

BEFORE THE ARBITRATION PANEL

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 In the Matter of the Arbitration :
 of a Dispute Between :
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 TEAMSTERS "GENERAL" LOCAL : Case 118
 UNION NO. 200 : No. 43882
 : MA-6097
 and :
 :
 COUNTY OF WAUKESHA :
 :

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., by Ms. Marianne
 Michael, Best and Friedrich, by Mr. Thomas W. Scrivner, on behalf of the County

ARBITRATION AWARD

Teamsters "General" Local Union No. 200 and Waukesha County, hereinafter the Union and County, are parties to a collective bargaining agreement providing for final and binding arbitration before a three-member arbitration panel. Pursuant thereto, Amedeo Greco was appointed to hear this matter and panel members Frank J. Busalacchi and Allen C. Walsch were respectively appointed by the Union and County.

Hearing was held in Waukesha, Wisconsin on May 17, 1990, and it was transcribed. The parties subsequently filed briefs which were received by August 10, 1990.

Based upon the record in this matter, the panel issues the following Award.

ISSUE:

Since the parties were unable to jointly frame the issue, the panel has framed it as follows:

1. Is the grievance arbitrable?
2. If not, did the County violate the contract when it failed to post the job of Shop Clerk in September, 1989 and, if so, what is the appropriate remedy?

DISCUSSION:

In September, 1989 Shop Clerk John Rockteacher transferred to the job of Sign Installer, a bargaining unit position in the County's Highway Department. The County did not post his vacant Shop Clerk position; it instead assigned some of the Shop Clerk's duties to the newly-created position of Clerk Typist III, herein Typist, which is in another bargaining unit represented by AFSCME. The Typist works in the same Highway Department building, the Main Shop, as did the Shop Clerk and there is a substantial difference between the highest rates of pay for the Shop Clerk and Typist, with the former earning about \$1,947 per month to the latter's \$1,453. As noted in greater detail below, there are both similarities and dissimilarities between the Typist's position and the former Shop Clerk position.

Prior thereto, Labor Relations Manager James Richter spoke by telephone on July 25, 1989, 1/ with Union Business Representative Lee Wenker and told him that the Shop Clerk position could be eliminated. Richter at that time did not say anything about either moving some of the Shop Clerk's duties to another bargaining unit or creating the new Typist position. The County Board subsequently abolished the position of Shop Clerk and approved the creation of the Typist position on August 25 by passing an ordinance to that effect and the County posted said position for bidding on August 14. It does not appear that anyone from the Union knew about the posting at that time. The job was subsequently awarded to Ann Stone from outside the bargaining unit. Employee Raymond F. Martens filed the instant grievance on September 18 asserting that the County had violated the contract by failing "to post the position of Shop Clerk that is vacant. . ."

In support thereof, the Union basically argues that the grievance is timely, that the County violated the contract when it "failed to post the job of Shop Clerk in September of 1989 but instead removed the position from the bargaining unit to a newly-created position outside the unit", and that the "minor amount of gerrymandering" which occurred in August regarding the job does not warrant its exclusion from the unit. It also points out that in response to a grievance it filed on the subject in 1988, Richard E. Bolte, the County's Director of Transportation, told the Union that the County would not assign any bargaining unit work to the newly-created position of Clerk/Typist II which is in the AFSCME bargaining unit. As a remedy, the Union seeks a cease and desist order directing the County to stop its violation of the

1/ Unless otherwise noted, all dates hereinafter refer to 1989.

contract, to return the duties of the Shop Clerk to this bargaining unit by posting said position, and to make whole and compensate the successful candidate for any losses suffered because of the Company's contract violation.

The County, in turn, primarily contends that the grievance was untimely within meaning of Section 7.01 of the contract; that it has the inherent and reserved right to abolish the Shop Clerk position and to transfer some of said work to the newly-created Clerk position; and that contrary to the Union's claim, "the contract recognition clause and statement of Wage Classifications do not create substantive work preservation rights."

The first issue which must be resolved here is whether the grievance was timely filed under Article 7.1 of the contract, entitled "Grievance Procedure", which provides, inter alia, that:

. . .

"To be processed, a grievance shall be presented in writing to the department head with a copy to the Personnel Department under Step Two (2) below within thirty (30) days after the time the employee affected knows or should know the facts causing the grievance."

. . .

The key inquiry here is whether the September 18 grievance was filed "within thirty (30) days after the time the employee affected knows or should know the facts causing the grievance." The County contends that it was not because the thirty (30) day period started running when Richter told Wenker on July 25 that the County was planning to abolish the Shop Clerk position.

There are two major reasons why the County's position is without merit: The first is that the County's plans at that time were just that --- plans, as it was entirely conjectural at that point as to whether the County Board in fact would vote to abolish that position. That being so, there was no need for Wenker to grieve over something which might not even happen. Secondly, Richter at that time did not inform Wenker that some of the Shop Clerk's duties would be transferred to a newly-created position in another bargaining unit. Since Wenker is such an experienced union representative who must surely know that management generally has the inherent right - absent any contract language to the contrary - not to fill vacant positions and to abolish job positions, he therefore had no reason to complain over the County's decision not to fill the vacant Shop Clerk position based upon the limited information he had at that time.

The issue herein therefore did not really crystalize and become ripe until the County subsequently established and filled the Typist position. Since the grievance was filed only a few days after the job was filled, 2/ it was timely under Article 7.1 and hence, arbitrable under well-established arbitrable law. Elkouri and Elkouri, How Arbitration Works, p. 151, (BNA, 1976). 3/

Turning to the substantive merits of this dispute, the County correctly points out that nothing in the contract expressly prohibits it from abolishing the Shop Clerk position, that it has the inherent right to create new positions as it did here with the Typist position, and that it has the right to assign job duties under Article 1 of the contract, entitled "Management Rights Reserved", which provides that:

1.01 Except as otherwise specifically provided herein, the Management of the County Department and direction of the work force including but not limited to the right to hire, transfer, promote, lay off employees for lack of work or funds and recall employees, the right to decide job qualifications for hiring, the right to discipline or discharge employees for cause, the right to abolish and/or create positions, the right to make reasonable rules and regulations governing conduct and safety, the right to determine schedules of work, to determine methods, procedures and equipment used in providing services, to provide new equipment or discontinue temporarily or permanently in whole or in part, the operations or services performed by the employees herein, to subcontract any or all of said operations or services and to determine the number of employees assigned to any particular operation or service are vested

2/ Moreover, even if one were to assume arguendo that the grievance had to be filed within thirty (30) days after the County Board's August 25 action, it was still timely.

3/ See also Bethlehem Steel Corp., 46 L.A. 767 (Strongin, 1966) and Genesco Community School District, 75 L.A. 131 (Birmans, 1980).

exclusively in the County. Management in exercising these functions will not discriminate against any employee because of his or her representation by the Union.

That however does not end the matter because, as the Union correctly points out, the exercise of these rights cannot violate one of the fundamental tenets of the collective bargaining agreement - the right of employees to be paid a fixed wage for performing certain duties, a right which has been upheld in other cases dealing with this same issue. 4/ For here, both parties agreed in the contract that the former Shop Clerk position should be paid at Wage Level IV, thereby recognizing the general proposition that the Shop Clerk's job duties were to be performed by bargaining unit personnel at the rate provided for in the contract.

This is not to say, however, that all of the Shop Clerk's duties had to be exclusively performed by employees within the bargaining unit, as there is nothing in the contract which limits the County's right to assign some of these duties to someone else either inside or outside the bargaining unit pursuant to Article 1 of the contract.

The real question here therefore boils down to whether the County has assigned so many of those duties to the Typist position so as to in effect merely substitute one title for another. If the County has, the grievance will be sustained; if not, it will be dismissed.

As the Union correctly points out, Typist Stone now performs some of the same duties formerly performed by the Stock Clerk, as she works in the same location as Rockteacher and has the same contact with bargaining unit personnel as he did. Like Rockteacher, she answers the telephone and operates the radio; checks invoices; arranges for various payments; and uses a computer to perform some of her duties. That is why she was trained by Rockteacher for the job. Furthermore, the County hired Stone for the Typist position in part because she formerly was a Radio Dispatcher in the Sheriff's Department, hence showing how important this one function is to her overall responsibilities.

On the other hand, there are also significant differences, largely because the County in 1988 reorganized its operations by creating a Central Fleet and because the nature of the Shop Clerk's job had changed. Thus, vehicle inventory, processing work orders, and distributing charges for labor and materials are now computerized and are easily performed by Stone. Furthermore, Stone does not spend as much time as Rockteacher did in distributing charges and she does not purchase as many items. In addition, and because they became physically separated, she no longer fills in for the Stock Clerk whenever the latter is absent.

Furthermore, and unlike Rockteacher, she operates a typewriter and now spends about 25-30 percent of her time performing various clerical duties which the Shop Clerk never performed. She also serves management representatives at the Main Shop who, up until now, had to rely on clerical help elsewhere. Since there are about 80 employees in the Main Shop and 5 supervisors, Stone is now able to provide clerical services which were previously unavailable, including the preparation of drafts. The record also shows that she is responsible for maintaining many more files.

This is a difficult case because there are elements of the Typist's position which support the arguments advanced by both sides.

However, it is not enough from the Union's point of view for the Typist to be performing some of the Shop Clerk's duties since the contract here does not contain the kind of Maintenance of Standards clause found in so many Teamster contracts and it likewise has no prohibition on either subcontracting or the performance of bargaining unit work by persons outside the bargaining unit.

Hence, the Union's case therefore entirely stands or falls on its contention that the Typist position is really nothing more than the Shop Clerk's position, but under a different guise and under a lower rate of pay. On balance, I find that it falls because of the significant differences noted above between the two positions and because the position of Shop Clerk itself has changed so much in the last several years, primarily as a result of the County's reorganization and the creation of its Central Fleet operations and the introduction of new equipment to perform some of the Shop Clerk's former job functions.

It is true, as noted by the Union, that the County is now saving money because of its elimination of the Shop Clerk position. But that in and of itself is not improper since employers under the broad kind of management rights' clause here are entitled to run their operations as economically as possible in the absence of any express language limiting their right to do so, something which is not present here.

Moreover, not much weight can be given to Bolte's representation to the Union in 1988 that the County would not assign bargaining unit work to the

4/ Sonoco Products Co., (Coyne, 1981) 77 L.A. 266 and City of Milwaukee, an unpublished decision issued by Arbitrator Gil Vernon. (Case No. A/PM-880153).

Typist II since the County in fact has apparently not done so. Moreover, while the Union may believe that it has been sandbagged, the fact remains that Bolte's statement was limited to that position and not to the subsequently created Typist III position. Furthermore, the Union in any event has had a ready remedy to rectify the County's action herein by filing the instant grievance.

In light of the foregoing, it is my

AWARD

1. That the grievance is arbitrable.
2. That the Company's actions herein were not violative of the contract; hence, the grievance is dismissed.

Dated at Madison, Wisconsin this 27th day of February, 1991.

By Amedeo Greco /s/
Amedeo Greco, Arbitration Panel Chair

—
Frank J. Busalacchi /s/
I dissent.

Allan C. Walsch /s/
I concur.