

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
LOCAL 2717-C, WISCONSIN COUNCIL	:	Case 90
OF COUNTY AND MUNICIPAL EMPLOYEES,	:	No. 48155
AFSCME, AFL-CIO	:	MA-7524
	:	
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 June 11, 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 stipulated the following issues for decision:

Is the County required to post County Sections once the County creates them?

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 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

. . .

EXHIBIT A - WAGES

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

1/ 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

- Range 1 Laborers 2/
- 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
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.

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

wage rates changed.

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

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 . .

BACKGROUND

The grievance, dated June 11, 1992, was filed on behalf of General Laborers, and states the "applicable violation" thus:

Management created 12 new County sections and assigned labors (sic) to them without posting new positions. Management is in violation of Article 7, Section 1, and any other Article that may be applicable.

Kerry Sullivan-Flock, the County's Corporation Counsel/Personnel Director denied the grievance in a memo date June 19, 1992, which reads thus:

County denies any violation of the collective bargaining agreement. Pursuant to Article 2, Section 1 of the collective bargaining agreement, management is within its' (sic) right under the agreement to have taken the action referenced in the grievance.

Thomas Johnson, presently a Patrolman, has been employed by the County since April 16, 1967. He testified that the County once assigned an employe to a section of County Highways A and F, but did not continue that assignment after the employe's resignation. He was aware of no County use of section numbers for County Highway assignments for at least the last ten years.

The parties agreed that for the purposes of addressing the issues posed in this grievance the following facts could be taken as the relevant background:

There were no County sections prior to the County's creation of some sections after Michael L. Hemp became Commissioner.

County sections were assigned by Michael L. Hemp.

County sections were assigned to non-State

Patrol positions.

A grievance was filed. The Union wants the County Sections posted, the County wants to assign them as duties without a job posting.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the factual background to the grievance, the Union argues that "vacated or new County Sections must be posted according to Section number or area of the County that the Section is located." This conclusion, the Union contends, flows from the issues posed by a related grievance involving the posting of State Highway Sections. If, as the Union urges, Article 7, Section 1, requires that state sections be posted, it necessarily follows, according to the Union, that "the same contractual language should apply to County Section numbers." To read the Management Rights clause to grant the Highway Commissioner the unilateral right to assign work "without regard to County Section number", would, according to the Union, read the balance of the contract out of existence. Beyond this, the Union asserts that the Highway Commissioner does not need the flexibility to assign employes to any section he chooses. The Union contends that posting section numbers does no more than "grant primary assignments to that County Section", and that the Commissioner could reassign employes outside of their primary assignment "as needs may dictate." Beyond this, the Union argues that posting sections encourages the successful bidder to become familiar with, and responsible for, the section he is primarily assigned to. The Union also notes that the County's view of its assignment powers precludes "a Patrolman to post for another Patrolman position even if the individual employee finds the alternate County Section more desirable."

The Union concludes by asking that:

(T)he arbitrator sustain the instant grievance and the County sections be posted and the successful applicants be made whole, if any losses were suffered. In addition, that the County be ordered to post and award all future County Patrol vacancies according to the County Section number.

The County's Initial Brief

After a review of the factual background, the County argues that the Management Rights clause stated at Article 2 of the labor agreement "clearly allows the County to assign duties and work to individual employees". Noting that Article 7, Section 1, governs "new positions", and arguing that the newly created County Sections are not "new positions", the County concludes that Article 2, not Article 7, governs this grievance. To underscore its contention that the newly created sections are not new positions, the County notes that "(t)he individuals appointed to these County section positions have not, nor will they change range levels", and thus "do not become 'patrolman' in the wage schedule of the contract". It thus necessarily follows, according to the County, that "(t)he County section leader appointments effectively equate to a work assignment or the re-assigning of work rather than the creation and filling of new positions."

Because the County, by creating County sections, "simply made work assignments which they clearly are allowed to do under the management rights section of the contract", the County concludes that the grievance must be denied.

DISCUSSION

The issue in this case is stipulated. The Union contends that the issue cannot be properly addressed until resolution of the issues posed by the Union's grievance challenging the posting of State section numbers. 3/ This position is influenced, if not dictated, by the Union's assertion, in the State sections grievance, of a past practice regarding the posting of section numbers. No such practice is posed by this grievance, since Hemp initiated the assignment of Laborers to County sections. The County has denied that past practice plays any role in the resolution of either grievance.

The County and the State section grievances each focus on the provisions of Article 7, Section 1. Because the practice asserted by the Union in the State sections grievance impacts the interpretation of that provision, I have issued the State sections award prior to addressing the stipulated issue here.

As preface to addressing the stipulated issue, certain background common to both grievances should be reviewed. Each grievance questions the application of Article 7, Section 1, which requires the County to post "vacancies or new positions within the

3/ That grievance has been captioned by the Commission as Case 91, No. 48156, MA-7525.

bargaining unit". Such postings "shall state the job to be filled, qualifications for the job and the rate of pay." The parties dispute, in each grievance, whether section numbers are so essential a feature of the "job to be filled" that those numbers must be stated on the posting. In each grievance, the parties advance plausible, but conflicting, interpretations of Article 7, Section 1. The County contends that assignment to a specific section of roadway is a duty, which need not be posted, within a position, which must be posted. The Union contends that primary assignment to a specific section of roadway is an essential feature of the work to be performed. This is underscored, in the Union's estimation, by the fact that an employe may prefer to bid into or to avoid a certain section.

The point at which a collection of duties becomes a job cannot be characterized as clear or unambiguous. Because each party advances a plausible claim regarding what constitutes a "job" or a "position" under Article 7, Section 1, the language of that section cannot be considered unambiguous.

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.

The significance of past practice in this case is rooted in evidence submitted in the State sections grievance. This is because the Union seeks to turn the practice asserted in that case into a basis for interpreting Article 7, Section 1. Although the Union did prove the existence of a practice in the State sections grievance, that practice is insufficient to establish the entitlement the Union seeks here, for the practice did not clarify the reference in Article 7, Section 1, to "the job to be filled".

If it did, as I noted in the State sections decision, "the practice would be a part of that language, modifiable only by a change in that language." Such a practice "would not be subject to the provisions of Article 26, which governs practices arising outside of the terms of the agreement." The practice proven by the Union in the State sections grievance, however, constituted "an independent condition of employment". I stated the implications of Article 26 on that practice thus:

As an independent condition of employment, the practice falls within the scope of Article 26, which unambiguously "supercedes all . . . past practices between the parties".

There is, then, no practice applicable to this grievance.

More significantly, the language of the agreement favors the County's interpretation over the Union's. As was the case with the Patrolman position, the Laborers' position is generic. Exhibit A does not specify any breakdown of "Laborers" by road section. This silence cannot be dismissed as insignificant. Exhibit A, Section 1, Subsection A.1, mandates "four (4) posted full-time Heavy Equipment positions exclusive of the Time Keeper/Stock Clerk position." This reference clarifies that "Laborers", like "Time Keeper/Stock Clerk" is a position, which under Article 7, Section 1, must be posted. Subsection A.1 does not, however, support the Union's assertion that section numbers are an essential feature of the position. That the parties expressly noted the number of positions within Range 3 cuts against the implication the Union seeks for Range 1. That specific equipment within the classification of "Heavy Equipment" is listed also cuts against the implication the Union seeks here. It is apparent that certain duties (the operation of certain forms of equipment) within the Heavy Equipment position were expressly listed, while section duties within the Laborers' position have not been.

In sum, the language of the parties' agreement favors the County's view that assignment of a Laborer to a section of County roadway is a duty, which need not be posted as "the job to be filled" under Article 7, Section 1. The practice proven by the Union in the State sections grievance does not clarify that reference, but stands as an independent condition of employment. As such, the practice is superceded by the provisions of Article 26, and is inapplicable here. Thus, the Union's contention that County section numbers must be posted has no contractual basis.

Whether or not assignment by section is the best form of work assignment, and whether or not that form of assignment should be posted must be left to the parties to bargain. If county section numbers are to be posted, that right must be secured in collective bargaining before it can be enforced in arbitration.

AWARD

The County is not required to post County Sections once the County creates them.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 13th day of April, 1993.

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