

BEFORE THE BOARD OF ARBITRATION

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In the Matter of the Arbitration :
of a Dispute Between :
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DOOR COUNTY HIGHWAY EMPLOYEES UNION, :
LOCAL 1658, AFSCME, AFL-CIO :
 :
and : Case 69
 : No. 45048
 : MA-6488
DOOR COUNTY (HIGHWAY DEPARTMENT) :
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Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221, appearing on behalf of the Union.
Mr. Dennis D. Costello, Corporation Counsel, 138 South 4th Avenue, Sturgeon Bay, Wisconsin 54235, appearing on behalf of the County.

ARBITRATION AWARD

Door County Highway Employees Union, Local 1658, AFSCME, AFL-CIO, hereafter the Union, and Door County (Highway Department), hereafter the County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a staff member as Chairman of a three-member Board of Arbitration. On January 22, 1991, the Commission designated Coleen A. Burns, a member of its staff, as Chairman of the three-member Board of Arbitration. Mr. Michael Wilson was designated the Union representative on the Board of Arbitration. Mr. Lyle Hill was designated the County representative on the Board of Arbitration. Hearing was held in Sturgeon Bay, Wisconsin on March 6, 1991. The hearing was transcribed and the record was closed on May 7, 1991, upon receipt of post hearing written argument.

ISSUE

The parties stipulated to the following statement of the issue:

Did the Employer violate a previous agreement and previous practice by failing to provide transportation to Dennis Anschutz during the summer and fall of 1990?

RELEVANT CONTRACT PROVISIONS:

AGREEMENT

THIS AGREEMENT, made and entered into this 1st day of January, 1990 by and between the Highway Committee of Door County Board of Supervisors, hereinafter referred to as the "Employer" and the Door County Highway Department Employees through their Union, the Door County Employees Union, Local 1658, affiliated with the Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, hereinafter referred to as the "Union", for the purpose of maintaining harmonious labor relations between the Employer and employees, and for purposes of promoting the mutual interest of the employees of the Door County Highway Department and the Board of Supervisors so as to provide for the operation of the equipment and physical properties of the Door County Highway Department under methods which will further to the fullest extent the safety and the welfare of the above mentioned members, economy of operations, elimination of wastes, and the quantity and the quality of the results of the scope of operations carried on by the Door County Highway Department. It is recognized by this Agreement to be the duty of the Union and its members and the Board of Supervisors through its Highway Committee to compare fully for the advancement of these conditions. This Agreement shall be binding on both parties.

ARTICLE V - GRIEVANCE PROCEDURE AND ARBITRATION

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Step 4: If the employee is dissatisfied with the result in Step 3 or if any grievance filed by the County cannot be satisfactorily resolved by conference with the appropriate representatives of the Union,

either party may submit said grievance to arbitration by giving notice in writing to the other party. Within five (5) working days of such notice, the Union and the County shall each select one (1) member of an arbitration board to be composed of three (3) disinterested members. The two (2) members of such board so selected shall then select a third member. Should the two (2) members selected be unable to agree on its selection of a third member, the third member shall be appointed by the Wisconsin Employment Relations Commission. The Board of Arbitration shall, after hearing both sides, hand down its decision in writing, and if approved by not less than two (2) members thereof, such decision shall be final and binding on both parties to this Agreement. Each party shall bare the cost of its chosen arbitrator and the cost of the third arbitrator shall be shared by the County and the Union.

BACKGROUND

On May 10, 1988, the Union and the County entered into the following:

AGREEMENT

1. The Union agrees to withdraw grievances A-1 and B-1 without prejudice.
2. The parties agree that Dennis Anschutz shall work out of the Sister Bay shop during the winter work season (five (5) months more or less) and out of the main shop during the summer work season (seven (7) months more or less). During the summer work season, the County shall provide Anschutz with transportation to and from his home in Egg Harbor. During the winter work season, Anschutz shall provide his own transportation to and from the north shop.
3. Overload tickets shall be paid as in the past.
4. This agreement shall not set a precedent for any purpose.

Prior to June 6, 1990, there were four employes assigned to the North Shop, located in Sister Bay, who worked out of the Main Shop, located in Sturgeon Bay, during the Summer work season. Two of these employes, Richard Tesnow and Gregg Hass, lived north of the North Shop. Dennis Anschutz, the Grievant, lived in Egg Harbor and the fourth employe lived in Baileys Harbor. Egg Harbor and Baileys Harbor are south of the North Shop.

During the Summer work season, which generally extends from April to November, Tesnow and Hass used a County vehicle to commute to work at the Main Shop. This vehicle was picked up at the North Shop in the morning and returned to the North Shop in the evening. Tesnow and Hass normally worked the same hours.

The employee who lived in Baileys Harbor was permitted to keep a County vehicle at his home and to use this vehicle to commute between his home and the Main Shop. This employee, like Anschutz and unlike Tesnow and Hass, was a Truck Driver. During the Summer work season, the Truck Drivers often work overtime.

When the Truck Drivers are required to work overtime, they generally work different hours than Tesnow and Hass.

Prior to June 6, 1990, the County provided Anschutz with transportation between his home in Egg Harbor and the Main Shop during the Summer work season.

At times, Anschutz drove a County vehicle between his home and the Main Shop and at other times Anschutz rode in a County vehicle which was driven by other County employees.

Prior to June 6, 1990, Union Stewards approached County representatives to express a concern that the employee who lived in Baileys Harbor should not be driving because he was having a problem with alcohol. After considering this concern, as well as other factors such as public complaints about employees using County vehicles to commute between home and the work place and economic efficiencies, County Highway Commissioner, Harvey Malzahn, asked the Highway Committee to establish a new vehicle use policy.

On or about June 6, 1990, the County posted the following:

VEHICLE POLICY

COMMISSIONERS VEHICLE

The commissioner is on call twenty four (24) hours a day. He has full use of the vehicle twenty four (24) hours a day.

SUPERINTENDENTS VEHICLE (2 pick up trucks)

Other than regular scheduled hours. The superintendents are called on duty by the commissioner. They may take their vehicles home. They have use of their vehicles to and from work.

OTHER COUNTY OWNED VEHICLES

All other vehicles will be left at either the Main, South, or North shop.

One vehicle will be used as a bus for transportation from the South shop in the morning (time to be set by employees), and return to the South shop after 3:30 P.M. from the Main shop.

One vehicle will be used as a bus for transportation (when needed) from the North shop in the morning (time to be set by employees) and return to the North shop after 3:30 P.M. from the Main shop.

Any variance from this policy must be approved by the Door County Highway Committee.

When Union Representatives objected to the policy, Malzahn suggested that the Union agree to the implementation of the policy on a trial basis. The Union agreed to this suggestion. Malzahn and the Union Representatives understood that, by agreeing to the trial period, the Union was not waiving its contractual right to grieve the policy.

During the trial period, Tesnow and/or Hass picked up a County vehicle, known as the bus, at the North Shop and drove the bus to the Main Shop. Upon completion of the work day, Tesnow and/or Hass would return the bus to the North Shop. Tesnow and Hass arranged the bus schedule to coincide with their work schedule. When directed to do so by their Supervisor, Aaron Daubner, Tesnow and/or Hass would pick up Anschutz at his home as they drove to the Main Shop and would drop off Anschutz at his home as they returned to the North Shop. Tesnow and Hass were not always directed to transport Anschutz to the Main Shop. When Anschutz did not ride the bus, he generally drove his own vehicle between his home and the Main Shop.

On October 9, 1990, the Union filed the instant grievance, alleging inter alia, that "Some employees must bring their personal vehicles because transportation was not provided." When the County responded to the grievance, it raised an issue of timeliness. The grievance was denied at all steps and,

thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

Union

Each party understood that the policy was to be implemented on a trial basis, subject to subsequent grievance action. By agreeing to a trial period, the parties waived the contractual time limits for filing a grievance. The grievance is timely.

The Vehicle Policy is a unilateral change in existing policy and violates the Anschutz grievance settlement agreement. The Employer's claim that Anschutz now lives closer to the Main Shop than he did at the time of the May 10, 1988 agreement is irrelevant to the determination of the instant dispute. Anschutz continues to be assigned to the North Shop. Since that status has not changed, the Employer can make no claim that there are changed conditions which affect the status of the settlement agreement.

The Union requests that the Arbitrator enforce the May 10, 1988 agreement between the Union and the Employer by requiring the Employer to provide Anschutz transportation between his home and the Main Shop during the Summer work season. This transportation should be arranged so that Anschutz or other employees don't have to spend undue idle time waiting for their work to start or waiting for the work of others to end. The Union also requests that the Arbitrator order the Employer to pay Anschutz for the transportation cost which he incurred during the 1990 Summer construction season in the form of the mileage reimbursement rate which the County has afforded other County employees who are reimbursed for mileage.

Employer

The Employer has provided a "bus" specifically for the purpose of transporting employees from the North Shop to the Main Shop during the Summer work season. The Highway Commission has not told the employees at what time they must leave with the "bus" for the Main Shop, which route to take, or what time the "bus" must return to the North Shop. The North Shop employees were given complete discretion to work out a departure and return schedule. The Employer has no objection to the "bus" taking a route which is a little longer but would pass by Anschutz' home. If Anschutz was not provided transportation it was because of disagreements with other employees as to the "bus" schedule and not because the Employer did not provide transportation. The County Highway Department does not have to provide a "bus" for anyone, much less one for each employee.

Anschutz has shown no proof of the exact days that he used his own vehicle to transport himself to work. Anschutz admitted that there were days he chose to take his own vehicle for personal reasons such as for errands, appointments or shopping. This case cannot be decided on speculation or innuendo.

Although Anschutz contends that, in the past, there were two vehicles that went north, he agreed that no one would ride in one of the vehicles because the driver had a drinking problem. Indeed, it was the Union stewards and employees who suggested that the second driver not be allowed to drive. Thus, for all practical purposes, there was only one "bus" running from the North Shop. There has been no change in the way Anschutz has been treated prior to or after the posting of the June 6, 1990 notice.

As former Highway Commissioner Delorit testified, when the employee who lived in Baileys Harbor was allowed to take a truck home with him it was because no employee lived further north than the North Shop and the North Shop was further north than Baileys Harbor. It was in management's best interest to put fewer miles on the truck. Now there are two employees who live north of the North Shop. These employees report to the North Shop to get the "bus."

The Door County Highway Department has been very accommodating with its employees. The Door County Highway Department has not violated the agreement of May 10, 1988.

DISCUSSION

Timeliness

Inasmuch as the County has not addressed the issue of timeliness in post-hearing written argument, it may be that the County has abandoned this argument. However, since the issue was raised during the processing of the grievance and was addressed by the Union in post-hearing argument, the issue of timeliness has been addressed herein.

The record demonstrates that, following the posting of the June 6, 1990 Vehicle Policy, Union Representatives objected to the new Vehicle Policy. Following discussions with Highway Commissioner Malzahn and other supervisory personnel, Union Representatives agreed to Malzahn's suggestion that the policy

be implemented on a trial basis. Malzahn and the Union Representatives understood that the Union had reserved its right to grieve the policy.

Article V, Step 1, of the parties' collective bargaining agreement provides, inter alia, that "the grievance shall be presented within the first five (5) working days after the date of the event or occurrence which gave rise to the complaint." In the present case, "the event or occurrence " giving rise to the complaint is not the posting of the new Vehicle Policy, but rather, it is the completion of the trial period.

Since the parties did not specify the length of the trial period, there is no date certain upon which to compute the time limits set forth in Article V, Step 1. This failure, however, does not exempt the Union from any and all time constraints. Rather, one may appropriately apply a rule of reason to determine whether there was undue delay in the filing of the grievance.

With respect to Union employees, the Vehicle Policy of June 6, 1990 was primarily applicable to the Summer work season. Absent specific time limits for the trial period, it was not unreasonable for the Union to "try" the policy during the Summer work season in which it was promulgated.

Although weather conditions may alter the length of the Summer work season, this season generally runs from April to November. The grievance, which was filed on October 9, 1990, was filed at or near the end of the 1990 Summer work season. Since it was reasonable to extend the trial period through the 1990 Summer work season, there was no undue delay in filing the grievance. The grievance was timely filed.

Merits

On May 10, 1988, the parties entered into a written agreement in resolution of two grievances. In Paragraph Two of this written agreement, the parties agreed that Dennis Anschutz is to work out of the North Shop during the Winter work season and out of the Main Shop during the Summer work season. The parties further agreed that, during the Winter work season, Anschutz is to provide his own transportation to the North Shop and that, during the Summer work season, the County is to provide Anschutz with transportation to and from his home in Egg Harbor.

A settlement agreement, such as the Agreement of May 10, 1988, may be rendered ineffective by changed circumstances which materially affect the conditions of the agreement. However, such changed circumstances are not evident herein. At all times material hereto, Anschutz has worked out of the North Shop during the Winter work season and has worked out of the Main Shop during the Summer work season. As the County argues, Anschutz did change his residence between the date of the Agreement and the filing of the instant grievance. However, as reflected in Joint Exhibit #8, Anschutz continues to live at Egg Harbor. Since the Agreement does not reference a specific address in Egg Harbor, the change in residence is not a change which materially affects the conditions of the Agreement.

The Agreement of May 10, 1988 requires the County to provide Anschutz with transportation between the Main Shop and Anschutz' home in Egg Harbor when Anschutz works out of the Main Shop during the Summer work season. While the Union and the County have the right to bargain changes in the Agreement, the record does not demonstrate that the parties have agreed to any change which relieved the County of its duty to provide Anschutz with transportation between his home in Egg Harbor and the Main Shop during the Summer work season. Having entered into the Agreement of May 10, 1988, the County must abide by the terms of the Agreement. 1/

As the County argues, the Agreement of May 10, 1988 does not require the County to provide Anschutz with a vehicle to drive back and forth between his home and the Main Shop. While the provision of such a vehicle would provide the transportation required by the Agreement of May 10, 1988, the transportation requirement can be met by other means. Thus, had the bus been used to transport Anschutz between his home and the Main Shop, the County would have been in compliance with the Agreement of May 10, 1988. However, the bus did not always provide such transportation.

Contrary to the argument of the County, it was not sufficient to make the bus available to employees and to allow the employees to determine the route and schedule of the bus. If the County wished to use the bus to meet the requirements of the May 10, 1988 Agreement, then it had the obligation to ensure that the bus was used to transport Anschutz between his home and the Main Shop. Indeed, given the fact that supervisory employee Aaron Daubner determined when the bus would be used to transport Anschutz, it is somewhat disingenuous to argue that fellow employees deprived Anschutz of transportation

1/ While it may be that the Vehicle Policy of June 1990 serves legitimate County interests, such interests do not take precedence over the Agreement of May 10, 1988.

between his home and the Main Shop. 2/

As the County argues, the record presented at hearing does not clearly establish the number of times that the County failed to provide Anschutz with transportation between his home and the Main Shop during the Summer work season of 1990. This fact, however, impacts upon the remedy and not the merits of the grievance. Jurisdiction will be retained for a period of thirty days from the date of the Award for the sole purpose of addressing any questions as to remedy.

Based upon the foregoing, the record as a whole, and arguments of the parties, the undersigned issue the following

AWARD

1. The grievance is timely.
2. The Employer violated a previous agreement by failing to provide transportation to Dennis Anschutz during the summer and fall of 1990.
3. To remedy this violation, the Employer is hereby ordered to provide Anschutz with transportation between his home in Egg Harbor and the Main Shop as required by the Agreement of May 10, 1988 and to make Anschutz whole by immediately reimbursing Anschutz for mileage between his home and the Main Shop, at the mileage reimbursement rate afforded other County employees, for all times during the Summer work season on which the County did not provide the transportation required by the Agreement of May 10, 1988. The County need not reimburse Anschutz for mileage on days on which Anschutz elected to drive his vehicle to the Main Shop for personal reasons.
4. Jurisdiction will be retained for a period of thirty days after the date of the Award. Within this thirty day period, either party may request further hearing on the issue of remedy.

Dated at Madison, Wisconsin this 12th day of July, 1991.

By _____
Coleen A. Burns
Chairman of the Board of Arbitration

Union

Employer

I Concur:

I Concur:

Michael J. Wilson /s/ 07-11-91
Michael J. Wilson Date

Lyle Hill Date

I Dissent:

I Dissent:

Michael J. Wilson Date

Lyle Hill /s/ 07-08-91
Lyle Hill Date

2/ Presumably, Daubner arranged to have the bus pick up Anschutz when Anschutz Tesnow, and Hass were on the same work schedule and did not make such arrangements when Anschutz worked a schedule which differed from that of Tesnow and Hass.