the question of whether driving pickup trucks is "traditional work" belonging to employees represented by the Teamsters, i.e., MTDs. The second, more specific area of dispute involves the question of whether driving pickup trucks when they are being used as Rapid Response vehicles is "traditional work" belonging to the MTDs. Finally, the third and most specific area of dispute involves the question of whether the driving of a van, like WD 3306, when it is being used as a Rapid Response vehicle, is "traditional work" belonging to MTDs

Driving Pickup Trucks

The decisions of Arbitrators Goldstein and Berman established two fundamentally important points. First of all, when making determinations about what constitutes "traditional work" under the agreements between the City and its craft and trade unions, like Section 14.2 here, it is the City's actual practice with respect to the assignment of *specific work* in the City department at issue that is controlling. Evidence concerning the traditional jurisdictional lines drawn in the private sector, based on the specialized skills and ability possessed by members of a particular craft or trade union, and the work assignment practices in other City departments, may be helpful in making decisions about the reasonableness of an assignment of "new work," not previously performed. However, such evidence cannot be used to trump the actual practice in the department in question.

Second, in order for a work assignment practice to justify a claim of "traditional work," belonging to employees represented by the union making the claim, the practice must be historic, involving the consistent and continuous assignment of the specific work over a significant period of time. If the evidence discloses that the practice involves "new work," or that the practice has not been consistent and continuous, the right to claim the work as "traditional work" does not exist. In that case, a question might be raised as to whether the City has acted arbitrarily, capriciously or unreasonably in assigning the work to the employees in question, but a claim of traditional work cannot be sustained.

Local 700's position in this case is not entirely consistent. In the grievances and at the hearing, Local 700 made the claim that driving pickup trucks, at least when they are carrying

"tools," is traditional work within the meaning of Section 14.2 and must be assigned to MTDs unless some agreed to exception is applicable. In its written arguments, Local 700 does not abandon that claim. However, its principal argument is that driving pickup trucks when they are being used as Rapid Response vehicles is work that must be assigned to MTDs under the specific terms of the settlement agreement dated September 18, 2006. That argument will be discussed separately below.

The evidence presented in this case included extensive testimony about the historic use of pickup trucks in the Department and its predecessor departments. Reference was made to the use of 4-door pickup trucks to perform the work now performed using the ACTs and the use of a 2-door pickup as a parts truck in the 1980s, as well as the current use of pickups as barricade trucks, propane trucks, saw trucks, etc.

The Arbitrator understands that certain pieces of equipment, such as Vactors and Orange Peels, are driven almost exclusively by MTDs. However, the appropriate inquiry in this case is not whether "driving pickup trucks" is traditional work. The question of whether a particular work assignment involves traditional work does not necessarily depend on the vehicle or piece of equipment used to perform the work assignment. As the evidence in this case demonstrates, pickup trucks can be used to perform a variety of tasks, including running for parts and hauling "supplies and materials," which was the subject of the numerous grievances cited in the settlement agreement. The question presented in this case is whether the Union has met its burden of proving that driving pickup trucks in order to perform the work that was performed on the dates in question constituted traditional work belonging to the MTDs.

Use of Pickup Trucks as Rapid Response Vehicles

The grievances in this case cite specific incidents that gave rise to all but one of the grievances in this case. They all involve the driving of pickup trucks when they are being used as Rapid Response vehicles. (Grievance No. 23 involves driving a van when it is being used as a Rapid Response vehicle.) In the view of the Arbitrator, the Union has not met its burden of proof that the City violated the Agreement on those occasions.

It is basically undisputed that ever since the Department began using pickup trucks as Rapid Response vehicles, they have been driven by a laborer, accompanied by a plumber/caulker. There have been some exceptions in the North District, where the practice has been to put MTDs on Rapid Response vehicles (along with the laborer and plumber/caulker) during regular hours

when no other work is available for the MTDs. Such evidence of occasional work assignments cannot serve to establish a claim of traditional work.

Two of the grievances involve claims that MTDs who were put on Rapid Response vehicles had the right to continue driving the vehicle on overtime. One other alleges that an overtime assignment should have been offered to a MTD. Those claims hinge on the underlying claim that driving pickups is traditional work belonging to MTDs. Even so, it is significant that Local 700 presented no evidence that an MTD placed on a Rapid Response vehicle during regular hours has ever been allowed to continue to drive the vehicle on overtime. The testimony of Employer witnesses is to the contrary.

Authority of Settlement Agreement

As noted above, in its written argument, Local 700 argues that the provisions of the settlement agreement dated September 18, 2006 should be treated as controlling in this case. Before addressing that argument, consideration needs to be given to the wording of the next to the last paragraph of the side letter. It states:

> "These agreements are not to be construed as an admission of liability by or an admission of the legal position of any party, shall not be construed as setting any precedent, and shall not be used, referred to or cited in any arbitration...except as may be necessary to enforce specific provisions of this agreement."

The grievances all allege that the City is violating the terms of the settlement agreement. And, as Local 700 points out in its arguments, the last paragraph of the side letter contains an exception that states that the terms of the settlement agrement can be considered by the Arbitrator, "as may be necessary to enforce specific provisions of this agreement." At the hearing, a copy of the side letter containing the settlement agreement was admitted into evidence as a joint exhibit. The City introduced evidence concerning its bargaining history. Both the City and the Union cite its provisions in support of their respective positions.

Under these circumstances, the Arbitrator finds that it is appropriate to consider the terms of the settlement agreement. However, in the absence of evidence that the parties have agreed to make the terms of the settlement agreement precedential, such consideration is necessarily limited to two purposes: (1) whether the City has failed to abide by the specific provisions of Paragraph 2; and (2) if not, what consideration or weight should be given to the existence of the settlement agreement in relation to Local 700's claim of traditional work in this case.

Alleged Violation of Settlement Agreement

As Local 700 argues, the last paragraph of the side letter allows the Arbitrator to entertain claims that the City is not abiding by the specific terms of the settlement agreement. In the settlement agreement, the City agreed, "Non-bargaining unit employees will not haul supplies and materials in any vehicle they operate, or by use of a trailer, with the exception of barricades and generators, unless there is a bona fide emergency which prevents the department from using a driver."

Local 700 contends that the terms of the settlement agreement are clear and unambiguous. It goes on to argue that the words used should be given their ordinary and usual meaning and that the reference to "supplies and materials" includes "tools."

In the view of the Arbitrator, if the words used in the settlement agreement are given their ordinary and usual meaning, they do not appear to include "tools" as items that are covered by the phrase "supplies and materials." However, the words used in the settlement agreement are not clear and unambiguous.

It is not possible to say with certainty that the parties did not intend the phrase "supplies and materials" to include "tools," without giving appropriate consideration of any relevant evidence concerning the work performed in the Department using pickup trucks, the content of the grievances that were filed, and the bargaining history of the settlement agreement. A review of that evidence supports a finding that the parties did not intend to include "tools" in the disputed phrase.

In order to carry out its construction, maintenance and repair activities, the Department has frequent occasion to "haul" supplies and materials of the type described by the City's witnesses, i.e., sand, bricks, stone, pipes, manhole covers, lids, etc. According to Material Dispatcher Howell, he "never" puts such materials on a pickup truck to be driven by a laborer. He testified that such supplies and materials are "always" hauled on larger trucks driven by MTDs.

Grievance No. 08-06-088-0037, which is said to be typical of the grievances that were settled, involved an allegation that a pickup truck driven by a laborer, and accompanied by a plumber/caulker, was used to haul 8 hydrant heads. For present purposes it does not matter whether that allegation was accurate. The important point is that the pickup trucks that were the

subject of the grievances in this case, which were driven by laborers, were not being used to "haul supplies and materials." They were being used to investigate citizen complaints pursuant to the Department's Rapid Response Program.

The evidence of bargaining history confirms this interpretation. According to Egan, and the notes she took on the day before the side letter was signed, Clair expressed concern that laborers were "driving toolboxes" and that such conduct was wrong because "hauling materials is our job." Again, for present purposes, it does not matter whether Clair's allegation was true or whether the toolboxes were on wheels or in trailers. The important point is that the settlement agreement was intended to make clear that the Department would not use non-bargaining unit employees to *haul* the items described.

The terms of the settlement agreement do not prohibit non-bargaining unit employees from driving pickup trucks being used as Rapid Response vehicles that happen to have some tools on it, either for legitimate use in connection with the investigation, or because they happened to be present on the vehicle when it was dispatched. It prohibits non-bargaining unit employees from driving any vehicle they operate—including a pickup truck—when it is being used to "haul supplies and materials."

Egan's testimony, and the notes she took, stand unrebutted and therefore support a finding that Clair also made a statement to the effect that Local 726 "gave up pickups and vans." However, it would be unreasonable to read that statement literally. It should be read in the context of the above discussion of the intent of the settlement agreement, and the evidence indicating that pickup trucks are normally used for the purposes that are consistent with the terms of the settlement agreement.

The Settlement Agreement as Evidence

The question that remains is what weight, if any, should be given to its terms of the settlement agreement for the purpose of deciding whether driving pickup trucks when they are being used as Rapid Response vehicles is traditional work within the meaning of Section 14.2 of the Agreement. For two reasons, the Arbitrator is inclined to give it no weight.

First of all, doing so would be contrary to the last paragraph of the side letter. Second, even if it is assumed that the parties have waived the application of that language by putting the settlement agreement into the record and making arguments based on its content, it does not

directly address the central issue in this case. The other evidence of record is more than sufficient for that purpose.

Using Vans as Rapid Response Vehicles

The evidence indicates that, unlike pickup trucks, vans may at times be driven by MTDs, for transporting personnel or other purposes. The question of whether such work is traditional work belonging to employees represented by Local 700 is not before the Arbitrator. The only question before the Arbitrator is whether the City has violated Section 14.2 of the Agreement, by assigning to laborers the task of driving van WD 3306 as a Rapid Response vehicle on a daily basis. The answer to that question is no.

So long as the van in question is functioning as a Rapid Response vehicle, staffed with a laborer and a plumber/caulker, there would appear to be no violation when the City assigns a laborer the task of driving the van. As indicated above, it is the work assignment itself and not the type of equipment that is used in carrying out that assignment that is controlling for purposes of deciding whether the work assignment involves traditional work.

Using Pickup Trucks as Saw Trucks

Over the City's objection, the Arbitrator permitted the presentation of evidence and arguments on the question of whether the City violates the Agreement when it allows laborers to drive pickup trucks with saws on them, or "saw trucks." The Arbitrator agrees with the City that the question of whether the City violates the Agreement when it assigns a non-bargaining unit employee to drive a saw truck is not properly before him.

At the hearing, the Arbitrator indicated that, even though the City's jurisdictional arguments appeared to have merit, the presentation of evidence and argument on saw trucks might serve two purposes. First, it was deemed possible that the Department's practice with regard to "saw trucks" might shed some light on the questions presented by the grievances. In retrospect it did not. As it turned out, the evidence established that all of the grievances in this case deal with the use of pickup trucks as Rapid Response vehicles.

Second, it was assumed that at some point in the future the parties may need to resolve the question of whether the driving of saw trucks is traditional work belonging to the employees represented by Local 700. The record and decision in this case may provide the parties with a basis for doing so through mutual agreement.

Driving the Rapid Response Vehicles as "New Work"

The record is not entirely clear as to when the Department first began using pickup trucks to perform the work associated with its Rapid Response Program. Taken as a whole, the testimony indicates that it was implemented shortly after the merger. The 311 system was installed in 1999 and the merger occurred in 2003. Cozzi testified that the Rapid Response Program began after the merger, "approximately 2005-2006."

In its written arguments, Local 700 contends that the evidence establishes that the Rapid Response Program did not start until several years after the signing of the side letter, in mid-2008 or 2009, and argues that the driving of Rapid Response vehicles is no different than driving "complaint trucks, ATCs, and investigative trucks," and therefore should have been assigned to MTDs.

First of all, the Arbitrator does not agree that the record will support a finding that the Rapid Response Program did not start until shortly before the grievances were filed or that the failure of the grievances to make any reference to that fact was inadvertent. The evidence indicates that it was implemented during the term of the prior Agreement. Further, even if the record did support a finding that the Rapid Response Program was not implemented until shortly before the grievances were filed, the driving of Rapid Response vehicles ought to be viewed as "new work." It involves the dispatch of a two person crew—one with sewer experience and one with water experience—to investigate and report back on citizen complaints. The larger trucks that are driven by MTDs carry a crew and the tools, equipment, supplies and materials needed to deal with known problem or a scheduled construction, maintenance or repair job.

Section 14.2 is not applicable to "new work." The provisions of Section 14.2 deal with the assignment of "traditional work," the logical opposite of "new work."

The Berman award stands for the proposition that in the case of "new work" the City has the managerial prerogative to assign the work to employees based on considerations such as efficiency and cost, and that an arbitrator has no authority to second guess that judgment unless it can be shown that the decision was arbitrary, capricious or unreasonable. For or the reasons set out in the arguments of the City and the Intervener, it is evident that the decision to assign the task of driving Rapid Response vehicles to laborers was not arbitrary, capricious or unreasonable.

For these reasons, the Arbitrator enters the following:

AWARD

The Employer did not violate the Collective Bargaining Agreement or the September 18, 2006 Side Letter and Settlement Agreement that it has with Teamsters Local 700 when: on January 16, 2009, it assigned a laborer to drive pick-up truck WSD 3203; on January 16, 2009, it assigned a laborer to drive pick-up truck 3220; on January 16, 2009, it assigned a laborer to drive pick-up truck WSD 3210; on January 17, 2009, it assigned a laborer to drive a pick-up truck [not identified]; on January 17, 2009, it assigned a laborer to drive a pick-up truck [not identified]; on March 4, 2009, it assigned a laborer to drive a pick-up truck [not identified]; on March 8, 2009, it assigned laborers to drive pick-up trucks WD 3210 and 3220; or when management assigned a laborer to drive van WD 3306 on a daily basis.

The grievances presented in this case are denied.

George R. Fleischli 10/19/10

George R. Fleischli, Arbitrator Date