

Office of the Comptroller, ex rel. Local 1320
v. Office of Labor Relations

OATH Index No. 1522/09 (Sept. 10, 2009)

Comptroller's preliminary determination that sewage treatment workers and senior sewage treatment workers be paid commensurate with wages and supplemental benefits of Consolidated Edison's Operating Mechanic A and Plant Operator titles should be affirmed.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**COMPTROLLER, EX REL. LOCAL 1320,
DISTRICT COUNCIL 37, AFSCME, AFL-CIO**

Petitioner

-against-

OFFICE OF LABOR RELATIONS

Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

Petitioner, the City of New York Office of the Comptroller ("Comptroller"), brought this proceeding pursuant to section 220(8-d) of the Labor Law on behalf of Local 1320, an affiliate of District Council 37, AFSCME, AFL-CIO ("Union" or "Local 1320"). Petitioner seeks a determination of the prevailing wages and supplemental benefits to be paid by the City of New York Department of Environmental Protection ("DEP") to sewage treatment workers ("STWs") and senior sewage treatment workers ("SSTWs") (collectively "complainants") from July 1, 2002, through June 28, 2008. Petitioner urges this tribunal to uphold its preliminary determination that STWs and SSTWs be paid commensurate with the wages and supplements set forth in the collective bargaining agreements between Consolidated Edison Company of New York ("Con Ed") and the Utility Workers' Union of America, AFL-CIO, Local No. 1-2 ("Local No. 1-2") for workers in the titles of Operating Mechanic A and Plant Operators.

Following a nine-day hearing, with each party producing witnesses and documentary evidence, the record closed on July 31, 2009, with the submission of post-trial briefs. For the reasons below, I find that the Comptroller's preliminary determination should be affirmed.

BACKGROUND

Statutory Framework

Section 220 of the New York State Labor Law (“Labor Law 220”) requires the City of New York (“City”) to pay “laborers, workmen, or mechanics” in its employ the prevailing rate of wages and supplemental benefits paid in the private sector “for a day’s work in the same trade or occupation in the locality” where the work is performed. Labor Law § 220(3) (Lexis 2009). Although the statute refers to the rates paid in the “same” trade or occupation, courts have recognized that a comparison may be made to workers doing similar jobs. *See Smith v. Joseph*, 275 A.D. 201 (1st Dep’t), *aff’d*, 300 N.Y. 516 (1949) (fixing prevailing wages of persons in “comparable” positions); *Flannery v. Joseph*, 300 N.Y. 149, 152 (1949) (Comptroller was obligated to determine the prevailing rate of wages paid to those workers whose trade or occupation was “comparable” to city-employed maintenance workers).

The statute also requires that bargained rates paid in the private sector be deemed prevailing, providing that the collective bargaining agreements cover at least thirty percent of the “workers, laborers or mechanics in the same trade or occupation in the locality.” Labor Law § 220(5)(a). Only when there are less than thirty percent of private sector unionized employees within the same trade or occupation is the prevailing wage determined by reference to non-unionized workers. In that case, “the average wage” paid to non-unionized workers within the same trade or occupation is found to be prevailing. Labor Law § 220(5)(a).

The City and public employee organizations are required to negotiate in “good faith” and enter into a written agreement as to the rate of wages and supplemental benefits to be paid prevailing wage employees. If negotiations break down, the union is authorized to file a complaint on behalf of these employees with the Comptroller. The Comptroller is then mandated to conduct an investigation to determine the prevailing rate of wages and supplemental benefits due the workers, and to hold a hearing in the matter after conducting its investigation, but prior to making any order or determination. Labor Law §§ 220(8-d); 220(8). Prevailing wage hearings are held at this tribunal pursuant to the Comptroller’s rules. 44 RCNY § 2-02(d).

Procedural History

Following unsuccessful negotiations with the City’s Office of Labor Relations (“OLR”), the Union filed complaints with the Comptroller on May 21, 2002, and June 14, 2007, seeking an investigation and determination of the prevailing rate for STWs and SSTWs from 2002 through

2008 (Pet. Exs. 1, 3). A prior consent decree established the prevailing rates from April 1, 2000, through June 30, 2002 (Pet. Ex. 2).

On August 9, 2007, the Comptroller issued a preliminary determination (Pet. Ex. 19) finding that the contract between Con Ed and Local No. 1-2 covers “the predominant number of comparable private-sector workers,” that Local No. 1-2 constitutes the prevailing union, and that utility workers in that union “constitute the best private sector analog for the complainants.” The Comptroller also found that the work performed by complainants should be classified as operations and maintenance and that STWs and SSTWs should be matched with specific Con Ed employees who work in operations and maintenance. The Union and OLR engaged in further collective bargaining but were unable to reach an agreement.

On November 10, 2008, the Comptroller filed the instant petition on behalf of the Union (ALJ Ex. 1). Both the Union and OLR filed answers objecting to the Comptroller’s August 9, 2007, preliminary determination and in particular to the decision to split the titles into operations and maintenance (ALJ Exs. 2, 3). The Comptroller subsequently modified its preliminary determination on March 31, 2008 (Pet. Ex. 20), and again on April 3, 2009 (ALJ Ex. 4). The hearing began on April 6, 2009. At the conclusion of the hearing, petitioner indicated that it wished to recall a witness and revise its preliminary determination. The request was granted (Tr. 960-61). On May 14, 2009, the Comptroller agreed that complainants should not be classified as operations and maintenance and issued a new preliminary determination that STWS should be matched to the Con Ed Operating Mechanic A title and SSTWs should be matched to the Con Ed Plant Operator title (Tr. 980-82). It is this preliminary determination which is at issue here.

The Proof

The proof at the hearing focused on four areas: the sewage treatment process; the work performed by STWs and SSTWs; the work performed by utility workers at Con Ed’s steam plants; and the Comptroller’s investigation.

The Comptroller presented the testimony of Wasyl Kinach, the Director of Classifications of the Comptroller’s Bureau of Labor Law, who conducted the investigation, and Jan Van Daatselaar, the Operations Trainer at Con Ed’s East River steam plant. In addition, the Comptroller submitted documents related to the investigation, which included investigator notes, the job specifications, evaluation forms, notices of examination for STWs and SSTWs,

photographs of STWs and SSTWs working at DEP, DEP daily work sheets, prevailing wage schedules, the relevant Local No. 1-2 contracts, and various documents provided by Con Ed.

The City presented the testimony of James Petito, the Director of Facilities Operations for the DEP's Bureau of Wastewater Treatment, and documentary evidence related to various DEP activities and the job duties of STWs and SSTWs.

The Union presented the testimony of representatives from Con Ed, DEP, and Local 1320 including: Henry Gutierrez, a material analyst and former Mechanic B at Con Ed; Steven Green, a Mechanic A at Con Ed; Timothy Hunter, an Operating Mechanic A at Con Ed; James Tucciarelli, a SSTW and the President of Local 1320; James Pynn, DEP's Plant Superintendent and Plant Chief at Newtown Creek; and John Quinn, a SSTW. In addition, the Union submitted into evidence 138 photographs, and other documentary evidence including brochures, equipment lists, DEP logs, and various memoranda and reports.

With the exception of Mr. Gutierrez, all of the witnesses were credible. In particular, I found Mr. Van Daatselaar, Mr. Petito, and Mr. Tucciarelli to be very knowledgeable about their areas of expertise and I believe their testimony to be reliable.

The Sewage Treatment Process

DEP has 14 water pollution control plants ("WPCP") and various dewatering facilities and pumping stations throughout the five boroughs. Approximately 1.3 billion gallons of wastewater are discharged in New York City each day and processed at DEP's plants. Wastewater includes rain water and melting snow which is collected in catch basins and everything that is flushed down toilets and drains. The combined wastewater is conveyed through a complex series of pipes and pumping stations. In the event of an overflow due to a severe storm, untreated water flows directly into the City's waterways. A series of tide gates control the flow into the local waterways (Union Ex. 139). WPCPs are in operation 24-hours a day, seven days a week ("24/7") and have three shifts per day (Petito: Tr. 593).

When wastewater reaches a WPCP, pollutants are removed and the water is treated through a series of physical and biological processes and then released into the surrounding waterways. Wastewater undergoes five major processes: preliminary treatment, primary treatment, secondary treatment, disinfection, and finally sludge treatment. Preliminary treatment involves screening out large pieces of debris. The screened wastewater is pumped into primary settling tanks to allow heavy solids to settle to the bottom and lighter materials to float to the top.

Lighter materials are skimmed from the surface while heavier solids, known as primary sludge, are pumped through degritters to force out sand, grit and gravel. Materials that have been removed from the wastewater are loaded into containers and transported to landfills by truck or barge. The primary sludge is pumped to the plant's sludge handling facilities for further treatment. The wastewater flows into a secondary treatment system where it is treated and tested to stimulate growth of oxygen-using bacteria that consume organic materials which pollute the water. The wastewater then moves into settling tanks where heavy particles settle to the bottom. The secondary sludge is removed for further processing. Wastewater is diverted to a tank where it is tested and disinfected by various chemicals. Thereafter, the disinfected wastewater is released into local waterways (Tucciarelli: Tr. 744-62; Union Ex. 139). This entire process is governed by federal and state laws, and requires maintaining federal log sheets and a State Pollution Discharge Elimination System ("SPEDES") permit (Tucciarelli: Tr. 756).

The primary and secondary sludge, which is 99 percent water, is concentrated through a thickening process and treated again. The remaining water is removed and reprocessed through the WPCP in the manner stated above and the thickened sludge is treated so that it is safe for the environment. Some of the sludge is converted into methane gas which is used to operate the plants. Leftover sludge is reduced to a "cake" through a dewatering process. The cake is then taken to another facility that converts it to fertilizer (Union Ex. No. 139).

The hierarchy in a WPCP is the Plant Superintendent in charge, followed by the Stationary Engineer, the Stationary Engineer Electric, the SSTW, and the STW. The Plant Superintendent is the holder of the SPEDES permit and reports to the Division Chiefs who are part of DEP management (Kinach: Tr. 86-87; Petito: Tr. 581; OLR Ex. 1).

Work Performed By STWS and SSTWS

DEP employs approximately 668 STWs and 201 SSTWs (Petito: Tr. 582-83). Complainants are responsible for operating and maintaining WPCPs, dewatering facilities, and pumping stations. In order to be appointed to the civil service title of STW, applicants must receive a passing grade on a civil service examination. Only STWs are eligible to take the civil service exam for promotion to SSTW (Pet. Exs. 4-7).

To become an STW, an applicant must have three years experience as a journeyman in a trade such as plumbing, mechanical aptitude, welding, burning, rigging, and carpentry (Pet. Ex. 6; Pynn: Tr. 886-87; Tucciarelli: Tr. 770). STWs must also have basic math skills (Tucciarelli:

Tr. at 771) and a valid New York State driver's license (Pet Exs. 6, 7). Some STWs have commercial driver's licenses and are certified to transport hazardous waste (Tucciarelli: Tr. 784-85). Initially, STWs receive classroom training, including a lab practicum, and must be certified by New York State as a Wastewater Treatment Plant Operator. They are also trained by DEP on: procedures; safety; how to take, store, and log samples in accordance with federal and state requirements; and how to use the relevant DEP equipment. SSTWs go through supervisor training, which they repeat yearly and also receive training from manufacturers on special equipment used at DEP (Tucciarelli: Tr. 772-74, 779-82, 786; Union Exs. 146-52). In addition, STWs and SSTWs are required to hold various certificates of fitness issued by the City's Fire Department for burning, fire watch, welding, handling flammable and non-flammable gases, boiler operation, and storage of acid (Tucciarelli: Tr. 777-78). They are exposed regularly to dangerous conditions including raw sewage with harmful bacteria and debris, working in spaces which require a confined space permit, working with gases including methane or hydrogen sulfide, and operating mechanical equipment (Kinach: Tr. 98, 276; Tucciarelli: Tr. 763-68, 785). Complainants are considered to be in physically taxing titles (Tr. 279, 768).

The STWs job specification provides, in relevant part, that an STW "operates, maintains and repairs machinery, equipment and structures in wastewater treatment plants, pumping stations, intercepting sewers, sludge treatment and disposal facilities and associated equipment facilities; takes samples and does testing of sewage; performs related work" (Pet. Ex. 6). STWs regularly perform both maintenance and operations functions (Kinach: Tr. 238, 248; Petito: Tr. 597; Tucciarelli: Tr. 823; Pynn: Tr. 888-89, 905; Pet. Exs. 4B, 6).

STWs are evaluated based on approximately 14 different tasks which range from inspecting and adjusting equipment in the event of a malfunction; reading and interpreting meters and gauges correctly; scrubbing and cleaning floors, walls, and equipment; performing electric, gas welding, plumbing and pipefitting for repair and modification of existing equipment; maintaining structures using carpenter and mason skills; painting; repairing mechanical equipment; and performing preventative maintenance (Pet. Exs. 8A, 8B).

Ordinary maintenance and repair of equipment is performed during the daytime shift Monday through Friday, whereas preventive maintenance, such as changing filters, checking oil levels, or tightening valves, is performed during all operations shifts (Kinach: Tr. 95-96). When maintenance issues arise off-hours, STWs must be able to either make the repair or take the equipment out of service so that the operations functions can continue (Petito, Tr. 597, 634, 637-

38, 644). Approximately two-thirds of an STW's time is spent on operations and the other third is spent on maintenance (Tucciarelli: Tr. 830; Pynn: Tr. 924). The STW title is versatile and DEP expects each worker to be proficient in all areas and ready to perform either operations or maintenance functions at any time (Petito: Tr. 597, 634, 638; Pynn: Tr. 905).

When engaged in operations, STWs are running the plant. Operations includes: operating machinery and equipment in the WPCPs; conducting sludge treatment and disposal; taking samples and testing sewage; loading barges; reading meters, gauges and charts; maintaining operating logs and other records; and preparing reports and requisitions (Kinach: Tr. 79, 94; Petito: Tr. 587; Quinn: Tr. 946-47; Pet. Exs. 4B, 8A, 8B). STWs performing operations functions are also responsible for taking equipment offline and performing "lock and tag out," so that the equipment may be safely repaired (Kinach: Tr. 95; Petito: Tr. 614).

When engaged in maintenance, STWs are focused on maintaining and repairing the machinery, equipment, and structures in the plant. This includes: replacing sprockets, drive mechanisms, chains, shafts, and lubricating fittings in settling tanks. STWs also maintain and repair regulators, diversion chambers, tide gates, pumps, sludge equipment, blowers, compressors, motors, air filters, oil purifying equipment, chlorination equipment, heat exchangers, boilers, valves, pipes, meters, and HVAC systems. In addition, STWs perform plumbing and pipefitting work, carpentry and masonry work such as making ramps or stairs, repairing handrails, and placing guards around pieces of equipment, and non-structural welding including gas welding, burning, and cutting. Many of these tasks require STWs to perform "rigging and hoisting" (Kinach: Tr. 298-302; Petito: Tr. 587, 592-94, 607, 625; Pynn: Tr. 903, 908; Pet. Exs. 4b, 8A, 8B 10A, 10B, 12A, 12B).

The SSTW job specification is very similar to the STW job specification in terms of operating, maintaining, and repairing machinery in WPCPs. It also provides that SSTWs supervise STWs in the performance of their duties and that they prepare reports (Pet. Ex. 7). SSTWs must possess the same skills and training as STWs and be capable of performing all the same functions. SSTWs are considered working foremen and are first-line supervisors. They assign STWs their work and work alongside them. SSTWs are charged with knowing all safety protocols, completing the necessary paperwork regarding STWs, and monitoring the preventive maintenance program (Kinach: Tr. 69, 281; Pynn: Tr. 889-90; Union Exs. 163-165). SSTWs are required to have four years' experience of a mechanical and/or electrical nature and at least one of those years must be in a WPCP (Pet. Ex. 7).

SSTWs are evaluated based upon eleven different tasks, ranging from reading meters and gauges and maintaining logs; supervising, under direction, the repair and modification of structures, mechanical equipment and piping; preparing sub-managerial evaluations for all personnel; and giving assignments in an efficient manner. SSTWs also supervise the use of chlorination equipment, monitor test procedures, and instruct others in the use of safety devices, first aid and rescue procedures (Union Exs. 163, 165).

DEP allows Local 1320 to bid on and perform projects on overtime which would otherwise be given to outside contractors. These jobs involve a wide range of skills and trades such as machinist and plumbing work (Tucciarelli: Tr. 816-19, 840). The decision to keep a job in-house depends on the resources available and the nature of the job. DEP also has machinists to fabricate parts, perform repairs on the main sewage pumps, and perform high precision alignments (Petito: Tr. 594, 647-48, 650-53). STWs and SSTWs cannot do structural welding, which requires a certified welder, and they cannot work on anything with electrical voltage (Petito: Tr. 647-48).

Work Performed By Utility Workers at Con Ed

Mr. Van Daatselaar testified that Con Ed's steam generation plants have water treatment facilities that remove sand, salt and other minerals from city water before processing it into steam. The plants process about 5.8 million pounds of water in order to produce 5.8 million pounds of steam per hour. The water must be treated before it is converted into steam to prevent damage to the plant machinery (Tr. 495-96). Steam plants also take in river water to cool machinery, after which the water is returned to the river. The river water must be filtered through screens before being used in the plant (Kinach: Tr. 123-24; Van Daatselaar: Tr. 479). Con Ed also works under a SPEDES permit (Tr. 527), and operates 24/7 with operations occurring around the clock and maintenance done during the day (Van Daatselaar: Tr. 482, 549). Confined space permits are sometimes required (Van Daatselaar: Tr. 473).

The general operation and maintenance functions at Con Ed steam plants are performed by utility workers who are represented by Local No. 1-2. Utility workers include the titles of Production Worker, Operating Mechanic A, Plant Operator, General Utility Worker, Operating Mechanic B, and Mechanic B. These workers have a minimum and maximum wage and receive longevity and merit wage increases each year as provided for in their collective bargaining agreements (Van Daatselaar: Tr. 506-08; Pet. Exs. 18A, 18B). Operations and maintenance

functions are divided between two distinct groups of employees, each with its own career path (Kinach: Tr. 133; Van Daatselaar: Tr. 466). The Shift Supervisor supervises Local No. 1-2 employees and there are no working foremen (Kinach: Tr. 124, 144; Van Daatselaar: Tr. 472; 482-83). Shift Supervisors monitor employees' time and pay them, give job assignments, and do disciplinary interviews (Van Daatselaar: Tr. 978).

The career path for operations begins with the Production Worker, which is a training position. Following class work in such areas as safety, first aid, hazardous materials, math, basic tools, air pollution certification, and meter testing, Production Workers take exams in these areas prior to promotion to Operating Mechanic A. An Operating Mechanic A can be promoted to the higher title of Plant Operator after completing further training. Operating Mechanic As can also be hired from the outside after passing an exam. People from the outside generally come from other utility plants or the Navy and sometimes have mechanical engineering degrees (Van Daatselaar: Tr. 489-91, 561; Pet. Ex. 25A).

On the maintenance side, the career path begins with the training position of General Utility Worker. At one time, General Utility Workers were promoted to Operating Mechanic B, but that title is no longer in use and was combined with the Operating Mechanic A title. General Utility Workers are now promoted to Mechanic B following extensive training and examinations in areas such as math, safety, first aid, hazardous materials, crane operation, rigging and hoisting, valves and pipefitting, basic pumps, basic burning, machine shop, and coupling alignment (Van Daatselaar: Tr. 464, 467, 483-86, 556; Pet. Ex. 25B).

Operating Mechanic As inspect plant equipment, take temperature and pressure readings, take water samples, maintain logs, check oil levels, "tag out" equipment so that it can be repaired, and unload fuel oil barges (Van Daatselaar: Tr. 475, 478-80, 513, 519-20; Hunter: Tr. 729-33). An Operating Mechanic A also performs some preventive maintenance, such as changing filters, changing lubricating oil, greasing motor bearings and cleaning the condenser, heat exchangers, and stationary screens that filter river water (Van Daatselaar: Tr. 479; 482). Operating Mechanic A is a fixed-post position, and each post has a crew of Operating Mechanic As, Plant Operators, and other titles assigned to it. Operating Mechanic As must be qualified in at least two posts in the steam plant, and work in twelve hour shifts, on a five-week rotation (Van Daatselaar: Tr. 482-83, 487). There are upper and lower elevation posts as well as seven water treatment posts (Van Daatselaar: Tr. 969-70).

Plant Operators perform the same duties as Operating Mechanic As, but must be qualified in six posts, rather than two. Plant Operators are not hired from the general public but are promoted from the Operating Mechanic A title upon completing the requisite courses and passing a written examination. Plant Operators are more advanced in their knowledge and can be utilized anywhere in the plant. While the Plant Operator does not supervise the Operating Mechanic, a Plant Operator can help a junior member on the job when a specific problem arises (Van Daatselaar: Tr. 967-69). A Shift Supervisor can also send a Plant Operator to a post where an Operating Mechanic A is having a problem in order to correct the problem or explain how to resolve it (Van Daatselaar: Tr. 976). Although the Plant Operator and Operating Mechanic A perform the same functions, the Plant Operator title is a more experienced and more flexible than the Operating Mechanic title (Van Daatselaar: Tr. 973-74).

Mechanic Bs repair and maintain the equipment in the steam plant, like centrifugal pumps, positive displacement pumps, motors, regulators, pipes, fans, blowers, feed water heaters, and heat exchangers. They also perform preventive maintenance, such as repacking of pumps and replacing seal links (Van Daatselaar: Tr. 468-69; 471). They perform rigging and hoisting of machinery and stationary screens, perform pipefitting and plumbing, and burn bolts off flanges to replace sections of pipe (Van Daatselaar: Tr. 470, 513-14, 524). They cannot perform welding, which requires special training, since they work in a high-pressure steam facility (Van Daatselaar: Tr. 470). In order to perform complex mechanical alignment, welding or electrical work, Mechanic Bs must be promoted to Mechanic A, after they have received specialized training in one of these fields (Van Daatselaar: Tr. 473-74; Pet. Ex. 25B). Mechanic As perform the repair work on the major machinery (Van Daatselaar: Tr. 474; 488).

The Comptroller's Investigation

Mr. Kinach testified that he started his investigation in July 2005 (Tr. 62). He began with the STWs and SSTWs civil service job descriptions. He also conducted site visits to several WPCPs, pumping stations and collections facilities, reviewed relevant DEP documentation, and spoke with various DEP personnel and Mr. Tucciarelli, the Local 1320 President.

After understanding the work performed by STWs and SSTWs, Mr. Kinach considered various private sector employers including beer breweries and the Domino Sugar factory. These industries were rejected because many no longer exist and none were operating on a large scale. At the suggestion of the Union, Mr. Kinach looked at Con Ed natural gas facilities (Kinach: Tr.

120, 126-27). Eventually Mr. Kinach settled upon the Con Ed steam generation plant as the private sector facility most similar to the WPCP because it involved a large-scale water processing operation (Kinach Tr. 122). Mr. Kinach performed a site visit to the East River steam plant at 14th Street in Manhattan with Mr. Tucciarelli and Mr. Petito. On the visit Mr. Kinach observed equipment that was similar to equipment found in WPCPs and also saw Con Ed workers performing many of the same tasks and duties as the complainants. He spoke with Con Ed management and was provided with various documents (Kinach: Tr. 123, 132; Pet. Exs. 18A, 18B). Mr. Kinach subsequently designated Local No. 1-2 utility workers as the private sector trade or occupation comparable to complainants. The key criterion considered was that the different skills employed by utility workers were used with an eye to operating and maintaining Con Ed's water treatment plants (Tr. 191-92).

A preliminary determination designating Local No. 1-2 as the prevailing trade or occupation for the complainants was issued on August 9, 2007. The determination classified STWs as Production Workers and Operating Mechanic Bs when performing operations, and as General Utility Workers and Mechanic Bs when performing maintenance. SSTWs were classified as Operating Mechanic As when performing operations, and as Mechanic As when performing maintenance (Pet. Ex. 19). The Comptroller revised its preliminary determination twice in response to feedback received from the Union (Tr. 135-38; Pet. Ex. 20). When the Union and OLR failed to reach an agreement, the matter was scheduled for hearing. Mr. Kinach met with Mr. Van Daatselaar who provided more information about Local No. 1-2 job titles that was used to finalize the Comptroller's position at the hearing (Tr. 141-42). Following the hearing, the Comptroller issued the May 14, 2009, preliminary determination that STWS should be matched to the Operating Mechanic A title and that SSTWs should be matched to the Plant Operator title.

Positions of the Parties

Petitioner contends that STWs and SSTWs should be paid wages and supplemental benefits commensurate with those set forth in the contract between Con Ed and Local No. 1-2 from 2002 through 2008. Specifically, petitioner contends that STWs and SSTWs should be paid commensurate with the wages and supplements for workers in the titles of Operating Mechanic A and Plant Operators, respectively, because they do comparable work.

The Union argues that STWs and SSTWs routinely perform comparable work with private sector trades including machinists, plumbers, pipe fitters, carpenters, welders as part of their regular job duties and when they perform outside work for DEP. Under *Kelly v. Beame*, 15 N.Y.2d 103 (1965), they should be paid wages based on the work actually performed. In essence, the Union contends that if an STW is performing work that involves plumbing, millwright or carpentry skills, the STW should be paid the prevailing rate that has been established by the Comptroller for those titles for the amount of time the work is performed. In the alternative, the Con Ed Plant Operator is the appropriate match for the STW so long as the rate is set at the maximum. The Union argues against matching the SSTW to the Plant Operator because the Plant Operator does not have any supervisory functions. Moreover, the Union asserts that the Con Ed pay progression plan is inconsistent with Labor Law 220.

OLR does not dispute that the contract between Con Ed and Local No. 1-2 is an adequate match for the STW title. However, OLR asserts that a new survey needs to be conducted for the SSTW title. Moreover, OLR contends that it is inappropriate to match all STWs to the Operating Mechanic A title because a significant part of their duties involve maintenance work. Rather, a composite hourly rate should be established for STWs based on the Operating Mechanic A and Mechanic B titles. OLR also disputes the Comptroller's inclusion of the longevity and merit wage increases from the Con Ed and Local No. 1-2 contract in the determination because the increases are discretionary.

In its reply, petitioner contends that the parties' arguments on wage and benefit rates are outside the scope of this proceeding and are unsupported by any legal authority.

ANALYSIS

As set forth above, Labor Law 220(3) requires that workers employed on public works be paid the prevailing rate of wages. The prevailing rate is defined as:

[T]he rate of wage paid in the locality . . . by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed.

Labor Law § 220 (5)(a). The "locality" is defined by reference to the collective bargaining agreement for the relevant trade or occupation. Labor Law § 220 (5)(d). The "locality" must

include the place in which the work in question is performed - here, the City of New York, where all of the WPCPs, pumping stations and collections facilities are located.

Because there are no private sector employers in the City of New York that operate wastewater treatment plants comparable in size and scale to WPCPs, it is not possible to identify the same trade or occupation in the private sector. The Comptroller's conclusion that Local No. 1-2 utility workers in Con Ed's steam plants comprise 30 percent or more of workers in the "same trade or occupation" was unrebutted. OLR agreed with the Comptroller's match to the extent it covers STWs and failed to advance any other collectively bargained group as comparable to the SSTWs. The Union argued that complainants should be paid multiple rates based on the work performed, or, in the alternative, that STWs be matched to Plant Operators.

As a preliminary matter, *Kelly v. Beame*, does not provide for the setting of multiple wage rates based on work performed and is, therefore, inapplicable to this matter. In *Kelly*, there was one civil service title of laborer, but employees in that title were regularly assigned to perform distinct functions such as highway maintenance, special services, water repair and sewers. In setting the rate, and in order to reflect these specialized assignments, the Comptroller determined that laborers should be classified into groups A through E. The Comptroller then fixed an "average" prevailing rate to be applied to all laborers regardless of the group a particular laborer was assigned. *Kelly*, 15 N.Y.2d at 108. The question presented was whether the employees in each group, were engaged in the "same trade or occupation" for the purpose of Labor Law 220 and, therefore, entitled to a single prevailing rate. The Court held that each group was so distinct that they represented separate trades and occupations. As a result, the Comptroller was ordered to fix a separate prevailing rate for each group based on the work actually performed within the civil service title. *Id.* at 110. In reaching its decision, the Court recognized that there was little, if any, shifting of a laborer's department or duties. *Id.*

The instant case is distinguishable from *Kelly* for several reasons. Although there is no dispute that complainants perform a variety of tasks consistent with other trades, there are no separate and distinct groups of workers within the STW and SSTW titles. To the contrary, the record shows that STWs and SSTWs are not specialized in one particular area or trade but are versatile enough that they can be called upon to do any of the tasks set forth in their job specifications. Moreover, the Union is not seeking different prevailing rates for distinct groups of STWs or SSTWs; rather, it is seeking to have complainants paid the prevailing rates of other titles such as plumbers, carpenters and machinists, when performing work that involves these

skills. Such a rate schedule would be unworkable from a practical point of view and would violate Labor Law 220 and the Civil Service Law (“CSL”). STWs, SSTWs, plumbers, machinists, carpenters, welders, steamfitters, and cement masons hold competitive positions in the City’s civil service (Pet. Exs. 6, 7, 26a-g). A civil service employee performing the tasks of a higher competitive class cannot be paid the higher prevailing wage under Labor Law 220 because this would conflict with the CSL. *See, Flannery*, 300 N.Y. at 155 (maintenance man who is engaged in the duties of a skilled craftsman, cannot find his remedy in section 220); *see also, Doyle v. New York*, 148 Misc. 503 (App. Term 2nd Dep’t 1933) (prevailing wage law not intended to enable persons to avoid the CSL but to give an employee the prevailing rate for the position he is legally appointed to).

I also find to be without merit OLR’s argument that because STWs are comparable to the Operating Mechanic A title for operations work and comparable to the Mechanic B title for maintenance work, any prevailing rate must reflect at least a portion of the Mechanic B rate. OLR’s reliance on *General Electric Co. v. New York State Dep’t of Labor*, 936 F.2d 1448, 1456 (2d Cir. 1991), which involved a challenge to Labor Law 220 on constitutional grounds, is misplaced. In *dicta*, the Court stated the language of the statute is broad enough to allow the state to examine the collective bargaining agreements involved and to independently decide which of the rates is prevailing. *General Electric Co.*, 936 F.2d at 1456. Nothing in this decision allows for the fiscal officer to blend wage rates because there are several similar titles. Indeed, doing so would be contrary to *Kelly, supra*.

I now turn to whether the record supports a finding that STWs and SSTWS are comparable to Operating Mechanic As and Plant Operators. If they are, Operating Mechanic As and Plant Operators must be the prevailing groups for purposes of rate-setting. *See Austin v. City of New York*, 258 N.Y. 113, 117 (1932); *see also Kelly v. Beame*, 15 N.Y.2d at 110 (noting the statute’s “basic underlying policy” that “persons employed on public works should receive the prevailing rate of wage that those doing the same work on nonpublic works receive”).

Comparability does not require that the nature of the business performed by the private employer and the municipal employer be identical. Even workers employed in different fields can be working in a comparable trade or occupation if the actual work performed is similar. *Watson v. McGoldrick*, 286 N.Y. 47, 53-55 (1941). Blind insistence on identifying the exact same trade or occupation in the private sector where none exists would impermissibly thwart the statutory purpose. *Austin*, 258 N.Y. at 117; *see also Office of the Comptroller, ex rel. Local*

1087 v. Office of Labor Relations, OATH Index No. 2451/08 (Apr. 6, 2009) *adopted in full*, Comptroller's Order and Determination (June 26, 2009) (similarities in the type of work performed by the maintenance engineers and radio repair mechanics, and the skill sets needed to repair, maintain, and install the various electronics communications equipment found sufficient to support a finding that the two jobs are comparable).

As a legal matter, the controlling issue is the "actual work" performed by the two groups of workers being compared. *See Flannery*, 300 N.Y. at 154 (the "critical" factor, in determining whether private employees are in the same trade or occupation as publicly employed workers, is whether "their work differs substantially"); *Kelly*, 15 N.Y.2d at 110 (prevailing wages must be fixed "based on the work actually performed"). Thus, workers who are in two distinct fields but who perform "similar" work may still be in the same "trade or occupation" for purposes of the prevailing wage law. *Watson*, 286 N.Y. at 53 (persons engaged in different "fields" but performing "similar" work could still be in the "same trade or occupation"; differences in the nature of their activities could differentiate the "trade" in which the employees worked, but only if the differentiation is "based upon a substantial ground"). *See also Comptroller's Office, ex. rel. Local 621 v. Office of Labor Relations*, OATH Index No. 1398/97 at 19 (Nov. 5, 1997), *adopted in full*, Comptroller's Order and Determination (Apr. 1, 1998), Commissioner's Supplemental Order and Determination (Apr. 29, 1998), *aff'd*, 253 A.D.2d 596 (1st Dep't 1998) (master mechanics responsible for keeping construction machinery operational and supervising workers in a variety of trades found comparable to city workers who supervise the repair and maintenance of different types of equipment, including sewage treatment equipment, even though building construction and sewage treatment are different fields).

At the hearing, competent evidence was adduced on six job titles - all of them contained in the Local No. 1-2 collective bargaining agreement: Production Worker, General Utility Worker, Operating Mechanic A, Plant Operator, Mechanic B and Mechanic A. Thus, the question is which, if any, of these titles is comparable to complaints?

It was uncontroverted that Operating Mechanic B has not been an active title for at least 20 years and that Operating Mechanic Bs are now Operating Mechanic As (Tr. 464; 556). Because the Operating Mechanic B title was not active during the period at issue here, it cannot be considered in the comparability determination. Moreover, the entry-level Production Worker and General Utility Worker titles are not appropriate for comparison because they are training titles. *See Local 363, International Brotherhood of Electrical Workers v. New York State Dep't*

of Labor, 230 A.D.2d 440 (3rd Dep't 1997). The Mechanic A title is also not a viable option because that title performs complex mechanical alignments, welding, or electrical work, which is not comparable to the work performed by complainants. This leaves only three titles to consider: Operating Mechanic A, Mechanic B, and Plant Operator.

The evidence established that the Operating Mechanic A title is comparable to the STW title. Both titles work around the clock to process and treat large volumes of water under a SPEDES permit. At Con Ed, Operating Mechanic As are treating city water to remove sand, minerals and other contaminants before it is converted into steam. They also screen debris from river water which is used to cool down machinery and is later returned to the river. At DEP, STWs are screening and treating wastewater to remove pollutants before the water is returned to the local waterways. In processing the water, both titles work with similar equipment and machinery, including screens, tide gates, filters, pumps, tanks, piping, motors, fans, blowers, centrifuges, boilers, compressors, heat exchangers, valves, meters, rigging and hoisting equipment, safety equipment, and barges. Moreover, both titles perform preventative maintenance on the equipment such as changing filters, checking oil levels, and tightening valves, and both "tag out" equipment that needs repair. Operating Mechanic As and STWs also perform similar operation functions in that they monitor, test, and treat the water with heat and chemicals and keep related records. The fact that the overall purpose of the steam generation plant is different from that of the wastewater treatment plant or that some of the equipment is unique to the process is irrelevant because the actual work performed in both plants is the same or similar. *Watson*, 286 N.Y. at 53-55; *Flannery*, 300 N.Y. at 153-54.

Unlike Operating Mechanic As, STWs are not limited to operations and preventive maintenance duties. STWs also perform repair and maintenance work, although for much less time than they spend on operations work. Examples of typical maintenance duties are: repacking auxiliary pumps, replacing seal links, repairing leaks, burning off bolts on flanges to replace sections of pipe, cleaning motors, non-structural welding, rigging and hoisting plant machinery and replacing components in order to keep plant equipment in operable condition. Confined space permits are sometimes required. In this regard, the STW title performs similar work to the Mechanic B title which is responsible for general maintenance and repairs to keep steam plants in operation. Mechanic Bs also repack pumps, fix leaks, burn off bolts, clean motors and perform tasks that require confined space permits. Mr. Gutierrez's testimony that a

Mechanic B is a helper who is incapable of working independently (Tr. 666-67, 671-72, 689) was contrary to the weight of the evidence.

There was no dispute that overall STWs generally spend approximately two-thirds of their time on operations and one-third on maintenance duties. Although STWs perform similar work to the titles of Mechanic B and Operating Mechanic A, the majority of work performed by the STWs is in operations, which includes preventive maintenance.

The Union also argues that to the extent STWs are comparable to Operating Mechanic As and Plant Operators, they should be compared to Plant Operators because STWs perform a greater range of duties than Operating Mechanic As and work in a more diverse and hazardous environment. This was not borne out by the evidence. The record supports a finding that STWs and Operating Mechanic As face similar hazards from chemicals, dangerous debris, confined spaces, high pressure tanks or gases, malfunctioning equipment, and barges, and that they are given extensive training to deal with these hazards. My impression is that both groups work under difficult conditions and that steam production and wastewater treatment require a broad range of similar training and skills.

The fact that Plant Operators are proficient on six posts as opposed to two for Operating Mechanic As and that STWs are proficient on all posts, while notable, is not sufficient reason to find STWs comparable to Plant Operators where so many parallels exist between STWs and Operating Mechanic As. In addition to performing similar work on comparable equipment, STWs and Operating Mechanic As start out as journeymen in similar fields, both groups have entry level training, and both must obtain various certifications and pass certain tests in order to perform their duties in compliance with state and federal law. Like STWs, the Operating Mechanic As are the first level workers in the hierarchy of the water treatment plant. In order to reach the higher levels of SSTW and Plant Operator, the STW and the Operating Mechanic A must gain new skills and pass additional tests. *See BA-CEE Division of Local Union No. 3, IBEW v. Office of Labor Relations*, OATH Index No. 230/92 (Apr. 15, 1992), *aff'd in relevant part*, Comptroller's Decision (June 17, 1992) (pedigree and history should not be ignored when making comparability determination). Therefore, the comparable title to STW is Operating Mechanic A.

With regard to the SSTW title, the Union and OLR object to comparing SSTWs to Plant Operators because they do not have supervisory functions whereas SSTWs do. SSTWs are working foremen who supervise and assist STWs in performing their duties. The evidence

established that there is no working foreman title at the Con Ed steam plant and that utility workers are supervised by Shift Supervisors, a management title (Tr. 482-83). Since the Shift Supervisor title is not encompassed in a collective bargaining agreement, it cannot serve as a basis for classification in this proceeding. Labor Law § 220(5).

It was undisputed that SSTWs must be able to perform the same tasks as STWs and that Plant Operators must be able to perform the same jobs as Operating Mechanic As. Moreover, SSTWs and Plant Operators are higher ranking and more experienced than their junior counterparts. Since STWs have been found to do comparable work to Operating Mechanic As, it is, therefore, reasonable to conclude that SSTWs perform similar work to Plant Operators. In addition, Plant Operators are promoted from the Operating Mechanic A title after completing the requisite training and passing examinations. Likewise, SSTWs are promoted from the STW title after passing the SSTW civil service exam and completing the requisite training. While Plant Operators do not supervise Operating Mechanic As by giving them assignments or conducting performance evaluations, the senior worker can assist and direct the junior member with a problem. In this manner Plant Operators perform analogous work to SSTWs who also assist and direct STWs with their duties.

Although the Union and OLR argue that the STW and SSTW titles must be classified separately, neither provides alternative trades or occupations which they deem comparable to both titles. While it is unclear how much time SSTWs devote to supervisory functions as opposed to general operations and maintenance work, the Union and OLR argue that this additional duty is enough to distinguish them from STWs. Indeed, having both STWs and SSTWs in either the Operating Mechanic A or the Plant Operator titles would be inconsistent with Labor Law 220 because both titles would receive the same rate of pay. Given that this investigation was commenced in 2005, that all parties had an opportunity to participate in the process of identifying comparable titles, and that there are no other readily discernable trades in New York City besides Con Ed whose work comes close to the work performed at a WPCP, OLR's suggestion that an additional SSTW survey be conducted would only delay this matter further. Moreover, the Union's suggestion that SSTWs be compared to the supervisory rate of whatever trade they are engaged is not feasible for the reasons stated above.

The fact that there is no comparable working foreman title at Con Ed or elsewhere cannot thwart the statutory mandate to determine a prevailing rate for the SSTW. *Watson*, 286 N.Y. at 53-55; *Flannery*, 300 N.Y. at 153-54; *Austin*, 258 N.Y. at 117; *see also Bucci v. Village of Port*

Chester, 22 N.Y.2d 195, 201 (1968) (“We are here required to give effect to a unique statutory scheme, one that has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate from a public employer. This court has more than once noted that section 220 must be construed with the liberality needed to carry out its beneficent purposes”). Because SSTWs perform similar work to Plant Operators, have similar promotional paths, and can assist junior workers with complex tasks, they are comparable to Plant Operators.

To the extent the Union and OLR raise issues concerning the establishment of wages and supplements to be paid to STWs and SSTWs based on the progressive rates in the Local No. 1-2 contracts, these questions are not properly before me. This matter was referred to this tribunal to hold an evidentiary hearing to determine which private sector trade or occupation is comparable to STWs and SSTWs. Petitioner indicated on numerous occasions that once the comparability determination was made, it would use that determination to set the appropriate rates. If there are disputes as to the establishment of the wages and supplements to be paid, they must be raised at a subsequent hearing, if necessary. *See Office of the Comptroller, ex rel. Local 108*, OATH 2451/08, at 3; *BA-CEE Division of Local Union No. 3, IBEW v. Office of Labor Relations*, OATH Index No. 230/92 (Apr. 15, 1992), *aff’d in relevant part*, Comptroller’s Decision (June 17, 1992); *Comptroller v. Office of Labor Relations (Elevator Mechanics)*, OATH Index No. 616/98 (May 18, 1998), *aff’d*, Comptroller’s Decision (Aug. 10, 1998), *aff’d sub nom. Local 237 v. Comptroller of the City of New York*, 259 A.D.2d 314 (1st Dep’t 1999).

RECOMMENDATION

The Comptroller’s May 14, 2009, preliminary determination that STWs and SSTWs should be paid commensurate with the wages and supplements set forth in the collective bargaining agreements between Con Ed and Local No. 1-2 for workers in the titles of Operating Mechanic A and Plant Operators should be affirmed.

Alessandra F. Zorgniotti
Administrative Law Judge

September 10, 2009

SUBMITTED TO:

WILLIAM C. THOMPSON, JR.

Comptroller

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