BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
IOWA COUNTY EMPLOYEES, LOCAL 1266, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO	Case 81 No. 52029 MA-8816
and	
IOWA COUNTY, WISCONSIN	

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of Iowa County Employees, Local 1266, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Howard Goldberg, Brennan, Steil, Basting & MacDougall, S.C., Attorneys at Law, 433 West Washington Avenue, P.O. Box 990, Madison, Wisconsin 53701-0990, appearing on behalf of Iowa County, Wisconsin, 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 Mitchell Zablotowicz, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on March 3, 1995, in Dodgeville, Wisconsin. The hearing was not transcribed. The parties entered oral argument at the close of the March 3 hearing, and chose not to file written briefs.

ISSUES

The parties stipulated the following issues for decision:

> Did the Employer violate the collective bargaining agreement by the incidents which took place on October 27, 1994?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE III - MANAGEMENT RIGHTS

3.01 The County possesses the sole right to operate the County and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

A) To direct all operations of the County;

B) To establish reasonable work rules and schedules of work;

C) To suspend, demote, discharge and take other disciplinary action against employees for just cause;

. . .

3.02 The above rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Union, and provided further, that the above rights shall be used fairly and reasonably.

ARTICLE IV - GRIEVANCE PROCEDURE

4.01 A grievance shall mean any dispute concerning the interpretation or application of a provision of this Contract, and shall be handled in the following manner:

. . .

4.04 STEP 3:

. . .

Arbitration Procedure: . . . The Arbitrator shall make a decision on the grievance, which shall be final and binding on both parties. Only questions concerning the application or interpretation of this Agreement are subject to arbitration. . . . The arbitration board shall have no power to modify, add to or delete from the express provisions of this Agreement.

BACKGROUND

The grievance, numbered 0010 and filed on October 31, 1994, 1/ states the factual background thus:

> Improper safety procedures used on job site. Signs not put up prior to job being started. No Flagmen -- County Patrol Supervisor Don Bach & Commissioner Glenn Thronson both knew no flagmen were at job site.

The grievance form states the "Article or Section of contract which was violated if any" thus: "1981 Work hand book Rule 8 and 13." The grievance form states the "corrective action desired" thus:

> Monthly safety meetings to be instituted on a specific date and time and management personnel who ignore rules in the handbook of 1981 be disciplined according to same.

Bach and Thronson responded to the grievance in a letter, dated November 4, which states:

> Regarding your grievance #0010 . . . management always has been and will continue to be very safety conscious. There have been several directives put out to all personnel concerning work zone safety. We have also given all lead persons the right to provide safety measures as they see fit.
>
> As for your request that management be subject to the employee handbook, management has a handbook of its' (sic) own. It is these rules that we have to live by and we do our best to do so.

John Willborn, a Union Steward, responded to Bach and Thronson in a letter dated November 9, which states:

1/ References to dates are to 1994, unless otherwise noted.

> (Y)ou stated that management always has been and will be very safety conscious. With all do (sic) respect we question the validity of this statement citing that on the day of the infraction both you and Patrol Superintendent Don Bach drove by the work site on separate occasions and did nothing to correct the situation of not having a flag person for the work being performed on the road. We cannot believe that the safety and welfare of the employees is being given the proper consideration in view of that fact. With approximately ten trucks going up and down the road and at times as many as a half dozen of those trucks stopped on the road waiting to be unloaded, In addition the lead persons vehicle, a grader, and the oversized shoulder machine all being on the road and moving in all directions it is inconceivable that anyone would feel this was a safe environment and not in need of all possible safety precautions necessary.
>
> The grievance was filed to serve notice that the directives handed out concerning safety have not been adhered to on a number of jobs throughout the year! This brings us to the statement in your response concerning the lead persons being given the right to provide safety measures as they see fit. This statement concerns us deeply. We are not willing to submit to unacceptable provisions made by lead persons whose decisions put our lives and the lives of others in jeopardy.
>
> With regard to the response on the handbook, we request that a copy of management's handbook be provided at the Highway Committee Meeting of which we now formally ask to be put on the agenda so that a discussion between concerned parties involving grievance #0010 may occur in hope of finding an agreeable solution.

The grievance was discussed at a Highway Committee meeting, and in a letter to the Grievant dated December 2, James C. Murn, the Committee Chairman responded thus:

> You referred to the 1981 Highway Employee handbook in your grievance dated October 27, 1994. This handbook is no longer in effect. You were given a revised handbook on August 11, 1994 and this is what you should be using for reference.

> The management handbook referred to in Mr. Bach's and Mr. Thronson's letter of November 4, 1984 is the Iowa County Personnel Policies of which governs all Iowa County Management employees.
>
> In the future, Management will make every attempt possible to prevent this from happening again and to provide safety measures as they see necessary.
>
> For the above reasons, Grievance No. 10 is respectfully denied.

Rules 8 and 13 of the 1981 handbook referred to in the grievance form read thus:

> April 3-7, 1981
>
> Commissioner Elden Rule, Patrol Sup't Harvey Bryant, and Officers for the Union met and discussed guidelines for progressive disciplinary action. Following is a list of offenses and action to be taken.
>
> . . .
>
> 8. Violation of Work Rules. (Included are failure to use hard hats, vests, placing signs, and usual safety equipment)
>
> . . .
>
> 13. Poor Performance.-
> 1st offense-Oral reprimand
> 2nd offense-Written reprimand
> 3rd offense-1 day off without pay

The remaining factual background is best set forth as an overview of witness testimony.

The Grievant

The Grievant has been employed by the County for roughly six years, serving as a Patrolman, Oil Crew Leadman and Truck Driver. He noted his belief that Flagmen should be

used "all the time," and noted his understanding that the County has given Leadman discretion to determine when Flagmen should be assigned at a job site.

On October 27, the Grievant was assigned to drive a dump truck to a work site on County Highway K, north of Barneveld. He could not recall exactly what work was being done, but thought the crew was "shooting and covering" or "shimming" that day. While driving to the job site, the Grievant heard, over his two-way radio, the Leadman on the job site, Leo Klostermann, request Bach to assign Flagmen to the job site. Bach responded that he would try to get Flagmen to the site as soon as possible. When the Grievant arrived at the job site, he noted that no Flagmen had been assigned. As the day progressed, he noted that both Thronson and Bach viewed the job site. During the course of the day, the Grievant overheard a radio communication between Thronson and Klostermann during which Thronson informed Klostermann that no Flagmen were available, and Klostermann responded that he would try to get along without them. The work on Highway K continued into October 28, but on that day Flagmen were assigned to the site.

The Grievant acknowledged that he, as other truck drivers, carries flags in his truck. He did not use those flags on October 27, and did not offer to serve as a Flagman. He also acknowledged that Klostermann has the independent authority to assign workers to serve as Flagmen. The Grievant noted that he does not talk to Klostermann much, did not talk to Klostermann on October 27, and saw no need to do so.

Glenn Thronson

Thronson serves as the County's Highway Commissioner. Thronson noted that the Highway office received Klostermann's request for Flagmen. Because no employes were available for the assignment, none were sent. He noted Klostermann had the authority to assign any available employe on the site to serve as a Flagman. Beyond this, he stated Klostermann had the authority to shut the job down if he felt it could not be made safe. He did not feel Klostermann, who is a member of the bargaining unit, would be subject to discipline for doing so.

Thronson noted that the work being performed on October 27 was shouldering work, which is a fairly fast-paced operation. He viewed the job site early in the afternoon, and noted that shouldering signs were up and that the work, at that point, was on straight and flat terrain. He acknowledged that the Department does not maintain written safety rules regarding Flagmen. He felt this area was best governed by the common sense of a Leadman who, he assumed, would factor in the type of road, size of road, volume of traffic and terrain as relevant factors in determining whether to assign Flagmen. He stated his belief that the County provided its employes with relevant safety training.

THE PARTIES' POSITIONS

The Union contends that the Employer failed to follow its own safety rules by failing to have Flagmen present for the shouldering work performed on October 27. Noting Klostermann has the authority to assign Flagmen, and that he requested them for the job, the Union concludes that the failure of Bach or Thronson to assign Flagmen is apparent. Whatever duty Klostermann had to make the assignments was fulfilled, according to the Union, when Bach informed Klostermann that Bach would get Flagmen to the job site. Bach and Thronson are, according to the Union, the Employer representatives who failed to respond to the safety requirements of the shouldering work. Noting that Section 3.01 states the Employer's management rights, and imposes on the Employer a duty to exercise those rights "fairly and reasonably," the Union asserts that the Employer's unreasonable actions of October 27 fall well within the contractual definition of a grievance at Section 4.01. To conclude that the grievance does not fall within Section 4.01, according to the Union, thwarts an effective and bargained remedy and makes a mockery of the principle of "work now grieve later." Declining to pursue the stated request of the grievance for discipline of responsible management representatives, the Union asserts that the entry of a cease and desist order constitutes the remedy appropriate to the Employer's violation of Section 3.01.

The Employer contends that the grievance is a Union attempt to enter into a domain it is not entitled to enter. The grievance, according to the Employer, improperly seeks to micro manage job sites with non-management personnel; to compel discipline of management representatives; to compel safety meetings; to determine the rules governing administrative personnel; and to insert individual unit employes as the managers of job sites. Permitting this intrusion into management rights is, according to the Employer, both improper and fiscally irresponsible. Noting Klostermann has broad discretion over the management of a job site, the Employer asserts his absence as a witness undercuts the force of the Grievant's assertion of safety concerns. Thronson did not fail to respond to the situation, according to the Employer. Rather, he unsuccessfully attempted to secure Flagmen, then entrusted Klostermann to deal with the work site. Klostermann could have shut the job down if it was unsafe, but chose not to. The Employer concludes the site was not as unsafe as the Grievant and Union contend. That the Grievant is personally motivated in this grievance is demonstrated, the Employer asserts, by his failure to raise his concerns to Klostermann. Beyond this, the Employer contends the grievance states no claim litigable under Article 4. The Employer asserts that in the absence of such a claim, there is no arbitral authority to issue a remedy in this case. At most, the grievance states no more than the Grievant's "bitter tears" over a situation which was rendered unsafe less on the roadway than in his imagination. Because there is no appropriate grievance, there can be no remedy ordered.

DISCUSSION

The issues are stipulated, but the parties dispute their scope. The Employer argues the grievance poses no issue remediable through arbitration. This is less a contention that the grievance fails to meet the legal standard of arbitrability than that the grievance poses no facts

meaningfully addressable through arbitration. This poses a more subtle point than the legal standards governing substantive arbitrability, and is difficult to address without an examination of the processing of the grievance.

Both as a practical and as a legal matter, the steps in the grievance procedure serve to air work place concerns and to mold those concerns into disputes resolvable through arbitration. The concerns brought through this process can run from personality to policy conflicts. The path by which larger work place concerns are translated into disputes resolvable in arbitration can be tortuous. At its worst, this translation can rework a dispute to the point that the concerns underlying the dispute and those addressed by an award share only a passing resemblance. At its best, the process can turn ill-defined and ongoing conflict into a resolvable difference.

As filed, Grievance 0010 is narrow on its factual allegations, but sweeping on its remedial request. The processing of the grievance reflects this. The Employer's November 4 response focuses on the grievance's broad remedial allegations, noting that the grievance challenges overall departmental management more than its response to the events of October 27. The Union's November 9 response focuses both on the events of October 27 and beyond: ". . . the directives handed out concerning safety have not been adhered to on a number of jobs . . ." The Highway Committee's December 2 response highlights the tension in defining the dispute by noting that the Employer "will make every attempt possible to prevent this from happening again" then denying the grievance. This response acknowledges some fault for the events of October 27, but denies the grievance to clarify that the Committee rejected any broad challenge to the management of its department. In sum, from the initial filing of the grievance, the dispute has shown a basic tension between a sweeping challenge to department management and a specific focus on the events of October 27.

This underlying tension is significant as a contractual matter. Section 4.01 defines a grievance as a "dispute concerning the interpretation or application of a provision of this Contract." Section 4.04 restricts an arbitrator's authority to "the express provisions of this Agreement." As a contractual matter, then, the parties' agreement narrows the range of disputes resolvable through arbitration. The broader ramifications of the grievance are eliminated through the operation of these sections. The Work Rules the grievance seeks to apply against Bach and Thronson as a disciplinary matter are not addressable here. Section 3.01 B) permits the Employer to promulgate "reasonable work rules," but the section is directed to rules governing the conduct of unit, not management, employes. The grievance seeks "monthly safety meetings," but cites no contract provision to address this point. Beyond this, the facts of the grievance are rooted in the events of October 27, which pose no issue regarding safety meetings. The Union's November 9 letter asserts ongoing safety violations, but whatever contract interpretation issue is posed here is rooted in the events of October 27.

Read together, Sections 4.01 and 4.04 limit the scope of Grievance 0010 to the events of October 27. The Employer's contention that the grievance poses no remediable issue is most

persuasive when viewed against the more sweeping allegations of the grievance. It is less persuasive as a challenge to the arbitrability of the specific safety issue posed by the absence of Flagmen on October 27.

The Union's contention that Section 3.02 encompasses this specific safety issue is persuasive. The issue posed is whether the Employer's failure to assign Flagmen to the job "fairly and reasonably," within the meaning of Section 3.02, exercised the authority granted it under Section 3.01. The Employer contends this leads to a fruitless inquiry, since the arbitration process cannot move as swiftly as daily job assignments. The persuasive force of this contention must be granted, for it underscores that the circumstances requiring the assignment of Flagmen will inevitably vary. It is less persuasive when applied to the procedures by which Flagmen are assigned, and by which the absence of Flagmen is challenged. Those procedures should not, presumably, vary over time, but should reflect the stability of the work assignment process.

Accepting the Employer's argument does not warrant finding the grievance not arbitrable. Doing so would force the dispute into an undesirable form. The Grievant could have posed the issue by refusing to work. This would, however, push him toward an act of insubordination, addressable through the Employer's Section 3.01 C) disciplinary authority. The underlying validity of the Grievant's safety concerns would be posed through the application of the just cause standard. This is, at best, an awkward vehicle to pose a safety issue. While Grievance 0010 risks posing an overbroad issue, that risk is addressable through an interpretation of Section 3.02, read with respect for Sections 4.01 and 4.04. This is preferable to ignoring the safety issue posed under Section 3.02, and encouraging self-help as a means to pose safety issues.

The safety issue posed is the failure of the department to assign Flagmen to the Highway K job site on October 27. Even narrowed to this point, the sweeping breadth of the grievance poses a problem. The Grievant did testify that Flagmen should be assigned "all the time." Grievance 0010 cannot, however, be persuasively read to pose so large an issue. Patrolmen are assigned to drive sections of roadway to check for obstructions, such as dead animals, branches, etc. Such work can be performed alone. Taken to its logical extreme, the Grievant's testimony implies that the Employer cannot assign any work to a crew of less than three employes -- one to work, and two to flag. To be meaningful and addressable under Sections 4.01 and 4.04, Grievance 0010 must be restricted to the events of October 27.

Stripped to the events of October 27, there is no dispute that Flagmen were necessary to the work on Highway K. No management personnel on or after October 27 denied the necessity of assigning Flagmen to the site. Employes were so assigned on October 28. Bach's statement to Klostermann that Flagmen would be assigned to the site, if anything, worsened the situation on October 27 by making it appear such an assignment was imminent. The Union contention that this sequence of events cannot be characterized as a fair and reasonable application of the Employer's authority has been proven. This establishes a violation of Section 3.02.

The issue now posed is remedy. The Union seeks a cease and desist order. The Employer asserts this is a futile gesture, since the events of October 27 will not be repeated and were fully addressed by the Committee's December 2 letter. The Employer also notes that the Grievant's conduct on October 27 belies any finding of a safety violation.

Each party makes persuasive points, and the Award entered below seeks to balance them by stating the violation involved, then distilling from the record the procedures which should have been followed on October 27.

The balance sought by the remedy reflects the difficulty of reconciling the arguments of each party to the evidence. The Employer's contention that the Grievant's conduct must be considered in creating a remedy is persuasive, but its assertion that no remedy should be entered is not. The Union's request for a clear statement of the violation is persuasive, but the assertion that the violation warrants a broad cease and desist order is not.

To explain the balance sought in the Award, it is necessary to examine the impact of the Grievant's conduct on October 27. The assertion that the Employer permitted an ongoing and significant safety hazard to take place on October 27 must be balanced against the Grievant's willingness to watch the work proceed without offering to flag, or discuss his concern with his Leadman. The Grievant testified that he did not see this as his responsibility and that he and Klostermann do not communicate well together. This testimony, however, means either that he values such points above unit-members' safety or that the events of October 27 did not pose so stark a threat that he was willing to let these non-safety based considerations guide his behavior. The latter conclusion is better rooted in the evidence. Klostermann's, Bach's and Thronson's conduct all square with the Grievant's. No one saw the Highway K site as so unsafe that work could not proceed without Flagmen. Thus, the Grievant's conduct minimizes the degree of danger posed on October 27. It does not, however, follow from this that no safety violation was posed. No unit or management personnel familiar with the work denied the desirability of having the site flagged. In sum, the Grievant's conduct is a valid remedial consideration, but affords no basis to deny the creation of a remedy.

The Union seeks a cease and desist order which the Employer challenges as moot and futile. The Union's position that arbitral determination of a safety violation can deter future problems in a way internal procedures cannot is persuasive. It is apparent that broad labor/management differences swirl around this grievance. Presumably, the determination of a disinterested third party can underscore the non-partisan elements of the dispute.

The Award does not, however, follow a standard cease and desist order format, which is more typical of prohibited practice litigation. This reflects a number of complicating factors. A cease and desist order is often posted to remedy any unit-wide implications of an employer's conduct. In this case, however, the Grievant chose not to communicate his concerns to Klostermann specifically or to unit members generally. The dispute is, then, a difference of opinion on a specific safety issue, not an ongoing issue of unit-wide concern. Thus, the Award contains no posting requirement. The substance of the Award states the specific Employer conduct violating Section 3.02, but does not include a broad cease and desist requirement. The statement of the wrongful conduct reflects that the Committee's December 2 letter constitutes a less than direct acknowledgement of any wrongful conduct. The absence of a broad cease and

desist requirement reflects the impossibility of defining the situations requiring Flagmen or of assuming that the facts of October 27 will be repeated. The Committee's December 2 letter notes "Management will make every attempt possible to prevent this from happening again." There is no persuasive basis to doubt the underlying good faith behind this statement, and thus no reason to state a broad cease and desist requirement in the Award.

The balance of the Award concerns the procedures the Grievant should have followed to voice his safety concern. This underscores the significant role his conduct has played in the processing of the grievance, and the need to highlight the flaws in proceeding in that manner.

The most noteworthy of the flaws in the October 27 response is that the Grievant did not pose his safety concern through the departmental chain of command. This precluded any hope of a swift remedy for the problem. Klostermann, a unit member, is the first step in that chain of command. The Employer indicated, to the apparent surprise of at least some of the Union's representatives, that Klostermann had the authority to shut down the Highway K work site on October 27 if he felt it could not be made safe. There is no reason to doubt his authority to do so, and he thus becomes the necessary first step to any meaningful response to a safety issue. The Grievant's unwillingness to alert Klostermann to his concerns is the most fundamental flaw in the events of October 27. The Union's November 9 letter indicates it is unwilling to concede the reasonableness of Klostermann's discretion. Whatever this may say of other factual situations, it has no persuasive force applied to the events of October 27. As a general procedural point, the failure to put the issue to Klostermann precluded any hope of a timely remedy. Beyond this, the Grievant's conduct indicates he, no less than Klostermann, was willing to have the work proceed without Flagmen. If the Union wishes to dispute Klostermann's judgment, it must first advise him a dispute exists. Challenges to his exercise of discretion should follow the chain of command, presumably Bach and then Thronson.

Disputes over the Leadman's exercise of discretion can be challenged through the grievance procedure. That procedure affords only after-the-fact relief in "work now, grieve later" types of disputes such as that posed on October 27. Immediate concerns of life-threatening situations can pose the stark issue of self-help. Extended discussion of such points would be unwarranted here, for the events of October 27 do not rise to that level. If the Union took the position they did, the Grievant's willingness to observe the work without taking any action would be unconscionable. He would have sat as a passive witness to an immediate threat to the safety of his co-workers. In any event, a refusal to work on October 27 should have been preceded by an offer to flag. The act of refusing to work should be reserved for life-threatening situations in which all other avenues have been exhausted.

The Award entered below distills these general considerations into a more direct statement of the Employer's wrongful conduct and of the procedures which should have been followed on October 27 to meaningfully pose the safety issue. Whatever reservations the Union may have on following the chain of command in voicing safety issues, that chain of command is indispensable. It affords a chance for the safety issue to be addressed immediately, and assures any safety issued

to be addressed in arbitration will focus on the reasonableness of management's exercise of discretion. The processing of Grievance 0010 focuses less on the exercise of management discretion than on an attempt to substitute the Grievant's views for Klostermann's.

AWARD

The Employer did violate the collective bargaining agreement by the incidents which took place on October 27, 1994.

The Employer's failure to provide Flagmen to the Highway K work site on October 27, coupled with its failure to promptly advise the work site Leadman of the unavailability of employes to serve as Flagmen constitute an unfair and unreasonable application of its management rights in violation of Section 3.02.

On October 27, the Grievant, as an employe aware of a safety violation, should have advised the Leadman of his belief that Flagmen were needed, then followed the departmental chain of command to communicate any disagreement with the Leadman's response. The filing of a safety grievance should, whenever possible, follow an attempt to address safety violations within the Highway Department's chain of command.

Dated at Madison, Wisconsin, this 28th day of April, 1995.

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