BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between		
JACKSON COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 2717-C, AFSCME	:	Case 83 No. 45609 MA-6666
and		
JACKSON COUNTY		

Appearances:
Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Ms. Kerry Sullivan-Flock, Corporation Counsel/Personnel Director, Jackson County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and the County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to resolve a dispute concerning wage rates while driving trucks. A hearing was held on September 18, 1991, in Black River Falls, at which time the parties were given the opportunity to present their evidence and arguments. The parties filed post-hearing briefs by October 25, 1991.

ISSUE:

The parties stipulated that the following issue is to be decided by the Arbitrator:

> Has the County violated the collective bargaining agreement by not paying laborers the light equipment rate, or Range 2 pay, while driving trucks? If so, what is the appropriate remedy?

Additionally, the County has raised the issue of the timeliness of the grievance.

CONTRACT LANGUAGE:

ARTICLE 4 - GRIEVANCE PROCEDURES

> SECTION 1. A grievance is defined as any difference or dispute regarding the interpretation, application or enforcement of the terms of this agreement. The grievance procedure shall not be used to change existing wage schedules, hours of work, conditions and fringe benefits. For purposes of this Article, "days" shall be defined as work days excluding Saturdays, Sundays and holidays.
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> SECTION 2. The failure to file or appeal a grievance in a timely fashion as provided in Section 4 of Article 4 shall be deemed a settlement and waiver of the grievance. The party who fails to receive a reply in a timely fashion shall have the right to automatically proceed to the next step of the grievance procedure.

However, if it is impossible to comply with the time limit specified in the procedure because of work schedules, illness, vacation, etc., these limits may be extended by mutual consent in writing.

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SECTION 4 - Steps in Procedure

Step 1. Any employee who has a grievance shall first discuss the matter with the Union Steward. The employee, individually or with a Union representative, shall present and discuss the written grievance with the Commissioner or other designated non-Union supervisor within ten (10) days after the employee knew or should have known the cause of the grievance.

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ARTICLE 21 - MISCELLANEOUS PROVISIONS

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SECTION 3. Employees working in a higher class job shall received the rate of pay of the higher class job for all time worked. If employees work in the higher class job for four (4) hours or more, they shall be paid the higher class rate for the entire day.

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EXHIBIT A -- WAGES

Range 1 Laborers (rates omitted)

Range 2 (It is agreed that machinery not listed in Range 3 below will be classified as light equipment.)
(rates omitted)
Patrolman
Rest Area
State Auxiliary

Range 3 Heavy Equipment (rates omitted)
Air Compressor
Big Cat TD-20
Booster Operator
Chip Spreader
FWD/Oshkosh (with wings)
Grader - Including Shoulder Machine
Hoe Kruiser
Little Cat and Back Hoe
Moving Truck #81
Paver and Pickup Attachment
Rollers (All)
Sign and Bridge Inspector
Time Keeper/Stock Clerk
Weed Sprayers

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BACKGROUND:

Shortly after the parties completed negotiations and the signing of their second collective bargaining agreement, the Union filed a grievance on August 27, 1990, alleging that the County was violating the contract wage schedule by not paying Range 2 pay scale to general laborers when they drive trucks. The County responded by noting that there is no provision in the collective bargaining agreement classifying a truck as a piece of machinery or light equipment, and that the grievance was not filed in a timely manner.

General laborers receive the Range 2 pay rate if they run a brush saw, a chain saw, and tractors for mowing. They receive the laborers' rate when doing hand labor, such as shoveling, working on culverts, or serving as a helper on the patch crew. They need commercial drivers licenses in order to operate County trucks.

John Borek is a general laborer who has been working for the County for four years. He was employed by the County when the first collective bargaining agreement went into place, and was the Union steward when the grievance was processed. Although Borek assumed that laborers were getting the Range 2 pay rate when driving trucks, he realized at least one or two years ago that they were not getting it. He talked to Highway Commissioner Roger Huber and Highway Patrol Superintendent Robert Gabriel about it, but did not initially file a grievance. During negotiations for the successor agreement between the parties, Borek was aware that laborers were not getting the Range 2 rate when driving trucks, but the Union did not want to bargain a change in the language. Neither party proposed any change in the contract language during the bargaining for the successor agreement.

The parties settled their 1990-91 contract in the middle of 1990, and employees received their back pay on July 27, 1990. The next two payroll checks were dated August 10 and August 24, 1990. The Union filed its grievance on August 27, 1990.

THE PARTIES' POSITIONS:

The Union asserts that the stipulated issue does not involve the question of timeliness, which the County raised during the hearing. The Union considers this grievance to be ongoing and that the issue of timeliness goes only to the remedy. The Union did not file a grievance during the term of the 1988-89 agreement, but the parties did not achieve their first signed collective bargaining agreement until March of 1989. Also, employees thought they were being paid the differential in rates because of retroactive pay checks they received for light equipment. The Union argues that if timeliness is considered, affected employees should receive a make whole remedy as of 10 days prior to the filing of the grievance.

The Union is seeking the light equipment rate of pay for laborers when they operate a truck, pursuant to Article 21, Section 3, and it is not seeking to have laborers permanently reclassified to light equipment. The question is simple -- is a truck a piece of machinery? The only truck listed in Range 3 is the FWD/Oshkosh with wings, and thus, trucks are not listed in Range 3 and must be considered machinery in Range 2. The contract language is clear on its face and cannot be reasonably interpreted otherwise. The Union finds it unusual that the County would pay employees the light equipment rate of pay for operating a chain saw that costs hundreds of dollars but would refuse to pay the higher rate for operating a truck that costs thousands of dollars.

The County asserts that the grievance is not timely and should be denied. According to the bargaining agreement, employees have 10 days after they knew or should have known to present a grievance. The employees received their first regular payroll check under the new bargaining agreement on July 27, 1990, along with a backpay check, and they received two more regular payroll checks prior to filing this grievance on August 30, 1990. Employees knew or should have known on July 27, 1990, that they were not getting the hourly rate for truck driving, and the 10 days started to run at that time. Thus, the Union has not complied with the terms of the collective bargaining agreement.

The County contends that it has not violated the labor contract. Employees were paid Range 1 pay for driving tuck under the previous contract. The Union did not request a change in the pay for driving truck during the negotiations for a successor contract. The Union submitted letters from the County regarding retroactive pay for light equipment, but the County's records indicate that those letters and backpay amounts were sent to 21 highway employees as back pay for light equipment. There is no mention in the letter that the pay was for truck driving. The County states that its records indicate that the checks were for operating specific items of light equipment -- mixer, brush chipper, snow plow, sweeper broom, distributor truck, quack digger, power saw, tractor mower, end loader, sand conveyor and cement mixer. Truck driving was not included.

The County argues that there is no bargaining history of the Union requesting a change in the rate of pay when the current agreement was bargained, and wages have to be bargained as mandatory subjects of bargaining. If the Union intended for light equipment to be defined differently than it was applied in the first contract, the burden was on the Union to bargain it. With no evidence to the contrary, the Union and the County intended the term light equipment to have the same meaning as that given during negotiations -- that being not including trucks.

In the event that a contract violation is found, the County requests that the remedy be limited to the date of the order or the date of the filing of the grievance, consistent with cases where employers' exposure has been limited when timeliness issues are involved.

DISCUSSION:

Timeliness:

Arbitrators have long considered certain types of contract breaches to be continuing violations or ongoing violations. In Bethlehem Steel Co., 20 LA 76 (1953), Arbitrator Seward defined a continuing violation as follows:

> . . . there is a clear distinction between claims which arise from single isolated events and those which are based upon a continuing course of Company action. It would be one thing to hold that when a transaction has been completed a failure to process a claim concerning that transaction within the contractual time limits properly bars its later consideration. It would be quite another thing to hold that when the Company has undertaken a permanent and continuing course of conduct alleged to be in violation of the Agreement a failure to process a grievance within 30 days would be a bar to all future efforts to have that course of conduct corrected.

A continuing violation has been explained as one where the act complained of may be said to be repeated from day to day, such as the failure to pay appropriate wage rates. 1/ The purpose of the continuing/recurring grievance or violation rule is to be able to make an equitable adjustment if a violation is found, that there be some remedy and that the employer not be allowed to continue sheltering a violation which occurred some time ago in a manner to erode the bargaining agreement.

Grievances involving benefits are often considered to be of a continuing nature, as contract violations remain unremedied each pay period. 2/ A few examples of disputes which have been held to be continuing violations include: improper wage rates, Bethlehem Steel Co., 34 LA 896 (Seward, 1960) and Steel Warehouse Co., 45 LA 357 (Dolnick, 1965); erroneous placement of an employee on a seniority list, American Suppliers, Inc., 28 LA 424 (Warns, 1957); misassignment of work, Copolymer Rubber & Chemical Co., 40 LA 923 (Oppenheim, 1963); reductions of sales commissions, Sears, Roebuck & Co., Inc., 39 LA 567 (Gillingham, 1962); failure to grant merit increases, Taylor-Winfield Corp., 65-2 CCH ARB Para. 8651 (Kates, 1965); transfer of teacher from counselor to classroom, Board of Education of Special School District 1, 81 LA 41 (Rotenberg, 1983); etc.

This grievance falls well within the accepted concepts of a continuing violation. The conduct complained of -- the failure to pay higher wage rates when operating trucks -- is a continuing matter, and not an isolated event. The potential violation continues with every pay check where laborers who have operated trucks receive a wage rate which they believe to be inappropriate. The conduct is renewed with each occurrence, showing a continuing course of conduct which is alleged to be in violation of the labor contract.

While the Arbitrator agrees with the County that the Union should have brought its grievance in a more timely manner, and should have brought the

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1/ Bethlehem Steel Co., 26 LA 550 (Feinberg, 1955).

2/ Neville Chemical Co., 73 LA 405 (Richman, 1979).

subject matter to the second round of contract negotiations, the grievance has the classic earmarks of a ongoing grievance, and the Arbitrator finds in favor on the Union on the issue of timeliness.

However, the failure of the Union to act promptly affects its potential remedy. 3/ In the event that a violation of the contract is found, the Arbitrator may fashion a remedy in view of the parties' respective conduct in the case.

The Merits:

The parties had only recently completed the negotiations for their second collective bargaining agreement when the Union filed its grievance. The first bargaining agreement for 1988-89 was not signed until March of 1989. The second contract was agreed to a little more than a year later. The parties had only one year and a couple of months to interpret the provisions of their first contract. Therefore, the parties have no long history of interpreting the provisions of their bargain, and no past practices can be said to apply, given the short history of the contract language in dispute. The fact that the County did not pay the Range 2 rate to laborers when they drove trucks does not have any force of past agreement or prior acquiescence, where the parties have no historical perspective on interpreting their bargain.

Under Article 21, Section 3, the parties clearly contemplated that employees would be working out of classification from time to time, and that they would receive the rate of pay for the higher class job when they performed such work. The work in dispute here is when laborers, in pay Range 1, operate trucks. The Union contends that such work should be paid at the Range 2 rate, as the wage scale states that machinery not listed in Range 3 will be classified as light equipment, and trucks are not listed in Range 3, except for the FWD/Oshkosh (with wings) and the Moving Truck #81. Laborers are paid Range 2 rates when using other equipment, such as brush saws and chain saws. The County

argues that the Union knew how the County interpreted the provisions in the parties' first agreement, and if the Union intended that light equipment be defined in a different manner, it was incumbent upon the Union to bargain it.

However, the parties did strike a bargain which included all aspects of wage rates. The parties specifically listed all the heavy equipment for the Range 3 pay in their wage schedule, and stated under the Range 2 category: "It is agreed that machinery not listed in Range 3 below will be classified as light equipment." Where the parties specifically listed certain pieces of equipment in the Range 3 scale and then stated that all other pieces of machinery would be in the Range 2 scale, the Arbitrator fails to see how the County could consider trucks to be left out of the bargain entirely. No one disputes the fact that trucks are machinery. The parties have agreed by contract that the regular trucks, excluding the FWD/Oshkosh with wings and the moving truck #81, are not heavy equipment in Range 3. By the terms of the parties' contract, the trucks must fall into light equipment in the Range 2 wage schedules.

3/ See Neville Chemical Co., 73 LA 405, at 408 (Richman, 1979), and Miller Brewing Co., 67-2 CCH ARB Para. 8383, at page 4377, 4378 (Slavney, Anderson, and Rice, 1967).

The County notes that the Union made no mention of this in negotiations, and the parties did not bargain specifically to put trucks in Range 2. However, the parties did bargain to put trucks in Range 2, by virtue of their listing of the heavy equipment to be in Range 3 and then stating that machinery not listed in Range 3 is classified as light equipment in Range 2. The parties did not specifically spell out that chain saws, brush saws, or lawn mowers would be in Range 2, but the parties acknowledge that such machinery is light equipment in Range 2. The County has not denied Range 2 pay for laborers operating other light equipment not specifically listed in the wage schedule. In fact, its records show that it sent backpay checks to 21 highway employees for operating specific items of light equipment, such as mixer, brush chipper, snow plow, sweeper broom, distributor truck, quack digger, power saw, tractor mower, end loader, sand conveyor and cement mixer.

Range 2 is the catch-all category for machinery. It rewards those who operate certain types of equipment, but it does not reward them as if they were operating heavy equipment. It rewards them more than if they are working with a shovel, doing hand labor, or helping on patch crews. The parties deemed it unimportant to list all the pieces of equipment that would be paid at a higher rate in Range 2, while they deemed it important to spell out which pieces of heavy equipment would received the Range 3 rates. The parties did not forget that employees drive trucks from time to time, anymore than they forgot to denote that employees use chain saws or brush chippers from time to time. Trucks are part of the machinery in the catch-all Range 2 category, and part of the bargain reached by the parties in their negotiations. 4/ To hold otherwise would reach a nonsensical result.

Thus, the Arbitrator finds that the County violated the collective bargaining agreement by not paying laborers the light equipment rate, or Range 2 pay, while driving trucks. As noted previously, the Union's failure to bring this grievance in a more timely manner affects the remedy. The County was not put on notice of the dispute until the grievance was filed, and the record does not indicate whether the County has adequately tracked the time the laborers have spent driving trucks. The appropriate relief should date back to the filing of the grievance, and no more. The Arbitrator will retain jurisdiction over this case for 60 calendar days from the date of this Award, and should questions arise regarding the implementation of the remedy, the parties should jointly contact the Arbitrator.

AWARD

4/ The Arbitrator agrees with the County that once the Union became aware that the Range 2 rates were not being paid, it should have raised the issue in the next round of bargaining (and/or filed a grievance). The Arbitrator recognizes the fact that the Union may have feared that to raise the matter but not resolve it would work against the Union in a subsequent arbitration. However, the Union could have raised the matter as a clarification without waiving its right to grieve the matter or waiving its interpretation of the existing language.

The grievance is sustained.

> The County violated the collective bargaining agreement by not paying laborers the light equipment rate, or Range 2 pay, while driving trucks.
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> The County is ordered to pay to laborers the pay rates of Range 2 for time spent driving trucks, retroactive to the date the County received the grievance, August 30, 1990.
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> The Arbitrator will retain jurisdiction for 60 calendars days from the date of this Award to resolve any disputes or questions that should arise regarding the implementation of the remedy.

Dated at Madison, Wisconsin this 26th day of December, 1991.

By _____
Karen J. Mawhinney, Arbitrator

KJM/ms
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