

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 MANITOWOC COUNTY :  
 (HIGHWAY DEPARTMENT) :  
 :  
 : Case 242  
 : No.45611  
 and : MA-6668  
 :  
 MANITOWOC COUNTY HIGHWAY :  
 DEPARTMENT EMPLOYEES, LOCAL 986, :  
 AFSCME, AFL-CIO :  
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Appearances:

Mr. Jerry Ugland, Staff Representative, Wisconsin Council 40, AFSCME,  
 AFL-CIO, P.O. Box 370, Manitowoc, Wisconsin 54221-0370, on behalf  
Mr. Alan M. Levy, O'Neil, Cannon & Hollman, S.C., 111 E. Wisconsin  
 Avenue, Milwaukee, Wisconsin 53202, on behalf of the County.

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ARBITRATION AWARD

According to the terms of the 1989-90 collective bargaining agreement, the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an impartial arbitrator to hear and resolve a dispute between them involving Kenneth Bessert's being denied a County Patrol Section job which was awarded to a less senior County employe. The undersigned was designated arbitrator and made full written disclosures to the parties to which no objections were raised. Hearing was held on June 18, 1991 at Manitowoc, Wisconsin. A stenographic transcript of the proceedings was made and received on June 24, 1991. The parties submitted post-hearing briefs by July 30, 1991 which were thereafter exchanged by the undersigned. The parties waived their right to file reply briefs at the instant hearing.

ISSUE:

The parties stipulated to the issue for determination here, as follows:

Did Manitowoc County violate the contract by not awarding the County Patrol Section position to Kenneth Bessert but instead awarding it to John Tebo.

The parties stipulated at the hearing that should the Union prevail here and a remedy be necessary, the amount of money that would be due is equal to \$641.90. This amount represents the amount of overtime benefit the recipient of the position would have earned during the relevant period.

RELEVANT CONTRACT LANGUAGE:

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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 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.

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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. The parties recognize the County's right to implement an Employee Assistance Program. Practices and policies established pursuant to the Employee Assistance Program shall not be considered a past practice, regardless of how long they exist. The County reserves the right to modify or discontinue any portion of the program. The decision of the County to modify or discontinue any

portion or all of the program shall not be subject to the grievance procedure.

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ARTICLE 29 - ENTIRE MEMORANDUM OF AGREEMENT

- A. This Agreement constitutes the entire agreement between Manitowoc County and Manitowoc County Highway Department Employees, Local 986, AFSCME, AFL-CIO. None of the terms and conditions of this Agreement shall be changed unilaterally. Changes may be made by mutual agreement of the parties in writing.

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STIPULATED FACTS:

The parties stipulated to the following facts at hearing:

1. Kenneth Bessert is a Highway Department employe who was eligible to bid on the County patrol Section position vacated by Gregg Peterson.
2. Both John Tebo and Kenneth Bessert were hired on April 17, 1989, started work the same day and shift and thus have the same seniority date.
3. John Tebo was employed at a Grade 4 position and Kenneth Bessert was employed in Class Grade 2 prior to the County Patrol Section position posting.
4. The patrol position in question is a Class Grade 2 position.

FACTS SURROUNDING THE DISPUTE:

For many years, the County has posted a seniority list in the Highway Department. Prior to 1981, the County's system of listing employes on its seniority list was to list them by date of hire and then if there were more than one employe hired on a particular day, the employes so hired were listed in alphabetical order. The birth date of each employe was also indicated on the list. Prior to 1981, neither the Union nor any employes complained about this method of listing County employes for seniority purposes. Some time between 1981 and 1985, the County computerized its seniority lists. In doing so, the computer automatically listed all employes who had the same date of hire in order of their birth dates rather than by alphabetical order. This change had not been intentional. Rather, the computer had done this merely due to its programming. Again, neither the Union nor any employes complained about this change. The current computerized seniority list was posted in the Highway Department at the time the job posting at issue here was also posted. Kenneth Bessert stated that he relied on that posted computerized seniority list when he signed the posting for the position in question. Bessert was not employed when the old alphabetical seniority list was in effect.

The County Patrol Section job (working out of the St. Nazianz shop) formerly occupied by Gregg Peterson was opened for bidding on January 23, 1991. Grievant, Kenneth Bessert, John Tebo and Gregg Schnell all signed the posting.

Schnell had less seniority than Tebo and Bessert. Therefore, Schnell was not considered further for the position. However, both Bessert and Tebo had become employed by the County on exactly the same date and on the same shift so their date of hire, April 17, 1989, was identical. Both Bessert and Tebo were found qualified for the job opening. Highway Commissioner Schramm ultimately awarded the job to John Tebo. Schramm based his decision on the fact that because both Tebo and Bessert had identical seniority, Schramm believed he could award the position to Tebo in the best interest of the County, because Tebo lives in St. Nazianz where the reporting station for the job is located. Schramm reasoned that Tebo would be able to respond to the job shop in St. Nazianz more quickly in the Winter months than would Bessert who lives in Valders, Wisconsin. 1/ In this regard, it should be noted that the overtime available on the job in question generally occurs in the Winter when there is snow to remove from the highways. Later, Schramm told Bessert that the reason he (Bessert) had not been selected for the position was because Bessert lived too far away from the job shop. 2/

It is undisputed that Bessert previously held this same St. Nazianz job on two prior occasions. Bessert did not retain the job because a more senior employe, Gregg Peterson, bumped him out of the job, when Peterson returned to this job from another job which Peterson had chosen not to continue to work in. Bessert stated that he received these positions solely on the basis of his seniority, as far as he knew. It is also undisputed that no complaints were lodged or received regarding Bessert's response time to the St. Nazianz shop during the times he previously held the position in question. Indeed, there are County employes who live 10 miles away from their job shops and these employes hold County Patrol Section positions.

Highway Commissioner Schramm indicated that with other job openings which had occurred before the disputed one, he had had to make his decision among the qualified applicants on the basis of seniority only. Because a tie in seniority had never occurred before the situation here, he had had no choice but to promote people who lived relatively far from their reporting stations to those previous openings solely because of their seniority. In this case, Schramm felt that he was not bound by seniority alone, because both Tebo and Bessert had the same seniority date of hire and Schramm felt he could select Tebo because of his proximity to the St. Nazianz job shop. Schramm stated that the County has always followed seniority when employes who posted were qualified, except in the instant case.

POSITIONS OF THE PARTIES:

Union:

The Union urged that because Kenneth Bessert relied upon the County's posted computerized seniority list he should have been awarded the County Patrol Section based merely upon his position on the seniority list. The Union pointed out that whether the County had used an alphabetical or a birth date seniority list, Bessert's name would have appeared ahead of Tebo's. The Union noted that County Highway Commissioner Schramm admitted that the County has

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1/ Valders is about 2.5 miles from the Manitowoc City limits.

2/ The evidence also showed that John Tebo voluntarily relinquished the St. Nazianz job in question on or about March 7, 1991 and returned to his previously held Grade 4 position. Thereafter, Kenneth Bessert was given the position in question and Bessert was employed in the position on the date of the instant hearing.

"always honored the seniority list." Thus, the Union contended that the County has also relied upon its posted seniority list(s).

The Union asserted that the County applied arbitrary and unsupported criteria to select Tebo over Bessert -- the proximity of Tebo's residence to the reporting station for the job. In this regard, the Union noted that the County failed to show that Tebo actually lived closer to the shop than did Bessert and the County also failed to show that there were any previous problems or complaints regarding Bessert's ability to respond to emergency snow situations at the St. Nazianz job station when Bessert was assigned there in the past.

The Union contended that the posted seniority list in these circumstances rose to the level of an agreement which supplemented the contract. The Union urged that both parties' reliance on the posted seniority lists and its listing of various employes who had the same starting date of employment implied that they must have thought about the possibility and expected to apply the order of the list to a situation like this one where two employes with the same starting dates of employment posted for the same job.

Based on these arguments, the Union sought that the grievance be sustained, Bessert be paid \$641.90 and retain the job in question and that the County be ordered to follow the posted seniority list in the future unless the parties mutually agree otherwise.

County:

The County asserted that because the labor agreement specifically defines seniority as net credited service and because the labor agreement is silent regarding what must occur if two employes who posted for the same job possess the same seniority, the County should be able to make a reasonable, discretionary decision between two equally senior employes as to which employe should be awarded the job. The County noted particularly that the posted seniority list is neither referenced nor incorporated into the labor agreement.

The County also pointed out that Article 29A of the contract prohibits any unwritten changes in the labor agreement. Furthermore, the County also stated that Article 3 vests in the County the right to ". . . manage, hire, promote, transfer . . ." employes as it sees fit so long as the County by its actions does not thereby violate a specific provision of the agreement.

In this case, the County stated, both Bessert and Tebo had equal seniority and the County was therefore free to select either Bessert or Tebo, (pursuant to Article 3), and yet satisfy its Article 2B obligations. The County contended that the Highway Commissioner's concern over response time to the job station was a reasonable consideration for the County to use to break the tie in seniority here.

The County also urged that because no similar situation had ever arisen, in the County, no applicable past practice could be found to have been established here. The County noted that prior to computerization of the County's seniority list by date of hire and birth date, the list had been arranged by date of hire and alphabetical order. Neither method of listing employes was objected to by the Union. The County asserted that these facts indicate that the seniority rankings among those with the same date of hire were "arbitrary rules" applied for purposes of "mechanical convenience" in generating the lists and not consciously intended to be used by the parties to break a tie in seniority.

In sum, the County argued that the grievance be denied in its entirety based upon the above arguments.

DISCUSSION:

Article 2 - Seniority in the effective labor agreement clearly defines seniority as ". . . the net credited service of the employe . . . beginning with the date and hour on which the employee began to work . . . ." In the instant case, John Tebo and Kenneth Bessert began work for the County on exactly the same date and at exactly the same hour. Therefore, they possess the same "seniority" as defined in Article 2. Article 2 also states that "job posting preference shall be given to Department seniority . . . defined as net credited service within the Department" (emphasis provided).

However, Article 2 is silent regarding how the parties are expected to deal with the particular situation in this case. That is, Article 2 does not describe a procedure to be used to break a tie in seniority, to select between two qualified applicants for the same job who have exactly the same date and time of hire.

Given the absence of a tie-breaker provision in the agreement here, no one can contend that Tebo is more senior than Bessert, or vice versa. Indeed, had the County chosen Bessert for the job in question, this action would have drawn a grievance from Tebo who could have argued, just as Bessert has, that he (Tebo) should have received the job based upon the fact that he was the most senior employe who posted. In this context, I am reluctant to supply or read into the agreement, a tie-breaker provision as the Union has urged. Such tie-breaker provisions are normally negotiated by the parties and are specified and detailed in their labor agreements. These provisions often include agreements to draw lots or straws, to toss coins or involve agreements to use employe birth dates or the alphabetical order of employe names.

The Union has argued that the seniority list, posted since sometime after 1981, has risen to the level of an amenity or practice (pursuant to Article 3) and that it should supply a tie-breaker procedure here. Yet, in this case, the evidence demonstrated that the methods used for listing employes with identical seniority -- alphabetically or by birth date -- were applied completely unintentionally. These methods of listing employes were never discussed by the parties before the instant case arose, and the particular problem that occurred here had never occurred before. Thus, there was no experience with and no past practice regarding how to treat the instant case. Thus, the Article 3 amenities provision is not applicable here.

The fact that the posted seniority list showed Bessert ahead of Tebo does not mean that Bessert had a right to rely on the order of the posted list when the clear language of Article 2 ("net credited service") belied such reliance. In addition, it is significant that Articles 3 and 29A contain language which would allow the County to do as it did here so long as it did not act in an arbitrary or discriminatory manner. In Article 3, the County reserved to itself "the right to hire, promote, transfer . . ." employes unless the contract specifically provided to the contrary. Because the labor agreement is silent regarding how to break ties in seniority, I conclude that the contract does not provide "otherwise" than the County did here.

Furthermore, Article 29A provides that the contract constitutes the "entire agreement" between the parties and that changes in it cannot be made unilaterally but that they "may be made by mutual agreement of the parties in writing." Notably, no written mutual agreement was reached by the parties here and no meeting of the minds occurred between them regarding what method to use to list employes who had identical seniority or how to break a tie in seniority.

In these circumstances, therefore, the County was free to select either

Tebo or Bessert based upon Commissioner Schramm's reasoning. On this point, I note that the selection of Tebo based upon the proximity of his residence to the St. Nazianz job shop was reasonable. This is so despite the fact that other County section employes live farther away from their job shops than Bessert did from St. Nazianz and despite the fact that no problems or complaints were ever received regarding Bessert's response time to the St. Nazianz shop when he previously held the job. I find that an employe's likely response time to the job shop during snow and other emergency situations was a reasonable and logical basis upon which to break the tie in seniority which occurred here and to select the employe best suited for the job in question.

Therefore, based upon the above analysis of the relevant evidence and argument herein, I make the following

AWARD

Manitowoc County did not violate the contract by not awarding the County Patrol Section position to Kenneth Bessert but instead awarding it to John Tebo.

The grievance therefore is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 11th day of October, 1991.

By \_\_\_\_\_  
Sharon Gallagher Dobish, Arbitrator