

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

VERNON COUNTY HIGHWAY DEPARTMENT
EMPLOYEES, LOCAL 1527, AFSCME, AFL-CIO

and

VERNON COUNTY

Case 93
No. 51167
MA-8517

Case 94
No. 51168
MA-8518

Appearances:

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

Mr. Jerome Klos, Attorney at Law, appearing on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer, respectively, were signatories to a 1992-1993 collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear two grievances. A hearing was held on October 19, 1994, in Viroqua, Wisconsin. The hearing was not transcribed. The Employer's brief in the matter was received November 10, 1994, and the Union's brief was received July 10, 1995, whereupon the record was closed. Both grievances have been consolidated into this Award. Based on the entire record, the undersigned issues the following Award.

ISSUES

The Union frames the issues as:

1. Did the County violate the collective bargaining agreement by transferring a patrolman from his section? If so, what is the appropriate remedy?
2. Did the County violate the collective bargaining agreement by not posting the winter maintenance of the "Dell" section? If so, what is the appropriate remedy?

While the County frames the issues as:

1. Did the County violate the collective bargaining agreement by assigning a patrolman winter maintenance duties only outside of his section? If so, what is the appropriate remedy?
2. Did the County violate the collective bargaining agreement by not posting the assignment of winter maintenance duty only in the "Dell" area? If so, what is the appropriate remedy?

Since the parties were unable to agree on the issues, the undersigned has framed them. From a review of the record and the briefs, the undersigned has framed the issues as follows:

1. Did the County violate the collective bargaining agreement by assigning the section 14 patrolman winter maintenance duties outside of his section? If so, what is the appropriate remedy?
2. Did the County violate the collective bargaining agreement by not posting the winter maintenance of the "Dell" area? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1992-1993 collective bargaining agreement contained the following pertinent provisions:

ARTICLE I Recognition

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- 1.03 Subject to the provision of this contract and applicable law, the County possesses the right to operate County government and all management rights repose in it. These rights include, but are not necessarily limited to the

following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedule work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the County Highway Department;
- D. To suspend, demote, discharge and take other disciplinary action against employees, for just cause;
- E. To relieve employees from their duties because of lack of work or other justifiable economic reasons;
- F. To maintain efficiency of County government operations;
- G. To take reasonable action necessary to carry out the functions of the County in situations of emergency;
- H. To take whatever action is necessary to comply with State or Federal law;
- I. To introduce methods or facilities which are new or exist elsewhere;
- J. To change existing methods or facilities;
- K. To determine the kinds and amounts of services to be performed as pertains to County government operations; and the number and kinds of classifications to perform such services;
- L. To contract out for goods or services;
- M. To determine the methods, means and

personnel by which County operations are to be conducted; and

N. Provided, with regard to Paragraphs H through M above, the County will comply with its duty to bargain on such matters to the extent required by law.

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ARTICLE X
Seniority, Probation, Layoff, Rehire and Job Posting

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- 10.08 When it becomes necessary to fill a vacancy or a new position, the County shall bulletin such new position or vacancy for a period of ten (10) days, asking for applications, and the qualified employees within the system with the longest period of service shall be assigned to the new position or vacancy.
- 10.09 All new or vacated job positions shall be posted at each garage or shop for the minimum of ten (10) days preceding the selection of the employee to fill the new or vacated job position. Seniority and qualifications shall be considered in the selection of the applicant for the new or vacated job position. The notice shall include the rate of pay and the duties of the position. Said position shall be filled on the 12th day following the original date of posting. Before the new or vacated position is filled, the Highway Commissioner and the Union representatives shall attempt to mutually agree on the nominee for the position. If a mutual agreement is not reached, the Union shall be given a hearing before the Highway Committee and the Highway Commissioner, and if a mutual and final agreement is not reached at this point, a grievance may be filed by the Union. The successful applicant shall be allowed sixty (60) days to qualify for the new position. If the successful applicant qualifies, he shall be ineligible to apply for any other position for a year. Interim appointments to the new or vacated position may be made by the Highway Commissioner until such time as a mutual agreement between the parties is reached.

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APPENDIX A

CLASSIFICATION AND WAGES

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A-03 Patrolmen shall not be transferred from one patrol section to another patrol section.

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FACTS

The facts are undisputed. The County employs patrolmen and truck drivers in its Highway Department to do road maintenance work. Patrolmen have a specific territory, known as a section, which they cover. Patrolmen get their sections by bidding for them. Truck drivers though are not assigned to a particular section.

The Highway Department has divided the County into nine sections for purposes of County road maintenance. The three sections east of Viroqua, which are known as sections 12, 13 and 14, average 36.2 miles of road in each section. The six sections west of Viroqua average 28 miles of road in each section. Thus, there are more miles of road to maintain in sections 12, 13 and 14 than in the other six sections.

The Employer has traditionally insured adequate wintertime coverage for the roads in sections 12, 13 and 14 and equalized the work load among employes by having auxiliary workers do winter maintenance on the roads in the south part of sections 12, 13 and 14. Over the years, the number of auxiliary workers has declined. Several years ago there were two auxiliary workers who were located in the LaFarge and Hillsboro highway shops. During the 1992-1993 winter season, there was just one auxiliary worker who worked out of the LaFarge highway shop. In the fall of 1993, the auxiliary worker position was eliminated completely in a cost-cutting move. Thus, the Highway Department no longer has any auxiliary workers.

After the auxiliary worker position was abolished, Highway Commissioner William Stahl considered how to best utilize the Department's existing manpower to maintain road coverage in sections 12, 13 and 14 and equalize the winter maintenance road length work load among all employes. He also considered economic, efficiency and safety factors. After considering the foregoing, he took the following actions. First, he directed the section 14 patrolman who works out of the LaFarge highway shop (Kermit Harris) to do snow and ice removal in the south part of

sections 12, 13 and 14. This action resulted in the section 14 patrolman plowing snow on roads previously plowed by the auxiliary worker. Second, he directed three truck drivers from the Viroqua highway shop, on an alternate basis, to do snow and ice removal in the north part

of section 14. That area is known as the "Dell" area. The three truck drivers selected to do this work were the only bargaining unit employees available. All other bargaining unit employees were occupied with other winter maintenance assignments.

After the Employer implemented these actions, the Union filed two separate grievances over same. One is known as the patrolman grievance. It alleged that by having the section 14 patrolman work in the south part of sections 12 and 13, in addition to the south part of section 14, the Employer transferred the patrolman from one section to another in violation of the agreement. The other grievance is known as the new position grievance. It alleged that when the Employer assigned three truck drivers to work in the "Dell" area (the north part of section 14), the Employer should have posted it and failed to do so.

The record indicates that patrolmen have routinely been assigned to work outside their regular section during the summer months. These assignments to other sections have involved mowing, road repair and reconstruction. Insofar as the record shows, this was the first time management assigned a patrolman to do snow and ice removal in an area outside his regular section.

POSITIONS OF THE PARTIES

The Union contends the Employer's actions herein violated the contract. The Union notes at the outset that it does not oppose the creation of four patrol sections for purposes of winter maintenance out of the original sections 12, 13 and 14. In its view, four employees will be better able to maintain the roads than three employees. Additionally, the Union acknowledges that the Employer has the right to assign work. It notes though that such assignments must conform with the contract. It is the Union's position that the assignments involved here do not conform with the contract. Specifically, the Union objects to the method the County used to assign the workers to the four sections. In the patrolman grievance the Union argues that the section 14 patrolman should not have been assigned to plow snow in sections 12 and 13. According to the Union, this assignment violated Section A-03 which provides that "Patrolmen shall not be transferred from one patrol section to another patrol section." This contention is obviously based on the premise that the section 14 patrolman was "transferred." The Union emphasizes it is not taking the position here that patrolmen can only work in their own section. It notes in this regard that patrolmen have worked outside their own section in the summertime. In its view though, patrolmen working outside their own section for winter maintenance is "clearly different." Next, in the new position grievance the Union notes that three truck drivers were unilaterally assigned to the "Dell" area by the Highway Commissioner. The Union asserts that the "Dell" area was a new position which should have been posted pursuant to the contractual posting provision. Since it was not, the Union believes this violated the contract. In order to remedy these alleged contractual breaches, the Union asks the arbitrator to uphold both grievances and award the following remedies. In the patrolman grievance the Union requests that the Department be ordered to not transfer the section 14 patrolman to another patrol section. In the new position grievance the Union requests

that the "Dell" winter maintenance position be posted, with a make-whole remedy.

The Employer contends its actions herein did not violate the contract. It notes at the outset that what it did was to change certain existing assignments in sections 12, 13 and 14. It asserts that these assignments were temporary, left the sections intact except for winter maintenance, and left part of that winter maintenance in section 14. It avers that the changes were designed so that patrolmen continued to operate out of the same shop and a route nearest their home. In the Employer's view, it was not contractually precluded from making these changes in assignments. To support this premise the Employer first relies on the management rights clause. The Employer reads that clause as expressly giving it the right to assign work. The Employer asserts that making assignments, as happened here, is commonplace. Second, the Employer contends there is a long history of patrolmen working outside their regular section. In support thereof, it notes that patrolmen have regularly been assigned in the summertime outside their section to assist with storm damage clean-up, construction projects and mowing. It also notes that auxiliary workers have long been used in the wintertime to work in sections 12, 13 and 14 to equalize the winter maintenance load in those sections. That said, the Employer goes on to specifically respond to the Union's grievances. With regard to the patrolman grievance, the Employer argues that Section A-03 (the non-transfer provision) was not violated. In its view, that provision was not intended to prevent management from making job assignments; rather it was designed to prevent management from arbitrarily transferring a patrolman as a punitive measure. It notes that here, though, there is no allegation by the Union that such is the case. That being so, the Employer contends the changed assignments involved here did not constitute a section transfer. With regard to the new position grievance, the Employer disagrees with the Union's contention that the assignments in question created a new position. According to the Employer no new position was created in the "Dell" area. That being so, the Employer avers it was not required to post the "Dell" assignment. The Employer asserts that what the Union is trying to do here is force it to create a new position when that call is the Employer's to make--not the Union's. The Employer therefore requests that both grievances be denied.

DISCUSSION

What happened here is that after the Department lost its last remaining auxiliary worker, the Highway Commissioner considered how to best use the Department's remaining manpower to maintain road coverage and equalize the winter maintenance road length work load among employees. After doing so, he took the following actions. First, he decided to have someone do the winter maintenance (i.e. snow and ice removal) in the south part of sections 12, 13 and 14 that was previously done by the auxiliary worker. He assigned that work to the section 14 patrolman. Second, he decided that someone else would do the snow and ice removal in the north part of section 14 (the "Dell" area) that was previously done by the section 14 patrolman. He directed three truck drivers from the Viroqua highway shop, on an alternate basis, to do the snow and ice removal in the north part of section 14 (the "Dell" area). At issue here is whether these actions

comport with the labor agreement or violate same.

I begin my analysis of this contract dispute by first looking at the event that caused the Employer to take the above-noted actions. That event, of course, was the elimination of the auxiliary worker position. When the Employer eliminated that position, was a vacancy created which the Employer was obligated to fill? Generally speaking, an employee's departure from the work force does not automatically create a new vacancy. When an employee departs, management has the right to decide whether or not the employee's departure creates a vacancy. This prerogative is reserved to the Employer here by the management rights clause (Section 1.03) which grants the Employer the right to determine the amount of work it needs and what level of service or activity can be eliminated. In the absence of a contract provision limiting management's right to fill vacancies (for example, a clear requirement to maintain a certain number of positions in each classification), it is management's right to determine whether a vacancy exists and when it shall be filled. Nowhere in this labor agreement is there any contractual provision which requires the Employer to fill every vacancy or maintain a certain number of positions in each classification. Section 10.08 certainly does not guarantee that all vacancies will be filled. On its face, that provision neither contradicts the management rights noted above nor restricts the County from determining how many positions it chooses to fill. If management determines that a vacancy exists within the meaning of Section 10.08 which is to be filled, then and only then do the posting and filling procedures found in Section 10.09 come into play. However, unless management determines that a vacancy exists, no contractual right which is contingent on the existence of a vacancy may be exercised.

This rationale also applies to the Union's contention that the Employer created a new position in the "Dell" area which should have been posted. According to the Union the work in the "Dell" area was a new position. However, simply calling this work a position does not make it one. As previously noted, the Employer determines whether a vacancy exists. The same is true of positions. Thus the Employer also determines whether a position exists. Here the Employer decided that performing the winter maintenance duties in the "Dell" area did not constitute a position. The undersigned agrees since the time in which this work is done is both irregular and indefinite. It is therefore held that the work in question in the "Dell" area is not a position. As a result, it did not qualify for a posting under the terms of the parties' agreement.

Having found that the work in question in the "Dell" area is not a position, the question remains what it is. It is held that it is an assignment of duties. What the Employer did was assign certain job duties, namely snow and ice removal in the "Dell" area, to three truck drivers on a rotating basis. The contract does not address the assignment of job duties, nor are they covered by the posting provision. Consequently, the management rights clause controls and allows the Employer to make assignments to truck drivers which are within the scope of their job description. There is nothing in the record which indicates that the winter maintenance duties of snow and ice removal are outside the truck drivers' job description. It therefore follows that the Employer was within its contractual rights when it assigned three truck drivers on a rotating basis to do winter maintenance duties in the "Dell" area. Thus, that particular assignment did not violate the contract.

Next, the Union contends that by having the section 14 patrolman perform winter maintenance duties in the south part of sections 12, 13 and 14, he (the section 14 patrolman) was transferred in violation of Section A-03. I disagree for the following reasons. To begin with, simply calling what happened here a "transfer" does not make it one. While the section 14 patrolman is now plowing snow on roads outside section 14, that does not mean he's been transferred to a different section. In point of fact he has not. He is still the section 14 patrolman, is still stationed in section 14 and is still responsible for that section. Conversely, other individuals are still the patrolmen in sections 12 and 13, are still stationed in those sections and are still responsible for those sections. Second, it has previously been noted that the management rights clause gives the Employer the right to make work assignments. My reading of Section A-03 is that it is not intended to prevent management from making job assignments to employees that cross section lines. Instead, I read it as intended to prevent management from arbitrarily transferring a patrolman as a punitive measure. In this case there is no allegation by the Union that the section 14 patrolman was singled out for the assignment involved here as a punitive measure, nor was any proof of same presented. Third, the record indicates that patrolmen have previously been assigned to work outside their regular section doing mowing, road repair and reconstruction. The Union notes that the assignments just mentioned occurred in the summertime, while the assignment involved here occurred in the wintertime. According to the Union, this makes it "clearly different." However, in my view, the Union's attempt to distinguish between summertime and wintertime job assignments is not persuasive. If the Employer is not contractually precluded from assigning patrolmen to work in other sections in the summertime, it logically follows that it is not contractually precluded from doing so in the wintertime either. Additionally, it cannot be overlooked that the patrolmen in sections 12, 13 and 14 were previously assisted with their winter maintenance duties by an auxiliary worker. Now, though, it is the section 14 patrolman that is assisting the section 12 and 13 patrolmen with snow and ice removal and the section 14 patrolman is, in turn, being assisted with same in his section by the truck drivers. Given the foregoing, it is held that the assignment of the section 14 patrolman to do winter maintenance duties in the south part of sections 12 and 13, in addition to section 14, did not constitute a section transfer within the meaning of Section A-03. Thus, that particular assignment did not violate the contract.

To summarize then, it is held that the Employer could contractually assign the section 14 patrolman to plow snow in the south part of sections 12, 13 and 14. It has also been held that the work in the "Dell" area was not a position, so it did not qualify for a posting under the contract. Therefore, the Employer could contractually assign three truck drivers on a rotating basis to do snow and ice removal in the "Dell" area.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the County did not violate the collective bargaining agreement by assigning the section 14 patrolman winter maintenance duties outside of his section; and
2. That the County did not violate the collective bargaining agreement by not posting the winter maintenance of the "Dell" area. Therefore, both grievances are denied.

Dated at Madison, Wisconsin, this 15th day of September, 1995.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator