

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES :  
UNION, LOCAL NO. 75, affiliated with : Case 23  
the INTERNATIONAL BROTHERHOOD OF : No. 49031  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN : MA-7801  
AND HELPERS OF AMERICA :  
 :  
and :  
 :  
VILLAGE OF HOWARD :  
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Appearances:

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz,  
Miller & Brueggeman, S.C., Attorneys at Law, 1555 North  
Rivercenter Drive, Suite 202, Milwaukee, Wisconsin  
53212, appearing on behalf of Drivers, Warehouse and  
Dairy Employees Union, Local No. 75, affiliated with the  
International Brotherhood of Teamsters, Chauffeurs,  
Warehousemen and Helpers of America, referred to below  
as the Union.  
Mr. Dennis M. Duffy, Duffy, Holman, Peterson, Wieting &  
Calewarts, Associated Attorneys, 716 Pine Street, P.O.  
Box 488, Green Bay, Wisconsin 54305-0488, appearing on  
behalf of the Village of Howard, referred to below as  
the Employer.

ARBITRATION AWARD

The Union and the Employer 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 grievance filed on behalf of Jeffrey Krause Sr., referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on May 19, 1993, in Howard, Wisconsin. The hearing was not transcribed, and the parties filed briefs by July 8, 1993.

ISSUES

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

Did the Employer violate the collective bargaining agreement on January 19, 1993, by indefinitely reassigning bargaining unit members to different snowplowing sections without regard to the seniority of the reassigned employees?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

**ARTICLE 7. SENIORITY**

. . .

7.04. Seniority principles shall apply in daily job assignments within the Department of Public Works and Park Department provided that such principles do not interfere with the efficient operation of the department as determined by the Department Head or his/her designated representative.

. . .

**ARTICLE 25. MANAGEMENT RIGHTS**

25.01. Except as otherwise provided in this Agreement or as may affect the wages and hours and working conditions of Employees, the Union recognizes that the management of the Village is vested exclusively in the Employer. All power, rights, authority, and responsibilities customarily executed solely by management are hereby retained. Such rights include but are not limited to the following:

A. To direct and supervise the work of its Employees;

. . .

E. To plan, direct and control operations;

F. To determine to what extent any process, service or activity shall be added, modified or eliminated;

- G. To introduce new or improved methods or facilities;

. . .

- I. To assign duties;

. . .

#### BACKGROUND

The grievance, filed on January 19, 1993, 1/ questions the Grievant's removal from Snowplowing Sections 7 and 8. The Employer's snowplowing routes have evolved as the Village has grown. The section numbers originally tracked voting wards within the Village.

The Grievant's reassignment from plowing Sections 7 and 8 occurred during a meeting called by Bruce Boykin, the Employer's Director of Public Works. Boykin called the meeting to address, with unit employees, the Employer's concerns on snowplowing. Boykin prepared a memo summarizing those concerns. The memo, headed "Snowplow Meeting With Union Employees", reads thus:

- 1) Management concerns with clean-up of last 2 snowstorms:
  - a) Snow not pushed back far enough to accommodate mail delivery . . .
  - b) Some cul de sacs not cleaned up after the storm . . .
  - c) Equipment not properly checked by operators before and after each storm:  
(i.e. - Radios and lights left on units that drained batteries . . . after the storm, equipment ran out of fuel during the storm, etc.)
  - d) Slow response to critical areas of the Village:  
(i.e. - Village Hall, Fire Stations, & school areas not cleaned in a timely manner, etc.)
  - e) Operators making too many passes on

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1/ References to dates are to 1993, unless otherwise indicated.

arterial/primary roads before catching  
secondary roads . . .

f) Operators plowing streets out of route  
sequence . . .

2) Equipment assignments/changes for next  
snowstorm . . .

3) Route assignments/changes for next snowstorm:

Section 1 - Dale Weyenberg/Dave Burkel  
Section 2 - Dave Bringe/ Dave Burkel  
Section 3 - Dave Vanlanen  
Section 4 - Jeff Krause/ Dave Burkel  
Section 5 - Ken Pamperin  
Section 6 - Ken Pamperin  
Section 7 - Tom Hermansen  
Section 8 - Mike Butz

4) Standard procedures after each storm:

- After each storm, and on regular time,  
Management requests that all snowfighting  
equipment be washed, inspected for  
necessary repairs and fluid levels of  
each vehicle checked and filled if  
required . . .

5) Breaks during snowstorms . . .

6) Other areas of snowplowing concern . . .

It is not clear if Boykin distributed this memo to unit employees.

It is, however, apparent he read from it during the meeting. The Grievant and Ken Pamperin, the Employer's Street and Sanitation Department Working Foreman and the Union's Steward, testified that Boykin directed the bulk of his concerns specifically to the Grievant. Boykin did not deny he was concerned with the Grievant's work performance, but also stated his concerns were directed at more than one employee. It is undisputed that the Grievant had been plowing Sections 7 and 8 for roughly ten years prior to January 19, and that he has more seniority than Butz. Hermansen's seniority was not discussed.

The Grievant's reassignment to Section 4 moved him to a less desirable route, from his perspective, and required him to use an older piece of equipment. The employees reassigned to Sections 4, 7 and 8 plowed those routes throughout the balance of the winter

of 1992-93.

The Employer roots its concern with a change in route assignments in a memo to Boykin from the Village Administrator, Kevin Anderson, dated December 21, 1992. That memo reads thus:

Our basic plan for removal of ice and snow in mild to moderate snow conditions is quite good. However, if there is any weakness in our plan on attacking the snow, it may be in the area of severe snow conditions.

Snow removal is critical to the Village for several reasons. First of all it is public safety. Fire, Rescue and Police Personnel are in heavy demand during poor weather and we must provide routes for them. School buses must safely carry children to and from school and vehicular traffic must be able to move in a reasonable fashion. Secondly, economics. Businesses must stay open and people must continue to get to work. If not, our snow removal system has failed.

As a Village, we must recognize that we cannot own enough equipment or hire enough people that could take care (of) any possible storm event. We must also recognize that there are other businesses with heavy equipment and trained personnel that may be able to assist . . . us in emergency situations. You need to draw a plan that identifies who has equipment and who would be available to work with our crews in emergency snow situations. Who takes leadership over crews in a snow storm situation and at what point outside crews would be called in to assist.

I would like your recommendations prior to addressing the union with this matter.

Boykin noted that the Employer has prepared snow plowing sections, and is in the process of modifying those sections to reflect the continued urbanization of the Village. He stated that the January 19 meeting reflected this continuing process, and the Employer's ongoing attempt to make the snowplowing process more efficient. That Hermansen and Butz were assigned to Sections 7 and 8 reflects, Boykin noted, the Employer's overriding concern with

efficiency.

Past assignment of routes and duties within routes was covered by the testimony of several witnesses. Pamperin noted that he selected Sections 5 and 6 in 1978, and has been plowing them ever since. The Grievant noted he assumed Sections 7 and 8 as his regular route roughly ten years ago, and did so on the basis of his seniority. It is undisputed that Boykin, either in his present position of Director of Public Works or in his prior position as Assistant Director of Public Works, has addressed the assignment of equipment and snowplowing sections in memos issued to "Public Works Personnel" in November of at least 1986, 1987 and 1988. Each of these memos reflects that Pamperin was assigned Sections 5 and 6 and that the Grievant was assigned Sections 7 and 8, but each also reflects that the Grievant has been assigned to operate different pieces of equipment on those sections.

Generally speaking, the implementation of daily job assignments is undisputed. On at least a weekly basis, Boykin meets with the two Working Foremen and the Chief Mechanic and reviews with them the work duties which must be addressed in the following week. Boykin tracks the performance of any such duties, and may add to them as special needs arise. He does not assume any role in the day to day assignment of routine duties. Pamperin stated he takes the weekly duties and shows them to unit employees under his direction. Those employees then select, by seniority, which duties they wish to assume. Pamperin stated he has followed this means of assignment since at least 1985.

Boykin is Pamperin's direct supervisor. It is undisputed that when Pamperin is not performing duties as a Working Foreman, he performs the same type of duties as other unit members. The Working Foreman's performance of such duties was, in 1986, the subject of a series of grievances. A memo issued by Boykin dated September 9, 1986, indicates the parties agreed that "the Working Foreman would be included on a seniority basis for routine assignments when he was not coordinating work activities."

The parties stipulated that Section 7.04 has been contained in the parties' labor agreement since 1985. It is undisputed that the Employer has sought to remove the provision in each round of negotiations since that date.

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

#### THE UNION'S POSITION

At the hearing, the Union phrased the issue for decision

thus:

Has the Employer violated the collective bargaining agreement by removing the Grievant from Snowplowing Districts 7 and 8 and replacing him with a less senior employee?

The Union contends that the grievance "arose due to the employer's unilateral abandonment of the seniority methods of selecting job assignments mandated by Section 7.04". The record demonstrates, according to the Union, that the following facts are undisputed: (1) Daily job assignments are made by strict seniority; (2) This method of job assignment is a long-standing past practice mandated by Section 7.04; and (3) Winter snow removal route assignments have always been selected on the basis of strict seniority. Against this background, the Union asserts that the Employer's decision, in January of 1993, to assign routes on a non-strict seniority basis caused the grievance.

The Union asserts that it does not dispute the Employer's authority to remap routes, to redistrict, or to assign equipment on routes. The Union argues that the grievance questions the Employer's authority to assign employees once routes have been organized. According to the Union, the Employer must make work assignments on a seniority basis "just like they have always done in the past."

Section 7.04 governs this dispute, according to the Union, and requires route assignment on a seniority basis "so long as there is no efficiency concern." The record will not, the Union asserts, support any Employer assertion that efficiency concerns dictated its January, 1993, route assignments. More specifically, the Union argues that the Employer's concern for "cross-training" employees is both belated and unproven. Viewing the record as a whole, the Union concludes that the January, 1993, route assignment was based on "favoritism."

Acknowledging that Section 25.01 does apply to work assignment, the Union argues that provision applies only where more specific contract language is not present. Since Section 7.04 specifically provides the seniority rights at issue here, the Union concludes that both the contract and proven past practice support the granting of the grievance.

The Union concludes that "the grievance should be sustained, and the grievant allowed to choose, by seniority, the route to which he wishes to be assigned on a daily basis." The Union adds that the "grievant should also be made whole for any losses he suffered as a consequence of the Village's violation of the labor

agreement."

#### THE EMPLOYER'S POSITION

The Employer phrases the issue for decision thus:

Is the Village in violation of the seniority principles for daily job assignments by assigning Employees who have posted to snow removal on a seniority basis to a particular snow removal route?

After a review of the factual background to the grievance, the Employer acknowledges that seniority governs "daily job assignments within the Department of Public Works" but argues that this right extends only to "the selection of the type of work." Thus, according to the Employer, if on a given day snow plowing and brush cutting duties are available, an employee may select, by seniority, which type of duty he wishes to perform, but may not use seniority to determine, within that type of duty, which specific tasks to perform. The Employer contends that the Grievant, having elected to perform snow plowing duties cannot use seniority rights to also select which route to plow.

The Employer asserts that the record establishes that both the Village Administrator and Public Works Director believe "it was critical to the efficient operation of the Department to make specific route assignments for snow removal." To permit employees to select route assignments by seniority would, the Employer concludes, "limit the Village's ability to cross-train Employees . . . (and) would limit the Village's ability to respond in emergency situations by not having more than one operator familiar with the route."

Noting that Section 25.01 grants it the authority to assign and to determine methods of operation, the Employer asserts it has the contractual authority to assign as it did in January of 1993.

Noting that the Public Works Director has "determined that a route reassignment was required for more efficient operation", the Employer concludes that Section 7.04 is inapplicable.

The Employer concludes that it has acted within the scope of its Management Rights and requests that "the Arbitrator issue an award finding that the contract language does not preclude the Village from assigning to an Employee specific routes or tasks within the daily job assignment selected by that Employee."



## DISCUSSION

The issue stated above is more fact-specific than the issues phrased by the parties. The general right to assign under Section 25.01, and the specific limitation of that general right in Section 7.04, pose potentially broad issues. I have posed the issue before me narrowly to avoid unnecessary arbitral intrusion into the operation of the public works department.

Before addressing the parties' dispute, it is important to clarify what is not in dispute. The Union does not challenge the Employer's right to redraw snowplowing sections, or to assign equipment within those sections. Beyond this, the parties have not questioned overtime call-in procedures. What remains in dispute is whether, as the Employer contends, snowplowing a specific section is a duty within the daily job assignment of snowplowing, or whether, as the Union contends, snowplowing a specific section is an essential feature of the daily job assignment. It should be stressed the Union has not argued an employee has an unfettered right to a specific section. It is undisputed that employees can be, and are, assigned to different sections. Rather, the dispute on the Employer's right to assign focuses on whether an employee can select a particular section as a "home" route, for which he is responsible except in non-routine situations.

The parties' dispute implicates the provisions of Subsections A, E and I of Section 25.01 and Section 7.04. The Employer has also pointed to Subsections F and G of Section 25.01, but these subsections are not on point in light of the Union's agreement that it does not question the Employer's right to modify sections.

Section 7.04 is, under the terms of the agreement, the initial focus of this dispute. The general rights of Section 25.01 apply only "(e)xcept as otherwise provided in this Agreement". Examination of the parties' dispute must, then, start with the specific terms of Section 7.04.

Section 7.04 requires that "(s)eniority principles shall apply in daily job assignments" if "such principles do not interfere with the efficient operation of the department as determined by the Department Head or his/her designated representative." Applying this provision to the facts requires a series of determinations. First, it must be determined if a snowplowing section is part of a daily job assignment. If it is not, as the Employer asserts, then Section 7.04 does not apply, and the Employer's general right to assign under Section 25.01 governs the dispute. If it is, as the Union asserts, then it must be determined if the application of seniority interferes with a departmental determination of efficiency.

Each party states a plausible interpretation of what "daily job assignments" are under Section 7.04. As a result, those terms cannot be considered clear and unambiguous. The most persuasive guides to the resolution of contractual ambiguity are past practice and bargaining history, since each focuses on the conduct of the parties whose intent is the source and the goal of contract interpretation.

Evidence of bargaining history is unhelpful. There is no persuasive evidence the parties addressed daily job assignments in bargaining. The Union notes that the Employer has tried unsuccessfully to remove Section 7.04 from the contract, but this begs the issue here, which is to apply that provision to the January 19 reassignments.

Evidence of past practice is, in this case, determinative. Pamperin testified, without contradiction, that he has plowed the same sections since 1978, and used seniority to select those sections. That he plays a significant role in daily job assignment and reports directly to Boykin underscores the significance of his testimony. The Grievant's testimony underscores Pamperin's. He noted he plowed the same route for roughly ten years prior to January 19, and selected that route with seniority. The series of memos Boykin issued in November of 1986, 1987 and 1988 also underscore the practice. Those memos refer to "an equipment assignment program" during the winter season, and do reflect, as the Union acknowledges, that the Employer can assign equipment within routes. Each memo, however, confirms that Pamperin was responsible for Sections 5 and 6, while the Grievant was responsible for Sections 7 and 8.

Beyond this, the memos underscore the difficulty with the Employer's view of the role of seniority in the assignment of duties. Under the Employer's view, snowplowing is the "daily job assignment" and a specific route is a duty, within that assignment, which is assignable without regard to seniority. It is not, however, apparent from any of the memos how or when an employee selected the assignment of snowplowing. Rather, each memo is directed primarily to the operation and maintenance of a given piece of equipment. Nor is there any other evidence to establish how or when employees chose the assignment of snowplowing. If the Employer afforded the employees no such choice, the record is silent on how the Employer used seniority to assign snowplowing duties. Viewed as a whole, the record supports Pamperin's testimony that sections were assigned on a seniority basis as an essential part of a "daily job assignment."

The next determination is whether the Grievant's January 19 reassignment was necessary as a matter of departmental efficiency

as determined by the Employer. Initially, it must be noted that the Employer's efficiency determination cannot be considered unfettered. If the Employer could cite departmental efficiency as a basis to override seniority without demonstrating an objective basis in fact for that concern, the seniority principles which Section 7.04 states "shall apply," would be read out of existence.

The record does not reveal an objective basis in fact for the Employer's efficiency concern in the January 19 reassignments. That the Village is growing and the sections must be modified to reflect the on-going urbanization of the Village can be granted, but has no applicability to the reassignments. Boykin split Sections 7 and 8 among two employees, but the issue posed here is not whether Boykin is authorized to do this, but whether seniority must be applied to the assignment of employees to such sections once they have been modified.

Beyond this, the general efficiency concerns noted in Anderson's memo of December 21, 1992, are not posed on this record. That memo primarily addresses emergency situations. As noted above, overtime call in is not at issue here, and there is no persuasive reason to conclude daily job assignments in emergency situations are posed here. The reassignments effected on January 19 continued from that point on, emergency or not.

Nor will the record support the Employer's contention that the cross-training of employees is the efficiency concern which must override seniority in the assignment of sections. It can be granted that the training of employees on various routes and with various pieces of equipment will enhance the efficiency of the Employer's operation. This concern is not, however, implicated on the facts of this case. Cross-training would, by definition, be applicable for a limited period of time, and would, presumably, be applicable to all, or least several, unit employees. In this case, however, it is not apparent if the reassignments affected any employees other than those who displaced the Grievant. Those assignments were, in any event, indefinite. There is no persuasive evidence of any oversight of the purported training. Rather, the employees simply assumed different sections.

The Employer has also raised efficiency concerns specifically relating to the Grievant. The concerns noted in Boykin's January 19 memo must be regarded as significant. If the Grievant plowed his own street before plowing streets with a greater priority, or deviated from a known route to plow his own street he would be guilty of negligence or willful misconduct. The record on this point is, however, less than clear. More significantly here, the issues posed concern job assignment, not discipline. The Employer did not discipline the Grievant for negligence or willful misconduct, but reassigned him.

Having chosen to reassign the Grievant, the Employer has focused this dispute on Section 7.04. That provision precludes an assignment without regard to seniority. There can be no question that the Grievant was capable of plowing Sections 7 and 8 efficiently. He had done so for ten years prior to January 19.

In sum, Section 7.04 specifically governs "daily job assignments" and requires that such assignments be made by seniority unless the Employer can show a determination of its Department Head or his designee that the application of seniority will interfere with the efficient operation of the department. Such a determination must have an objective factual basis. The parties' past practice establishes that snowplowing sections have been awarded on a seniority basis, and thus constitute an essential part of a daily job assignment. On January 19, Boykin indefinitely reassigned the snowplowing sections of the Grievant and two other employees without regard to their seniority. The efficiency concerns cited by the Employer are, as general statements, valid. None of those concerns, however, have been rooted in the facts surrounding the January 19 reassignment. The reassignments did, then, violate Section 7.04.

At the hearing, each party noted the issue posed was one of contract interpretation. The Union did not pose a remedial issue, and did not present any evidence that the Grievant had suffered financially due to the reassignments. The Union's brief mentions, in passing, a make whole remedy. Because I can see no factual basis for a make whole remedy, the Award below is restricted to a finding of a contractual violation and a cease and desist order. This award essentially determines the contractual violation and its implications.

#### AWARD

The Employer violated Section 7.04 of the collective bargaining agreement on January 19, 1993, by indefinitely reassigning bargaining unit members to different snowplowing sections without regard to the seniority of the reassigned employees.

As the remedy appropriate to the Employer's violation of Section 7.04, the Employer shall cease and desist from making daily job assignments concerning snowplowing routes without regard to seniority. Seniority principles shall apply in routine daily job assignments concerning snowplowing routes except as specifically provided by Section 7.04.

Dated at Madison, Wisconsin, this 3rd day of September, 1993.

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