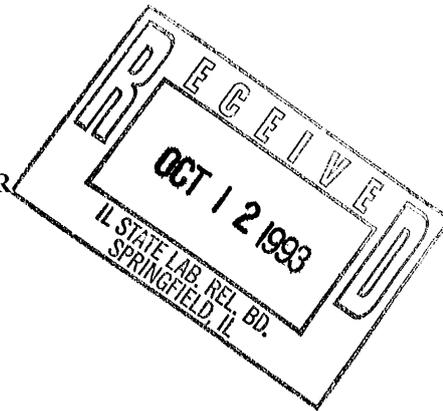


BEFORE
EDWIN H. BENN, NEUTRAL ARBITRATOR
KURT BRESSNER, VILLAGE APPOINTED ARBITRATOR
DAN PICHA, UNION APPOINTED ARBITRATOR



In the Matter of the Arbitration

between

THE VILLAGE OF DOWNERS GROVE

and

DOWNERS GROVE FIRE FIGHTERS
ASSOCIATION, LOCAL 3234

Case No.
Arb. Ref.

S-MA-93-92
92.262
(Interest Arbitration)

OPINION AND AWARD ON MERITS

APPEARANCES:

For the Village:

James P. Bartley, Esq.
Bruce C. Mackey, Esq.

For the Union:

Lisa B. Moss, Esq.
Adrienne E. Hampo, Esq.

Place of Hearing:

Downers Grove, Illinois

Dates of Hearing:

May 13, 1993, June 9, 1993

Dates Briefs Received
(on arbitrability):

May 29, 1993 (Union); June 2, 1993 (Village)

Date of Award
(on arbitrability):

June 4, 1993

Dates Briefs Received
(on merits)

July 12, 1993 (Village); July 13, 1993 (Union)

Date of Award
(on merits)

September 15, 1993

I. BACKGROUND

This proceeding was bifurcated on the procedural question of whether the issue of 1993-94 Captains' pay was properly before this Panel. After hearing facts and argument on the procedural question and by award dated June 4, 1993 (Village Member dissenting), a majority of this Panel found that the issue of 1993-94 Captains' pay was properly before this Panel and had not been previously resolved.

II. REMAINING ISSUES

1. What shall the Captains be paid for 1993-94?

2. Shall the agreed-upon fair share language also contain a grandfather provision proposed by the Village exempting employees from coverage who were not members of the Union as of June 9, 1993?¹

III. CAPTAIN'S PAY FOR 1993-94

Upon consideration, Captain's pay for 1993-94 shall be \$48,000 with an added \$500.00 stipend.

IV. FAIR SHARE

A. The Parties' Proposals

The parties are in accord that specific fair share language shall be included in

¹ At the commencement of the proceedings, the parties were also at issue concerning the scope of a sick leave buy back provision and the inclusion of a certain employee in an appendix to the Agreement governing that benefit. The Union has withdrawn that issue from this proceeding.

the Agreement. *See* U. Exhs. 6., 11; U. Brief at 1-2. However, while the Village agrees to the inclusion of fair share language, it seeks to grandfather certain employees from operation of that provision. *See* Vil. Exh. 12; Vil. Brief at 2:

The Village's final offer as to fair share ... is to add to the Union's proposed fair share clause the following grandfather provision:

"This clause will apply only to those members of the bargaining unit who were members of the Union as of June 9, 1993, and to any employees hired after June 9, 1993."

B. Facts

The Union initially filed a representation petition with the Illinois State Labor Relations Board on June 26, 1989. Unit questions arose resulting in extensive litigation before the ISLRB with court appeals culminating in a February 5, 1992 order of the Supreme Court denying the Village's leave to appeal the decision of the Second District which affirmed the ISLRB's actions *See* U. Exh. 1.² The parties commenced negotiations for their initial contract in the summer of 1991 (Tr. 102) and bargained until January 1993 with tentative agreement reached on all but the issues re-

² There were 10 days of hearing during July-September 1989 on the unit questions (which included a dispute over the Village's position that captains are supervisors). Post-election objections were also filed after the Union won the election. *See* U. Exh. 1.

maintaining in this case.³

Evidence was offered concerning the structure of the membership of the bargaining unit. According to the Union, at the commencement of the hearing, the unit consisted of 78 employees (captains, lieutenants, engineers, fire fighters, and fire fighter/paramedics). As of May 13, 1993, 58 individuals were members of the Union. Of the 20 non-members at that time, one had been hired September 28, 1992; eight were hired April 19, 1993 and one had been hired April 26, 1993. As of the second day of the hearing, eight of the nine employees hired in April 1993 had completed the paperwork to become members of the Union and the ninth individual was in training at the fire academy and thus was not yet working. The remaining 10 members of the bargaining unit who were not members of the Union were all employed prior to the commencement of the organizing in 1989.

The Village asserts that of the 78 bargaining unit members, a maximum of nine did not belong to the Union as of the date proposed in the Village's grandfather provision. *See* Vil. Exh. 3; Tr. 21, 183; Vil. Brief at 3.⁴

³ According to the Union (Tr. 29), there were approximately 16 bargaining sessions with eight to 10 mediation sessions.

⁴ The parties' agreement to go to a 24 on/48 off work schedule as opposed to the then existing

The Union's annual dues are \$362.00 and subject to check-off at \$13.92 per pay period. The Union asserts that because of extensive legal expenses due to the representation proceedings before the ISLRB and its efforts to secure an agreement through the lengthy negotiation process, it has had to require its members to pay "more than four" special assessments (three of which were in excess of \$100 per member) and has further conducted a raffle for fund raising purposes.⁵ According to the Union, fair share monies from those who are not members are needed to pay the Union's monthly expenses. (Tr. 161-162; U. Brief at 6).⁶

11 hour shifts resulted in a reorganization dictating the hiring of a substantial number of new employees. *See* Tr. 103-105.

⁵ Union President Difatta testified (Tr. 161):

Q. With respect to the union's financial status, since the local union has come into existence to the present date, how many, if any, special assessments have you assessed the bargaining unit?

A. More than four, three of them I believe being over \$100. We also do approval which we consider a slight assessment, if you don't sell a certain amount you have to pay the rest. Some guys call it an assessment. I ease into it saying give me the money.

Q. Is that raffle for purpose of a fund raiser for funds for the union?

A. Strictly for legal fees.

Q. With respect to those special assessments, for what reason have you made those special assessments?

A. Strictly to pay legal expenses.

⁶ According to Union President Difatta (Tr.

Further, according to the Union, of those individuals who are not presently members, the Union has represented seven of those individuals on grievance-type matters. *See* Tr. 159-161. Additionally, the Union pressed the wage issue in this proceeding which would benefit a Captain who is not a member of the Union.

The Village and the Fraternal Order of Police have executed three collective bargaining agreements. The first (1986-1988) did not have a fair share provision. *See* Vil. Exh. 1 at Art. XVI. The second (1988-1991) and third (1991-1994) agreements do have fair share provisions without grandfather provisions. *See* U. Exhs. 6 and 7 at Art. XIX(B). *See also*, Tr. 21, 128. The clause sought by the Union in this case mirrors the language found in the Police contract. *Compare* U. Exh. 11 (Vil. Brief. App. A) and U. Exh. 6 at Art. XIX(B). The Village also had agreed to an initial collective bar-

162):

- Q. How would you characterize the need of the union or the financial status of the union with respect to being able to obtain a fair share fee from individuals who are currently not paying or who you anticipate will not pay?
- A. With the expenses incurred, we make it month-to-month, and in that aspect looking at the revenues from the potential number of fair shares, it would be a quarter of what I'm taking in now, *I would need that money in order to make bills* and be on

gaining agreement with Teamsters Local 726 covering employees in the Public Works Department which agreement had a fair share provision without grandfathering conditions. *See* Tr. 144-147; U. Exh. 5 at Article II, Section 2.2. That agreement was, however, rejected by the membership of that unit and, after a decertification petition was filed, Local 726 I.B.T. no longer has representation rights in that unit. Tr. 145-147.

C. Discussion

1. The Parties' Positions

The parties have agreed that a fair share clause *will* be part of their initial Agreement. The narrow question is whether the fair share clause shall have a grandfather provision excluding those employees from coverage who were not members of the Union as of June 9, 1993. The Village seeks such a provision. The Union seeks unrestricted fair share requirements.

2. The Cited Authority

In support of their respective positions, the parties have relied upon a number of awards addressing the fair share issue. *See Village of Western Springs and Teamsters Local 714* (Goldstein, 1992); *Jackson County Sheriff's Department and Fraternal Order of Police*, S-MA-91-18 (Epstein, 1992); *Village of Arlington Heights and*

Firefighters, S-MA-88-89 (Briggs, 1991); *Peoria County and AFSCME*, S-MA-10 (Sinicropi, 1986). In *Jackson County, Arlington Heights* and *Peoria County*, the unions' attempts to include a fair share provision in an initial contract were rejected. In *Western Springs*, the union's attempt was not accepted in full. There, a fair share clause was implemented, but a grandfather provision was inserted exempting employees working on the effective date of the contract.

Several general concepts flow from the cited awards.

First, the issue of fair share is non-economic allowing the interest arbitrator "to award the Village's final offer, the Union's final offer or 'something in-between', that is, that I can devise a contractual provision which varies from the parties' final contract offers." *Western Springs* at 3.⁷

Second, "changes in the status quo ('breakthroughs') should normally not be granted in interest arbitration" *Western Springs* at 20 [emphasis in original].

Third, "[g]enerally speaking, interest arbitrators are reluctant to award a fair share clause in the first contract." *Arlington Heights* at 71.

Fourth, in order to obtain a fair share

provision through interest arbitration as opposed to bargaining in an initial contract, "the Union should be required to produce some evidence that it is required for the financial stability for which the Union argues". *Peoria County* at 16. See also, *Jackson County Sheriff's Department* at 47 ("... this type of benefit should be realized from bargaining rather than arbitration, or that the Union be required to produce evidence that fair share is required for the financial stability of the Union."); *Western Springs* at 22 ("As the Employer also correctly notes, the Union has also presented no proof that the lack of a fair share provision in this initial labor contract would directly cause disharmony or contention among the members of the bargaining unit. This gap in proof clearly is a factor militating against the Union's final offer" [emphasis in original]); *Arlington Heights* at 71 ("Another arbitral consideration on the fair share issue is whether the union has demonstrated the need for one.").

Fifth, the reluctance to impose a fair share obligation on some employees exists for a first contract because "[i]n such early stages of organization, members of the bargaining unit may not yet have had an opportunity to see what kind of a job the union will do for them [because t]hey may not yet have had sufficient evidence

⁷ The parties agreed (Tr. 33) that fair share is a non-economic issue.

upon which to decide that union membership is worth the cost." *Arlington Heights* at 71.

Sixth, where the parties litigate the non-economic issue of fair share in an interest arbitration and where that dispute is the sole difference between the parties, the differences that keep the parties apart may be based on firm philosophical grounds which ultimately might not really be amenable to resolution through the ordinary give and take of the bargaining process. *Western Springs* at 16, 21 ("Why would the Village therefore go to the expense of participating in this interest arbitration? Obviously, because of the philosophy involved ... [and] the fact that both sides were willing to go to interest arbitration over a single issue, especially a non-economic one, convinces me ... that the parties have demonstrated that bargaining will not solve the issue now").

3. Application Of The Relevant Criteria To This Case

Upon consideration, this Panel finds that the Union's proposal is the more reasonable and shall be adopted without modification—*i.e.*, there shall be a fair share clause as agreed to by the parties, but the clause shall not grandfather out any individuals from its coverage. Our reasons are as follows:

First, the arbitral reluctance to grant

"breakthroughs" or, specifically, a fair share provision in an initial agreement, is not a determinative consideration in this case. The parties have agreed to the overall concept of fair share in their initial contract. Thus, there is no "breakthrough" that comes from establishing fair share as part of this relationship. Through negotiations, the parties have already broken that ground. Thus, while a number of the concepts discussed in the awards cited by the parties are relevant, the discussion in those awards favorable to the Village that fair share should not ordinarily be part of an initial agreement are not on point. *See Jackson County Sheriff's Department; Arlington Heights; Peoria County.* Examination of those awards shows that in each instance where the union's argument for fair share in the initial contract was totally rejected, the public employer was opposed to *any* kind of fair share provision in an initial contract. That is not the case here. Here the Village has specifically agreed to a fair share provision. The only issue is whether certain employees should be grandfathered from operation of the fair share provision.

Second, the Village relies upon *Western Springs* for the proposition that a grandfathered fair share clause is appropriate. *See* Vil. Brief at 4. The

Village points out that a fair share clause “should be obtained through bargaining rather than from arbitration” citing *Western Springs* which rejected the parties’ all-or-nothing positions on fair share and fashioned a fair share provision with grandfather rights similar to the clause urged by the Village. But, in *Western Springs*, the arbitrator took note of the general concepts of reluctance of interest arbitrators to grant breakthroughs; the reluctance to award fair share in a first contract; and, as pointed out by the Village, performed the function of fashioning a clause “as most likely to give the parties what they should have agreed to or could have worked out by negotiation” (*Western Springs* at 24). But, nevertheless, the arbitrator fashioned a fair share provision, albeit a modified one. In *Western Springs*, the arbitrator took particular note of the fact that the arbitration was a single issue case over a non-economic question which was the only reason the parties could not reach agreement through the give and take of the bargaining process. *Id.* at 23 [emphasis in original]:

Perhaps the most significant fact on this record, to me, is that the parties brought this *single issue dispute* to interest arbitration and underwent the expense and inconvenience of litigating a non-economic issue that in many bargaining relations is not considered of central importance. Simply put, in my view, this

underscores the depth and difference in philosophy and the fact that, in this particular Village, fair share can only be won by the Union in arbitration, and not by bargaining across the table

The procedural posture of this case is really not much different. While it can be argued that this case is technically not a single issue matter, the depth of the parties’ division on the fair share question is even more distilled than in *Western Springs*. Here the difference is not over the question of whether fair share should be in the initial contract—the difference is over the question of grandfather rights in the agreed-upon fair share provision. *That* is the only wedge that presently really these parties apart after such a long and apparently grueling organizing and bargaining experience on both parties’ part. With the exception of what remains in this case, *all* other terms and conditions of the parties’ relationship have, ultimately, been worked out. Given all that has occurred between these parties, and further given the parties’ difference on an issue “that in many bargaining relations is not considered of central importance” (*id.*) which can be said to be generally of less importance here because the parties have agreed to the concept of fair share, it can thus be concluded that, as in *Western Springs* (*id.* at 23) “in this particular Village,” the issue “can only be won by the Union in arbitration, and not by bargaining across

the table” Therefore, given the type of difference between the parties on the fair share issue—*i.e.*, the only difference being over the grandfather provision as opposed to the general concept of fair share in an initial contract—*Western Springs* really supports the Union’s position in this case insofar as overcoming the general arbitral reluctance to grant a full fair share provision in an initial contract. This difference in the parties’ positions, which is perhaps philosophically driven, is thus not amenable to resolution through the normal give and take of the bargaining process.

Third, as noted above, in declining to award fair share provisions in an initial contract, the awards have discussed that there was an absence of evidence produced by the union of a demonstrated financial need for the inclusion of such a provision. *See Peoria County* at 16; *Jackson County Sheriff’s Department* at 47; *Western Springs* at 22; *Arlington Heights* at 71. That, again, is not the case here. The Union demonstrated several points in support of the argument that financial need is present. Because of legal expenses due to the lengthy representation proceedings before the ISLRB and its efforts to secure an agreement, the Union had to require its members to pay at least four special assessments (three of which were in excess

of \$100 per member) and has further conducted a raffle as a fund raiser. The Union’s dues are \$362.00 per year. Assuming for the sake of discussion that, as the Village argues, there are nine of 78 employees who could be grandfathered out of the obligation to pay fair share, the \$3258.00 per year not paid by 11.5% of the bargaining unit in a situation where other members have had to pay substantial special assessments in order to bring the representation and negotiation questions to finality and where the Union has shown that the money is needed “in order to make bills” (Tr. 162), is sufficient evidence for this Panel to conclude that the Union has demonstrated a financial need for a fair share provision that covers all employees.⁸

Fourth, the reluctance to impose a fair share provision so as to allow non-joiners to first observe the Union’s actions because they “may not yet have had an opportunity to see what kind of a job the union will do for them”, (*Arlington Heights* at 71) is also not a determinative factor here to defeat the Union’s request. *See Vil. Brief* at 4 citing that observation in *Arlington Heights*. The evidence shows that

⁸ *Cf. Arlington Heights* at 71 where the request for fair share was rejected but the number and percentage of non-payers (four out of 81 or 4.9% of the unit) were substantially less than the 11.5% present here.

Union's organizing efforts began in 1989 and withstood challenges up to the Supreme Court. The Union's negotiating efforts on behalf of the employees lasted for an approximate 18 month period and resulted in increased benefits to the bargaining unit as a whole. The Union even originally brought a pay question to this interest arbitration on behalf of an employee who has not joined the Union and the Union has represented other similarly situated employees in grievance-type matters. Given all that has occurred, those demonstrated efforts are reasonably "sufficient evidence" for those who have not yet decided to draw their conclusions on whether "union membership is worth the cost." *Id.*

Fifth, this Panel must also consider the conditions governing other employees in the Village.⁹ The Union has shown that although it did not have the provision in the initial contract (*see* Vil. Exh. 1 at Art. XVI) the Police unit did obtain an unrestricted fair share provision in the 1988-1991 and 1991-1994 agreements. *See* U. Exhs. 6 and 7 at Art. XIX(B). The provision sought by the Union in this matter mirrors the clause in

⁹ No specific external comparables under Section 14(h)(4) (A) or (B) of the Act were offered. However, we can note from the awards tendered by the parties that inclusion of fair share clauses in a number of agreements is a fact in this State.

the Police contract. *Compare* U. Exh. 6 at Art. IX(B) and U. Exh. 11. Thus, in terms of comparing conditions governing other employees, the fact that the Police unit ultimately obtained such a provision weighs in favor of the Union's position seeking an unrestricted fair share provision in this Agreement.¹⁰

Sixth, this Panel recognizes that the issue of fair share is a non-economic one and that, under the Act, we have the authority to structure a provision that is reasonable but is different from the last offers advocated by the parties. *See Western Springs* at 3. We see no reason to do so in this case. The parties positions are clear—they differ on whether any employees can be grandfathered out from operation of a fair share requirement. While we have the authority to change a non-economic proposal, given the all or nothing positions taken by the parties on the grandfathering issue, any efforts by this Panel to attempt to structure something that we feel might be fair and yet grant a grandfather exception to operation of the fair share clause would amount to an unjustified splitting of the

¹⁰ We give no weight to the fact that the Public Works employees formerly represented by the Teamsters had an unrestricted fair share provision in its tentative agreement (*see* U. Exh. 5 at Article II, Section 2.2). That agreement was never ratified and the Teamsters no longer represent that unit. In any event, given the showing in the Police unit, this additional evidence is redundant.

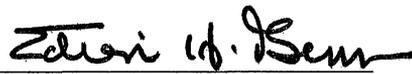
difference.

**4. Conclusion On Fair
Share**

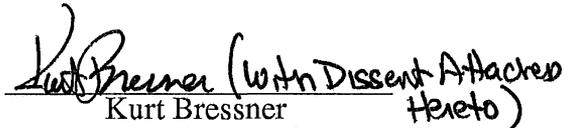
In sum then, the evidence shows that the parties have agreed to the concept of fair share thus taking this matter out of the realm of a "breakthrough"; there is a demonstrated financial need shown by the Union due to the expenses it has incurred through the representation and negotiation process to have the additional sums that a fairly substantial percentage of those who have not yet joined the Union would provide, particularly due to the fact that special assessments have been imposed upon other members and fund raising methods have been used to help pay for these costs; other employees performing similar duties (the Police) have a fair share clause with no grandfathering exception; the language sought by the Union mirrors the clause found in the Police contract; and no viable alternatives exist that would be more reasonable than the position presented by the Union. Weighing those factors accordingly, this Panel therefore adopts the Union's position. The fair share clause shall contain no restrictions or exceptions in terms of grandfathering certain employees from its coverage.

V. AWARD

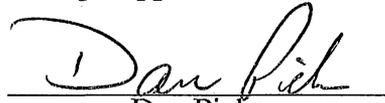
1. Captain's pay for 1993-94 shall be \$48,000 with an added \$500.00 stipend.
2. The Union's position that the agreed-upon fair share clause should not exclude members of the bargaining unit who were employed prior to June 9, 1993 is adopted.



Edwin H. Benn
Neutral Arbitrator



Kurt Bressner
Village Appointed Arbitrator



Dan Picha
Union Appointed Arbitrator

Dated: September 15, 1993

BEFORE
EDWIN H. BENN, NEUTRAL ARBITRATOR
KURT BRESSNER, VILLAGE APPOINTED ARBITRATOR
DAN PICHA, UNION APPOINTED ARBITRATOR

In the Matter of the Arbitration))	
between)	
THE VILLAGE OF DOWNERS GROVE)	Case No. S-MA-93-92
and)	Arb. Ref. 92.262
DOWNERS GROVE FIREFIGHTERS)	(Interest Arbitration)
ASSOCIATION, LOCAL 3234)	

DISSENTING OPINION

I cannot concur with the award to the extent that it adopts the Union's position on inclusion of a fair share clause without a grandfather provision. Accordingly, I respectfully dissent and would adopt the Village's final offer as to fair share.

Although the majority decision acknowledges the appropriate arbitral precedents that: (1) arbitrators are reluctant to award a fair share clause in a first contract (Arlington Heights at p.71), (2) a breakthrough fair share clause should be obtained through bargaining rather than arbitration (Western Springs at p. 14), and (3) that a union should produce evidence sufficient to show that a requested fair share fee provision is required for the financial stability of the Union (e.g., Peoria County, p.16); these precedents are, in my judgment, simply avoided and undercut, by ignoring record facts and by flawed reasoning. This I expect may simply come from a predisposition of the neutral arbitrator to believe that unions are somehow by right entitled to unrestricted

fair share clauses. In my view, this belief is supported by the strained manner in which the majority decision attempts to distinguish this case from the acknowledged precedents.

First, the majority award twists the fact that the Village, as a final offer submitted near the conclusion of the arbitration hearing, offered a grandfather provision, into the conclusion that "through negotiations" the parties "broke the ground" and somehow arrived at mutual acceptance of the fair share fee concept through "bargaining". In my view, this is simply erroneous. Further, it completely ignores one of the fundamental reasons that municipal employers are, in principle, opposed to mandatory fair share fee requirements. Specifically, the fact that long term employees who come to work without such an obligation and who have chosen not to join and pay dues are forced to do so. (See: Village Brief, page 4.)

The majority award also contains a superficial and erroneous view of the facts that it concludes, support the proposition that the Union "presented evidence" that it requires an unrestricted fair share fee clause for financial stability. I believe that the evidence calls for the exact opposite conclusion.¹

Despite the uncontroverted evidence that the grandfather clause would exempt only 9 of 78 current unit members or 11.5

¹The majority award on this point is even more incredible in the light of the fact that the Union presented no evidence as to the amount of any extraordinary bills or as to its current financial status.

percent, the award quotes and accepts the testimony of the Union President that "looking at the revenues from the potential number of fair shares, it would be a quarter (i.e. 25 percent) of what I'm taking in now." Moreover, the majority award simply ignores the uncontroverted fact that as a result of the negotiations and new hiring, the bargaining unit was, by May of 1993, increased in size from 45 to 78. Accordingly, the facts show that approximately 33 new members, all but two of which were at the time of arbitration, dues paying Union members, have been added thus increasing the Union revenues by approximately 73.3 percent.

In addition to simply ignoring the 73 percent revenue increase, the majority award is further flawed by its total failure to acknowledge that the "extraordinary expenses" which the Union stated it paid due to representation proceedings before the ISLRB and lengthy negotiations were not only already paid but also paid when the unit consisted of 45 members rather than 78.

The above-noted financial facts clearly appear in the record and are described in the Village's Brief (See: Village Brief, page 5). They are, however, simply ignored in the award.

In sum, I disagree and dissent from the majority award on the issue of the fair share fee clause.

DATED: 4, October, 1993



Kurt Bressner
Village Appointed Arbitrator