

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	
STEVE BAGLEY, JOHN LONG,)	DOCKET NO. 92-19
GEORGE REGAN, JOHN SWEENEY)	
)	

FINDINGS OF FACT

Statement of Case

On April 17, 1992, the Vermont State Employees Association, Inc. ("VSEA"), filed a grievance on behalf of Steve Bagley, John Long, George Regan, and John Sweeney ("Grievants"). The grievance alleges that the Vermont Department of Transportation ("Employer") violated Article 53 of the collective bargaining agreement between VSEA and the State for the Non-Management Unit, effective July 1, 1990 to June 30, 1992 ("Contract") by failing to award Grievants higher assignment pay when they assumed the duties of higher pay grade positions. Grievants also allege that the Employer violated the temporary reallocation provision of Section 2.0121 of the Rules and Regulations for Personnel Administration, and 3 VSA § 310 and 312, which require the State to adopt a uniform and equitable classification plan.

Hearings were held on November 5, 1992, and March 29, 1993, at the Labor Relations Board hearing room in Montpelier, before Board Members Charles McHugh, Chairman, Catherine Frank and Carroll Comstock. Assistant Attorney General Michael Seibert represented the Employer. Jonathan Sokolow, Legal Counsel for VSEA, represented Grievants. At the conclusion of the November 5, 1992, hearing, the State made an oral Motion For a Directed Verdict. The Board treated this as a Motion to Dismiss.

On February 2, 1993, the State filed State's Memorandum in Support of Motion For a Directed Verdict. VSEA filed an Answer to the State's Motion For a Directed Verdict on February 2, 1993. The Board denied the State's Motion on March 4, 1993. A second day of hearing was then held on March 29, 1993. The parties then filed post-hearing briefs on June 14, 1993.

FINDINGS OF FACT

1. Article 53 of the Contract states in pertinent part:

HIGHER ASSIGNMENT PAY

1. An employee who, in the absence of an incumbent, is assigned by the appointing authority:

- a. to perform a majority of those duties of the higher level job which is substantially different from his or her own duties, or

- b. to assume the responsibilities of a higher level supervisory or managerial job without any substantial change in duties, shall, commencing with the fifth consecutive workday in which the employee actually worked a full shift, be eligible for higher assignment pay, retroactive to the first day worked.

2. The amount paid shall be an 8% differential in addition to the regular hourly rate. In no case shall it exceed the maximum or be less than the minimum of the paygrade of the higher level position.

...

5. The position must be at least one pay grade higher than the employee's own pay grade.

...

2. Prior to the 1990 - 1992 Contract, there was no article of the contract entitled "Higher Assignment Pay". There was an article entitled "Alternate Rate Pay". An alternate rate pay article had been part of the collective bargaining agreements since at least 1973. The Alternate Rate Pay provisions of the contracts in effect from July 1, 1984, until the 1990-92 Contract provided in pertinent part:

ALTERNATE RATE PAY

...

2. From time to time, employees may be required by higher authority to take over the job of an employee assigned to a higher pay grade than their own when that higher-level employee is absent from duty. When time and circumstances permit, vacant higher-level positions will be filled through the merit system under the applicable Rules and Regulations for Personnel Administration. However, because of the absence of an employee for a short period of time, and in management's judgment job continuity must be maintained, eligible employees in this bargaining unit who are required to take over the higher-level job shall receive "alternate rate pay" provided all the following criteria are met:

- a. The employee takes over the job of the higher-level employee (see paragraph 7 below for definition);
- b. The higher-level work is performed with the authorization of appropriate supervisory personnel;
- c. The position is at least one pay grade higher than the employee's own pay grade; and
- d. The employee takes over the job of the higher-level employee for one full work shift per day.

...

7. For purposes of this Agreement, the term "to take over the job of an employer in a higher-level position," means that an employee is required by appropriate higher authority to perform a majority of those duties of the higher-level job which are substantially different from his own normal duties and that the employee will be held accountable for poor performance in the same manner that a newly assigned permanent employee would be held accountable for poor performance in the higher-level job.

...

3. Section 2.012 of the Rules and Regulations for Personnel Administration states in pertinent part:

2.012 ALLOCATION is the determining of the classification of a position by the Commissioner [of Personnel].

2.0121 REALLOCATION is a change of a position from one class to another class due to (a) a gradual increase or decrease in duties and responsibilities, or (b) the addition or subtraction of significant duties and responsibilities at a given point in time.

4. The Employer has organized its operations into separate districts. Grievants worked in District 1 which includes the area in and around Bennington.

5. Grievants are each classified as Transportation Maintenance Worker B's ("Maintenance Worker"), Pay Grade 13.

6. The class specification for a Maintenance Worker B, states in pertinent part:

DEFINITION

Maintenance work for the Agency of Transportation involving a variety of tasks relating to state transportation systems. Incumbents are often responsible for routine maintenance and repair work on an assigned section of the system. Duties may . . . involve acting as a lead worker for a small crew, performing maintenance and construction work using hand tools and/or operating both heavy and light equipment. Work is performed under the supervision of a Transportation Area Maintenance Supervisor who reviews work while in progress...

EXAMPLES OF WORK PERFORMED

Serves as lead worker or member of work crew engaged in routine transportation maintenance activities such as repairing shoulders, patching road surfaces, cleaning roadsides, fixing guardrails, and filling washouts ... Assists in accomplishing bridge construction and repair, paving, and crack sealing projects . . . Directs and assigns helpers as necessary. May occasionally serve as area supervisor in his absence . . .

KNOWLEDGES, SKILLS AND ABILITIES REQUIRED FOR CLASS ENTRY

Knowledge of proper use of hand tools and equipment...
Working knowledge of transportation repair and maintenance methods.
...

KNOWLEDGES, SKILLS AND ABILITIES REQUIRED FOR FULL CLASS PERFORMANCE

...

Knowledge of construction techniques required to replace culverts and roadbed materials.
Skill in the operation and maintenance of assigned equipment.
Ability to lead others in assigned work.
Ability to take initiative and assume responsibility in routine maintenance matters.

... (Grievant's Exhibit 2; State's Exhibit 1)

7. The Employer also has positions classified as Bridge Maintenance Mechanics ("Bridge Mechanics"), Pay Grade 15.

8. The class specification for Bridge Mechanics, states in pertinent part:

DEFINITION

Skilled work at the journeyman level involving the maintenance and repairs of bridge structures. Work is performed under the supervision of the Bridge Maintenance Supervisor. When required, supervises semi-skilled laborers assigned to work crew.

EXAMPLES OF WORK PERFORMED

Builds or constructs forms for the pouring of concrete necessary for various types of bridge or building repair projects. Places, handles and finishes concrete and masonry materials. Erects various types of scaffolds, staging, and other temporary work platforms needed for bridge or building repairs. Familiarity with the erection and maintenance of structural steel. Cleans, prepares, and paints structural steel. Supervises assigned helpers and assures that proper work procedures are followed and appropriate safety precautions are taken . . .

KNOWLEDGES, SKILLS AND ABILITIES REQUIRED FOR CLASS ENTRY

Considerable knowledge of the methods, practices, tools, materials, and equipment used in general carpentry and structural maintenance or repair...
Ability to work in high places.

...

KNOWLEDGES, SKILLS AND ABILITIES REQUIRED FOR FULL CLASS PERFORMANCE

Working knowledge of the methods, practices, tools, materials, and equipment used in bridge construction,

maintenance, and repair including interpretation of plans and drawings.
Considerable knowledge of the hazards and safety precautions related to bridge work.
Skill in rigging scaffolds, staging, bosun chairs, and other temporary work platforms.
Ability to follow instructions and to work without direct supervision at all times.
Ability to take initiative and assume responsibility and to lead others in assigned work.

... (Grievant's Exhibit 1; State's Exhibit 2).

9. Joseph Talbot is the District Transportation Administrator of District 1. Transportation General Maintenance Supervisor Alden Grout reports to Talbot. Grout has several employees under his supervision, including four Transportation Area Supervisors, one of whom, John Dart, was responsible for the bridges in District 1 during all relevant time periods. Dart supervises two Bridge Mechanics and several Maintenance Workers.

10. The Employer's summer construction season runs each year from the first part of April through October. Allen Thompson and Earl Bishop were the only two employees classified as Bridge Mechanics in District 1 from April through October, 1991.

11. Grievants have each worked for the Employer for approximately 3 - 5 years. Bagley, Long, and Regan each had many years of construction experience prior to their tenure with the Employer. Sweeney had previously been a farmer and came to the Employer with limited experience in construction. Sweeney worked as a "helper" on a crew until the 1991 summer construction season.

12. During the 1991 summer construction season, there were two crews working in District 1: crew A and crew B. Both Bridge Mechanics, Thompson and Bishop, worked on Crew A. Area Supervisor John Dart supervised Crew A. Crew A's primary project was the reconstruction of a bridge in Halifax, Vermont. Grievants Bagley, Long and Sweeney worked on Crew A.

13. Bishop was generally responsible for recording Crew A's hours, handling equipment needs and ordering materials. In his absence, Thompson performed this role. Bishop and Thompson's supervision of Bagley, Long, and Sweeney was limited to assigning them work. They did not tell them how to perform the work, nor did they supervise or oversee its completion.

14. The Halifax bridge spans 160 feet and is approximately 20 feet high. A large portion of the work required Bagley, Long, and Sweeney to work from temporary work platforms. They scrapped, sandblasted, and painted from such temporary work platforms. They performed this work independently and without supervision.

15. Bagley, Long, and Sweeney custom-constructed scaffolding, outriggers, bosun chairs, and other types of temporary work platforms. They constructed rigging that would safely carry equipment and workers to high places. They performed this work independently and without supervision.

16. Bagley, Long and Sweeney tied steel, and poured and finished concrete. Finishing concrete is often complicated by the weather. In hot weather, it is necessary to work fast so that the concrete does not set up too rapidly. They performed such work independently and without supervision.

17. In addition to the above-referenced work, Bagley, Long, and Sweeney constructed wing walls. A wing wall is a concrete wall that helps support a bridge and prevents erosion. In constructing a wing wall, Bagley, Long, and Sweeney had to determine the angle the wall should descend from the bridge, then drill with power tools, construct a proper form for pouring the concrete, tie steel, and pour and finish the concrete. They performed such work independently and without supervision.

18. Bridge Mechanics Bishop and Thompson frequently worked alongside Bagley, Long, and Sweeney. On many occasions, Grievants were on one end of the bridge and the Bridge Mechanics were on the other. Occasionally, neither Bishop nor Thompson would be on the site at all. Bishop and Thompson both worked out of the Bennington garage. Bagley and Long worked out of the Wilmington garage. Bagley and Long often started working before Bishop or Thompson arrived at the work site and continued to work after they left.

19. Steven Wright, a Maintenance Worker B, worked as a "helper" during the 1991 summer construction season, including a short time on Crew A. As such, Wright did not work independently, nor did he supervise other helpers.

20. Bagley, Long, Sweeney, and the Bridge Mechanics on Crew A all supervised the helpers. They told them what to do, and when and how to do it. Wright and the other helpers performed such tasks as cleaning up work areas, shoveling debris, flagging, assisting with carpentry tasks in the building of scaffolding or forms for concrete, and carrying materials and equipment to and

from the work site (commonly referred to as "gofer" work). On occasion during the 1991 summer construction season, Bagley, Long, Regan, and Sweeney also performed such "helper" work, but such work did not constitute their primary duties.

21. At the beginning of the 1991 summer construction season, sometime in April, 1991, Bagley called District 1's Maintenance Supervisor Grout and asked if he could receive higher compensation because he felt he was performing the work of a Bridge Mechanic. Grout told him he was not entitled to more money. Bagley did not pursue the issue further at that time.

22. Grout supervised Crew B during the 1991 summer construction season. There were no Bridge Mechanics on crew B.

23. Crew B worked on several small projects. They repaired and constructed wing walls, culverts, box culverts, and drop inlets. A culvert is a large form that runs under the road and is made of steel, concrete, or wood; a box culvert is made of concrete. Culverts serve as bridges, but are technically not long enough to be considered bridges. A drop inlet is a drainage system which drains water from a road, through a grate, and into a culvert or basin.

24. Regan worked on Crew B with two other Maintenance Workers, Rickey Hayes and Jeff Murray. Grout was not on the work site every day. Grout considered Hayes the crew leader. Hayes was responsible for the crew's paperwork. Hayes was out for four or five weeks during the 1991 summer construction season, during which time Grout considered Murray the crew leader.

25. Regan built forms, tied steel, poured and finished concrete in the construction of wing walls. He performed these tasks with Hayes and Murray without direction or supervision by a supervisor or Bridge Mechanic. They all knew what needed to be done and completed the task together. On occasion, Regan worked on his own. The only specific direction Regan, Hayes, and Murray received was technical assistance from John Bonesteel, the Transportation Technical Project Supervisor in District 1. Bonesteel told them where he wanted the wing walls tied into the bridge and at what grade or pitch they should construct them.

26. Regan worked on the construction and reconstruction of many drop inlets during the 1991 summer construction season. In building a drop inlet, Regan built forms, and poured and finished concrete. He independently constructed drop inlets with Hayes or Murray without direction or supervision.

27. In order to perform the above-described tasks, Regan had to use and maintain such power tools as pneumatic drills, power saws, jack hammers, and compressors.

28. All the Maintenance Workers on crew B supervised the helpers. The helpers did not use power tools, nor did they construct concrete forms. The helpers on Crew B used hand tools, shoveled, swept, and performed "gofer" work.

29. In October, 1991, all four Grievants, plus Murray and Hayes, filed a Step I grievance. This grievance was denied by Talbot on October 29, 1991 (State's Exhibit 5).

30. On October 30, 1991, Grievants, Murray and Hayes filed a Step II grievance grieving "the denial of higher assignment pay

for performing a majority of those duties of a higher pay level". Such grievance cited Articles 15 and 53 as the applicable contract sections alleged to have been violated. The grievance was denied by the Employer's Human Resources Chief William McManis on December 12, 1991 (State's Exhibit 5).

31. Grievants, and Murray and Hayes, filed a Step III grievance on December 24, 1991, grieving the "denial of higher assignment pay and/or a temporary reallocation for performing a majority of those duties of a higher level job". Grievants' Step III grievance also stated in pertinent part that "in similary (sic) situations the agency has temporarily reallocated positions into a higher class", and that the Employer "has applied a rule or regulation in a discriminatory manner". The Step III grievance cited Contract Articles 15 and 53 as the applicable contract sections alleged to have been violated (State's Exhibit 3).

32. The Step III grievance was denied by Director of Employee Relations Thomas Ball on February 18, 1992. Ball concluded that there was no violation of Article 53, and his decision was limited to discussing the alleged violation of that article. Murray and Hayes received compensation at some point, either before or after Ball's decision, and did not further pursue their grievances. They are not mentioned specifically in Ball's decision (State's Exhibit 4).

33. In 1990 and 1991, the Employer compensated three Maintenance Workers in Districts 5 and 9 for performing the higher-level duties of Bridge Mechanics during the summer

construction seasons. The Employer's method of compensating these employees was by temporarily reallocating them to the higher-level position. The Employer accomplished this by making a request to the Department of Personnel that is similar to a request for the reclassification of a position. The reclassification of a position by the Department of Personnel involves a procedure called the Willis Point Factor System, and an analysis of the position's duties and responsibilities to determine its appropriate pay grade.

34. The supervisors of District 5 and 9 had initiated this request by meeting with the Employer's Personnel Administrator, Richard Boulanger, and persuading him that they had Maintenance Workers who were performing the higher level duties and responsibilities of Bridge Mechanics. Boulanger informally performed a Willis point factor analysis based on the supervisors' representations, and agreed in all cases that their requests were justified. He then forwarded the requests for temporary reallocation to the Department of Personnel. The requests were approved.

35. The supervisor of District 9 made his request during the 1990 summer construction season during which time an employee who worked as a Bridge Mechanic was out on medical leave and Maintenance Worker, Les Brown, performed his higher-level duties. The Bridge Mechanic retired at the end of the summer construction season and Brown was then permanently promoted to the position.

36. During the 1991 summer construction season, the District 5 Supervisor requested that two employees receive higher

compensation because they were performing the duties of Bridge Mechanics. They were not taking over the duties of employees absent from duty. One employee received higher compensation until the end of September, and the other received higher compensation until the end of the summer construction season, October, 1991.

37. The District 1 Supervisor, Talbot, did not request additional compensation for Grievants for performing the additional duties and responsibilities of Bridge Mechanics during 1991 or 1992.

38. During the 1992 summer construction season, Sweeney was asked if he wanted to "volunteer" for bridge work, but did not think he should perform such work because of the pending grievance. He did work on bridges for one or two days during the 1992 summer construction season and used the same skills as he had during the 1991 summer construction season.

39. During the 1992 summer construction season, Regan used the same skills as he had during the 1991 summer construction season. He worked on approximately eight or nine bridges and box culverts. Regan's crew consisted of two Bridge Mechanics and one other "volunteer", Russell Carrier. Long and Sweeney also worked with Regan a few days.

OPINION

Grievants contend that the Employer violated the Contract, the Personnel Rules and Regulations and Vermont Statutes by its failure to compensate four Maintenance Workers for assuming the additional responsibilities of Bridge Mechanics during the 1991 and 1992 summer construction seasons. Specifically, the grievance alleges violations of Article 53 of the Contract, Section 2.012 of the Rules and Regulations for Personnel Administration, and 3 VSA §§ 310 and 312.

Procedural Issues

The Employer contends that this grievance should be dismissed due to procedural flaws. We will discuss each of the procedural issues in turn.

The Employer first contends that Grievants waived their right to contest the Employer's pay practices because Grievants did not comply with Article 15 of the Contract. Article 15, Section 3(a)(1) requires that an "employee, or his or her representative, or both shall notify his or her immediate supervisor of a complaint within fifteen (15) workdays of the date upon which the employee could have reasonably been aware of the occurrence of the matter which gave rise to the complaint". The Contract further requires that a grievant proceed to Step II if no satisfactory settlement is reached at Step I...within ten (10) workdays after receiving the Step I decision..." Article 15, Section 3(b)(1). Failure to timely grieve to Step II of the grievance procedure means "the matter shall be considered closed". Id.

It is the Employer's position that Grievants Long, Regan, and Sweeney failed to initiate a grievance within 15 workdays of the time they could have reasonably been aware of the occurrence of the alleged violation, April, 1991, as required by Section 3 (a)(1). The Employer contends that Bagley did properly invoke Step I of Article 15 in April, 1991, when he contacted Grout and requested additional compensation, but he failed to proceed to Step II within the contractually prescribed time of 15 workdays after Grout denied him such compensation, as required under Section 3(b)(1).

The Board has accepted the validity of a continuing grievance in cases where pay practices were involved and employees initially did not grieve the alleged violations within the contractual time limitations, but grieved the alleged violations during the period they were occurring. Grievance of Reed, 12 VLRB 135, 143-44 (1989). Grievance of Cole, 6 VLRB 204, 209-210 (1983). Employees are permitted to institute grievances over the matter at any time during the period in which the alleged violations are occurring, since there is a new occurrence of the alleged violation every time a paycheck is issued, with the restriction that the employees waive their right to backpay for all periods prior to the pay period immediately preceding the filing of the grievance. Id.

The grievance before us is one involving a continuing pay practice. Grievants filed their Step I grievance shortly before the close of the 1991 summer construction season. Under our precedents, by not grieving until shortly before the close of the 1991 summer construction season, Grievants waived their right to

back pay for all periods prior to the pay period immediately preceding the filing of the grievance. Thus, the grievance is timely, but for a limited period.

The Employer also contends that the grievance should be dismissed with respect to Grievants' temporary reallocation claim because Grievants did not specifically reference any pertinent contractual article or provision of the Rules and Regulations in their Step III grievance.

The Board will resolve an issue on the merits if at all possible unless the collective bargaining agreement requires it to be dismissed on procedural grounds. Grievance of Kimble, 7 VLRB 96, 108 (1984). Grievance of Amidon, 6 VLRB 83, 85 (1983). Grievance of Mason, 16 VLRB 222, 235-236 (1993). Failure to file a grievance pursuant to the grievance procedure of a collective bargaining agreement constitutes such procedural grounds. This is reflected in Section 18.1 of Board Rules of Practice, which provides that the "Board shall hear and finally determine the grievances brought before it, provided that such grievances are appealed pursuant to the procedures contained in an existing collective bargaining agreement." Id.

The Contract requires that a grievance filed at Steps II or III of the grievance procedure contain "specific references to the pertinent sections(s) of the contract or the rules and regulations alleged to have been violated". Article 15, Section 2(b)(4). Failure to timely grieve to Step II and Step III means "the matter shall be considered closed". Article 15, Section 3(b) and (c).

This language generally mandates specific and timely raising of issues at the earlier steps of the grievance procedure or the right to raise the issue is waived. Grievance of Ulrich, 12 VLRB 230, 239 (1989). Aff'd (Vt. Supreme Court Docket No. 89-608, Unpublished Decision, 1991). Grievance of Colleran and Britt, 6 VLRB 235, 239 (1983). Mason 16 VLRB at 236. Grievants did not raise the issue of temporary reallocation in their Step II grievance.

Nonetheless, Article 15, Section 3(c)(1) of the Contract provides the following with respect to the Step III level of the grievance procedure:

Upon the introduction of facts or arguments not raised at Step II, such issues shall not be ruled untimely merely because they are raised at Step III for the first time. The Department of Personnel shall either rule on such facts/arguments or have the option to remand the grievance to the Step II grievance officer for further consideration.

Grievants mentioned "temporary reallocation" in their Step III grievance and referenced Articles 15 and 53 as the applicable contract sections alleged to have been violated. Article 15 is the Grievance Procedure article and makes no reference to temporary reallocation. Article 53 is the Higher Assignment Pay article and also makes no reference to temporary reallocation. The Step III hearing officer responded to the grievance with respect to whether there was a violation of Article 53, Higher Assignment Pay.

Although Grievants mentioned temporary reallocation in their Step III grievance, their failure to cite pertinent contractual provisions, or provisions of the Personnel rules and regulations

or statutory provisions, relating to temporary reallocations means that they waived their right to raise such pertinent provisions for the first time at the Board. This is precisely what Grievants are attempting to do by raising a violation of Section 2.0121 of the Personnel Rules, and a related violation of 3 VSA §§ 310 and 312, as such provisions relate to temporary reallocations, for the first time at the Board.

A hearing officer should not be expected to speculate as to grievants' claims. Ulrich, supra. Grievants must give sufficient notice of a specific issue at an earlier grievance step in order to preserve the issue before the Board. Id. This rule encourages grievants to have their disputes resolved before they reach the Board. Id. Grievants' failure to provide fair notice of their claimed violations of Section 2.0121 of the Personnel Rules, and their related claim concerning 3 VSA §310 and §312, at Step III of the grievance procedure means they waived the right to present such claims to the Board. Id. Thus, Grievants failed to timely raise any alleged violations of pertinent provisions for us to consider the temporary reallocation issue.

Higher Assignment Pay

We now turn to discussing the merits of Grievants' allegations that the Employer violated Article 53, Higher Assignment Pay, of the Contract. This article states that "an employee who, in the absence of an incumbent", performs "a majority of those duties of the higher level job which is substantially different from his or her own duties . . . shall, commencing with the fifth consecutive workday..., be eligible for

higher assignment pay, retroactive to the first day worked".
Article 53, Section 1.

We conclude by a preponderance of the evidence that Grievants performed a majority of the duties of Bridge Mechanics, for at least five consecutive days during that portion of the 1991 summer construction season relevant to this grievance, which were substantially different from their own duties as Maintenance Workers. Such duties were the skilled bridge construction and repair responsibilities of Bridge Mechanics. These duties constituted more skilled work than the unskilled and semiskilled duties required of Maintenance Workers in assisting in the accomplishment of bridge construction and repair.

Nonetheless, the Employer contends that Grievants did not satisfy the criteria for payment of higher assignment pay because they did not work "in the absence of an incumbent", and the absence of an incumbent is a condition precedent to the payment of higher assignment pay under Article 53. The Employer bases this contention on the evidence that most of the grievants worked at a worksite which included one Bridge Mechanic.

The meaning of the term "in the absence of an incumbent" is sufficiently ambiguous for us to look to extrinsic evidence such as bargaining history and past practice to interpret this language to ascertain the true intention of the parties. Grievance of Gorruso, 150 Vt. 139, 143 (1988); Nzomo v. Vermont State Colleges, 136 Vt. 97, 101-102 (1978); Grievance of Majors, 11 VLRB 30, 35 (1988). We look to the Alternate Rate Pay article of the contracts which preceded the current Higher Assignment Pay provision, and our interpretation of those provisions, as providing some guidance on bargaining history. The Alternate Rate

Pay provision recognized that employees may be "required . . . to take over the job of an employee assigned to a higher pay grade than their own when that higher-level employee is absent from duty". The Alternate Rate Pay provision provided that, "because of the absence of an employee for a short period of time . . . employees . . . who are required to take over the higher level job" were entitled to alternate rate pay provided other criteria were met.

The Alternate Rate Pay provision specifically required a situation in which a higher level employee was absent from duty and a lower level employee assumed the higher level employee's duties. We decided under this article that employees who assumed the duties of a higher level employee, in the absence of the higher level employee from duty, which were substantially different than his or her own duties met the criteria set out in the Alternate Rate Pay article and were eligible for alternate rate pay. Grievance of Kastner, 10 VLRB 212, 218 (1987). Grievance of Watson, 11 VLRB 253, 260-261 (1988). We found an employee not entitled to alternate rate pay where he had not taken over a higher level employee's job in the higher level employee's absence. Grievance of Reed, 12 VLRB 135, 145 (1989).

The parties have provided us with no evidence on the negotiations leading to replacing the Alternate Rate Pay with its successor article, Higher Assignment Pay. We note though that, although the Alternate Rate Pay article specifically required a situation in which a higher-level employee was absent from duty and a lower level employee assumed those higher-level duties, its

successor provision, the Higher Assignment Pay article, sets forth no such specific requirement. It states that an employee is eligible for higher assignment pay by performing the duties of a higher level job "in the absence of an incumbent" if certain additional criteria are met.

Under the circumstances, we conclude that the change in the wording of the contracts was not without significance. We conclude that an employee performs the duties of a higher level job "in the absence of an incumbent", pursuant to Article 53, when the employee performs the duties of the higher level position which an occupant of the higher level position would perform if available to perform such duties, provided the additional criteria set forth in Article 53 are met.

In the case before us, there were two Mechanics assigned to District 1 during the 1991 summer construction season. The Employer needed more Bridge Mechanics to complete its construction projects, but did not have additional occupants of the higher level position available to perform such duties. In assigning Grievants those higher level duties, the Employer did so because there was an absence of incumbents of the Bridge Mechanics position to complete the Employer's projects. The purpose of the contractual provision dealing with higher assignment pay is to provide compensation to employees who are requested to perform higher level duties, such as those long term duties that Grievants performed during the relevant period of the 1991 summer construction season.

Also, the Employer's practice in district 5 during the 1991 summer construction season is relevant to our conclusion. The

Employer compensated two employees at a higher level of pay for the period of time that they performed the higher level duties of Bridge Mechanics, even though they were not taking over the duties of employees absent from duty. Although the chosen method of compensation was to "temporarily reallocate" those District 5 employees to the higher-level position, this practice is still pertinent. Whether the Employer procedurally chooses to compensate employees who meet the criteria of higher assignment pay through a temporary reallocation or higher assignment pay, in both cases the Employer is recognizing that employees are entitled to be compensated for performing higher level duties beyond those of their position. Under the present contractual language and the provisions of the Personnel Rules, the Employer may choose either method of compensating employees in such circumstances.

In sum, we conclude that the Employer violated the Higher Assignment Pay article by not compensating Grievants for performing the majority of duties of Bridge Mechanics during that portion of the 1991 summer construction season relevant to this grievance.

Grievants did not show by a preponderance of the evidence that they performed a majority of the duties of Bridge Mechanics for at least five consecutive days during the 1992 summer construction season. Accordingly, we find no violation of the Higher Assignment Pay article in 1992.

Thus, we determine that there was a violation of Article 53, but for the limited period of the 1991 summer construction season

beginning with the payroll period immediately preceding the filing of the grievance. As a remedy, Grievants shall be awarded back pay, plus interest at 12 percent per annum, pursuant to Article 53, Higher Assignment Pay, for performing the majority of duties of Bridge Maintenance Mechanics for the payroll period immediately preceding Grievant's Step I grievance until the end of the 1991 summer construction season.


ORDER

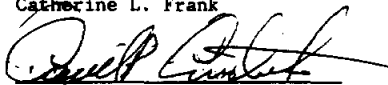
NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of Steve Bagley, John Long, George Regan, and John Sweeney is SUSTAINED in part; and Grievants shall be awarded back pay, plus interest at 12 percent per annum, pursuant to Article 53, Higher Assignment Pay, for performing the majority of duties of Bridge Maintenance Mechanics for the payroll period immediately preceding Grievant's Step I grievance until the end of the 1991 summer construction season. Such payment shall be made within 30 days of the date of this final order.

Dated the 23rd day of December, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Catherine L. Frank


Carroll P. Comstock