BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

RICHLAND COUNTY PUBLIC EMPLOYEES' UNION, LOCAL 2387, AFSCME, AFL-CIO

and

RICHLAND COUNTY

Case 110
No. 51784
MA-8739

Appearances:

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Peter L. Albrecht, appearing on behalf of the County.

ARBITRATION AWARD

Richland County Public Employees' Union, Local 2387, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Richland County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the County, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Richland Center, Wisconsin, on January 9, 1995. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on April 6, 1995.

BACKGROUND:

Each summer the County hires three or four seasonal employes to perform the additional duties that normally occur in the Highway Department during the summer, as well as to fill in for vacationing employes. Seasonal employes are paid at the wage rate set forth under the part-time classification. Seasonal employes assist full-time employes and perform tasks such as mowing grass, leveling black top when it is being laid, flagging traffic, painting bridges, maintaining parks and other duties wherever needed.

In 1994, a Mr. Pauls retired from a position of Parks Maintenance. The job was posted

and a bargaining unit employe successfully posted for it but later posted to a different job. Another bargaining unit employe posted for it but after working the job for a short time, returned to his former position. The job was assigned to another bargaining unit member while the vacancy was posted. The County eventually decided not to fill the position and the duties were assigned during the summer of 1994 to a seasonal employe, Eric Kinney. His duties were to mow, pick up around the park and make repairs.

An employe classified as a truck driver was assigned to Truck #21, a tandem axle dump truck. In the summer of 1994, the County purchased a new tri-axle dump truck and this employe was assigned the new vehicle. Truck #21 was posted but no one bid for it. When seasonal employes were hired, Phil Plonka, a seasonal, was assigned to drive Truck #21. Both Kinney and Plonka were paid at the part-time rate set forth in the contract. On or about August 1, 1994, the Union filed a grievance alleging that Kinney and Plonka should receive the higher rate of pay for working in the classification established for the posted positions. The County denied the grievance and it was appealed to the instant arbitration.

ISSUES:

The parties stipulated to the following:

> Did the Employer violate the collective bargaining agreement when it failed to pay the two seasonal employes in question the "out of classification" pay during the summer of 1994?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE I - RECOGNITION

> 1.01 The County hereby recognizes the Union as the exclusive bargaining representative for the purposes of conferences and negotiations on questions of wages, hours, and conditions of employment for all employees of the Richland County Highway Department, but excluding the Highway Commissioner, the Patrol Superintendent, all craft employees, supervisors, and all other employees of Richland County, as certified by the Wisconsin Employment Relations Commission on November 29, 1971.

. . .

ARTICLE VII - SENIORITY

7.01 A regular full-time employee is defined as an employee hired to fill a regular full-time position in the job classification schedule attached to this Agreement.

7.02 A regular part-time employee is defined as one who is regularly scheduled to work a lesser number of hours than a full-time employee.

7.03 A temporary employee is one who is hired for a specified period of time and who will be separated from the payroll at the end of such period.

7.04 A seasonal employee is on the active payroll only during the season in which his/her services are required.

. . .

ARTICLE IX - WAGES

. . .

9.04 All employees in the bargaining unit who are temporarily working in a higher paid position for two (2) hours or more shall receive the higher rate of pay while working in said positions.

. . .

UNION'S POSITION:

The Union contends that Mr. Kinney and Mr. Plonka are "seasonal employes" as that term is defined in the parties' collective bargaining agreement. The Union points out that seasonal employes are covered by the terms of the contract under the recognition clause. The Union argues that Mr. Kinney and Mr. Plonka worked in higher paid positions in the summer of 1994. It submits that seasonal employes perform roadside mowing, levelling black top, flagging traffic and painting bridges and are paid in pay grade IX of the wage schedule. It notes that both the Parks Maintenance and Truck #21 positions were posted and ultimately went without bidders and these positions are paid in pay grade VII of the wage schedule. It asserts that Mr. Kinney performed all

the duties of Park Maintenance and Mr. Plonka performed all the duties assigned to Truck #21. The Union claims that Mr. Kinney and Mr. Plonka worked in higher paid positions and should have been paid in accordance with Sec. 9.04 of the parties' agreement. It maintains that this provision requires the County to pay grade VII rates to Mr. Kinney and Mr. Plonka.

The Union states that it is not questioning the County's decision not to permanently fill the positions in question nor is it asserting that the County was obligated to have the duties of the positions performed. It insists that because it assigned these duties to the seasonal employes, the language of the contract determines the rate of pay.

The Union cites Pierce County, Case 91, No. 48373, MA-7582 (Jones, 7/94) in support of its position. It notes that Arbitrator Jones rejected the employer's assertion that seasonal employes are to be paid seasonal wages, no matter what duties they are assigned. It points out that only regular employes receive holiday benefits, sick leave and bereavement leave, yet all employes receive out-of-classification pay. It alleges that the parties knew how to tailor provisions to particular classes of employes and they did not do so to out-of-class pay so no limitation should be read into it. It asks that the grievance be upheld and the County make the employes whole by paying them the out-of-classification pay for the summer of 1994.

COUNTY'S POSITION:

The County contends that the Union has waived its right to claim that seasonal employes are entitled to higher classification pay under Sec. 9.04. The County argues that for the past fifteen years, seasonal employes have been paid at the straight part-time rate without regard to the fact that the work performed by them was work assigned to full-time employes. It claims that during this fifteen year period the Union has never grieved nor complained about the payment of this rate. The County submits that seasonal employes have never been paid higher classification pay under Sec. 9.04 and the Union's inaction or acquiescence constitutes a waiver of their right to allege any violation of Sec. 9.04. It argues that it would be inequitable to the County to suddenly require such pay when the Union had acquiesced in the payment of the part-time rate.

The County contends that Sec. 9.04 refers to "positions," whereas Appendix "A" refers to "classifications." It insists that the County has considered "seasonal" to be a position in and of itself. It supposes that the Union interprets "position" to mean "classification" but under this interpretation any time a seasonal employe performs work that may fall under the job duties of another classification, the seasonal employe should be paid at the higher rate. With such an ambiguity, the County maintains the past practice must be examined to discern the meaning of the contract. The County takes the position that a consistent practice of fifteen years, along with the Union's acquiescence, forms a binding past practice which supports the County's interpretation of Sec. 9.04.

The County contends that the Union's interpretation of Sec. 9.04 would lead to absurd results because under the Union's theory, seasonals would always be paid a higher rate. The County points out that seasonals are hired to help regular employes with excess work load and perform the duties that are performed by regular full-time employes. The County claims that under the Union's interpretation, a seasonal employe performing a number of different tasks each day would be entitled to different rates of pay for each task performed which would be impossible to monitor and be unworkable. It furthers asserts that seasonal employes would never receive the rate set forth in the wage schedule for part-time employes, thereby making that provision superfluous.

In conclusion, the County maintains that seasonals are hired to fill in where needed and are paid a separate rate, i.e., that of the seasonal employe. It insists that seasonals are not assigned to a different position as required under Sec. 9.04 because a seasonal's position is to fill in or assist another employe. It asks that the past practice of the last fifteen years be followed and the grievance dismissed.

UNION'S REPLY:

The Union denies that it waived its right to claim that seasonal employes are entitled to out-of-class pay. It admits that it was aware that seasonals were paid the part-time rate but claims that it had no knowledge that seasonal employes ever "worked temporarily in a higher paid position for two (2) hours . . ." for the provisions of Sec. 9.04 to kick in. It maintains that inasmuch as it had no knowledge of previous violations of Sec. 9.04, it never waived its claim and is not estopped from asserting the instant grievance.

The Union submits that the facts of the instant case distinguish it from past circumstances in that the seasonals were not performing a few activities of a higher rated position but rather they replaced a full-time regular employe and performed all the duties of the employes they replaced. It claims this did not happen in the past, so no past practice applies. Additionally, it argues that the language of Sec. 9.04 is clear and unambiguous and past practice cannot be used to contradict clear contract language.

It submits that "all" in Sec. 9.04 includes seasonal employes and alleges the County violated this provision and the employes must be made whole for the County's failure to live up to its contractual obligations.

COUNTY'S REPLY:

The County distinguishes the decision in Pierce County, cited by the Union, on the grounds that the parties in that case stipulated that no past practice of paying seasonal employes at

a straight time rate existed. It argues that a past practice exists in the instant case and that any argument to the contrary is not credible. The County insists that it followed the past practice developed over the past fifteen years and the Union's acquiescence constitutes a waiver of any rights to assert wrongdoing on the part of the County. It asks that the grievance be denied.

DISCUSSION:

The issue presented in this case is whether Sec. 9.04 applies to seasonal employes. Sec. 9.04 states as follows:

> 9.04 All employees in the bargaining unit who are temporarily working in a higher paid position for two (2) hours or more shall receive the higher rate of pay while working in said positions.

Certainly, the reference to "all employes" is broad enough to apply to seasonal employes and Sec. 9.04 does not expressly exclude them. Arbitrators have held that past practice may amend the clear language of the contract where the past practice is definite, certain and intentional. 1/

The County has hired seasonal employes for at least the last fifteen years and they have always been paid at the part-time rate. The Union has acknowledged that seasonals have been hired in the peak summer months and have done road side mowing, levelling black top behind the paver, do flagging, painting of bridges and work wherever needed. The evidence also established that seasonals perform duties that regular employes perform and seasonals substitute for regular employes while they are on vacation. There was no evidence offered that the seasonals were ever paid more than the part-time rate negotiated in the contract.

Section 7.04 of the contract defines a seasonal employe but there is no other reference to seasonal employes in the contract. Appendix "A" lists the job classification and wage rate schedule but seasonal employe is not listed as a classification and the wage rate for a seasonal is not spelled out and the undisputed evidence is that they are paid at the part-time rate. A past practice which is binding on the parties must be unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice. 2/ In this case, the hiring of seasonals and the payment of the part-time rate has gone unchallenged by the Union for at least fifteen years. It must be concluded that a past practice has been established.

The Union admits that seasonals were paid the part-time rate for performing their regular duties but the instant case is distinguishable. It argues that in this case the seasonal employes

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1/ Elkouri & Elkouri, How Arbitration Works, (4th Ed., 1985) at pp. 455 and 413.

2/ Id. at 439.

replaced full-time twelve-month employes. This may be a distinction without a difference in that in the past seasonal employes replaced full-time employes who went on vacation, and no evidence was submitted that they ever received the higher rate. The two cases presented here involved a Park Maintenance job which Mr. Kinney, a seasonal, performed. A review of Appendix "A" reveals no such classification as "Park Maintenance." It would appear that the regular full-time employe held a classification which may be based on duties performed during the year when the park was not open. The duties included mowing grass, painting and general labor work which is what seasonals are hired to perform. With respect to Mr. Plonka, he was assigned to drive Truck #21, but Truck #21 was an extra having become available because the County bought a new tri-axle dump truck to replace it and the new truck was assigned to Mr. Roger Smith. There was no vacancy and Mr. Plonka did not replace Mr. Smith or anyone else, but simply drove Truck #21 as a floater and seasonals had driven a truck in the past and never were paid pursuant to Sec. 9.04.

It is concluded that the past practice establishes that Sec. 9.04 is not applicable to seasonal employes.

The Union's reliance on Pierce County, unpublished (Jones, 7/94) is misplaced. In that case, the parties' stipulated there was no binding past practice that could be used to interpret the contract. Here, there is a binding past practice. In Pierce County, supra, the language of the contract spelled out the rights of seasonal employes and Appendix "A" of that contract provided for out-of-classification pay and mentioned seasonals in the Vacation and Holiday sections. Appendix "A" also provided the seasonal employe pay rate in the pay schedule.

In the instant case, as noted above, seasonals are not listed anywhere in the contract except for a definition under Sec. 7.04. Seasonal classification does not appear in Appendix "A". The Union has pointed out that the holiday, sick leave and funeral leave provisions refer to regular full-time and regular part-time and regular full-time employes, respectively, indicating that the parties knew how to tailor provisions to particular classes of employes, and no such tailoring applied to out-of-class pay in Sec. 9.04. This is not persuasive because it may only make distinctions between regular full-time employes and regular part-time employes. Also, Article XII on vacation simply states employes shall receive vacations based on length of service and does not refer to regular full-time or regular part-time. Seasonals do not receive vacation so it follows that the mere statement of who gets what does not mean that all other provisions must be read to include seasonals. Rather, where seasonals are excepted or exempted in specific provisions as in Pierce County, one could conclude that the failure to specifically exempt them means they are included. In this case, the same conclusion cannot be reached, so Pierce County is distinguishable on the facts and not applicable to the instant case.

Thus, it is concluded that the past practice establishes that seasonal employes are not covered by Sec. 9.04 of the contract. The parties will have to negotiate whether seasonals are included under this provision in future contracts but the instant contract simply provides that seasonals are paid the part-time rate without regard to the work performed.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The County did not violate the collective bargaining agreement when it failed to pay the two seasonal employes in question the "out of classification" pay during the summer of 1994, and therefore the grievance is denied.

Dated at Madison, Wisconsin, this 11th day of May, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator