

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 MONROE COUNTY HIGHWAY EMPLOYEES :
 LOCAL UNION NO. 2470, AFSCME, AFL-CIO : Case 87
 : No. 43555
 and : MA-5998
 :
 MONROE COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40,
 AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, appearing on
 behalf of the Union.
Mr. Edward G. Staats, Personnel Director, Monroe County, County
 Courthouse, P.O. Box 202, Sparta, Wisconsin 54656, appearing on
 behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1987-88 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve a grievance filed by Hugh Zwiefel as president of the Union, protesting the Employer's method of calculating vacation and holiday pay for new employes.

The undersigned was appointed, and the parties agreed to limit the issue to be addressed initially to the question of timeliness of the grievance. Accordingly, a hearing on arbitrability was held in Sparta, Wisconsin on May 22, 1990, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was on July 18, 1990.

STIPULATED ISSUE

Is Grievance No. 89-1 timely?

RELEVANT CONTRACTUAL PROVISIONS

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Article 4 - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of the Agreement.

Section 2. Subject Matter: Only one subject matter shall be covered in any one grievance. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date that the incident or violation took place, the specific Section of the Agreement alleged to have been violated and the signature of the grievant and the date.

Section 3. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

Section 4. Settlement of Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied. Dissatisfaction is implied in recourse from one step to the next.

Section 5. Steps in the Procedure:

Step 1: All employee grievances must be filed by the aggrieved employee or the president of the Union, in writing, to the Union Grievance Committee and a copy must further be filed with the Highway Commissioner by the employee or Union representative no

later than thirty (30) calendar days after the employee knew or should have known of the cause of such grievance. The Union Grievance Committee shall try to settle the grievance with the Highway Commissioner. The Highway Commissioner shall have eight (8) days to meet with the Union Grievance Committee. Following this meeting, the Commissioner shall have two (2) days to respond to the grievance. If unsuccessful, it shall be submitted to the Highway Committee who shall have ten (10) days to meet with the Union Grievance Committee. Following this meeting, the Highway Committee shall have ten (10) days to respond to the grievance. If unsuccessful, it shall be submitted to the County Personnel Committee who shall have ten (10) days to meet with the Union Grievance Committee. Following this meeting the Personnel Committee shall have ten (10) days to respond to the Union Grievance Committee. If the grievance is not settled at this step, the union shall have thirty (30) days from the receipt of the Personnel Committee's decision to present the grievance for arbitration.

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DISCUSSION

Hugh Zwiefel, president of the Union in 1988 and vice-president in 1990, testified that at a Union meeting in early 1988, employees brought up a claim that they were not getting the proper vacation after their first year of employment. Zwiefel brought the matter to the attention of the Union's staff representative, Dan Pfeifer, who sent personnel director Edward Staats a letter on March 28, 1988. In that letter Pfeifer questioned management's method of pro-rating vacation, its mandating usage of paid time prior to a leave of absence being granted, and its policy of refusing to grant vacation requesting during the month of December. 1/ Pfeifer proposed a discussion concerning these issues prior to grievances being filed.

Zwiefel testified without contradiction that subsequently some discussions were had between the Union and management, but that no agreement was reached. Zwiefel filed the initial grievance on February 7, 1989. He testified that he mailed it without a cover letter, according to his practice, to Highway Committee Chairman Henry Laufenberg. Laufenberg testified that he never received a copy of the grievance, or a formal request to present it.

Prior to the filing of the grievance, on May 26, 1988 Staats wrote to Pfeifer and local members a letter discussing various pending matters, among which was the following:

3. I would suggest that you contact George Baker, Highway Commissioner to discuss the vacation accumulation along with a member of his office staff. After visiting his office myself, it appears to me that the Highway Department employees are afforded vacation benefits as prescribed in the current collective bargaining agreement.

On February 13, 1989, Commissioner Baker wrote to Zwiefel contending in relevant part that the grievance was untimely because there was mutual agreement as to how to calculate vacation since 1977, and that the issue had first arisen in Pfeifer's letter of March, 1988. (This letter followed a February 7, 1989 letter from Pfeifer to Baker enclosing a copy of the grievance previously submitted to Laufenberg.)

On March 20, 1989 Pfeifer wrote to Staats contending in part that he had been advised by Zwiefel that no response had been received from the Personnel Committee with respect to this grievance.

The sequence of events which follows is confused in the record. Zwiefel testified that on some date after he had attempted to submit the matter to the Personnel Committee, he received notice one morning to appear at a Highway Committee meeting that afternoon, did so, and there discussed the vacation/holiday grievance, without result. Laufenberg and Loren Pierce, another Highway Committee member, testified that they had no recollection of any discussion in the Highway Committee of this grievance. But on July 14, 1989 Pfeifer wrote to Staats referring to a meeting between the Union and Highway Committee concerning this grievance, and requesting that Staats inform the

1/ Only the first of these issues was explicitly made part of Grievance 89-1.

Union of the County's position on it. On August 15, Staats wrote to Pfeifer on behalf of the Personnel Committee, requesting that the Union obtain an answer as to the grievance first from the Highway Committee, contending that this was required by the contract prior to consideration of a grievance by the Personnel Committee. Subsequently, Pfeifer apparently contacted Staats again, because on October 20, 1989 Staats again wrote back reaffirming the Personnel Committee's position that the matter should have been submitted to the Highway Committee first, and also alleging that the grievance was untimely.

On November 7, Pfeifer wrote to Staats contending that the grievance had been presented to the Highway Committee and that the Committee had not presented any response, thus making it appropriate to refer the matter to the Personnel Committee. The letter went on to say that since the County had taken the positions that it had, the Union believed that it appropriate to submit the grievance to arbitration at that point, and that the letter would serve as notice of intent to arbitrate.

On November 14, the Highway Committee wrote to Pfeifer contending that the grievance was untimely by nine months and that it was not being presented in good faith.

On January 26, 1990 the Union mailed its request to the WERC to appoint an arbitrator. By letter on March 15, Staats confirmed the County's position as being that the grievance was untimely and not filed according to the grievance procedure.

The Union contends that the persuasive evidence is that the Highway Committee did in fact meet with Zwiefel to discuss the vacation grievance, and that Zwiefel's testimony is clear and consistent, contrasting with the poor recollections allegedly exhibited by Laufenberg and Pierce. The Union contends that the Highway Committee did not respond to the Union within ten days of receiving the notice, and that it is therefore the Highway Committee which caused the delays in processing this grievance. The Union argues that, accordingly, it was entitled by common labor relations practice to proceed to the next step of the grievance procedure.

The Union also contends that the Highway Commissioner, in contending that the grievance had been dropped because he had heard little about it for months, was incorrect, because his testimony showed that he was unaware of the ongoing discussion of the grievance between Pfeifer and Staats. The Union contends that a "continual" series of letters and oral communications concerning the grievance demonstrates that the Union had not abandoned the grievance at any time. In addition, the Union contends that even if the grievance were found untimely, it is an ongoing matter because the County's vacation/holiday policy is applied to all new employes, and therefore, the grievance should be considered a "continuing violation" with respect to any such new employe and timely at least to that extent. The Union contends that testimony as to the 1977 agreement with the Union's then staff representative Walter Klopp should not be considered, because it addresses the merits rather than the timeliness of the grievance.

The County contends that the Union knew or should have known of the cause of the grievance 11 years before the issue arose, because the initial agreement as to calculation of vacation dated from 1977, according to unrebutted testimony. The County further argues that the issue arose on March 28, 1988, and that between nine and ten months then elapsed before the grievance was filed, far longer than the 30 days provided in the agreement from the date the employe "knew or should have known of the cause of such grievance". Thereafter, the County argues, it processed the grievance according to the grievance procedure, but the Union again failed to comply with that procedure. The County argues that Baker, Laufenberg and Pierce should be credited that the grievance was never formally presented to the Highway Committee, and that Pfeifer admitted as much in his July 14, 1989 letter. The County contends that under Article 4, Section 3 any time extensions must be by mutual agreement in writing, and that there is no indication of any mutual consent in writing to the length of time taken at various stages for the Union to press this grievance. The County contends that the Union failed the time limits on six separate occasions, and that the grievance should be found untimely.

The tangled history of this grievance gives rise to a number of stages at which it could conceivably be found untimely. Of these, I find the County's allegation of the 1977 agreement as demonstrating untimeliness of the 1989 grievance unpersuasive, standing alone. While the evidence is unrebutted that the County made some kind of agreement with the Union concerning proration of new employes vacation at that time, no showing was made as to the exact content of that agreement, nor is there any evidence bearing on whether or not the County subsequently calculated the vacation correctly for new employes. Therefore, under the widely recognized concept of a "continuing" violation, the grievance might at its inception be held to be timely as to new employes even if common arbitral practice would limit the retroactivity of any remedy. Similarly, I find unpersuasive the County's contention that the Union failed to process the grievance properly at the Highway Committee stage; the record

indicates that more likely than not some kind of discussion of the grievance was had with the Highway Committee, and an exact and punctilious insistence that the grievance must be scheduled for the meeting in some particular manner in order to satisfy the requirements of due processing of the grievance does not sit well with last-minute calling of the Union president to discuss it. At the least, there is enough ambiguity here to justify the Union in its contention that the Highway Committee had in fact had an opportunity to reply to this grievance and that it was appropriate to process it then to the Personnel Committee.

This, however, is not sufficient to cause the Union's argument to prevail. The fact remains that on other occasions the Union clearly and unequivocally violated the time limits for grievance processing. I note particularly the time lag between the May 26, 1988 letter from Staats, arguing that the County was correctly calculating vacation time, and the actual filing of the grievance some nine months later. Even though Staats suggested that the Union discuss the matter further with Baker, there is no persuasive evidence that the Union engaged in any subsequent dialogue with Baker let alone one of such length as to warrant concluding that the 30-day period for filing the grievance was tolled for this length of time. I note also the time lag between the Union's November 7, 1989 letter announcing that it was appropriate to arbitrate the grievances and the January 26, 1990 filing for arbitration. In this instance the time taken substantially exceeded that provided for by contract, because the Union clearly triggered the 30-day period for filing at the arbitration stage by its November 7 letter, which explicitly stated that the Union had concluded that the County had waived the Personnel Committee stage by its actions.

There is no evidence of any action by the Employer after November 7, 1989 which even hints at an agreement to continue discussions rather than to require compliance with the time limits. Furthermore, there is no evidence in the record of a past pattern of lax handling of time limits on both sides which would justify an expectation of continued mutual ignoring of time limits, a factor sometimes relied upon by arbitrators in finding that a grievance should be considered timely for equitable reasons. And finally, though the Union avers generally that the hiring of new employes should result in this matter being considered a continuing violation, the concept of a continuing violation requires something more than just the allegation that a given grievance is one. Here, no evidence is in the record to show that an employe was hired within 30 days before the actual filing of the grievance, and even if such evidence did exist, this would not excuse the failure to file for arbitration promptly. Thus, even with a skeptical attitude towards any disposition which results in a matter not being heard on its merits, I can only find that any other result on the facts of this grievance would do violence to the parties' mutually-agreed time limits.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

That Grievance No. 89-1 is untimely and accordingly not arbitrable.

Dated at Madison, Wisconsin this 6th day of September, 1990.

By _____
Christopher Honeyman, Arbitrator