

Arbitration between

Watertown Professional Firefighters Association, IAFF Local 191

And

City of Watertown, New York

PERB Case No. A2020-253

Decision and Award of Arbitrator

Robert J. Rabin, Arbitrator,

Background

From time immemorial, or at least for a very long time in labor relations terms (some 50 years), captains have been an integral part of the Watertown fire department. The opening article of the parties' collective bargaining agreement, Recognition, lists them as one of the three covered categories of employees: fire fighters, fire captains and battalion fire chiefs. It is common in the public sector to include supervisors in the bargaining unit, as is the case here for captains and battalion chiefs.

Over that long period, the duties of the captains have been defined by practice as well as by the job specifications. A distinctive hallmark of the captain's job is the command function he exercises in most firefighting situations. The opening paragraph of the City's job specification says it all: "Employees in this class have the responsibility of being in charge of an assigned fire company and the responsibility of directing the work of a company at fires, emergency situations and in the station." Acknowledging this, and as a corollary, the job specification for firefighter provides that in performing emergency work the firefighter "receives instructions and immediate supervision from a higher-ranking officer in the department."

For purposes of our case, we consider two command functions historically performed by captains. One is directing the mission en route to the scene, making decisions about the route

to take and how to position the apparatus once it arrives. The other, more critical for our case, is directing operations at the call destination, for example, leading a team into a burning building for fire suppression or rescue purposes. The Department policy is that no man enters the building alone, and that one man is always in charge, to insure that careful and correct decisions are made and to reduce risks to the members of the team as well as to the public. Historically, and in accordance with the job specifications, that role has been exercised by the captain.

For ease of presentation, I will often use the masculine gender terms he, his, man or men in my decision, as the parties do in their briefs and as the CBA often refers to them, with the assumption that the unit also includes female fire fighting personnel or otherwise gender identified personnel, and that all members are equally valued.

There are currently 4 battalion chiefs, 17 captains and 45 firefighters, who serve a population of more than 25,000 residents. They are organized into 4 battalions, in order to provide 24/7 rotating coverage for two daily shifts. The Department now operates from three physical fire stations. Each of those stations has an engine, also sometimes referred to as a pumper. In addition, Station 1 has a ladder truck. Until recently, and this is the heart of this case, Station 1 also had a rescue truck. This was a heavy duty truck that carried special rescue equipment. Historically, 3 men were assigned to the engine, 3 to the ladder, and 2 to the rescue truck. If you add it all up, that would be 9 men on the engine (for three stations), 3 on the ladder and 2 on the rescue truck, for a total of 14 men on each shift. However, at the end of 2020 the City sold the rescue truck, assigning those two men to the ladder truck instead. This still left 14 men per shift, 9 on the engines at all three stations and 5 on the ladder at station 1.

Until 2016, the Department had 20 captains on the force. This enabled the Department to always deploy a captain on each apparatus. Here's the math: a captain on each of three engines, one ladder and one rescue truck per shift, multiplied by four battalions = 20 captains. The captains were part of the overall complement of 14 men per shift, usually comprising 5 of those 14 men. This meant that every team that performed fire fighting functions was normally led by a captain.

But in 2016, for budgetary reasons, the City eliminated 8 captain positions, reducing the number of captains to 12. Those captains, on the ladder truck and rescue truck, were demoted to fire fighters. The remaining captains continued to be assigned to each of the engine companies. That's three per shift (one for each station), times four battalions, or a total of 12 captains. In a series of orders, known as SOP's, which I'll get into later, the Chief at the time assigned the supervisory functions formerly performed by the captain on the ladder truck to

the remaining captain on the engine, and assigned the captain functions on the rescue truck to the battalion fire chief who was on duty for that particular shift.

The Union challenged these reductions in the number of captains in 2016 by filing two separate grievances. These grievances were resolved through two separate arbitration awards, one by Monte Klein, the other by Richard Curreri, both respected and accomplished arbitrators. I'll refer to them, as the parties do, as the Klein award and Curreri award. The Union's challenges in arbitration in 2016 proceeded on two fronts. One was the contention that the CBA prohibited the City from reducing the number of captains on the force. The other was that because some of the remaining firefighters were required to assume the supervisory duties formerly exercised by the captains, they were entitled to additional compensation under the out of title provision of the CBA.

The first challenge, that the City was prohibited from reducing the number of captains, was raised and addressed only in the Klein case. Arbitrator Klein ruled that there was no contractual provision mandating a minimum number of captains. The second claim, for out of title pay, was addressed in both cases, each arbitrator sustaining the Union's position.

As a result of these two decisions, the City was required to pay out of title pay to those fire fighters in the ladder company and rescue company who were required to perform captain's duties. The City was not, however, ordered to restore the captain positions that had been eliminated. Thus, captain positions existed only in the engine companies.

The City initially resisted compliance, but after the Union secured judicial enforcement, the City began to pay the affected fire fighters out of title pay in both the ladder and rescue companies.

Shortly after commencing compliance with the out of title pay orders, the City restored the four captain positions in the ladder company. The record does not indicate why the City took this action, but most likely the City concluded that it was financially no different but operationally more effective to restore the fire fighters to their former captain positions rather than to classify them as fire fighters but pay them captain's wages.

The City did not take the parallel step of restoring the four captain positions in the rescue company. Instead, it continued to operate the rescue company without a captain, and continued to pay out of title pay, in compliance with the arbitration awards, to the fire fighters who performed captain duties.

After the City began to implement the Klein and Curreri awards, the Union brought an action in State Supreme Court contending that the recurrent and routine out of title payments to these fire fighters in the rescue company pursuant to the Klein and Curreri awards, amounted to treating them as permanent captains. As a consequence, they should have been appointed as captains, in accordance with the provisions and procedures of Civil Service Law 61 (2).

Justice James McClusky agreed with the Union. He concluded that the City could not continue to routinely compensate fire fighters for performing captain's duties without making the appropriate promotion to captain. His decision addressed the only company in which captains were then not serving, the rescue company, specifically focusing on the "firefighters sitting in the right front seat of the rescue truck." His conclusion was affirmed by the appellate division on November 20, 2020.

By then the City had already restored the four captain positions in the ladder company, as I described earlier, so the City was in compliance with Justice McClusky's decision in that unit as well as in the engine company, which had captains all along. Only the rescue company was not in compliance with Judge McClusky's Order.

The City Council concluded, after consultation with counsel, that the City would probably be in violation of the McClusky Order if it failed to similarly promote the fire fighters in the rescue company to captain. The City's attorney noted that Justice McClusky had observed in his decision that the City might be able to avoid the obligation to pay fire fighters out of title pay if it "eliminated those duties so that a firefighter is not doing Captain duties when they sit in the right front seat, elect to eliminate a truck or some other act that would eliminate the need to routinely appoint someone in an acting position."

Building upon these suggestions, the City eliminated the rescue truck, hoping as a result to avoid paying out of title pay to the fire fighters who had been sitting in the captain's seat on the rescue truck, and as a consequence, to avoid having to promote any of those men to captain. The City also discontinued routinely making out of title payments to these fire fighters, but did pay for a limited amount of out of title work in some situations.

After the sale of the rescue truck, the two fire fighters assigned to the rescue truck on each shift were merged with the crew of the ladder truck, and that team (now five men rather than three, including a captain) continues to respond to calls in substantially the same manner as the two separate companies had responded before.

The elimination of the rescue truck generates the arbitration before me.

In the case before me, the Union again contends, as it did in the Klein and Curreri cases, that the City has violated the out of title provision of the CBA by continuing to assign those fire fighters who formerly rode the rescue truck, but who now ride the ladder truck, to duties that are historically and properly captain's duties. The Union contends that the Department must provide out of title compensation whenever those duties are performed, which it says happens on every shift.

In the case before me the Union does not make the same contention that it made in the Klein case, that the City is required to have a captain in charge of the rescue company. If the City had kept the rescue truck, maybe the Union would have made that argument again here, hoping for a more successful result than it got from Arbitrator Klein. Instead, the Union now contends that the City is prohibited under the CBA from eliminating the rescue company at all. The heading of this portion of the Union's brief is "The City must operate with a rescue company with at least two men." This argument does not include a contention that such a rescue company must include a captain.

As the reader can see, I do not write on a clean slate. Rather, I am guided by, and some would say obliged to follow, the two prior arbitration awards. Each party addresses the extent to which those awards apply now that the City has eliminated the rescue truck. The Union further contends that the Klein award is not soundly reasoned and should not be followed in certain respects, although the Union is happy for it to control in others.

With respect to the McClusky Order, the issues it raises have not been submitted as part of the case before me. I do not consider the issues raised by that Order as part of my decision.

With this background, I turn to the CBA provisions, the prior arbitration awards and the facts.

The CBA provisions

Generally speaking

Although there are several provisions in the CBA on minimum staffing, including a particularly tricky one in Article 5, Section 8 that will require some later discussion, they all address "manpower," "personnel" or "men." None of these provisions says how many of these required staff members must be captains. The CBA says in the recognition clause that there are

captains, but doesn't say how many. The Union faces a significant challenge in establishing that the CBA requires a specified minimum number of captains. The long history of assigning one captain to each apparatus is perhaps its strongest argument.

Although no CBA provision specifically requires the City to have a minimum number of captains, the CBA surely contemplates that there will be some captains. To begin with, the CBA specifically references captains in Article I, the Recognition clause, and in the various salary schedules. Further, as I'll explain shortly, the wording of Article 5, Section 4, regarding call ins, implies that there will regularly be at least be some captains assigned to fire fighting operations. Further, the job specifications make clear that critical fire fighting operations require a captain to be in charge. So, while not saying precisely how many captains are needed, the CBA surely requires some captains.

On the other hand, the provision for out of title pay is quite clear, and my two predecessors had no trouble in applying it to sustain the grievances before them. Still, it presents some interpretive issues in the case before me.

Article 5. Work Day and Work Week

Specific staffing levels are set out in Article 5. Article 5 is titled "work day and work week." It contains eight "sections." The sections are not given subject titles. Section 1 deals with the scheduling of work weeks, Section 2 addresses the technical question of the time of the shift changes, and Section 3 deals with overtime.

Section 4 deals with call ins to cover manpower shortages. Here we find a specific reference to total minimum staffing per shift. Subsection (a) covers the timing of the notice of the call in. Section 4 (b) refers to a manpower minimum of 14 men:

"Whenever manpower drops below 14 men, excluding the Battalion Chief, a member or members shall be called in to cover the shortage to bring the strength to at least 14. This member, or those members, shall be of equal rank whenever possible with the man or men they replace."

The exclusion of the battalion chief from the count, although a battalion chief is assigned on every shift, accounts for the 15 man minimum that is referred to in the parties' briefs.

The CBA uses the term “man” or “men” throughout, although it sometimes uses “member,” and I will follow that usage, understanding, of course, that the reference is gender neutral.

Since battalion chiefs are not included in the calculation to determine the minimum manpower required, the “shall be of equal rank” provision refers primarily to captains. It contemplates that there will always be captains assigned to any shift, otherwise the equal rank provision would serve no purpose. In other words, if the fire fighter must be of “equal rank” with the “man they replace,” that provision only makes sense if there is the possibility of a man of higher rank to replace, and such a man could only be a captain, since battalion chiefs are excluded from the calculation.

Sections 5, 6 and 7 address certain procedural issues involving posting schedules, swapping shifts and periodic relief.

Section 8 is the only other CBA provision that addresses minimum staffing. Because it raises some interpretive issues (to put it mildly), I quote it in full:

“Pumper companies shall not go below three (3) men at any time for duties other than firefighting. The ladder company shall not go below three (3) at any time for duties other than firefighting; rescue company shall not go below two (2). At no time shall there be less than eleven (11) men available for fire alarm responses.”

A few preliminary observations:

First, Article 5 contains three references to minimum staffing: Section 4 (b) is the 14 man minimum overall staffing provision, which triggers the obligation to call in replacements. Section 8 lists the minimum staffing for each of the three companies. Section 8 also contains the phrase “at no time shall there be less than eleven (11) men available for first alarm responses.”

If you add up the separate manpower requirements for each company in Section 8 per shift (companies, not apparatus), you get the same 14 man total as in Section 4 b:

3 men per engine company x 3 stations = 9
3 men for ladder company = 3
2 men for rescue company = 2.

Total of 14.

if you add the battalion chief, that makes 15 men per shift.

Second, Section 8 also contains the problematic qualification “for duties other than firefighting.” That qualification appears twice, expressly modifying the minimums for pumper and ladder companies, but not expressly modifying the minimums for the rescue company. That latter minimum, separated from the first two by a semicolon, simply states the unqualified minimum “rescue company shall not go below two (2).”

So on its face, at least, the reference to the rescue company is absolute and unqualified: At least two men. Period. As we’ll see, there are various spins on what this actually means.

Third, there’s another provision in Section 8, not fully explained on its face: “At no time shall there be less than eleven (11) men available for first alarm responses.” This provision, which is set out as a separate sentence, and not as a clause separated by a semicolon, as with the rescue company minimum, is not qualified by the phrase “for duties other than firefighting,” and nobody contends that it is. As we’ll see later, this phrase provides a possible interpretive solution as to the meaning of the “duties other than firefighting” phrase that precedes it in Section 8.

Fourth, whatever specific manpower minimums are provided here, they address only the total minimum number of men assigned, and not the minimum number of captains.

Article 4. Out of title work

Article 4 - Compensation, Section 3 (a) contains an explicit provision for out of title pay:

“Any member assigned to perform duties out of title in a rank higher than his permanent rank shall be compensated for such performance on a per diem basis, which increased pay shall reflect the differential between the employee’s regular pay and the pay which would be received in the higher position in accord with the provisions of 3a of the Rules for Administration of the Fire Pay Plan.”

In short, fire fighters are entitled to captain’s pay for captain’s work in any out of title situation.

The two prior arbitration awards

As I indicated earlier, the Union challenged the City's reduction of captains in 2016 by filing two grievances that went to arbitration. It was never explained in the arbitration before me why the Union chose to file two grievances, although it appears that each covered different and successive time periods. Nor is it clear why the Curreri case involved only the issue of out of title pay, while the Klein case involved both out of title pay and the City's right to eliminate these positions.

The Curreri award

I start with the later of the two awards, the Curreri decision. Richard Curreri was for many years the highly regarded Director of Conciliation for PERB. He assigned me my mediation and fact finding gigs over a long period of time, including, if memory serves, in Watertown.

The Curreri award covers many tangential issues, not relevant here, including issues of procedural and substantive arbitrability, and the intriguing "Shazam" principle whereby a firefighter becomes an acting captain.

Arbitrator Curreri gives a succinct account of the purposes of the various apparatus ("apparatus" is apparently an acceptable plural of the singular "apparatus"), which is supported by the record in this case and helpful here, and saves me the trouble of writing my own account:

"Engines and their respective companies are primarily responsible for fire suppression and water transport. The ladder truck is responsible for operations requiring an aerial device, and its company is responsible for proper ventilation of structure fires, as well as entering and searching the building. The rescue truck and company is responsible for more technical aspects of rescue, e.g. incidents requiring river or rope rescues, hazmat responses, building collapses or others requiring rapid intervention or the technical extrication of a victim."

As I indicated earlier, until 2016, the City operated each of its five apparatus with a captain on each one. When the City reduced its captains from 20 to 12, demoting them to firefighter, captains continued to staff each of the three engines, but the ladder and rescue vehicles no longer had a captain.

Arbitrator Curreri referred to the series of orders (SOP's) the then Chief wrote at the time of the reduction. He quoted SOP 1.25:

“As there is a need to have an individual assigned to the ‘officer seat’ of an apparatus, the shift commander will select a firefighter who is working on that day to be designated as a unit leader on an apparatus that does not have a regularly scheduled Fire Captain assigned.”

A later SOP referred to the member “assigned to the right hand front seat of department apparatus,” while a still later order required that there always be two fire fighters on each platoon who could assume the captain’s role. The Chief also assigned oversight of the now captainless ladder truck and crew to the captain in charge of Engine 1, and oversight of the rescue truck and crew to the battalion chief.

As far as I can determine, none of these orders has been specifically superseded.

After disposing of a number of arbitrability issues, Arbitrator Curreri got to the heart of the matter.

The testimony convinced him that those newly demoted firefighters continued to be assigned the same functions they had performed as captains, and therefore were entitled to out of title pay under Article 4, Section 3. For example, Captain Andrew Naklick testified, without contradiction, that he made the same decisions he did as captain, “from strategizing based on information received en route, to where to park and position the apparatus, to what tools will be used to access or ventilate a scene, to making the necessary operational determinations on elevator, water, gas leak and rope rescues.” “Nothing has changed,” he emphasized. Captain Naklick also testified in the arbitration before me, to much the same effect as in the Curreri arbitration.

As the preceding paragraph indicates, the evidence showed that the demoted captains continued to exercise leadership functions not only on the truck en route to the call, but at the call destination. Another former captain testified in the Curreri case that “I would dictate to the crew how we’re going to perform our tasks, what tasks we’re going to perform and the avenue in which we’re going to perform them.”

Arbitrator Curreri concluded, “I find that the demoted Captains on ladder and rescue continued to perform the same operational duties and supervisory functions that they had performed prior to the date of the demotion,” and therefore were entitled to out-of-title pay.

Arbitrator Curreri observed that a significant proportion of calls required the “professional discretion and judgment that Captains need to make on an incident to incident

and sometimes split second basis.” Arbitrator Curreri addressed the City’s contention that the SOP’s then in effect specifically assigned the oversight of these duties to the Engine 1 captain for the ladder truck and to the Battalion Chief for the rescue truck, and that this satisfied the need for captain supervision. Arbitrator Curreri observed that the testimony “firmly established” that neither the captain nor the battalion chief could effectively make those operational determinations “either due to their lack of physical presence or proximity to the fire scene, the responsibilities they have for their own apparatus, or the overall command tasks for which they are otherwise responsible.” The City makes the same argument in the case before me that oversight has effectively been assigned to another captain as well as to the battalion chief, and Arbitrator Curreri’s rejection of that argument applies equally here.

The Klein award

The other arbitration award was by Monte A. Klein, also a distinguished former PERB director. That case, like Arbitrator Curreri’s case, also involved the question of out of title pay to firefighters who performed captain duties. Arbitrator Klein reached the same result as Arbitrator Curreri on this issue, utilizing essentially the same reasoning. For example, he accepted the testimony that the demoted captains who sat in the right hand front position of the ladder truck and the rescue truck “were expected to perform every day all of the same operational duties that they had performed before their demotions.” Arbitrator Klein further observed that certain fire fighters, usually demoted captains, were assigned operational leadership functions at a call. “By way of examples, they were expected to continue ensuring that all members are secure, determining the status of unit activities, assigning duties to staff assigned to the apparatus, and ensuring accountability, safety, security and risk management for staff. However, they no longer were to receive captain’s pay.”

In addition, the Klein award addressed the Union’s contention that the City was required to continue to staff each apparatus with a captain. At the time of his decision, the rescue truck had not yet been removed from service, so arbitrator Klein was dealing with the removal of the captain from two existing apparatus, the ladder truck and the rescue truck.

Arbitrator Klein discussed in considerable detail the negotiation history leading up to the present contract language. None of this history was put in evidence in the hearing before me, and neither party has questioned Arbitrator Klein’s discussion of these points. I assume his discussion gives an accurate account of the negotiation history.

In the 1984 negotiations the Union made but withdrew a demand that all emergency response vehicles must have an officer in charge, which would in effect have required a captain

on each such vehicle. Later, the parties reached agreement for the life of one particular CBA that there would always be a captain assigned to each apparatus. When the City reduced the number of stations from 4 to 3, it made a commitment to have two captains as part of the hook and ladder company (at that time the rescue unit was apparently part of a larger ladder company). But neither commitment was included in the CBA.

In 2009 the parties discussed “that the fire department would continue to staff each apparatus with at least one captain as they had done for decades,” but Article 5 was not modified to require this.

The Union’s key contention was that Article 5, Section 8 set forth specific minimum manning requirements for each company, which included having a captain. However, Arbitrator Klein concluded that the directive that manpower “shall not go below” a certain level applied only to “duties other than firefighting.” He concluded therefore that the language of Section 8 did not apply to a reduction of force in a fire fighting situation, but only with respect to “duties other than firefighting.” The Union questions the soundness of this conclusion, and I will turn to this as a separate matter later.

However, Arbitrator Klein rejected the Union’s argument for a further reason, quite apart from his conclusion that Section 8 applied only to duties other than firefighting. He observed that the Union’s principal argument was that the word “men” in Section 8 meant “one captain and two fire fighters” for the ladder truck and “one captain and one firefighter” for the rescue truck, all in accordance with past practice. That word “men,” by the way, appears only in the reference to the pumper company. The reference to the ladder company just says “shall not go below two.” Same with the rescue company. Neither mentions “men.” So the “men” argument could gain only limited traction in any event.

Arbitrator Klein rejected the Union’s argument about the scope of “men” in light of the bargaining history that he discussed, as I summarized above. He observed that whatever the parties may have assumed about commitments to have a captain on each unit, and while the practice may have been to staff each apparatus with a captain, “it nonetheless remains that such deployment is not contained in either the current Agreement or any of the others spanning almost fifty years of collective negotiations.” Arbitrator Klein concluded that “men” did not mean that at least one of the men must be a captain.

Arbitrator Klein made clear that even if Section 8 did apply to firefighting situations (that is, even if he was wrong that it was limited to duties other than firefighting), the outcome would be the same:

“Moreover, even if the Arbitrator did not so find this limited application of the clause, the Arbitrator still finds that Article 5, Section 8 is not availing to the Union because the Union has not established that the word ‘men’ in the Agreement ‘means that there shall be a captain on every piece of apparatus’ for the reasons that follow.”

The “reasons that follow” were those elements of the bargaining history that I’ve already mentioned.

The facts – what captains and fire fighters did and still do on the job

Until the reduction in the number of captains in 2016, as many as five captains could be dispatched to a fire fighting operation – the captains then assigned to each of the five apparatus then in service, if all apparatus from each station responded. To take a common situation, Station 1 might send its engine, ladder and rescue truck. There would be three captains (one for each apparatus), and five fire fighters (two each on the engine and ladder, and one on the rescue truck). The personnel on the ladder and on the rescue truck often worked closely together, in teams. For example, under an OSHA rule known as the “2 in – 2 out” rule, a team of two men might enter the building for rescue or fire suppression purposes, while a second team would remain outside to provide back up support and ventilation, and be prepared to enter the building if necessary. Department policy called for the men to operate in tandem, in teams of two, so that no man was isolated when he entered a building or performed a function. In these team settings, one man was expected to provide a supervisory function. Before the reduction in the number of captains, when there was a captain on each apparatus, the captain on each team would perform that command function, in accordance with the job specifications. If there was not a captain on duty, a previously designated fire fighter was expected to perform that command function.

The captain’s command role in these situations is made clear in the bulleted examples in the fire captain job description under the heading “examples of work activities:”

- supervises activities of a fire company members . . . at the scene of a fire, other emergency or company assignments.

- checks to ensure that firefighters are properly assigned tasks for fire suppression, hazardous conditions, technical rescue and medical responses.

-directs fire suppression, rescue, laddering, ventilation, salvage and overhaul operations during and immediately following a fire.

-checks subordinates' duty performance and makes suggestions for better execution of work.

Among the listed skills for the captain are the ability to "recognize hazardous conditions and take appropriate steps to isolate/mitigate conditions."

Another is "resourcefulness: sound judgment in emergencies."

In the case before me, there is no longer a rescue truck. The former rescue crew is now assigned to the ladder. A captain now sits in the captain's seat on the ladder truck. There is no need for two men to direct the trip to the call destination. So there's no entitlement to out of title pay for a fire fighter on the trip over on the ladder truck, as long as there's a captain already on board.

But once the men arrive on the scene, some of the fire fighters continue to take on a command role as the men divide into teams. The Union presented compelling testimony that these fire fighters continue to assume the supervisory role once performed by the captain of the rescue company. The testimony was presented by men who had all performed emergency work in the past when there were more captains on the scene, and who once occupied or still occupy the ranks of captain and battalion chief. So they know what they are talking about. In addition, the Chief testified as part of the City's case, and, given his long history with the Department, he too knows what he's talking about.

Daniel Daugherty: Daniel Daugherty, a fire fighter, is presently the Union president. He would formerly respond to a call as part of the rescue company. The rescue unit is now part of the ladder company. Typically, Daugherty will be assigned to the "out" team. The captain from the ladder unit will be in the aerial bucket supervising certain operations. Daugherty said it would be hard for the captain in the bucket to give directions to the out unit, as "he's not right there." So, for example, if the two men on the out team had to enter the building on a moment's notice, "the person in charge determines which equipment to take, how to make access, to determine what's best to mitigate hazards, and to remove anyone who needs rescue."

We did not have an "official" transcript of this hearing, taken by a professional court reporter. These quotations are from the very extensive notes I take on my computer during the

hearing. Where I'm able to compare my notes to those taken by a reporter, I find that my notes, while not verbatim, are quite accurate.

Daugherty explained that prior to 2016 this supervisory function would be performed by a captain, usually the captain assigned to the rescue truck. Now, with no captain available, one of the fire fighters must assume that supervisory role. The captain in charge will have already designated the fire fighter who must assume that role, usually going with the more senior man or the one who has scored the highest in tests.

Daugherty testified that the five men arriving on the ladder truck usually split their duties at the scene between typical ladder team functions and typical rescue team functions, and that the captain of the ladder truck must choose to go with one team or the other, leaving the remaining team with no direct supervision by a captain.

The same thing occurs during an elevator rescue. One team will go to the elevator itself to remove the occupants. The other team will go to the equipment room. The captain can only go with one of the teams, leaving the supervision of the other team to a fire fighter and not a captain.

With respect to the work that he now does, Daugherty concluded, "nothing has changed in my opinion other than where I'm riding, in the ladder rather than the rescue truck."

Daugherty testified that it was impossible for the captain on the scene to adequately supervise all the men. He said that it was not adequate for the men to use the radio or phone to get direction. "You need to be there in person. You can't convey what's actually happening if you do it by phone. Radio contact is not enough."

Arbitrator Curreri was persuaded by similar observations in the case before him that a single captain could not provide adequate supervision in these situations where multiple teams were involved.

Captain Andrew Naklick. Naklick is currently a captain on the ladder company. He had been a captain on the rescue company. He testified that each person on the ladder truck has a specified job. Usually they are divided into teams. Only one team comes with him. He usually goes with the team that has the highest risk assignment. This is usually the interior group, leaving two fire fighters outside without direct supervision of a captain. "The other two are responsible for outside ventilation, cutting a hole in the roof or assigned to something else, such as rescue in another part of the building, much like the old rescue unit."

He said that the split occurs on every call we take, and that the truck goes out an average of at least once per shift.

He said that “supervising over the radio is difficult. I can’t do it.”

He said, “the two guys who are away from me, I can tell what to do but not how. The how, somebody among them has to do it. They decide who is in charge. When I’m elsewhere, I assign a secondary function, and they’re on their own how to do it.”

Battalion Chief Michael Kellogg. Kellogg testified that fire fighters are split from the captain on every alarm. At the outset of the shift “I provide the ladder company with somebody on the list, somebody with good experience, so the captain can rely on an experienced person to make decisions away from the captain.”

He said that the current ladder company is taking on the tasks of two prior crews, but with only one captain rather than two in charge.

He testified that one of those fire fighters who is split away from the captain has to perform supervisory duties “for the safety of those on the scene.” He “strongly disagreed” that the captain could provide this supervision by radio, citing in part the radio traffic and the background noise. He said that face to face supervision is far superior to remote supervision.

He testified that apart from the elimination of the rescue truck, the work performed by fire fighters on the scene is the same as it was before.

Battalion chief Kellogg testified that fire fighters are not supposed to act on their own. “That is freelancing and it gets people killed.”

Tucker Wiley, lieutenant chief, testified that he currently is a battalion chief, overseeing all the companies on a shift. He said that in most situations the men are working in separate units. When a group is split off from the captain, one of the fire fighters must assume command responsibilities. “He performs captain responsibilities,” Wiley said.

Chief Matt Timmerman. Chief Timmerman is a 24 year veteran of the force, having served in most positions, including on the rescue truck when it existed. When the rescue truck was decommissioned, he assigned its two fire fighters to the ladder truck. All four fire fighters on the ladder truck are under the supervision of the captain on that apparatus.

Chief Timmerman conceded that under this arrangement, as before, fire fighters may be assigned to tasks in separate units of two, but that they no longer always have the direct supervision of a captain. For example, in an elevator rescue, the captain might stay with two fire fighters at the elevator itself, while two other fire fighters are off on their own trying to secure power to the car.

Chief Timmerman conceded that in certain situations this might call for out of title pay. He said there might be situations where the fire fighters can't get direct instruction from the captain, or where the captain, busy elsewhere, hasn't time to give specific instruction to the captainless fire fighters. He conceded that in some situations "there is no way to oversee. We are acting without oversight." In those situations, he conceded, the fire fighter who assumed the supervisory role would be entitled to out of title pay.

Chief Timmerman differed from the Union witnesses in contending that in many situations the unsupervised crew makes routine decisions that do not require further supervision. He said, "splitting the crew is common, but in situations where they are remote from the captain they should be able to handle most of it by themselves. Usually, in my opinion, they are within their normal decision making capacity, things they can address on their own, or, if above and beyond the usual, they can contact the officer, and where neither applies and they can't contact somebody out of their rank it is entirely reasonable to reimburse them for out of rank pay."

The Chief testified that where the fire fighters need the captain's advice, "I imagine that in the majority of times the captain can stop what he's doing and address this," but, he conceded, "not always." He also conceded that, for example, if the captain was doing search and rescue with another fire fighter, it was "not possible" for him to also provide direction to fire fighters elsewhere.

The Chief testified that the men usually work in teams, especially the two "out," and that "the two always stay together. We try to avoid solo. If they do things by themselves they can get hurt, or nobody is there to help them if they get hurt."

While the Chief testified that the men are trained to handle many tasks on their own, and that he thought it was not necessary for one man to supervise another on a regular basis, he conceded that when he was the captain on the rescue truck he would regularly instruct the fire fighter with whom he was paired and regularly tell him what to do. For example, he'd give

orders, grab this, things other than routine instructions like what clothing to wear. He said it was not enough to just have a fire fighter on the team, but you needed an officer as well.

Chief Timmerman's order

After the rescue truck was decommissioned, Chief Timmerman issued a memo to the staff entitled "dissolution of the rescue company and resultant staffing changes (Ex. 20)."

The opening paragraph makes clear that the abolition of the rescue truck creates a difficult and "fluid" situation in which "we need to be on our toes to insure that we stay safe and accomplish our mission during this transition period." The Chief requests staff to keep him posted on how things are going, suggesting that adjustments may be needed as they go along.

The notice has a number of bulleted items. I quote some of the critical ones:

"the Rescue's two personnel will be moved to the Ladder Company, increasing their staffing to 5 personnel (1 Captain, 4 FF's)."

"generally speaking, the Ladder Company will be responsible to handle duties of what were previously handled by the Ladder and Rescue."

"at fires – the Ladder Company will be responsible for typical truck company operations, and search, 2 in – 2 out."

"elevator rescues will be handled by the Ladder Company."

In addition, separate bullets deal with carbon monoxide incidents, industrial accidents, and water rescue, placing most of these responsibilities with the ladder unit. Some of these had been rescue company functions.

The plan calls for transferring some of the rescue truck equipment to a new, smaller truck, which one fire fighter from the ladder unit will transport to call destinations.

The closest available engine company will now respond to medical calls, which had been primarily the province of the rescue company.

Additional possible future issues are addressed in a separate paragraph; for example, whether to move certain equipment from the rescue truck to the engine trucks.

Discussion and Conclusions

Out of title pay

I sustain the Union's claim for out of title pay whenever a fire fighter assumes customary and historical captain command functions during a fire or other emergency response. Article 4, Section 3 makes clear that "any member assigned to perform duties out of title in a rank higher than his," is entitled to the higher rate of pay on a per diem basis. It is abundantly clear through overwhelming testimony that even after the elimination of the rescue truck the fire fighters in question continue to respond to calls and perform command duties that in the past were routinely performed by captains, including captains in the rescue company, in accordance with the job specifications for captain.

To give one example, every time a team of fire fighters enters a building for rescue or fire suppression, one of them must assume a command function, in accordance with the examples of captain's work in the job specification. It's a captain's job to "direct fire suppression, rescue, laddering, ventilation," to name a few of the necessary actions described in the testimony. If a captain is not available, a fire fighter, usually designated in advance, must assume this function.

Now that the rescue truck has been eliminated, there is one less captain's function to be performed on the way to the call, for there is one less "captain's seat" to be filled on route. But once the crew arrives at the scene, the captain's functions that must be performed remain the same as before. Captain's work still must be done at the destination. While the two prior arbitration awards relied upon the obvious fact that a fire fighter occupied the captain's seat on the way to the scene, those decisions acknowledged other captain functions that the fire fighters on the rescue truck performed at their destination, and it is clear they still perform those functions now.

The two men who served as the crew of the rescue truck (initially one captain and one fire fighter, and after 2016 two fire fighters) continue to be assigned as members of the ladder company to essentially the same duties as before. They answer all the calls that the ladder truck answers, many of which would have been rescue truck calls prior to December, 2020. The principle difference is that they travel on the ladder truck rather than the rescue truck. They are an integral part of the ladder crew, and when they arrive at the scene, they perform many of the same functions they performed as rescue crew. The Chief's most recent directive makes that clear. Specifically, they often serve as the two out men of the "2 in – 2 out" teams in the

Chief's directive, and under OSHA rules are required to stand by outside a building and perform outside functions, such as ventilation, or to enter the building to assist in rescue. The Chief's directive also specifically assigns them to elevator rescue, which often requires them to work in a separate location from the captain. In both these situations, and undoubtedly many others, the fire fighters in question currently operate as a separate two man unit, without any direct supervision by a captain.

Before the demotion of the captains in 2016, the required supervision would have been provided by the captain on the rescue truck. That's what captains do. As I already stated, the job specification calls for a captain to "direct fire suppression, rescue, laddering and ventilation." In contrast, and as a corollary of the captain's duties, the fire fighter on the scene "receives instructions and immediate supervision from a higher-ranking officer in the department." Before 2016, captains provided this supervision, and that experience, memorialized in the job specification, establishes that this is a captain's function. When there was both a rescue truck and a ladder truck, and a captain aboard each, there was sufficient staffing that a captain could supervise and direct every responding unit. That is no longer the case. But the job specification for captain calls for somebody to perform these command functions in all response situations, not only when a captain is on the immediate scene.

The Union witnesses gave uncontradicted testimony that the ladder truck now goes out on a call every single day, and that during those calls fire fighters take some responsive action in isolated groups. In those groups, direct supervision often is not provided by a captain, who is located elsewhere. The captain's function must be assumed by a designated fire fighter. And that triggers out of title pay.

The defenses raised by the City, primarily through the Chief's testimony, are not compelling. The Chief contends that much if not most of the work that the fire fighters perform is the subject of thorough training, and relatively routine. He says a fire fighter does not need somebody else to tell him what to do. But the situations faced in today's responses are essentially the same as before the elimination of the rescue truck. They involve the same dangers and uncertainties whether or not a rescue truck is in service. A captain was historically assigned to a command role no matter how obvious the solution to the problem. The question whether you're facing an unusual rather than a routine situation is itself a matter of judgment, and the system was designed so that a captain would make that call. That's the nature of his job. The job specification acknowledges his skills of "resourcefulness; sound judgment in emergencies." The person who takes on that role assumes a greater responsibility no matter how simple the situation appears to be, and is entitled to captain's pay for that work.

The Chief contends that in most cases where two fire fighters operate alone, they can always reach out to the captain on the scene by phone or radio to obtain direction. But the Union witnesses testified that this is not the same thing as the captain being there and directly visually observing the dangers involved, and that remote phone communication is simply not as effective. The Chief conceded that is so in at least some situations. The captain who is off on another function, for example, leading a team in a rescue operation in a burning building, cannot turn his full attention to a problem in a different location. The time needed to make phone or radio contact can delay an effective response. The bottom line is that when captains performed this job function in the past, as spelled out in the job specifications, they did so in person, directly on the scene, and not by phone or radio. The bulleted job specification to “direct fire suppression, rescue, laddering and ventilation,” entails being there on a moment by moment basis.

The two prior awards, Klein and Curreri, clearly establish that the current situations I have described warrant out of title pay. The situations in the prior cases undoubtedly required some exercise of judgment as opposed to routine decisions, and that was enough to constitute a responsible command function. Those judgments were no different than in the case before me. Arbitrator Curreri concluded that the backup role assigned to the engine captain and the battalion chief were not adequate substitutes for a direct command presence. Those decisions are soundly reasoned. They follow the CBA and apply to the case before me. I find no factual distinctions that would justify a departure from those conclusions.

Captains are not a luxury. They are a necessity for carrying out the Department’s mission. Although the CBA does not set forth a minimum number of captains, it makes clear that when captain’s work is performed, the person assigned to that work is entitled to out of title captain’s pay.

Therefore, I find that the City has violated the out of title pay requirements in Article 4, Section 3. I direct the City to provide the proper compensation under that provision, including back pay where appropriate.

Implementation of the remedy for out of title pay.

The only remaining question is determining the situations in which out of title pay is warranted. The Union says out of title pay is due every day, at least every day in which the ladder company responds to a call. The City says it is due only for those calls in which a fire fighter actually engages in a necessary command function, and then only if more than routine judgment must be exercised, and only where the captain on the scene cannot be adequately

involved. In the Curreri and Klein cases, the entitlement was clear. It was triggered by the very obvious and ascertainable event of the fire fighter sitting in the captain's seat on the apparatus. That was enough to warrant out of title pay for the entire day, so it was not necessary to pay attention to what happened at the call destination. Now, because there is no rescue truck seat for the captain to occupy, and all direction en route comes from the captain's seat in the ladder truck, which is presently occupied by a captain, the automatic trigger of a fire fighter sitting in the captain's seat on the rescue truck is gone.

But once the unit arrives at the call destination, as soon as a team performs some operation that requires one fire fighter to direct another, the fire fighter who provides direction functions as a captain and is entitled to out of title compensation for the entire day. The Union's witnesses say this happens every single day, so the entitlement is essentially automatic.

Despite this contention by the Union, it is not clear that captain's duties are necessarily performed every time the unit is dispatched on a call, apart from the person in the captain's seat on the ladder truck. For example, the captain might declare upon the arrival at the scene that there is no need for further services because it was a false alarm or the danger had abated. If he ordered the crew to return to the station before anyone initiated any command functions, no out of title pay would be due. The fire fighter does not receive captain's pay just for traveling to the call scene, unless he occupies the captain's seat. A rule granting automatic out of title pay once the crew arrives at the destination would be easier to administer, but would not be consistent with the purpose of out of title pay. But once a team has begun an operational mission, and a fire fighter has assumed a command role, then the trigger for out of title pay for the day occurs.

I leave it to the parties to come up with a workable administrative procedure to implement this remedy, and remand the matter to them for this purpose. On the basis of the record, there is a reasonable presumption that whenever a unit is dispatched to a fire or other emergency, a fire fighter will inevitably be called upon to perform a captain's command function. That presumption could be rebutted by a clear showing that no such command work was performed, for example, where the unit was sent back to the station without performing any operational duties. The presumption would not be rebutted by a contention that the leadership function exercised by the fire fighter was merely routine, or that a captain could have overseen the operations remotely by phone or radio, for the prior arbitrators and I have rejected these defenses.

I retain jurisdiction on this aspect of the case.

The Elimination of the Rescue Company

The Union's second contention is that the City violated the CBA by eliminating the rescue company. The Union heads this section of its brief, "The City must operate with a rescue company with at least two men." The Union asks that I order the restoration of the rescue company.

The Union does not contend that one of the "at least two men" must be a captain. Thus, the Union does not revive the argument it made unsuccessfully before Arbitrator Klein, that the rescue company must be headed by a captain.

The Union's position rests squarely on Article 5, Section 8. I again quote it in full:

Pumper companies shall not go below three (3) men at any time for duties other than firefighting. The ladder company shall not go below three (3) at any time for duties other than firefighting; rescue company shall not go below two (2). At no time shall there be less than eleven (11) men available for first alarm responses.

The Union's argument is pretty simple and fundamental: "rescue company shall not go below two (2)." That means you must have a rescue company and it must have two men.

Is Article 5, Section 8 limited to "duties other than firefighting?"

The Union faces a threshold hurdle in taking this position. In the Klein case, the Union argued that Section 8 required a captain in each company. The Union's contention was addressed to both units that no longer had captains at the time – the ladder company and the rescue company (the engine company continued to have a captain). Arbitrator Klein quickly stifled that argument by ruling that Section 8 applied only in the limited situation where the unit was involved in "duties other than firefighting." Specifically, Arbitrator Klein ruled, Section 8 applied only to such things as deploying an apparatus to the fairgrounds for display, where it would have minimal staffing and would remain there as a second responder in case it was needed somewhere else. Arbitrator Klein made very clear that Section 8 requires minimum staffing only in those situations.

The Union argues strenuously that Arbitrator Klein was wrong on this point. However, as I pointed out in my opening section, Arbitrator Klein made clear that his decision did not depend upon his reading that Section 8 applies only to duties other than firefighting. Rather, his decision ultimately turned upon the Union's failure to establish that "men" in Section 8 meant

at least one captain per apparatus. Arbitrator Klein's conclusion on this substantive point was supported by extensive bargaining history, which showed that while the Union made several demands for CBA language guaranteeing a captain on each apparatus, and while the parties had discussed possible language to that effect, no such commitment was ever made in the CBA.

We arbitrators are not required to necessarily follow all prior arbitration decisions between the parties. My practice is to favor consistency and stability by following prior decisions that are soundly decided, even if I might have reached a different conclusion had that been my case to decide in the first instance. Arbitrator Klein's conclusion that Section 8 does not require a minimum number of captains is supported by the contract language, which contains no reference to "captains," as well as by the bargaining history. The Klein decision is now part of the fabric of this CBA and establishes its meaning. If the case presently before me raised the issue of whether Section 8 requires a minimum number of captains, I likely would have followed Arbitrator Klein's lead and concluded that it does not.

But that's not the issue before me. The issue is not whether the rescue company must be led by a captain, but whether there must be a rescue company at all. On that issue, neither arbitrator has spoken, and I write on a clean slate. In getting there, I am free to take my own approach to the interpretation of Section 8, particularly on the impact of the phrase "for duties other than firefighting," because Arbitrator Klein made clear that his interpretation of that phrase was not critical to his conclusion in that case.

I begin with the actual language of the CBA, and examine not just the words, but the structure and organization of the provision. Section 8 refers to three different companies. The language with respect to the rescue company, the only company at issue in this case, is unqualified: "Rescue company shall not go below two." Period. In stark contrast, the preceding two references are both qualified: "for duties other than firefighting." The parties knew how to express this qualification when they wanted to, and imposed it for the other two companies but not for the rescue company. In fact, according to page 5 of the Klein decision, back in the mid 80's the CBA expressly stated that "the rescue company shall not go below two men at any time for duties other than fire fighting." So the qualification was once specifically attached to the rescue company, and now it is gone. The omission of this qualification in the current agreement with respect to the rescue company supports the conclusion that the qualification does not apply to the rescue company, no matter how fervently the City wishes that it did.

I know, there's an answer. For a number of years Section 8 referred only to the engine and ladder companies, as in the 2009 CBA. The ladder company had five members, not three, apparently incorporating the rescue company's function as well as its two members. The rescue

company was not mentioned as a separate unit. Only in 2011 did the parties add language referencing the rescue company. Maybe the drafting was sloppy and maybe it was an oversight not to attach the “duties other than firefighting” bit to the rescue company reference. Maybe everyone understood that the rule for the rescue company was the same as for the other two units, so they didn’t bother to repeat that phrase. But the contract says what it says, and people reading it many years later should be able to rely upon the plain meaning of the language. They should be able to conclude that while the rule for other two companies is qualified, the rule for the rescue company is absolute. A minimum of two men. Period.

There’s a further reason not to extend the qualification for the first two companies to the rescue company. That reason is that the qualification “duties other than firefighting” makes little sense. So let’s not apply it any further than the language clearly requires. As the Union points out, why would you have a two man minimum for ceremonial activities at a fair ground, where the unit is not likely to be needed for any response, and have no staffing minimum at all when the rescue company is called out for the vital and far more important work of combating fires? The most likely explanation, attempted by a couple of witnesses, is that the parties were thinking about creating minimum staffing levels only for those minor, mostly ceremonial activities where the unit probably wouldn’t be needed for a first response and could function as a second responder. They were not addressing the minimum staffing requirements in a fire fighting situation. The epic exchange between the two lawyers as to what constitutes “duties other than firefighting” should be understood in that limited context.

But if that’s all the parties had in mind, and the exception is limited, then where do we find any provisions addressing the far more important question of minimum staffing for emergencies, like responding to a fire? Sure enough, Section 4, the critical provision that states the minimum number that triggers calling in replacements, is absolute and not limited to situations other than fire fighting. In fact, it makes no sense unless it applies primarily to fire fighting situations. Similarly, the reference in Section 8 to the 11 man minimum for first alarm responses obviously applies to fire fighting situations, for when else would you have a first alarm? It is not limited to duties other than firefighting. Given the uncertainties introduced by the “other than firefighting” language, we should confine that qualifying language to the two places where it is explicitly stated. The reference to the rescue company is not qualified in that fashion, and so should be given its plain meaning.

The parties probably should clarify Section 8, so that we all understand what it means. Meanwhile, I will apply Section 8 as it reads on its face. It says “rescue company shall not go below two.” Period. So it applies to the situation before me.

This brings us to the critical question whether the Union has established a violation of this language.

The merits of the Union's position under Article 5, Section 8

The Union contends that the City violated Article 5, Section 8 when it eliminated the rescue company. It says this violates the provision that the "rescue company shall not go below two." The Union does not make the claim that these two must include a captain.

I conclude, for several reasons, that the Union has not met its burden of establishing, on this record, that the City violated Article 5, Section 8 of the CBA by eliminating the rescue company.

Let's first put this question in perspective. A public employer normally has the unfettered authority to organize and direct its work force. That would include determining how many companies to deploy and which ones. That is so even though there is no specific management rights clause in this CBA. The parties have not briefed this issue, and I don't wish to make a definitive pronouncement on the scope of management prerogatives. But before I have the temerity to tell a public authority that it must have a rescue company, I'd better be sure this is what the CBA actually requires and that the City has in fact actually abolished that company.

The language in question, "rescue company shall not go below two," is part of a comprehensive article on assignments and compensation, including overtime. This article insures that adequate work opportunities are provided and distributed fairly, as part of a minimum work week. The title, "work day and work week," gives no indication that the article is designed to limit management's right to deploy its forces, except as such limitation is necessary to achieve the minimal manpower requirements.

The heart of Article 5 is its assurance that the overall complement of fire fighters does not go below 14 on each shift. Section 4 (b) is the operative provision, requiring that a member be called in if the aggregate number of men on the shift falls below 14. That figure of 14, and not the separate numbers referenced for each component company, is the trigger for the call in.

The centrality of the 14 man figure is shown by the interest arbitration award issued in June, 2019 (the Siegel award, Ex. 8). In that dispute, the City sought to reduce the minimum staffing level below 14. The award ordered that the 14 man minimum be maintained, deeming

it essential for adequate protection of the City. No mention was made in the award of the numbers for the individual companies that comprise this aggregate figure.

Given that the 14 man minimum in Section 4 is the controlling figure, Section 8 could be viewed as nothing more than an illustration of how that figure is calculated, based upon what was then the configuration of the three companies. Looked at that way, the phrase in Section 8, "rescue company shall not go below two," could be read to mean that if there is a rescue company it shall not go below two, leaving it up to the City whether to have a rescue company at all. It would be further understood that if there were no rescue company, the two men in question would then be distributed among the remaining two companies, most likely the ladder company, in order to maintain the 14 man minimum.

This is not a totally far-fetched reading. For the history shows that the parties have gone back and forth between having a separate rescue company or folding its functions into the ladder company, in either case maintaining the aggregate figure of 14 under Section 4. For example, the 2009-2011 CBA (Ex. 21) provided in Section 8 that pumper companies would not go below three men and the ladder company (then known as the hook and ladder company) not below five. There was no reference to a rescue company. The two men who would have been part of a rescue company were effectively incorporated into the ladder company, making an overall unit of five. The rescue company reappeared in the successor CBA, 2011-2014 (Ex. 7), with a minimum of two men, and the engine company minimum dropped correspondingly from five to three.

This history gives some credence to the testimony of former City Manager Mary Corriveau, who drafted the 2011-14 provision, which has continued forward unchanged. She testified that all she intended by the reference to the rescue company was to reflect the actual situation at the time, in which there was indeed a rescue company of two men. She testified that the City did not mean by that reference to commit to the permanent existence of a rescue company.

This would not be my preferred interpretation of Section 8, but it is a plausible reading, given the pattern of sometimes having a separate rescue company, and other times folding it into the ladder company, but at all times maintaining the 14 man aggregate minimum.

But I find it unnecessary to reach this interpretive issue, since the record shows that the rescue company or its equivalent remains a functional part of the response team, and that for the purpose of maintaining a full complement of members, Article 5, Section 4 has been satisfied.

The record does not establish that the City has definitively abolished the rescue company. The Council resolution of December 21, 2020, which is what brings us here, does not call for the abolition of the rescue company. It provides only that “the Heavy Rescue Truck is hereby removed from service.” (Ex. 9. P. 7). Chief Timmerman’s memo to the Department (Ex. 20) refers to the rescue company’s “dissolution.” But the Council did not go that far, only removing the truck itself.

Let’s be clear that nothing in Article 5 or elsewhere in the CBA limits the City’s right to eliminate the rescue truck. Article 5, Section 8, addresses only the number of men in each company; it does not say what equipment must be utilized. The Union brief concedes the point, and does not call for the restoration of the heavy rescue truck.

All the critical functions of the rescue company continue to be performed even after the sale of the rescue truck. In the same breath that he calls this a dissolution, the Chief distributes those same rescue duties to the ladder company. He says, “the Rescue’s two personnel will be moved to the Ladder Company, increasing their staffing to 5 personnel.” He continues, “generally speaking, the Ladder Company will be responsible to handle duties of what were previously handled by the Ladder and Rescue (his underlining).” He then gives specific examples of rescue company functions now handled under the auspices of the ladder company. He provides that another truck, and some of the rescue company equipment, may be utilized by the ladder company. There’s even an arrangement for one of the rescue truck members to hitch a ride on another vehicle if the back up ladder truck, which has fewer places to stand, is utilized.

As an operational matter, the ladder company, now beefed up by the two members formerly in the rescue company, performs the functional equivalent of rescue company work. The Union must acknowledge this, for that is the heart of its argument with respect to out of title pay. On the out of title issue, the Union contends that the fire fighters riding on the ladder truck are basically doing the same work the captains or their fire fighter substitutes formerly did as part of the rescue company. The staffing consequences after the sale of the rescue truck are exactly the same as before. The two men who were assigned to the rescue truck move over to the ladder truck and receive the same hours and compensation as before. This includes out of title pay if the circumstances warrant. The minimum staffing requirement in section 4 is still met whether the 14 man minimum includes five men on the ladder truck or three men on the ladder truck and two men on the rescue truck. Section 4’s bottom line of 14 men is satisfied equally both before and after the reorganization that followed the sale of the rescue vehicle. In

other words, the Union can show no economic or other tangible harm to the interests protected under Article 5 by the claimed dissolution of the rescue company.

What relief could I properly order if I concluded that the City violated Article 5, Section 8? No member has lost any compensation as a result of this reorganization. Each receives exactly what he would have received had the rescue company remained intact. Each has the same opportunities for hours of work, and for out of title pay if he performs captain's duties. Each man gets exactly what the article on work day and work week was designed to give him. There is no basis for additional monetary compensation should I conclude that the rescue company had been improperly eliminated in violation of Article 5.

The monetary outcome would be the same even if I ordered the rescue company restored with two men. That order would be satisfied by transferring two men back from ladder to rescue, which would have no economic consequences under Article 5. If I ordered that two men be placed in the rescue company, the City would be within its rights to make a corresponding reduction in the number of personnel on the ladder truck, as Section 8 guarantees only three men on that unit. This adjustment would satisfy Section 4's requirement of an aggregate of 14 men on the shift. There would be no monetary consequences.

Nothing in the record suggests that any member's compensation or perks are affected by being treated as part of the ladder company rather than a separate rescue company. There's no showing that assignments to these units are bid upon or that seniority is calculated on the basis of time served in the specific companies. There's no showing that members are sent out on calls more or less frequently now that only one truck responds. And in any event, fire fighters receive the same compensation no matter how many calls they answer.

The only other relief I could order, if I agreed with the Union that the City had violated Section 8 by abolishing the rescue company, would be to require the City to formally designate two of the men who travel on the ladder truck as belonging to the rescue company. But I don't know what remedial or operative purpose that would serve, and such an order might possibly impair the Department's flexibility in ordering members to respond to an emergency.

As long as the combined ladder company continues to incorporate the duties of the rescue company and employ the same number of people, the economic objectives of Article 5 are satisfied. I see no purpose in reaching out to decide an issue not squarely raised by the facts, especially where that determination might impair the efficiency of the Department's responses.

The chief stated a couple of times in his directives that this is a fluid, evolving situation. He indicated that the organizational response to the elimination of the rescue truck may change over time. It may turn out in the future that the removal of the rescue company will impair the economic opportunities and benefits protected under Article 5. That might well establish a violation of Article 5 and a need for remedial economic relief. But on this record, no such violation is shown.

In summary, the record does not show a clear abolition of the rescue company. The functional equivalent of a rescue company continues to operate. Whatever reorganization has been taken in response to the elimination of the rescue truck in no way impairs the economic benefits provided under Article 5. Therefore, this aspect of the Union's claim is denied.

Postscript. Civil Service Law Section 61 (2)

The Klein and Curreri arbitration awards in 2018 each required out of title pay for fire fighters doing captain work. Shortly after judicial confirmation of these awards, the City restored four captain positions and promoted four fire fighters to captain and assigned them to the ladder truck. So the ladder company was back to where it was.

Meanwhile, the City kept the rescue company, but did not restore the captain positions in the rescue company. Instead, it paid the affected fire fighters the out of title differential ordered in the arbitration decisions.

A few months later, in June, 2019, the Union initiated a law suit in State Supreme Court, contending that the continuing assignment of fire fighters to captain duties on the rescue truck and the ongoing payment to them of out of title pay violates Civil Service Law Section 61 (2), because these were in effect permanent captain appointments that should have been filled by promotions in accordance with civil service law.

As I described in the opening portion of my decision, in a decision on August 1, 2019, State Supreme Court Justice McClusky agreed with the Union with respect to the impact of the Curreri and Klein awards. He concluded that by continuing to routinely assign fire fighters in the rescue company to captain duties and paying them out of title pay pursuant to those awards, the City violated Civil Service Law Section 61 (2). He prohibited the City from continuing to make out of title payments without promoting those men to captain. His decision was upheld by the Appellate Division in November, 2020.

In December, 2020, now seeing the handwriting on the wall (or in the law books), and realizing that the McClusky Order would probably require the City to restore the captain positions in the rescue company, the City attempted to avoid that consequence by eliminating the rescue truck from service. The minutes of the Council meeting (Ex. 9) show that the Mayor recommended that course of action to avoid having to promote four firefighters to captain. The elimination of the rescue truck gave rise to the arbitration before me, for otherwise the Klein and Curreri awards would have continued to control.

The theory and argument that the Union advanced in court subsequent to the Curreri and Klein awards had not previously been raised before either of those arbitrators. For ease of reference, I call that the “conversion” theory, the contention that by continuously assigning fire fighters to captain’s duties and paying them out of title wages at the captain level, the Department had effectively converted the position to a captain’s position, which then had to be filled in accordance with civil service rules and procedures.

The Union does not make a separate conversion claim in the case before me. It does not contend, nor did it brief the point, that because fire fighters are regularly performing captain work and are routinely entitled to out of title captain’s pay, their position is converted to a full time captain’s position that must be filled in accordance with civil service law. It is not one of the issues in the agreed upon submission before me, just as it was not part of the Klein and Curreri decisions.

Accordingly, I do not consider the conversion argument previously raised by the Union before Judge McClusky, as applied to the Klein and Curreri decisions and ultimately upheld by the courts.

My decision upholding the Union’s claim for out of title pay may set the stage for the Union to make a conversion claim in court similar to the one it raised after the Klein and Curreri decisions. The City’s brief before me anticipates this direction: “the underlying purpose of this grievance and proceeding is to lay a predicate for the Union’s ultimate demand that the City create Fire Captain positions.” Nothing in my decision and award is meant to preclude or to endorse such an approach. The theory is of course a viable one, as it has been upheld in litigation between these parties. Whether it applies under the facts of this case is another story. I take no position on the merits of such a claim should it be advanced in court, for it is not my business. Nor do I take any position on whether such a claim would be arbitrable if it were advanced in arbitration.

Conclusion

The grievance is sustained in part and denied in part.

I sustain the Union's out of title claim. The City violated the CBA by failing to provide out of title pay for fire fighters who while assigned to the ladder company performed captain's duties. The City is directed to provide out of title pay on a per diem basis for all days in which such work was performed, in accordance with Article 4, Section 3, including back pay where appropriate. I remand the matter to the parties to implement this remedy.

I retain jurisdiction with respect to the implementation of this remedy until December 15, 2021. If either party notifies me on or before that date that issues remain with respect to remedy, my jurisdiction shall continue, and I will advise the parties of further procedures that will be taken. If neither party notifies me by December 15, 2021, my jurisdiction shall terminate.

I deny the Union's contention that on this record the City has violated the CBA by eliminating the rescue company.

No other issues are considered and no other relief is ordered.

Respectfully submitted,

Robert J. Rabin
Red Hook, N.Y.
October 5, 2021

AWARD OF ARBITRATOR

The undersigned arbitrator, having been designated in accordance with the parties' agreement, and having been duly sworn, and having heard the allegations and proofs of the parties, awards as follows:

The grievance is sustained in part and denied in part.

I sustain the Union's out of title claim. The City violated the CBA by failing to provide out of title pay for fire fighters who while assigned to the ladder company performed captain's duties. The City is directed to provide out of title pay on a per diem basis for all days in which

such work was performed, in accordance with Article 4, Section 3, including back pay where appropriate. I remand the matter to the parties to implement this remedy.

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I deny the Union's contention that on this record the City has violated the CBA by eliminating the rescue company.

No other issues are considered and no other relief is ordered.

STATE OF NEW YORK
COUNTY OF DUTCHESS

I, Robert J. Rabin, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Robert J. Rabin, Arbitrator
October 5, 2021