

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 49
 TEAMSTERS LOCAL UNION NO. 346 : No. 44746
 : MA-6406
 and :
 :
 BAYFIELD COUNTY (HIGHWAY DEPARTMENT) :
 :

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, Attorneys at Law, by Mr. Kurt C. Kobelt, on behalf of Teamsters Local Union No. 346. Mr. Michael J. Puksich, County Administrator, on behalf of Bayfield County.

ARBITRATION AWARD

Teamsters Local Union No. 346, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Bayfield County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The County subsequently concurred in the request and David E. Shaw was designated to arbitrate in the dispute. A hearing was held before the undersigned on February 13, 1991 in Washburn, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by March 11, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues to be decided. The Union would frame the issue as follows:

Did the County violate the collective bargaining agreement and the terms of a settlement agreement by not providing the grievant with a thirty day trial period in which to demonstrate his ability to work the Highway "C" route?

If so, what is the appropriate remedy?

The County would state the issue as follows:

1. Did Bayfield County violate the settlement agreement resolving the grievance of Eric Swansen dated March 26, 1990?
2. Did Eric Swansen, during a thirty (30) day trial period performing duties related to the Highway C Route, prove he possessed the required qualifications?
3. Did Bayfield County provide the reasons to the Union as requested, stating why Eric Swansen was found unqualified for the Highway C Route?

1/ The parties agreed to waive the Arbitration Board.

While the Settlement Agreement of the Swansen grievance sets forth the issue to be decided as whether Swansen has demonstrated his ability to perform the job, both parties have submitted the issue of whether the County violated the Settlement Agreement. Therefore, it is concluded that the issues may be stated as follows:

- (1) Did the County violate the Swansen settlement agreement?
- (2) If not, did Swansen demonstrate his ability to perform the Route C job? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The parties cite the following provisions of their Agreement:

ARTICLE 19

PROMOTIONS: 1. In making promotions and in filling job vacancies or new positions in the collective bargaining unit, preference shall be given to those employees oldest in point of service, provided, however, that the qualifications and physical fitness of the employees being considered for the job are relatively equal. In judging employee's qualifications for the job the following factors shall be considered:

- A. Ability to perform related work
- B. Attitude
- C. Aptitude
- D. Versatility
- E. Efficiency

The employer shall be the judge of employee qualifications.

2. All job vacancies or new positions shall be posted on the bulletin board ten (10) days prior to filling said vacancy or new positions so that each interested employee may have an opportunity to apply. Such notice shall state the prerequisites for the position to be filled and said prerequisites shall be consistent with the requirements of the job. Employees shall apply for the vacancy or new position in writing, and only those applicants who meet the prerequisite will be considered.

3. The successful applicant shall have a thirty day (30) trial period in which to demonstrate his ability to perform the job. If during said period the employer considers the employee unqualified, he shall be returned to his former position without loss of seniority rights.

4. The Employer may make immediate temporary assignments to fill any vacancy or new position while the job posting procedures are being carried out.

5. It shall be the policy of the Employer to promote to supervisory positions in the collective bargaining unit insofar as possible from the ranks of the employees. Such positions shall be posted as stated herein, however, all applications shall be submitted in writing and each applicant shall be interviewed by the Highway Commissioner and/or the Highway Committee to determine their qualifications for the position to be filled if deemed necessary by the Employer. Seniority will be considered, but may not necessarily be the deciding factor in filling such supervisory positions.

6. All grievances in connection with the filling of a job vacancy or new position shall be referred to the proper step of the grievance procedure of this Agreement.

7. The provisions of this Article are, however, subject to the rights of the employees as set forth in other Articles contained in this Agreement.

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BACKGROUND

The County and the Union are parties to a collective bargaining agreement covering the Bayfield County Highway Department maintenance employees. Employees are generally assigned to work along a prescribed section of highway, but are also assigned to work together for other construction and maintenance projects.

In the spring of 1990 an employe who was a Class I Heavy Equipment Operator assigned to service Route C, retired. The position was posted as a Class I Heavy Equipment Operator due to the fact that the person in that position needed to be able to operate a motor grader in order to clear snow from the highway and to grade shoulders. The Grievant, Swansen, was the senior bidder for the position, but he was denied the position on the basis that he was not qualified to operate the motor grader. Swansen grieved the denial of his bid and in September of 1990 the parties entered into the following Settlement Agreement on Swansen's grievance:

The parties agree that the grievance of Eric Swansen dated March 26, 1990 (Joint Exhibit 2) shall be resolved on the following basis:

- 1.) Eric Swansen will receive the County Highway C Route effective Monday, September 10, 1990. He will serve a thirty day trial period commencing on that date.
- 2.) Eric Swansen will waive any claim for back pay arising from his grievance.
- 3.) Eric Swansen agrees not to bid on another position (off of Highway C) for one year.
- 4.) This settlement is without precedence.
- 5.) In the event that the County returns Eric Swansen to his former job as unqualified, the

Union may request and the parties agree to proceed to expedited arbitration to be held in not more than thirty days on the issue of whether Swansen has demonstrated his ability to perform the job.

Pursuant to that Settlement Agreement, Swansen began a thirty day trial period in the Route C position on September 10, 1990 and remained in the position for thirty days. On September 10 the Highway Commissioner assigned Swansen to grade shoulders on Highway C using the motor grader. That assignment continued on September 11, 12, 13 and 14. The Highway Commissioner drove along Route C to observe the stretch of road after Swansen had graded on each of those days, keeping a log of his observations and taking Polaroid pictures. The log indicated that Swansen had not set out warning signs, that there was material on the roadway and that there were gouges and scrapes. There were similar comments for each of those five days in the Commissioner's log and also indications that Swansen was moving very slowly and did not appear to have confidence. Swansen did not receive any training or instruction on the motor grader during the thirty day trial period, nor did the Commissioner share his observations, comments or criticism of Swansen's grading work with him. The following week Swansen was assigned to drive truck, hauling culverts to an area where a contractor was doing work. Swansen was not assigned to do motor grader work at any time following the first week of his thirty day trial period. Prior to September 10, 1990, Swansen had never operated a motor grader.

Following his thirty day trial period Swansen was advised by a memo from the Highway Commissioner that he had been disqualified as a Heavy Equipment Operator at the end of the trial period. Swansen was returned to his Light Equipment Operator position. By letter of October 12, 1990, from the Union's Recording Secretary, Niemi, to the County Administrator, Puksich, the Union requested the reasons that Swansen was disqualified, indicating that they intended to request the expedited arbitration per the Settlement Agreement. By letter of October 16, 1990 from Puksich to Swansen, the County advised Swansen that after monitoring his performance on the motor grader during the trial period, the Highway Department had determined that he was unqualified.

The parties proceeded to arbitration on their dispute before the undersigned.

POSITIONS OF THE PARTIES

Union

The Union takes the position that the County has not met its burden of demonstrating that Swansen failed to demonstrate his ability to operate the motor grader. The Union notes that in the parties' Settlement Agreement of Swansen's grievance, they agreed that the sole issue before the Arbitrator is "whether Swansen has demonstrated his ability to perform the job." It asserts that although that language is taken from Article 19, Section 3, of the Agreement, the Settlement Agreement modifies that clause by not referring to the second sentence which provides that the Employer may return the employe to his former position if it considers the employe unqualified during the trial period. To the extent that language can be construed as insulating the County's determination of qualifications from review, it has no bearing in this case. However, under either the contract language or the Settlement Agreement, the grievant was never provided a fair opportunity to demonstrate his qualifications to operate the motor grader.

Citing arbitral precedent and Elkouri and Elkouri, How Arbitration Works,

4th Ed., the Union asserts that the County has the burden of proof in this case. The Union cites the following definition of a trial period from Elkouri and Elkouri:

"The purpose of a trial period is to determine whether an employee who possesses the basic qualifications can satisfactorily do a job which she does not regularly perform. It is assumed that she will not have to be trained in all aspects of the job; for a trial period is not a training period, but simply an opportunity to demonstrate ability to do the job. A trial period, in effect, is a lengthened familiarization or orientation period in which the employee is acquainted with the nature and techniques of the job. It presupposes that the employee will be given instruction and assistance and that she will not simply be turned loose to 'sink or swim.' Id. at 628. (Emphasis added)

The Union also cites a number of awards as establishing that arbitrators do not expect that an employe's capacity to perform a new job is to be measured solely by prior experience on that job and that the employe must be given a fair and reasonable opportunity, including adequate help or directions, to qualify for the job. The Union cites additional awards as establishing that arbitrators have interpreted unusually short trial periods as attempts to prove that the employe could not do the job. The Union contends that under the circumstances in this case, an examination of Swansen's experience compels the conclusion that his failure was preordained.

The Union cites the testimony of Aschenbauer, a Heavy Equipment Operator for eight years in the Department, as establishing the complexity of operating a motor grader. Aschenbauer testified that after eight years on the job he was still learning and still made some of the same mistakes made by Swansen. The Union contends that Swansen was left to "sink or swim" on that difficult piece of equipment. It asserts that the Highway Commissioner did no more than tell Swansen where to go and never attempted to inform Swansen of the alleged deficiencies, much less suggest how they may be corrected. His notes made clear that he unrealistically expected that Swansen did not need any training, even though training had been provided for another employe on the paver, a similarly complex piece of equipment. It asserts that the Commissioner's desire to prove Swansen would fail was so deep-seated that he did not alert him to the need to utilize warning signs or to the need to clear the roadway of obstructions.

Next, the Union asserts that the evidence of Swansen's shortcomings is unconvincing. Aschenbauer testified that the photographs identified as County Exhibits 2(A) and (B) were "first passes" and that the dirt clods left on the road would be removed on a "second pass". Both Aschenbauer and Swansen testified that the sod chunks indicated in County Exhibits 2(D) and (E) are routinely created by the graders, and Swansen testified that he did not break up those chunks during the week due to rainy conditions, but that he did break up sod which had accumulated in other areas that had dried out. Had he been permitted to continue work on the motor grader, Swansen would have broken up the remaining sod chunks. As to the alleged "gouges" in the road made by Swansen, it is asserted that while Swansen admitted he scraped cement on several occasions, Aschenbauer testified he still occasionally caused scrapes in the manner depicted in County Exhibits 2(C) and (F). The Union contends that the County's estimates of the cost of repairing the damage done to the areas worked on by Swansen are questionable, since no employe has been assigned to perform those repairs prior to the hearing. The Union concludes that Swansen was not "patently unfit" to operate the motor grader so that the County

would be within its rights to remove him from the position before the end of the thirty day period. To the contrary, Swansen testified that he believed he was making rapid progress on the grader, and it may be inferred that he simply encountered the same problems Aschenbauer did when he first began to operate a motor grader. Therefore, the grievance should be sustained.

With regard to remedy, the Union asserts that a remedy of requiring the County to permit Swansen a full trial period would not be appropriate in this case, since the County has demonstrated unusual animosity towards Swansen. It asserts that the County's conduct following the Settlement Agreement evidences its intent to undermine the settlement by not giving Swansen any training and by cutting off his thirty day trial period after only one week. Therefore, there is little hope that the County would provide Swansen with a fair opportunity to demonstrate his ability if that is the only remedy ordered. The Union asserts there are more meaningful remedies available. Swansen could be awarded the position without any further trial period, subject to discipline for inferior work performance. The Arbitrator could also require the County to provide Swansen with adequate training. The Union requests that the Arbitrator retain jurisdiction regardless of which remedy is awarded, and that the prevailing party's attorney's fees and costs be paid if further recourse to the Arbitrator becomes necessary.

County

The County first takes the position that it did not violate the Settlement Agreement of Swansen's grievance. He was placed on the Highway C Route effective September 10, 1990 and served a thirty day trial period commencing on that date as required by the Settlement Agreement. He performed the customary duties of an employe who would be assigned to the Highway C Route, including operating a motor grader, driving a truck, patching potholes and gang maintenance operations. The County notes that the Settlement Agreement does not specifically state the duties Swansen was to perform during the trial period. Citing Article 19, Paragraph 3, of the Agreement, which allows the County to return an employe to his former position if it considers the employe unqualified during the trial period, the County asserts that the Highway Commissioner found Swansen to be unqualified for the job and at the end of the trial period he was returned to his former position. The Settlement Agreement provides that if Swansen is returned to his former job as unqualified, the Union may request to proceed to expedited arbitration on the issue of whether Swansen had demonstrated his ability to perform the job. Noting that the arbitration has taken place, the County concludes that it has performed according to the terms of the Settlement Agreement.

Next, the County takes the position that Swansen did not demonstrate he possessed the necessary qualifications for the Route C position. That position requires that the person assigned to Route C operate a motor grader during the summer months for grading the shoulders of the road and for snow removal during the winter months. The Highway Commissioner testified that he observed Swansen's operation of the motor grader two to three times per day during the week he operated the grader. The Commissioner kept a log of his observations and the comments included in the log stated that the grader was being operated at a slow speed, gouges in the road surface, large chunks of sod not broken up, and that Swansen was redoing previous work and not controlling the blade. The Commissioner also took Polaroid pictures of what he observed and those pictures demonstrated the comments in the log. While Swansen testified that he believed he was a qualified motor grader operator, he conceded that he was not qualified to operate the motor grader prior to the trial period and that it was the purpose of the thirty day trial period to evaluate his qualifications to operate a motor grader. County Exhibit 3 is an estimate showing the cost to the County due to Swansen's inability to properly operate the motor grader.

The County estimates that had it allowed Swansen to operate the grader for the full thirty days, the cost may have been four times as high. The County concludes that Swansen demonstrated that he was unqualified as a motor grader operator as was determined by the Highway Commissioner who personally witnessed Swansen's operation of the grader. In his job, the Commissioner observes the operation of motor graders by qualified individuals throughout the year and he must evaluate their work relating to that operation. Further, no witnesses were presented to testify to the quality of the work or the ability of Swansen to operate the grader. While Aschenbauer testified regarding the operation of the motor grader, at no time did he state that he actually viewed Swansen operating a motor grader. Finally, in this regard, the County contends that it is not its responsibility to train individuals to meet the qualifications for a position being applied for, those individuals must possess the skills and abilities for the position prior to receiving the position. In this case, the Highway C route requires that the individual assigned be able to operate a motor grader, as established by the fact that the previous employe in the position did operate a grader, and that it was evident and common knowledge that use of a motor grader in the position was necessary.

Lastly, the County asserts that it properly provided notice to the Union as to its determination that Swansen was unqualified for the Route C position per the letter from Puksich to Niemi of October 16, 1990. That letter informed the Union that Swansen had been found to be unqualified due to his inability to properly operate a motor grader. If that letter was not sufficient notice, the County questions why the Union did not attempt to contact Puksich or the Highway Commissioner to request additional information as it had done in the past when additional information was required. Further, Puksich testified he was not aware until thirty minutes prior to the start of the hearing of the documentation other than that he was aware the pictures existed, but had never seen them. The County concludes that having properly notified the Union as to the reason Swansen was unqualified for the Highway C Route, the exhibits should be considered.

DISCUSSION

As noted in the "Issues" section of this Award, while the parties agreed in the Settlement Agreement that if Swansen was returned to his former position as unqualified, they would proceed to arbitration on the issue of "whether Swansen has demonstrated his ability to perform the job", both parties also submitted the issue of whether the Settlement Agreement was violated. The issue of whether Swansen demonstrated his ability cannot be viewed in a vacuum, however, as it presumes that Swansen was given a fair opportunity to demonstrate his ability during the trial period. For the following reasons, it is concluded that Swansen was not provided with that opportunity.

Elkouri and Elkouri, supra., cites the following distinction between a trial period and training period provided by Arbitrator Volz:

"The purpose of a trial period is to determine whether an employee who possesses the basic qualifications can satisfactorily do a job which she does not regularly perform. It is assumed that she will not have to be trained in all aspects of the job; for a trial period is not a training period, but simply an opportunity to demonstrate ability to do the job. A trial period, in effect, is a lengthened familiarization or orientation period in which the employee is acquainted with the nature and techniques of the job. It presupposes that the employee will be given instruction and assistance and that she will not simply be turned loose to 'sink

or swim.' But it also assumes that she brings with her to the trial period by virtue of prior experience or education considerable knowledge, background and skill for performing the duties of the new position. She still needs instruction in the peculiar requirements, procedures, equipment, and techniques of the job; but an intensive on-the-job training program, such as would be appropriate for a novice, is not contemplated." (At p. 628) 2/

While an employer is not expected to provide intensive training to the employe during the trial period so as to qualify him for the job, the employe at the same time cannot be expected to perform at the same level as a person experienced in the job. The employe is also not expected to perform the job from the start without any guidance or feedback from his supervisor.

It appears that the doubt as to Swansen's ability to perform the job centered on his ability to operate a motor grader. Paul Aschenbauer, a Heavy Equipment Operator in the Department with eight years of experience on a motor grader, testified that a motor grader has eight control levers, four foot pedals and a hand throttle and that controlling the blade is a continuous process. Aschenbauer also testified that even after eight years he still makes mistakes operating the grader. Both the Highway Commissioner and Swansen testified that Swansen was told the first day, September 10th, to grade shoulders on a section of Route "C" and was given no training or further instructions. That continued to be the case for the rest of that week, with the Commissioner viewing Swansen's work and noting the shortcomings on a daily basis, but making no mention to Swansen of any needed corrections or problems.

After five days on the motor grader, Swansen was assigned to other duties. While the County asserts that those other duties were of the type normally performed in the Route "C" position, the Highway Commissioner also testified that he assigned Swansen where he needed him, rather than finding work for him to prove his ability. Further, the question of Swansen's qualifications appeared to be limited to his ability to operate the motor grader. In other words, due to what the Commissioner felt were more important department needs, Swansen's thirty day trial period essentially ended on September 14th, after five days. Those five days were used by the Commissioner for the purpose of establishing that Swansen could not successfully operate a motor grader, rather than giving him an adequate opportunity to prove that he could.

By depriving Swansen of even the most basic instruction as to what he was expected to do and any feedback as to what needed to be corrected, and by in effect ending his trial period after five days, the County did not provide Swansen with a bona fide thirty day trial period in which he was given a fair opportunity to demonstrate that he could do the job.

The County's argument that Swansen proved his inability to operate a motor grader by the end of the five days and that it would have been too costly to keep him on the grader any longer due to the damage he had done, is not persuasive given the evidence. Two of the examples of Swansen's poor work on the grader (Co. Ex. 2A and 2B) were first passes where the material is purposely brought up so it can be spread evenly on a second pass. Aschenbauer testified that normally more than one pass is made over an area. Also, as noted above, Swansen was not told of the need to scrape the sod chunks farther off the shoulder, nor was it explained to him what was wrong with his work so that he could correct it. Swansen also testified that he had informed the

2/ Reynolds Metals Co., 66 LA 1276, 1280 (1976).

Commissioner about the sod chunks and that he would have to wait till they dried out some before he could grade them off farther. He also testified that he did regrade some areas and would have regraded others, but did not have time. As to the cost of repairing the damage, the Commissioner testified that Co. Ex. 3 was an estimate of the costs that he prepared sometime after Swansen was removed and prior to the hearing. Of the three examples of "gouges" caused by Swansen, i.e., Co. Ex. 2C, 2D and 2F, the Commissioner testified that he was not sure whether the "gouges" in 2C and 2D were repaired yet at the time of hearing, and Swansen testified that the "gouge" in 2F had not been repaired at the time of hearing. The "gouges" having not been repaired after five months had passed, it is doubtful that they were as serious as was described.

Having concluded that Swansen was not given the thirty day trial period in the Route "C" position required by the Settlement Agreement, along with adequate instruction, directions and feedback so as to give him a fair opportunity to demonstrate whether he is able to do the job, the County is found to have violated the Settlement Agreement. The Union has requested that Swansen be awarded the Route "C" position outright on the basis that the County has demonstrated its unwillingness to give him a fair chance to prove he can do the job. While there may be some merit to the Union's assertion, the Arbitrator does not have sufficient evidence upon which to conclude that Swansen has demonstrated his ability to perform the job, and that cannot be presumed. For that reason, the Arbitrator is without authority to find that Swansen is entitled to the job at this time. Therefore, the remedy is limited to a new thirty day trial period, during which Swansen is to be given adequate instructions as to what is wanted, some basic assistance as to techniques, and feedback as to how he is performing during the trial period in order to determine whether he can correct any mistakes. As the Union requests, the Arbitrator will retain jurisdiction in this matter in order to resolve any disputes that may arise.

Based upon the foregoing, the evidence and arguments of the parties, the undersigned makes and issues the following

AWARD

That Bayfield County violated the Swansen Settlement Agreement by not providing Swansen with a full thirty day trial period and adequate instruction and feedback. Therefore, the County is ordered to immediately provide Swansen with a full thirty-day trial period in the Route "C" position, which is to include adequate time to demonstrate his ability to operate a motor grader, adequate instructions as to what is wanted, basic instructions and assistance as to techniques, and adequate feedback during the trial period as to his performance. The undersigned retains jurisdiction in this matter for the purpose of resolving any dispute that may arise related to this Award, unless sixty (60) days pass from the date of this Award without the Arbitrator having been contacted by either party for that purpose.

Dated at Madison, Wisconsin this 5th day of September, 1991.

By David E. Shaw /s/
David E. Shaw, Arbitrator