

BEFORE THE ARBITRATOR

In the Matter of the Arbitration :
of a Dispute Between :
WAUSHARA COUNTY (HIGHWAY DEPARTMENT) :Case 44
and :No. 48402
:MA-7592
WAUSHARA COUNTY HIGHWAY DEPARTMENT :
EMPLOYEES UNION, LOCAL 1824, AFSCME, :
AFL-CIO :

Appearances:

Ms. Renee J. Samuelson, Corporation Counsel, Waushara County, P.O. Box 300, Wautoma, Wisconsin 54982, appearing on behalf of the County.
Mr. Gregory N. Spring, Staff Representative, Wisconsin Counsel 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appearing on behalf of the Union.

ARBITRATION AWARD

Waushara County (Highway Department), hereinafter referred to as the County, and Waushara County Highway Employees Union, Local 1824, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the reporting cite of an employe. Hearing on the matter was held in Wautoma, Wisconsin on August 4, 1993. Post hearing arguments were received by the arbitrator by September 14, 1993. Full consideration has been given to the evidence, testimony and arguments presented in rendering this award.

ISSUE

During the course of the hearing the parties were unable to agree on the framing of the issue and agreed to leave framing of the issue to the arbitrator. I have framed the issue as follows:

"Did the County violate the collective bargaining agreement when it assigned the grievant to report to work at the Wautoma shop?"

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 2 - MANAGEMENT RIGHTS

2.01 Except as otherwise herein provided, the operation and control of the Waushara County Highway Department is vested exclusively in the Employer and all management rights repose in it. These rights include, but are not limited to, the following:

- (a) To direct all operations of the Waushara County Highway Department;
- (b) To establish reasonable work rules and schedules of work;
- (c) To hire, promote, transfer, schedule and assign employees in positions within the Department;
- (d) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- (e) To relieve employees from their duties for lack of work or other legitimate reasons;
- (f) To maintain efficiency of operations;
- (g) To take whatever reasonable action is necessary to comply with state or federal law;
- (h) To introduce new or improved methods or facilities;
- (i) To change existing methods or facilities;
- (j) To determine the kinds and amounts of services to be performed as pertains to operations and the number and kind of classifications to perform such services;
- (k) To contract out for goods or services as long as bargaining unit employees are not on layoff or reduced hours as a result of the subcontracting;

- (l) To determine the methods, means and personnel by which operations are to be conducted;
- (m) To take whatever reasonable action is necessary to carry out the functions of the Department in situations of emergency.

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ARTICLE 6 - SENIORITY

6.01 - Definition: Seniority means an employee's length of continuous service with the employer since his last date of hire within the bargaining unit. Seniority shall not be diminished by approved temporary leaves of absence or layoff.

6.02 - An employee's continuous service record shall be broken by voluntary resignation, discharge, or retirement. Upon return to work after time lost, which does not constitute a break in continuous service, the employee's length of continuous service shall not be affected and he/she shall receive the same fringe benefits that he/she would have received had he/she not lost any employment time. An employee who accepts a non-bargaining unit position within the Department and subsequently returns to the bargaining unit shall maintain his/her bargaining unit seniority earned prior to accepting the non-bargaining unit position.

6.03 - Loss of Seniority: An employee's seniority is nullified:

- (a) if laid off and not recalled to work within eighteen (18) months from the date of layoff;
- (b) if the employee quits or retires;
- (c) if having been laid off and is recalled to work but fails to report at the scheduled time, unless prevented from doing so because of illness or other good cause;

- (d) if the employee is discharged and not subsequently reinstated; or
- (e) if an employee is absent from work for three (3) consecutive working days without notification to and approval by the Employer, unless unable to notify for physical or other reasonable excuse.

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ARTICLE 11 - JOB POSTING

11.01 - Posting: When the Employer deems it necessary to fill a vacancy or a new position, the Employer shall post a notice of such vacancy or new position on the bulletin boards in each shop for a period of five (5) working days. The posting shall contain the desired date of filling the position, the classification of the position, the job requirements, the rate of pay, and space for all interested parties to sign said posting. The position will be filled within fourteen (14) calendar days after selection of the successful applicant, or as may be mutually agreed.

11.02 - Job Award: The most qualified employee applying shall be assigned the position provided that where qualifications are relatively equal, seniority shall become the determining factor. Should no bargaining unit employee apply or qualify, the Employer may hire from outside the bargaining unit.

11.03 - Trial Period: The employee who receives the position shall serve up to a thirty (30) calendar day trial period in the position. When the Employer determines an employee is not qualified or an employee desires to return to his/her former position, within said period, he/she may be returned to his/her former job at his/her former rate of pay with no loss in other benefits. When such a situation occurs, the Employer shall then give the position to the next most qualified employee who signed the posting as outlined in .01 above. This procedure shall continue

until the position is filled permanently. When no present qualified employee applies, the Employer may hire a new employee and place him/her in the position.

11.04 - Notice to Union: The Union President of the local shall be notified in writing, at such time as an employee has been selected to permanently fill a position.

BACKGROUND

Amongst its various governmental functions the County operates a Highway Department. The County is approximately eighteen (18) miles by thirty-six (36) miles and the Highway Department has employes located at three locations. Located on the western side of the County in Hancock, centrally in Wautoma and on the eastern side of the County in Poy Sippi. During the early part of 1992 an employe, Les Wetmore, assigned as a truck driver at the Hancock shop was retiring. On April 23, 1992 the County posted the following job opening:

**WAUSHARA COUNTY HIGHWAY COMMISSION
Robert E. Bohn, Commissioner
Highway 21-East P.O. Box 867
Wautoma, Wisconsin 54982-0867**

April 23, 1992

JOB POSTING
Signing Deadline April 30, 1992

JOB: Class IV

DESIRED DATE OF FILLING THIS POSITION: May 18, 1992

JOB REQUIREMENTS: Please refer to position description

RATE OF PAY: Current wage schedule

APPLICANTS SIGN BELOW

Harvey E. Nigh /s/

Delmer Kemnetz /s/

WAUSHARA COUNTY

POSITION DESCRIPTION

Class IV - Truck Driver

Department:

Highway

Mower Operator
Janitor - Fuel Delivery Date:
State Auxiliary Worker

Function:

Performs a variety of skilled and unskilled labor, and equipment operations. These duties will be involving the maintenance and repair of all roads and right-of-ways in and around the County of Waushara. The duty will also involve the operation and maintenance of County owned equipment.

Distinguishing Features of This Class:

The employee will be responsible for any assigned equipment or roads on a daily basis. Must be a motivated responsible person.

Major Responsibilities: (Illustrative only)

Patch holes and cracks in roads
Work on a paving crew, do cement repair
Work on a sealcoat crew
Plow and salt or sand roads
Maintain restroom areas, cut grass, and repair buildings
Mow grass and weeds in various areas
Cut brush and trees in various areas
Pick up trash and debris in various areas
Repair gravel problems in various areas
Clean, repair, and replace culverts
Erect and remove snow fence
Operate trucks and heavy equipment
Paint and repair signs and guard rail as needed
Remove car-killed animals and debris off road and dispose of them
Change oil, grease, and do normal maintenance on County owned equipment, buildings, and grounds
Clean shops as directed
Deliver fuel to outlying shops and crews
Do all other related work as required by management

Education, Training & Experience:

Some experience in road maintenance and or construction; both grade school and high school diploma or the equivalent; some additional education in heavy equipment operation and maintenance may be helpful.

Knowledge, Ability & Skills:

A clear knowledge of materials and methods used in road repair; the ability to make minor repairs on all County owned equipment, buildings, and grounds; the ability to follow both written and oral instructions, and the ability to remember them; the ability to work alone or with a number of people; and the ability to get along with the general public in a polite, respective manner.

Additional Information

Must have a valid Wisconsin Commercial Drivers License with endorsements for Air Brakes, Combination Vehicles, Tanker, Hazardous Materials, and Doubles/Triples. Must pass a physical exam given by County appointed physicians. Must be able to lift 100 pounds. Must adhere to department work rules and conditions mutually agreed to in negotiated contract.

The job posting was signed by two (2) employees, one of whom was Harvey E. Nigh, hereinafter referred to as the grievant. The grievant at the time of the posting worked out of the County's Hancock shop, was in a higher paid job classification (State Patrol), and lived near Hancock. The grievant was informed by Highway Commissioner Robert Bohn that the individual who was awarded this position would be assigned to work out the Wautoma shop.

The grievant was awarded the position and began working in it on May 18, 1992. From May 18, 1992 to June 2, 1992 he worked out of the Hancock shop. Thereafter he was directed to report to the Wautoma shop. On June 3, 1992 the instant grievance was filed and processed to arbitration in accordance with the parties grievance procedure.

UNION'S POSITION

The Union asserts the County's actions in unilaterally changing the grievant's reporting site violated the collective

bargaining agreement, violated the grievant's seniority rights and that the County's actions were unreasonable and discriminatory. The Union acknowledges the right of the County to establish reasonable rules. However, the Union argues the County acted unreasonably when it directed an employe who lives one and a quarter (1 1/4) miles from the Hancock shop to report to the Wautoma shop, an additional thirty-three (33) commuting miles per day. Particularly when on certain occasions the grievant, upon arriving in Wautoma, then took a County vehicle to the Hancock shop so that he could operate a piece of equipment assigned to the Hancock shop and then at the end of the workday return to the Wautoma shop. The Union contends such actions are unreasonable and not dictated by any mitigating business necessity.

The Union also asserts the County's actions are discriminatory in that the County has directed certain employes assigned to the Hancock shop to drive to the Wautoma shop and back in County vehicles while on the same dates the grievant was required to report to Wautoma in his personal vehicle. The Union points out other employes have taken a pay cut to leave the State Patrol position. In addition, Bohn offered the grievant his previous position after the grievance was filed. The Union also points out that Bohn testified that there was no assigned reporting site on the posting and that all Class IV postings were interchangeable. The Union concludes it was obvious it was the County's intent to retain the grievant in the State Patrol position by making his move to the truck driver position as difficult as possible. The Union finds such actions to be discriminatory.

The Union further asserts the grievant's seniority rights were violated. The Union argues that when Les Wetmore retired a vacancy occurred in the Hancock shop. The Union stresses that the grievant signed the posting because he wanted to leave the stressful State Patrol position but wanted to remain assigned to Hancock. The Union argues the grievant, because of his seniority, had a right to report to the Hancock shop before less senior employes. The Union points out that employe Bill Paterson, who has eight (8) years less seniority than the grievant has reported to the Hancock shop and is assigned a county vehicle when needed to report to the Wautoma shop. The Union contends a validation of the County's actions would negate seniority and allow management to continue to make site assignments in an arbitrary and capricious manner.

The Union would have the Arbitrator sustain the grievance to protect the grievant's seniority rights and to make the grievant whole.

COUNTY'S POSITION

The County contends it followed the proper posting procedure as required by the collective bargaining agreement. The County also contends the grievant knew the position was to be based out of Wautoma and signed the posting anyway. The County points out that when a similar situation occurred in 1989 the grievant turned in a letter requesting his name be removed from the seniority list. The County argues that based upon this history, when the grievant signed the posting knowing it would require a change in reporting site, the County could rely on the fact that the grievant had no objection to a change in reporting site. The County also points out that if the grievant had somehow misunderstood the change in reporting site, or, decided he did not like the change in reporting site the agreement permits the employe to return to their old position during a thirty (30) -@ trial period. The County points out the grievant did not exercise this option.

The County also points out the collective bargaining agreement is silent concerning work site and mileage. The County argues that Article 2, Management Rights, clearly gives the County the right to assign work. The County further asserts it is not prohibited by the collective bargaining agreement from completely closing the Hancock shop and having all employes report to the Wautoma work location. The County points out that it is not unusual for employes assigned to report to one site to drive County vehicles to another site at the commencement of the work day. The County points out this is the nature of highway work, employes go to where the work is. The County stresses it must be allowed to conduct this aspect of its operations.

The County would have the Arbitrator deny the grievance.

DISCUSSION

A careful review of the parties' collective bargaining agreement demonstrates there is no requirement in the agreement which directs the County to identify the work site location (Hancock, Wautoma or Poy Sippi) when it posts a vacancy. Nor is there a provision in the agreement which allows employes to exercise seniority rights in the determination of work location preference. The agreement is also silent concerning any provision which would require the County to keep a specific position at a specific work site. Thus there is no requirement in the collective bargaining agreement which mandates that the County fill a position which was vacated by a retired employe at the same work site the employe retired from.

The Union claims that the County violated Article 2 of the agreement because it was unreasonable for it to direct the

grievant to report to one work site and then drive a County vehicle to another work site in order to operate County equipment located at that work site, then, to return to the first work site in a County vehicle. In effect this Union argument attempts to place a standard of reasonableness on the County's ability to assign work. However, the grievant only cited four occasions during a one month period where it would be more convenient for him to have reported to the Hancock work cite. If such assignments were occurring daily to the grievant the Union's arguments concerning the reasonableness or discriminating nature of the County's actions may have some merit. Herein the burden is on the Union to demonstrate that the County's actions were unreasonable or discriminating. Four occasions in a one month period does not establish that the County's act of assigning the grievant to work out of the Wautoma work site as unreasonable or discriminating. What it does establish is that the vast majority of the work the grievant is assigned to do is out of the Wautoma work site.

The grievant was also advised before he signed the posting that the open position was going to be assigned to the Wautoma work site. Knowing this, had the grievant not signed the posting and had the County then assigned the job to the Hancock job site, the grievant would then have a had a basis for claiming the County had discriminated against him. However, the grievant was informed prior to the posting the job was to be located in the Wautoma work site. Even though the grievant worked at the Hancock work site for the first two (2) weeks after he was awarded the position there is no evidence the County discriminated against the grievant when it assigned him to work at the Wautoma work site. The record only demonstrates the County did what it originally informed the grievant it intended to do, assign the position to the Wautoma work site. Even if the grievant is sent to Hancock once a week, the majority of his duties are still out of the Wautoma work site and it would not be reasonable to expect the County to transport the grievant in County vehicles four (4) times a week to the Wautoma work site.

There is also no basis to conclude the grievant's seniority rights have been violated. The collective bargaining agreement does not contain a provision which allows employes to exercise seniority rights over work site locations in their job classifications. Nor is there any evidence the parties have a binding past practice which grants an employe the right to exercise seniority over work site location. Absent a specific provision or a practice which allows employes to exercise seniority rights on work site preference there is no basis to conclude the grievant's seniority rights had been violated by the County.

Based upon the above and foregoing, and the testimony, evidence and arguments presented the undersigned concludes the County did not violate the collective bargaining agreement when it assigned the grievant to report to the Wautoma work site. The grievance is denied.

AWARD

The County did not violate the collective bargaining agreement the grievant to report to the Wautoma work site. The grievance is therefore denied.

Dated at Madison, Wisconsin this 29th day of October, 1993.

By Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator