BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 2717-C, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO	:	Case 91 No. 48156 MA-7525
and	:	
JACKSON COUNTY, WISCONSIN	:	

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, appearing on behalf of Local 2717-C, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, referred to below as the Union.

Ms. Kerry Sullivan-Flock, Corporation Counsel/Personnel Director, Jackson County Courthouse, 307 Main Street, Black River Falls, Wisconsin 54615, appearing on behalf of Jackson County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a "class action" grievance dated October 20, 1992. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on December 16, 1992, in Black River Falls, Wisconsin. The hearing was not transcribed, and the parties filed briefs and a reply brief or a waiver of a reply brief by March 8, 1993.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the County violate the collective bargaining agreement, including any past practice, by deleting the section numbers from state section postings? 1/

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

SECTION 1. The County possesses the sole right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the provisions of this Contract. These rights, which are normally exercised by the Employer, include, but are not limited to, the following:

A. To direct all operations of County government.

B. To . . . assign . . . employees in positions with the County . . .

E. To introduce new or improved methods or facilities.

F. To change existing methods or facilities . . .

H. To determine the methods, means and personnel by which such operations are to be conducted . . .

The Union and the employees agree that they will not attempt to abridge these management rights and the County agrees that it will not use these management rights to interfere with the rights established under this agreement . . .

ARTICLE 7 - JOB POSTING

SECTION 1. When it becomes necessary to fill vacancies or new positions within the bargaining unit, the Employer will post such vacancies or new positions for five (5) working days, during which time interested

1/ The parties stipulated that "As part of this hearing, the issue of the temporary posting of the Section 1 State Patrol Section is withdrawn without prejudice by the Union."

employees may apply by signing the posting. Job postings shall state the job to be filled, qualifications for the job and the rate of pay . . .

ARTICLE 26 - ENTIRE MEMORANDUM OF AGREEMENT

This Agreement, reached as a result of collective bargaining, represents the full and complete agreement between the parties, and supercedes all previous agreements and past practices between the parties. Any supplemental amendments to this Agreement shall not be binding upon either party unless executed in writing by the parties thereto . . .

EXHIBIT A - WAGES

Section 1. Effective January 1, 1992, the wage schedule shall be as follows: 2/

Range 1 Laborers 3/

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

Patrolman

Range 3 Heavy Equipment
Air Compressor
Big Cat TD-20
Booster Operator
Chip Spreader
FWD/Oshkosh (with wings)
Grader - Including Shoulder Machine
Hoe Kruiser

2/ Exhibit A lists four wage schedules. Each is effective for a six month period. The structure of those schedules, which is reproduced above, is the same in each schedule. Only the wage rates changed.

3/ Each range in the wage schedule sets forth a wage rate under each of the following three steps: Start; 6 Month; 18 Month.

Little Cat with Back Hoe
Moving Truck #81
Paver and Pickup Attachment
Rollers (All)
Sign and Bridge Inspector
Time Keeper/Stock Clerk
Weed Sprayers

Range 4 Mechanic - Welder
Body Work

Range 5 Foreman

A.1 There shall be four (4) posted full-time Heavy Equipment positions, exclusive of the Time Keeper/Stock Clerk position.

BACKGROUND

The grievance, dated October 20, 1992, was advanced as a "class action", and questions the County "not posting the position as State Section 1 Patrolman". In a memo dated October 26, 1992, Michael L. Hemp, the County Highway Commissioner, denied the grievance thus:

> There has been no violation of the Collective Bargaining Agreement with respect to posting the position of Patrolman. The County posted the position of Patrolman as listed in Exhibit A - WAGES Section 1. Range 2 of the Union Contract. The Union request of posting State Section 1 Patrolman is a job, and not a position. We do not post jobs, only positions.

The posting at issue is dated October 8, 1992, and reads thus:

> Position Vacancy - Patrolman
>
> Effective immediately the Jackson County Highway Department will examine applications for an opening in Range 2 for the position of Patrolman at the present rate set in the Union Contract.
>
> Applicant must have the training, experience, skill and ability to competently and efficiently perform the duties of a patrolman in a safe manner with minimal supervision.

> Applicant must have experience operating a 5 yard patrol truck, in snow plowing operations, shouldering, paving, mowing, crack filling, and patching. Applicant must be able to make minor machinery repairs and maintain equipment properly. Applicant must be willing to work odd hours and weekends as needed, and be able to respond within 30 minutes when called in an emergency.
>
> Qualifications of applicants may be evaluated by written test, interview, assessment of education or previous experience, performance test, and/or other job related means.
>
> Applicants for the above opening must obtain and complete a standard application form (sample attached) and envelope from the shop office or the main office in the Courthouse. Applications and envelopes are available upon request.
>
> Each application must be filled out completely. The applicant must detail his past experience and the reason he feels qualified for the opening.
>
> Completed applications are to be placed in the accompanying envelope and sealed. Please address the envelope with the name of the position you are applying for and file it with the Highway Commissioner on or before 7:00 A.M. Thursday, October 15, 1992.
>
> Copies of the job opening notice are available upon request.

Hemp became Highway Commissioner in March of 1992. Prior to that he was Highway Commissioner for Lincoln County. He testified that Lincoln County did not post road sections, and he saw no reason to include a section number on the October 8, 1992, posting. Hemp stated that he thought posting section numbers limited his flexibility to assign employes, and would encourage any employe not assigned to their customary section to file a grievance.

Prior to Hemp's arrival, the County had used section numbers in the assignment of employes to State Highways since at least 1967. Prior to the negotiation of the first contract between the Union and the County, the County had paired a Patrolman with a Helper. Each would typically work the same State Highway Section.

When a Patrolman left County employment, his Helper would typically assume the State Highway Section as a Patrolman.

The parties stipulated that their first collective bargaining agreement was effective for calendar years 1988 and 1989, was signed on March 29, 1989, and was retroactive to January 1, 1988. That agreement established a posting procedure, and eliminated the Helper position. During the effective period of the first contract, two Patrolman positions were filled. The posting which announced the first of those openings reads thus:

JOB POSITION

INTERSTATE PATROL SECTION

Posted Sept. 19, 1988 7:00 A.M.
Closed Sept. 23, 1988 3:30 P.M.

JOB DESCRIPTION:

Any person applying for the Section 8 Patrolman position shall be required to report for work 15 minutes after receiving orders for emergency or plowing or sanding or salting after being called.

Be able to work alone or with a crew, keep the Section maintained and looking good at all times.

Must be able to communicate with others effectively. Also general knowledge of the various types of machines and equipment used by the Highway Department.

Anyone positing for this job shall not be considered on job seniority alone but the most qualified person for the Highway Department and the best interests of Jackson County. This posting will be up for five (5) working days. Each person signing up shall within these five days furnish in writing a letter of qualifications, to be left at the Shop Office Desk.

The person that is assigned to this position has twenty (20) working days on the job to perform this job satisfactorily for the Department or he/she can return to his/her present position. If he/she wishes to return

to his/her position, they can within these (20) working days. Salary will be set in Union Contract. This is a non-discriminative position. Any questions can be directed to the Commissioner or Patrol Superintendent.

The second posting was headed thus:

JOB POSITION

INTERSTATE PATROL SECTION

Posted October 17, 1988 7:00 A.M.
Closed October 21, 1988 3:30 P.M.

The body of the second posting reads the same as the first with two exceptions. The first sentence under the "JOB DESCRIPTION" heading in the second posting reads thus: "Any person applying for the Section 7 Patrolman position shall be required to report to work at Northfield 15 minutes after receiving orders for emergency or plowing or sanding or salting after being called." The other exception is the second posting does not contain the reference that "Salary will be set in Union Contract."

George Lewis, presently a Patrolman, testified that, historically, Patrolmen did not work exclusively on the section they were responsible for, but were moved around as necessary to cover needed work. He felt that an employe who was primarily responsible for a specific section tended to assume greater responsibility for that section and for the equipment necessary to maintain that section. He also noted that employes valued the ability to bid for sections of their choice. Certain employes wanted the busier sections, other employes wanted to avoid them. Beyond this, he noted that bidding on a specific section permitted an employe to post into a section closer to the employe's home. Hemp testified that equipment was kept at the Black River or Northfield shops, and that employes had to report to the shop to get their equipment. As a result, response time was not a major factor in section assignment, particularly since an employe was not paid until their arrival at the shop. He also noted that employe ability, response time and preference would be taken into consideration whether or not a position was posted with a section number denoting the primary area of responsibility.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the factual background, the Union contends that "vacated or new State Sections must be posted according to Section number or area of the County that the Section is located." The Union argues that Lewis' and Johnson's testimony establish that vacancies on State Highway Sections "have been consistently filled according to Section number both prior to the introduction of the Union and after the Union became certified." This is, the Union argues, a significant point, since employes were thus afforded "the right to be assigned out of a shop that may be closer to their home or to work on a Section that may have less traffic or to work on a Section that may be more desirable for whatever reason."

The Union asserts that the grievance was prompted by Hemp's arrival as Highway Commissioner, and by Hemp's desire not to post section numbers as was the practice under his former employer, Lincoln County. The Union notes that the deletion of section numbers from job postings overturned an established practice in Jackson County, and argues that "(y)ou simply cannot change the interpretation of a collective bargaining agreement because another County does it differently."

Beyond this, the Union argues that reading the Management Rights clause as the County asserts effectively guts the balance of the contract, particularly Article 7, Section 1. Nor does the Union accept the County's assertion that the deletion of section numbers affords the County needed flexibility. The Union asserts that posting Section numbers "would only grant primary assignments to that State Section", and that the "Commissioner would still have the authority to reassign the State Section worker to other areas, as needs may dictate." The Union contends that assigning employes to a primary area to patrol encourages employes to become familiar with that area, and to assume responsibility for it.

The Union concludes that "Jackson County has violated the collective bargaining agreement and a past practice", and requests that:

> (T)he arbitrator sustain the instant grievance and that the October 8, 1992 State Section vacancy be re-posted and the successful applicant be made whole, if any losses were suffered. In addition, that the County be ordered to post and award all future State Patrol vacancies according to the State Section number.

The County's Initial Brief

After a review of the factual background, the County argues

that "for there to be a grievance under the contract, the union must refer to or cite a specific contractual violation." The County contends that, in this case, the Union has cited only Article 7, Section 1, which does not require the County to post Section numbers. It necessarily follows, the County concludes, that the Union has failed to cite any contractual provision violated by the County and thus "has failed to establish a proper grievance as defined in the contract".

Beyond this, the County contends that Article 2 grants it "the authority to put whatever language it sees fit in a posting." The County's deletion of any reference to section numbers is, according to the County, squarely within its authority under Article 2.

The County specifically denies that "there is an established past practice on the issue of the language of the posting for State Section Patrolman positions." Acknowledging that Lewis and Johnson moved from the position of Patrolman Helper to Patrolman, the County notes that this advancement occurred prior to the formation of a union, and that the first labor agreement eliminated the position of Patrolman Helper and established a new means to fill vacancies. These changes preclude, according to the County, any claim of past practice based on pre-Union employer practices. Beyond this, the County notes that the two postings of 1988 cited by the Union to establish a past practice pre-date the parties' agreement on a collective bargaining agreement. Beyond this, the County contends that any claim of past practice based on circumstances existing prior to the first contract is rebutted by the express terms of Article 26. Even if Article 26 did not exist, and even if the parties did not create a posting procedure different from that in effect prior to the Union's certification, the County argues that the evidence of practice cited by the Union is insufficient to create "an established practice that the County would be bound to follow again."

The County's next major line of argument is that the language of Article 7, Section 1, clearly and unambiguously "does not require that a specific section number be listed in State Patrolman job postings." Because that section "does, however, clearly spell out what is required in a posting" and the County has complied with those requirements, it follows, according to the County, that there is no reason for evidence of past practice to be considered at all. Arbitral authority requires, the County contends, that clear and unambiguous language be given its intended effect without recourse to extrinsic evidence. The County concludes that "the arbitrator cannot consider the past practice and must not create new contract language but stick to the four corners of the agreement."

The County concludes that the grievance must be denied.

The Union's Reply Brief

The Union waived the filing of a reply brief.

The County's Reply Brief

The County contends that only one issue need be addressed in reply to the Union's brief, "which is the continual reference to Lincoln County." The County acknowledges that Hemp did serve Lincoln County and that the management practices there differ from those he encountered in assuming his duties for Jackson County. This difference is, according to the County, no more than a "smoke screen" since "(w)hat was or was not done in Lincoln County is not the issue in this case." The issues here, the County asserts, are whether the contract or past practice requires the posting the Union seeks.

DISCUSSION

The Union's statement of the issue for decision has been adopted as that appropriate to this record. The reason this issue could not be stipulated at hearing was the County's objection to the reference to "including any past practice". Because the record poses both the relevance and the significance of past practice evidence, the Union's statement of the issue has been adopted.

The fundamental focus of the grievance is Article 7, Section 1, which requires the County to post "vacancies or new positions" stating "the job to be filled, qualifications for the job and the rate of pay." The parties dispute whether state section numbers are so essential a part of the "job to be filled" that the number must be included in the posting. That responsibility for a specific section of roadway could be considered an essential part of "the job to be filled", as the Union claims, is plausible. That such responsibility is only a duty within a position, as the County claims, is also plausible. Since each party states a plausible claim, the language of Article 7, Section 1, cannot be considered clear and unambiguous. The weakness in the County's claim that the language clearly and unambiguously supports its interpretation can be seen in the processing of the grievance. Hemp's October 26, 1992, letter denying the grievance notes "(w)e do not post jobs, only positions." Article 7, Section 1, however, uses the terms indiscriminately, referring initially to "positions", and then to "the job to be filled".

Past practice and bargaining history are the most reliable guides to resolve contractual ambiguity, since each focuses on the

conduct of the parties whose agreement is the source and the goal of contract interpretation. In this case, there is no evidence of bargaining history, and the parties' disagreement is embodied in their conflicting views of past practice.

Resolution of the parties' conflicting views on past practice requires that three points be addressed. First, it must be determined if there is a course of conduct which can be considered a practice at all. If so, the second point to be addressed is whether the practice clarifies Article 7, Section 1, or constitutes an independently enforceable condition of employment. The final determination is the impact of Article 26 on the practice.

The record will support a conclusion that a practice existed of including section numbers in postings. From not later than 1967 through the negotiation of its first contract with the Union, the County had assigned employes on state roadways to specific sections of road. The Union was not party to this form of assignment, and it cannot be considered evidence of a practice. It does, however, set the bargaining context against which the parties negotiated their first agreement. During the effective period of that agreement, the County posted two Patrolman positions, each of which included a reference to a section number. The County correctly notes that these postings, although arising during the term of the first contract, preceded the execution of the parties' agreement. This does not, however, mean the postings do not indicate a practice. The County made the postings either in reliance on the yet to be executed posting procedure, or as a statement of its own authority unlimited by the yet to be executed agreement. If the former is true, the postings indicate mutual agreement. If the latter is true, it must be noted that the parties did not redo the postings after the agreement was executed. This indicates an understanding that the pre-agreement postings did not violate the terms of the subsequently executed agreement.

The County has argued forcefully that the two 1988 postings are insufficient, standing alone, to constitute a practice. This argument, though having considerable persuasive force, must be rejected. As the County notes, there is arbitral precedent highlighting that practices, to be binding, should be characterized by clarity and consistency of repeated conduct over time. This precedent is, however, more helpful in highlighting cases in which the existence of a binding practice is beyond doubt than in clarifying the full range of cases in which past practice may be helpful. The source of the binding force of a past practice is the agreement manifested by the parties' conduct. 4/

4/ See, generally, "Past Practice And The Administration Of

That the factors noted above connote agreement must be acknowledged. It does not, however, follow from this that a rote application of those factors exclusively defines conduct in which mutual agreement can be found. In this case, that only two postings have occurred says more about employe turn-over in this unit than about whether the parties mutually understood the significance of state section numbers on a job posting.

The more difficult point in assessing the practice is what the scope of the parties' agreement is. More specifically in this case, the necessary determination is whether the evidence indicates the parties have, by conduct, clarified that posting "the job to be filled" under Article 7, Section 1, requires mention of the state section number. If the Union's assertion of the practice is accepted, the posting has arguably limited the Commissioner's right to assign work duties by limiting certain employes to certain sections of roadway. This determination poses the fundamental disagreement between the parties, since the practice the Union asserts potentially implicates the Commissioner's authority to assign under Article 2 more than the posting provisions of Article 7.

The evidence of a practice is insufficient to conclude the section number is a required feature of "the job to be filled" when that job is Patrolman on a state section. Initially, ambiguity in the scope of the proven practice must be noted. While the 1988 postings may be taken as proof of the prior Commissioner's willingness to post a pattern of assignment, there is insufficient evidence to conclude the prior Commissioner was willing to bind himself to that pattern indefinitely. The postings themselves underscore this, since the section number was not included in the job title but in the body of the posting describing the duties of the job. The parties' agreement underscores the conclusion that the parties have not made section numbers an essential attribute of the Patrolman position. Exhibit A lists the "Patrolman" classification without reference to section numbers. The absence of such a reference cannot be dismissed as insignificant. Section 1, A.1 of Exhibit A specifically requires "four (4) posted full-time Heavy Equipment positions". No such reference is made to state highway section positions within the Patrolman classification. That the Heavy Equipment classification contains specific mention of the equipment which supports placement in the classification must also be contrasted to the lack of any reference to sections within the Patrolman classification. It appears, then, that the parties, by contract, view Patrolman as a generic classification.

Collective Bargaining Agreements", Richard Mittenthal, from Arbitration And Public Policy, (BNA, 1961).

The evidence will not, then, support a conclusion that the parties have, by practice, acknowledged that a section number is so essential a feature of the Patrolman position on state maintained roadways that it must be included in a posting under Article 7, Section 1. The practice the Union has demonstrated is, if anything, an independent condition of employment, by which the prior Commissioner indicated to employes his pattern of assigning work.

This conclusion serves as preface to the final determination required here, which is to apply Article 26. If the practice could be taken as the definition of "the job to be filled", under Article 7, Section 1, as applied to the Patrolman position for state sections, the practice would be a part of that language, modifiable only by a change in that language. As such, it would not be subject to the provisions of Article 26, which governs practices arising outside of the terms of the agreement. As an independent condition of employment, the practice falls within the scope of Article 26, which unambiguously "supercedes all . . . past practices between the parties". The termination of a past practice, which has become an independent condition of employment, during the term of an agreement has been addressed in arbitral precedent. Typically, such a termination requires notice and is not effective until the agreement has expired. 5/ In this case, however, Article 26 specifically and clearly addresses this point. There is no room for arbitral interpretation. The practice the

5/ Ibid.

Union has demonstrated is, under the terms of Article 26, "not . . . binding". That Hemp is not willing to follow the practice of his predecessors is, under this language, a position which cannot be overturned in arbitration.

Whether Article 26 was included in the parties' first agreement could be viewed as potentially significant to this grievance. If the practice survived the creation of that clause, termination of the practice would arguably require notice. 6/ The point is not, however, determinative here, even if Article 26 was included in the first contract. While the Union has asserted a make-whole remedy is appropriate here, there is no evidence any employe suffered any financial loss as a result of the October 8, 1992, posting. Nor has the Union requested bargaining of the change reflected in that posting. Against this background, notice is, at most, a technical point.

The Union has, by brief and through Lewis' testimony, questioned the wisdom of departing from filling positions based on section numbers. Those arguments are persuasive, but cannot play a role in the resolution of this grievance. The parties' agreement does not contemplate an arbitrator setting policy for the Highway Department. Rather, the agreement contemplates arbitral enforcement of the policies set by mutual agreement of the parties. In this case, the policy of posting section numbers rests on a past practice which would, in the absence of Article 26, be enforceable through arbitration, at least through the duration of the current agreement. Without regard to how highway work should be assigned as a matter of policy, Article 26 precludes the enforcement of the practice the Union has proven here.

AWARD

The County did not violate the collective bargaining agreement, including any past practice, by deleting the section numbers from state section postings.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 5th day of April, 1993.

6/ The termination of a practice which conflicts with clear contract language has been taken to require notice, see, for example, Master Builders Association, 74 LA 1072 (McDermott, 1980).

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator