

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LOCAL 986, AFSCME, AFL-CIO

and

MANITOWOC COUNTY

Case 229
No. 43650
MA-6035

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221-0370, appeared on behalf of the Union.

Mr. Mark Hazelbaker, Attorney at Law, Manitowoc County Corporation Counsel, 1010 S. 8th Street, Manitowoc, Wisconsin 54220, appeared on behalf of the County.

ARBITRATION AWARD

On February 14, 1990, Local 986, AFSCME, AFL-CIO and Manitowoc County jointly requested the Wisconsin Employment Relations Commission to provide an arbitrator to hear and issue a final and binding award on a pending grievance. On March 12, 1990 the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on May 22, 1990, in Manitowoc, Wisconsin. Briefs were submitted and exchanged by August 2, 1990.

This case addresses the County's right to offer certain work to Gary Kennedy a laid off employe without first making it available to more senior employes on layoff.

BACKGROUND AND FACTS

On October 1, 1989 Manitowoc County Highway Department laid off its 15 least senior employes. On November 20, 1989 five more employes were laid off. These 20 people remained on layoff until February 5, 1990. Cletus Wagner was the most senior employe on layoff. Mark Horstmann was second and Gary Kennedy was third most senior.

Two or three weeks prior to the November layoff of Wagner, Horstmann and Kennedy, Kennedy was contacted by Beth Huber, County Personnel Director about temporarily supervising

some recycling work. Subsequent to the phone call, Kennedy met with Jeff Beyer, Public Works Director, was offered this supervisory work and accepted the assignment.

Kennedy was selected to perform the recycling supervision because he is a foreman. Neither Wagner nor Horstmann are foremen and neither was considered. Kennedy worked from November 20, 1989 to February 2, 1990, at a rate of \$8.41 per hour, with benefits. Most of the time he worked out of the Courthouse, though he spent a good deal of time on the road, and at the County Expo site. Kennedy did have occasional contact with the Highway Department and its employees. Kennedy supervised general relief recipients who worked recycling newspaper. He took direction from the Public Works Director and not from the Highway Department. He used Public Works equipment, with the exception of one day when he borrowed a loader from the Highway Department.

The record establishes that, on occasion, general relief recipients are assigned to pick litter along the roadway and grass mowing and that non-foreman have supervised those efforts.

Wagner and Horstmann have grieved the County's use of a less senior worker while they were on layoff.

ISSUE

The parties stipulated to the following:

Were the grievants' seniority rights violated by the County's employment of Mr. Gary Kennedy during a layoff at the Manitowoc County Highway Department?

If so, what is the remedy?

RELEVANT PROVISIONS OF THE CONTRACT

ARTICLE 1 - RECOGNITION AND BARGAINING UNIT

Employer recognizes the Union as the exclusive bargaining agent of all the employees of the Employer engaged in highway and bridge construction and maintenance work, shop and office employees, other employees in related activities of the Highway department, except the employees in the positions of Engineer, State Highway Superintendent, Shop Superintendent, Assistant Road Superintendent, and Office Manager, excluding temporary, supervisory, confidential and managerial employees.

ARTICLE 2 - SENIORITY

A. Seniority: It shall be the policy of the Highway

Department to recognize seniority.

- B. Definition: Seniority shall be defined for the purposes of this Agreement as the net credited service of the employee. Net credited service shall mean continuous employment in the County beginning with the date and hour on which the employee began to work after last being hired. However, it is understood that job posting preference shall be given first to Department seniority. The Department seniority shall be defined as net credited service within the Department. Department and County seniority shall include time spent in the armed forces of the Country (if such military service occurred after date of hire). Department and County seniority shall not include unpaid temporary leaves of absence in excess of six (6) months in any period of twelve (12) consecutive months.
- C. Layoffs: In reducing employee personnel, the last person hired shall be the first person laid off, and the last person laid off shall be the first person hired.
- D. Loss of Seniority: Seniority and the employment relationship shall be broken and terminated if an employee:
1. Quits by written resignation to the Employer;
 2. Is discharged for just cause;
 3. Is absent from work for three (3) consecutive working days without notification to the Employer, unless unable to notify for medical reasons;
 4. Fails to report to work within five (5) days after having been recalled from layoff, unless an extension is granted by the County Highway Committee. Employees who are sick or disabled shall report to work upon recovery from the illness or disability (after said five (5) work day period);
 5. Is on a leave of absence for personal or health reasons and is physically able to return to work but accepts other employment without permission; or,

6. Is retired.

E. Notice of Recall: The notice of recall for any employee who has been laid off shall be mailed to the last known address of the employee on the books of the County. Such notice shall be deemed effective upon date of receipt of registered mail. Employees on layoff are responsible for notifying the County of any changes in their mailing address. Notice of change in address should be given to the Highway Department office.

ARTICLE 3 - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

Manitowoc County 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. In the event the Employer desires to subcontract any work which will result in the layoff of any County employees, said matter shall first be reviewed with the Union.

Unless otherwise herein provided, the Employer shall have the explicit right to determine the specific hours of employment and the length of work week and to make such changes in the details of employment of the various employees as it from time to time deems necessary for the effective operation of its department. The Employer may adopt reasonable work rules except as otherwise provided in this Agreement.

The Employer agrees that all amenities and practices in effect for a minimum period of twelve months or more, but not specifically referred to in this Agreement shall continue for the duration of this

Agreement.

. . .

ARTICLE 4 - LAYOFFS AND MILITARY LEAVE

The seniority rights of an employee shall continue to accumulate during layoff periods for legitimate reasons or during service with the military forces of the United States, provided, however, said employee applies to return to work within ninety (90) days after the date of his or her discharge from said service.

ARTICLE 10 - DEFINITIONS OF EMPLOYEES

A. Regular Full-Time: A regular full-time employee is a person hired to fill a regular full-time position. Full-time employees are eligible to receive all benefits in this Agreement.

. . .

D. Temporary: A temporary employee is one hired for a specified period of time (not to exceed six (6) months) and who will be separated from the payroll at the end of such period. Temporary employees receive none of the benefits contained in this Agreement. Temporary employees shall not be used to replace, reduce or displace regular employment.

POSITIONS OF THE PARTIES

The Union contends that there is no evidence that the recycling work is under the jurisdiction of the Courthouse agreement. Kennedy received the job because he was a Highway Department employe, and was not treated as a temporary employe: i.e., he received the full range of benefits including longevity pay. In the view of the Union, the County hand-picked Kennedy without giving other employes a chance to apply for the job.

Neither Wagner nor Horstmann were evaluated for the position. The County wanted a job for Kennedy and is attempting to find a loophole around the contractual seniority clause. Kennedy is in the bargaining unit and both he and his position are governed by the contract. The record shows that Highway Department equipment was used, that there was some interaction with Highway Department employes, and that some breaks were taken at the Highway Department.

The Union believes that Wagner is entitled to be paid for all hours worked by Kennedy with an offset for Unemployment Compensation received.

The County contends that what it needed was a foreman and that Kennedy was the senior foreman on layoff. Neither Wagner nor Horstmann are foremen and are therefore not qualified. According to the County, recycling work does not operate from within the Highway Department. The work falls outside the bargaining unit and is therefore unregulated by the contractual seniority clause. The contractual recognition clause does not cover the recycling program. Even if seniority were to be applied, the County argues that neither Wagner nor Horstmann is qualified. The work was temporary in nature and thus exempt from coverage by the labor agreement.

DISCUSSION

I do not believe that there is anything in the collective bargaining agreement which regulates the assignment of an employe to supervise certain recycling tasks. Article I recognizes the Union as the exclusive representative of certain Highway Department employes. This record is uncontradicted that recycling is a part of the Public Works Department and not a part of the Highway Department. Kennedy testified to that as did Bill Schram, Highway Commissioner. No one testified to the contrary. Kennedy testified that he took direction from the Public Works Department, not from the Highway Department.

Article 2 requires job posting preference to applicants with Department seniority. I regard this clause as applicable to bargaining unit positions, not all positions county-wide. Since the position in question is not a bargaining unit position this provision is inapplicable. The layoff was by seniority as was the recall to a bargaining unit position.

I find the fact that Kennedy was offered non-bargaining unit work to be of no contractual consequence. The labor agreement regulates conditions of employment within the jurisdiction of the Local. Absent language which reaches outside of the agreement, the County is free to fill non-unit positions with whom it pleases, at least vis-a-vis this Local Union. The County has that freedom here. Similarly, the Local has no standing to tell Kennedy what non-unit work he may take during periods of layoff.

The Union contends that Kennedy was not treated like a temporary employe, but rather like a regular employe in that he received fringe benefits while performing the recycling work. I agree that the payment of benefits for what the County alleges to be temporary work is inconsistent with Article 10. However, since I believe that the work falls outside the jurisdiction of this agreement and therefore is not regulated by this agreement, the fact that its terms do not conform to Article 10 is of no consequence in this proceeding.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 25th day of October, 1990.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator