

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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GENERAL DRIVERS, DAIRY EMPLOYEES, :  
WAREHOUSEMEN, HELPERS AND INSIDE :  
EMPLOYEES, LOCAL UNION NO. 346 : Case 194  
:  
and : No. 48728  
:  
DOUGLAS COUNTY (HIGHWAY DEPARTMENT) : MA-7690  
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Appearances:

Mr. Patrick Radzak, Vice President, Teamsters Union Local 346, appearing on behalf of the Union.  
Mr. John Mulder, Personnel Director, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve a grievance filed by Jeff Bayard concerning the temporary filling of the Sign Shop Foreman position.

The undersigned was appointed and held a hearing on May 6, 1993, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, and neither party filed a brief.

STIPULATED ISSUES:

1. Did the County violate the contract or binding past practice when it filled the temporary vacancy of the Sign Shop Working Foreman in the week of December 7, 1992?
2. If so, what remedy is appropriate?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 17.

SENIORITY: 1. County-wide seniority shall mean the length of service of an employee from his last permanent employment date with the

County. Portal seniority shall mean the length of service of an employee from his last permanent assignment date to one of the

Portals within the County, except that where an employee is permanently transferred to another Portal (i.e. layoff or bidding), the employee may exercise his county-wide seniority in determining his Portal seniority.

The employee's seniority shall not be diminished by temporary layoff due to lack of work, shortage of funds, or any contingency beyond the control of either party to this agreement. When an employee is promoted or transferred out of the collective bargaining unit to another job with the County so as to be excluded from the coverage of this Agreement and is later returned to the unit by the County, he shall resume his seniority which he had as of the date of his transfer, but shall not be granted seniority credit for the time working in such non-bargaining unit job. The word "seniority" in this Agreement refers to Portal seniority unless specifically stated otherwise.

2. Except for bid or assigned jobs, County-wide seniority rights shall prevail on all open jobs within the Portal in making daily work assignments. There shall be no bumping on assigned or bid jobs, including employees assigned a Patrol. The assignment of all overtime work shall be made within the Portals among the employees based on Portal seniority, provided the senior employee is qualified to do the overtime work available; provided, overtime work required on a Patrol shall be done by the employee regularly assigned to the patrol if such employee is available for work and he shall not be removed because of seniority; but in the event the employee regularly assigned on the Patrol is not available, overtime work to be performed shall than (sic) be scheduled on the basis of the Portal seniority of other employees in the Portal; the Donneau Agreement shall be continued so employees assigned to work on a Friday shall be assigned to continue such work on overtime on Saturday without regard to seniority.

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6. Call Outs - by the seniority list the

youngest man must accept the work (portal seniority by portal).

#### ARTICLE 18.

PROMOTIONS: 1. In making promotions and in filling job vacancies or new positions, preference shall be given 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 employees' qualifications for the job, the following factors shall be considered:

- (a) Ability to perform related work.
- (b) Attitude.
- (c) Aptitude.
- (d) Versatility.
- (e) Efficiency.
- (f) Location in residence in relation to where work is to be performed.

NOTE: Employee shall reserve the right to move his residence to comply with subsection (f) as stated above.

2. All job vacancies or new positions shall be posted on the bulletin board ten (10) days prior to filling said vacancy or new position 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 prerequisites will be considered.

3. The successful applicant shall have a thirty (30) day 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 and rate of pay 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. Vacancies shall be posted

within fifteen (15) days after the permanent vacancy occurs unless mutually agreed to between the Employer and the Union.

. . .

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.

#### DISCUSSION:

The Douglas County Highway Department's employees work out of six locations, known as Portals. In the Superior Portal one of these employees, David Johnson, is the Sign Shop Working Foreman, a position which mixes preparation and installation of road signs with other duties such as snowplowing. During the week of December 7 to 14, 1992, Johnson anticipated being absent on vacation, and a replacement was needed. He asked the then new Highway Commissioner, George Palo, whether he should handle the replacement as in the past. Palo said that he would handle it himself, and proceeded to fill the job temporarily with employee Tom Kelly, transferred for this purpose from the Department's Portal located in Hawthorne. Jeff Bayard, the Welder/Mechanic in the Superior Portal, filed the grievance in this matter on December 15, on the ground that the work had customarily been assigned to him and that he was entitled to the increased pay rate and overtime opportunity involved.

Several Union witnesses gave testimony to the effect that the Sign Shop Foreman's position had always been filled temporarily, when that was necessary, by the Welder/Mechanic in the Superior Portal, because that was the senior employee in the Portal. Each of the Union witnesses testified that seniority within the Portal was the determining factor in the offer of this work. It is clear, however, that the overtime opportunity by itself is not at issue here: Union Steward Harold Sutherland testified that if an employee is temporarily in another employee's job, and overtime comes up for that job, that employee gets the overtime even though there might by then be a more senior employee available. The overtime goes with the temporary assignment.

On cross-examination, however, some exceptions emerged to the pattern identified by the Union witnesses. Thus Sutherland

testified that Norm Groehler has been given short one-day assignments to do the snowplowing part of the Foreman's work, being transferred from the Pattison Portal for that purpose. And Dave Johnson testified that Dave Charbonneau and Barb Dombrowski have not in the past been offered the Sign Shop Foreman temporary work, in Dombrowski's case because she is the Bookkeeper and has never claimed she wanted temporary work in seniority order, and in Charbonneau's case because he is deaf and non-vocal and is not considered qualified to do that particular job.

Retired Business Agent Harold Brown testified that he had originally negotiated the contractual seniority language with the County, and that his understanding was that any work that was not permanent "goes by Portal seniority if the employe is qualified".

And this, in effect, was the thrust of most of the testimony by the Union witnesses generally. Palo, on the other hand, testified that when the issue came up he first looked at the contract to see what was required, and concluded that there was nothing clearly identifying Portal seniority as a guiding principle and that he had the right under Article 4 to make the assignment in the best interests of efficiency. Palo testified that he decided to use the contract as a general guide to fairness, and drew an employe from the Hawthorne Portal, because Superior was short of employes, Hawthorne had loaned people out in the past, and Hawthorne had the largest staff. Palo also noted that it was easier to replace an Operator than to replace the Superior Portal's sole Welder/Mechanic. Palo stated that for these reasons he offered the work, in order of seniority, within the Hawthorne Portal, and Tom Kelly accepted the offer. Palo testified that Kelly got the overtime involved because the overtime went with the snowplowing route which was assigned to that job. Palo noted that Union officers told him during the grievance procedure that the grievance was really about overtime because this was the only overtime opportunity the employes got.

Palo said that he felt using overall County-wide seniority was fair to the employes because if there was slack in the shop crew but a need for roadwork, Bayard would likely have gotten that opportunity. 1/ He stated that while evidence was given at the

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1/ It appears that Palo did not in fact offer the work in question on a County-wide basis, but only within the Hawthorne Portal. No other employe grieved, however, and the parties did not argue on this point. Thus for purposes of

hearing to the effect that Kelly had turned out not to be familiar with some of the work and to have required assistance from Johnson, even though Johnson was supposed to be on vacation, he had not anticipated that Kelly would call Johnson directly. He had thought the main duty would be snowplowing, and that the Sign Shop manual would be adequate to help Kelly do the remainder of the work.

The Union argues that reading the whole collective bargaining agreement together, Portal seniority should be visible as the principle by which temporary assignments of work are made. The Union requests that as remedy, the Grievant be paid the pay differential involved for the week in question, plus the value of the overtime hours which arose during that week.

The Employer argues that there is no clear violation here of the collective bargaining agreement, and that a general interpretation of Portal seniority is not within the scope of the case. The Employer argues that the evidence is that assignments are not solely made by Portal seniority, that there is nothing in the contract that provides for temporary appointments, and that management rights should therefore prevail. The Employer requests that the grievance be denied.

In the course of the hearing the Union did make it clear that it desired a generally better definition of Portal seniority as an outcome of this case. Having read the collective bargaining agreement language concerned, I can understand and sympathize with the Union's concern. But it is not general practice for an arbitrator to delve into issues beyond the immediate question of whether a contract has been violated, unless both parties agree to broaden their request of the arbitrator in that way. Here, only one party has requested anything beyond a narrow interpretation for purposes of determining whether there has been a violation, and I must therefore return the broader question to the parties' discussions at the bargaining table.

The past practices within a workplace are potentially relevant to the outcome of a grievance in two different ways. The first is when an article of the contract involved specifically incorporates past practices into the collective bargaining agreement on its face. This type of clause, however, appears

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the present case the sole relevant fact concerning application of County-wide seniority is that Kelly has greater County-wide seniority than Bayard.

nowhere in the agreement in question. The only potential relevance here of past practices, therefore, would be as a guide to interpretation of ambiguous provisions of the Agreement. If, however, the contract itself is clear on its face, there is little or no value in arguing a past practice which is to the contrary.

Article 17 of this Agreement identifies in its Section 1 that Portal seniority is what is meant by "seniority" throughout the Agreement unless specifically stated otherwise. But while Portal seniority would therefore appear to be the form of seniority used in promotions and job vacancies, a job vacancy as commonly understood did not exist in this case, merely a temporary opening which did not require the use of Article 18's procedures to fill it. The sole express contractual limitation on management's right to assign temporary work therefore is in Article 17, Section 2. In that section, the first sentence states "Except for bid or assigned jobs, County-wide seniority rights shall prevail on all open jobs within the Portal in making daily work assignments." Neither party has specifically argued concerning the meaning of this sentence, and I am unwilling, for reasons identified above, to engage in a general discussion of the ins and outs of this seniority language. I cannot, however, ignore the sole language which appears to relate to the situation at issue herein. And the quoted sentence refers to County-wide seniority, not Portal seniority, in "making daily work assignments" to "open jobs within the Portal". This appears to support the County's decision not to offer the Sign Shop Foreman position based on Portal seniority. While the overall language involved is hardly a model of clarity, and the parties may well wish to re-examine it at the bargaining table, this sentence on its face suggests that the County did not violate the collective bargaining agreement in this specific instance.

Without some evidence indicating that an arbitrator should read an ambiguity in it which is not at present apparent, the contract therefore seems clear enough for purposes of the present case that the past practice is not relevant. Since Kelly had greater County-wide seniority than Bayard, the Union has not established that the County violated the Agreement by giving Kelly the assignment, because of the facial meaning of the first sentence of Article 17, Section 2 and the absence of any other language opposing that meaning. Meanwhile, the subsequent reference in that section to assignment of overtime work "based on Portal seniority" is also apparently not relevant, based on Sutherland's testimony that the first criterion is that overtime goes with the particular job in which the overtime occurs. Since the overtime which arose was by all accounts tied to the particular route which the Sign Shop Foreman normally handles, there is no independent violation of the Agreement in continuing to assign that work to the employee already selected.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD



1. That the County did not violate the collective bargaining agreement or binding past practice when it filled the temporary vacancy of the Sign Shop Working Foreman in the week of December 7, 1992.
2. That the grievance is denied.

Dated at Madison, Wisconsin this 14th day of July, 1993.

By Christopher Honeyman /s/  
Christopher Honeyman, Arbitrator