

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 FOND DU LAC COUNTY HIGHWAY :
 DEPARTMENT EMPLOYEES LOCAL 1366-B, :
 AFSCME, AFL-CIO : Case 107
 : No. 42385
 and : MA-5673
 :
 FOND DU LAC COUNTY :
 (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, N7242 Winnebago Drive, Fond du Lac, Wisconsin 54935, appearing on behalf of the Union.
Mr. Richard Celichowski, Labor Negotiator, Fond du Lac County, City-County Government Center, 160 South Macy Street, Fond du Lac, Wisconsin 54935, appearing on behalf of the County.

ARBITRATION AWARD

Fond du Lac County Highway Department Employees Local 1366-B, AFSCME, AFL-CIO, hereafter the Union, and Fond du Lac County, hereafter the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide a grievance concerning the meaning and interpretation of the terms of the agreement relating to job posting. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing was held in Fond du Lac, Wisconsin, on September 21, 1989. It was not transcribed. Briefs were submitted by November 29, 1989. The County submitted a reply brief by December 8, 1989; by letter received January 18, 1990, the Union waived its right to submit same.

ISSUE

The Union frames the issue as: "Did Management violate the intent and purpose of the contract when it created two (2) new full time "WORKING FOREMAN" classifications without negotiating the impact thereof, unilaterally and arbitrarily eliminated two (2) job posting opportunities in the process, and, if so, what is the appropriate remedy?"

The County frames the issue as: "Did Management violate the contract when it included in its job posting for foreman positions the duties of either Screed Operator or Gradall Excavator?"

The Arbitrator states the issue as: "Did the County violate the collective bargaining agreement when it included the duties of Screed Operator and Gradall Excavator (Operator) in the job postings for two newly-created Foreman positions? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE IV. MANAGEMENT RIGHTS RESERVED

4.01 Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demot (sic) or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vest exclusively in the Employer.

4.02 The County Board and its Highway Committee shall have the sole right to contract for any work it chooses and to direct its employees to perform such work wherever located subject only to the restrictions imposed by this agreement and the Wisconsin Statutes.

4.03 In keeping with the above, the Employer may adopt reasonable rules and amend the same from time to time, and the Employer and the Union will cooperate in the enforcement thereof.

ARTICLE VIII. JOB POSTING

8.01 Whenever any vacancy occurs due to retirement, quit, new position or for whatever reason, the job vacancy shall be posted. The vacancy shall be posted on all bulletin boards for a minimum of five (5) working days. The job requirements, qualifications and wage rate shall be a part of the posting and sufficient space provided for interested parties to sign said posting.

8.02 The Employer shall determine the qualifications of the applicants and in the event that qualifications as determined by the Employer are relatively equal, the applicant with the greater seniority shall be selected to fill the vacancy. Should such employee desire to return to his former position within thirty (30) actual work days thereof, he shall be reassigned to his former position without loss of seniority. Other employees affected by a decision of an employee to return to his former position shall likewise be returned to their former position without loss of seniority. In this event, the applicant next in line of seniority shall be given preference pursuant to the above procedure until the original vacancy is filled.

8.03 If no regular employee makes application for this job by signing the position, it shall be given to the temporary employee applying (signing) who has the most seniority, subject to the right of the Employer to determine whether the employee applying for said position has the proper qualifications to perform the job. If there are no applicants on a posted job and the Employer does not fill such job, the job shall be reposted within three months of the original posting, in the event the employer intends filling such position. However, the employer shall notify the Union if it does not intend to fill the position.

8.04 QUALIFICATIONS DISPUTES: If there is any difference of opinion as to the qualifications of an employee, the Highway Committee and/or the Highway Commissioner and the Union Committee may take the matter up for adjustment through the Grievance Procedure.

8.05 If an applicant signs a posting he shall be given notice of the status of such posting within 30 days after the posting is taken down from the Bulletin Board.

BACKGROUND

From 1985 through 1988, the Fond du Lac Highway Department employed two working foremen on a seasonal basis. In 1989, these positions became full-time. This grievance concerns the County's decision to assign to these new positions the duties of Screed Operator and Gradall Operator.

Each year from 1985 to 1988, Melvin Jahns, a Bituminous Machine Finisher, (Screed Operator) and Williard Brown, a Gradall Operator, served as seasonal working foreman. These temporary designation were in each instance made following a job posting issued pursuant to the collective bargaining agreement. During such periods, the two men received the pay of the higher-classified Foreman position, again pursuant to contract. During the time they served as seasonal foreman, their permanent positions were not reposted, as the duties thereof were subsumed in their temporary positions.

During negotiations for the 1989-1990 contract, the County proposed to reclassify Brown and Jahns to year-round foremen. This proposal was incorporated in the parties' collective bargaining agreement.

Subsequent to ratification of the 1989-1990 contract, the two foreman positions became vacant through Jahns' retirement and Brown's promotion to Patrol Superintendent. Thereafter, on March 20, 1989, the County posted the positions, including in each position description new qualifications specifying that Gradall Operator and Screed Operator, respectively, "shall be considered normal duties of this position."

It is the specification of such duties which the Union grieves.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and avers as follows:

Prior to 1989, there were full-time positions for the classifications of Gradall Operator and Screed Operator, and seasonal positions for Working Foreman. During that period, there was a clear past practice and policy enabling employes to hold one full-time position and one seasonal position -- a policy so established that the County proposed it be included in the written contract.

During negotiations for the 1989-1990 contract, the County proposed elimination of the two seasonal working foreman positions, and the creation of two full-time working foreman positions. The Union agreed to this proposal.

However, after the positions were agreed to, the County unilaterally re-wrote the position descriptions, requiring that the working foremen also be full time gradall operator or screed operator. This arbitrary and non-negotiated change meant that those who wanted to be foremen had to agree to be a gradall or screed operator, or, conversely, that an employe who wanted to be a gradall or screed operator had to also be a working foreman.

At no time did the County ever discuss the elimination of the two promotional opportunities by the creation of the two full time working foreman positions; had the Union known of the County's intent to eliminate these promotional opportunities, it would not have agreed to the proposal.

The County's decision to merge the new full time working foreman positions with the screed and gradall operator duties was arbitrary and capricious and without the Union's foreknowledge.

Moreover, the past practice of only allowing employes to hold one full time and one part time job was clearly established; the County has violated its own practice and procedure by allowing employes to hold more than one full time job.

Accordingly, on the basis of custom, practice and clear contractual language, the grievance should be sustained and the County ordered to repost the positions of Gradall Operator and Screed Operator and leave the Working Foreman classification as a separate full-time position.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

In assigning the duties of Screed Operator and Gradall Operator to the Foreman positions, the County was operating within its management rights, and was not in violation of the contract. The contract does not contain any restrictions upon the rights of management to assign tasks and duties to workers; nor does it provide for detailed description of the duties within each job title. The listing of classifications and their rates have been negotiated, but there are no limits on the assignment of duties.

The Union did not file a reply brief. In its reply brief, the County further posits as follows:

Contrary to the Union's allegations, the County did indeed negotiate the impact of the creation of the two new Working Foreman positions; as the Union itself concedes, it "agreed to Management's proposal" regarding the creation of these positions. Thus, there is no grounds for a grievance concerning this aspect.

The Union also alleges the County unilaterally and arbitrarily eliminated two job posting opportunities, apparently contending that the duties of Gradall and Screed Operator be excluded from the Working Foreman position. There is no basis in either contract or past practice for this contention.

The only contractual limit on management's right to assign and direct the work force concerns pay levels; otherwise, management has the right to set the number

and type of positions, and assign the duties thereof, for each classification as it deems necessary.

DISCUSSION

Prior to the 1989-1990 collective bargaining agreement, the County's standard operating procedure was to utilize seasonal working foremen, which positions were filled through the contractual posting provisions. For at least four years prior to the 1989-1990 contract, the County assigned Melvin Jahns, a Screed Operator, and Williard Brown, a Gradall Operator, to serve as seasonal working foremen, at the pay rate of the higher-classified foreman's position. During the time the men served as seasonal foremen, their permanent positions were not reposted, as the duties thereof were subsumed in their temporary positions.

In the 1989-1990 collective bargaining agreement, Brown and Jahns were reclassified as year-around foremen. Subsequently, Jahns retired and Brown was promoted to Patrol Superintendent, leaving the two newly-created positions vacant. In its posting to fill the vacancies, the County amended the respective position descriptions which it had formerly used, specifying that the tasks of Gradall Operator and Screed Operator "shall be considered normal duties of this position".

The Union has challenged this action on several fronts, claiming that it was arbitrary and capricious; that it violates the County's practice of allowing employes to hold one full-time and one seasonal position, but not two full-time positions; that the new position descriptions for the working foremen effectively eliminated posting opportunities for the Gradall and Screed positions; and that, had the Union known of the County's intent, it would not have agreed to the creation of the two new full-time positions.

Certainly, the County's action here was unilateral. But I find that it was not arbitrary. The term "arbitrary" denotes that something is determined by whim or caprice. Had the County incorporated into the new foreman positions duties clearly unrelated to the essential nature of that job -- e.g., that the foreman would also serve as building custodian or welder -- the Union's challenge would have more merit. But there are two reasons why the assignments which were made were not reflective of such caprice. First, the testimony of the Highway Commissioner, not fully rebutted, that the respective duties are indeed reasonably related. Second, and more persuasive, is the undisputed fact of the Brown/Jahns work history; that is, for several years, the Screed and Gradall duties were indeed successfully subsumed into the positions of seasonal working foremen. Having accepted such commingling for at least four years, the Union cannot now successfully challenge such an arrangement as reflecting whim and caprice.

This history -- that Gradall and Screed Operator duties have been success-fully borne by workers during their tenure as seasonal working foremen -- also refutes another Union contention, namely that the job posting violated the established practice of allowing employes to hold one full-time and one seasonal position, but not two full-time positions. The Union contends that the expansion of the foremen positions to incorporate the Screed and Gradall duties has turned what once was one job into two. I find that not to be the case.

As the County asserts, the collective bargaining agreement provides that "(u)nless otherwise herein provided, the management of the work and direction of the working forces . . . is vested exclusively in the Employer". While this is not an especially broad or detailed management rights clause, it does establish a framework which, when considered with other contractual provisions, provides an adequate basis for the County's actions.

In particular, Section 8.01, dealing with job postings "(w)henver any vacancy occurs", provides that the "job requirements, qualifications and wage rate shall be a part of the posting . . ." As posting for the vacancy is the responsibility of the Employer, so too is the setting of requirements and qualifications. While the contract specifies rates of pay per classification, and provides certain rules to implement the classification system, the contract does not require bargaining over each job description within the numerous classifications. The Employer's right to set job duties is not entirely free and unfettered, of course; as the contract provides, an employe's claim that he or she has been discriminated against, or treated unfairly or arbitrarily is subject to the grievance process, as are claims as to working out of classification. Making the Screed and Gradall duties normal and permanent parts of the new working foreman positions did not, by itself, violate the contract.

The same analysis applies to the County's decision to leave unfilled the former positions of Screed and Gradall Operator. The contract provides for such positions, and sets their classification. But the contract does not require that the positions be filled, and thus, absent other bases, leaves to the Employer the right to manage and direct its work force. Further, the

alleged unfairness of the County's action can be viewed by its impact on the sum of wages paid to unit members. Previously, Brown and Jahns, with permanent assignments in Class VI and VII, respectively, received the higher Class IX wages only during their seasonal service as foremen; under the new system, their replacements receive Class IX wages for the entire year. Thus, the County's actions here have actually resulted in a pay raise for unit members.

The Union's final argument is that, had it known the County's intent in this regard, it would not have agreed to the creation of the permanent foremen positions. If I accepted this premise, the remedy I would have to order would not be the retention of both the new and old positions, as proposed by the Union; rather, it would be the effective nullification of several personnel shifts, resulting in the restoration of the seasonal working foreman positions and the posting for the Screed and Gradall positions. There may be situations

where such an order would be appropriate. However, the record evidence fails to convince me that there was such substantial duplicity during negotiations as to justify my unilateral amendment to the collective bargaining agreement.

Accordingly, on the basis of the contract, the record evidence and the arguments of the parties, it is my

AWARD

That this grievance is denied.

Dated at Madison, Wisconsin this 28th day of February, 1990.

By _____
Stuart Levitan, Arbitrator