

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SAUK COUNTY HIGHWAY EMPLOYEES
UNION, LOCAL 360, WISCONSIN COUNCIL 40,
AFSCME, AFL-CIO

and

SAUK COUNTY

Case 120
No. 52785
MA-9099

Appearances:

Mr. Todd J. Liebman, Corporation Counsel, Sauk County, Sauk County West Square Building, 505 Broadway Street, Baraboo, Wisconsin 53913, appeared on behalf of the County.

Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717-1903, appeared on behalf of the Union.

ARBITRATION AWARD

On June 20, 1995, Sauk County Highway Employees Union, Local 360, Wisconsin Council 40, AFSCME, AFL-CIO and Sauk County filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following a series of scheduling delays, the Commission, on January 19, 1996, appointed the undersigned to hear and decide this matter. A hearing was conducted on March 27, 1996, in Baraboo, Wisconsin. The proceedings were not transcribed. The parties submitted post-hearing briefs which were received and exchanged by May 7, 1996.

This Award addresses the right of the Highway Department to assign a janitor to work the hours 3:00 p.m. to 11:30 p.m.

BACKGROUND AND FACTS

Local 360, AFSCME, is the exclusive collective bargaining representative of certain employees of the Sauk County Highway Department. The Employer and Union have a longstanding relationship and have been signatories to a series of collective bargaining agreements going back many years. One of those provisions, Article 14 - Hours of Work and Classifications whose relevant portions are set forth below, addresses employee's hours of work, and has existed in successive contracts for years. The typical bargaining unit member works the specific hours set

forth in Article 14.02. The janitor position, which is the subject of this dispute, has been somewhat of an anomaly in that regard.

Generally, the janitor is responsible for the cleaning, maintenance and minor repair of the Highway Department facilities. Included among the janitor's assignments are the vacuuming and waxing of floors and the cleaning of a rather substantial restroom. The latter assignment is a large daily chore. By all accounts, including that of Walter Marquardt, the retired janitor, Kevin Ketelboeter, the current janitor, and Steve Muchow, the Highway Commissioner, the job is more efficiently performed at night. These witnesses testified that it was difficult to work efficiently with co-workers coming in and out of the facility and that it was difficult to keep the floors and restroom clean while they were undergoing constant use.

The position was at one time a day job. Mr. Marquardt testified that when he started work for the County in 1966 Elmer Tyler held the position and worked days. On June 11, 1981, the position "Maintenance/Night Man For Baraboo Shop" was posted with the hours of work set from 3:30 p.m. to 12:00 Midnight. It was Mr. Ketelboeter's uncontradicted testimony that the position was awarded to Russel White, notwithstanding the fact that Mr. White never signed the posting. According to Ketelboeter, White was a mechanic's helper at the time of the posting. White did not sign the posting because he was being paid at a higher wage than was set forth in the posting. White wanted to keep his rate of pay and apparently did so. According to all accounts, he was given the job, maintained his existing rate of pay, with a change in the hours of the position. No grievance was filed.

When Mr. White retired, a posting essentially identical to that put up in 1981 was posted on July 2, 1984. No one signed the posting, and Tracy Torrez (phonetic) was hired from the street.

In 1986, Mr. Torrez vacated the position and Walter Marquardt assumed the job. It was Marquardt's uncontradicted testimony that there was no job posting in 1986. Rather, Highway Commissioner Geoghegan and the Shop Foreman (a management position) approached him and asked him to take the job. Marquardt indicated that he was having a problem with his legs at the time, and that this work would be easier on his leg. According to Mr. Marquardt, the most recent revision of the position, dated May 19, 1986, was created after he took the job. At some point in time, Marquardt's schedule was shifted to days to allow Geoghegan to keep an eye on him. According to Marquardt, that did not work out and he was thereafter returned to nights. The record is unclear as to precisely when that occurred.

Steve Muchow became Highway Commissioner in March of 1992. It was his testimony that Marquardt approached him and indicated that days were not working out. There were too many people in the office and Marquardt was not able to do his work efficiently. Muchow decided to allow Marquardt to begin work at noon. This appears to be the same incident that Marquardt referred to in his testimony that his assignment to days was not working out, and that he was thereafter returned to a later schedule. There is no indication the Union was brought in or made a part of the discussion between Muchow and Marquardt.

To this point in time, there appears to have been no Union objections or grievances filed with respect to these various shift changes.

Walter Marquardt retired on April 11, 1995 and his vacated job was posted. It appears that the Union asked that the position be reposted to correct what was regarded as an erroneous title. A job study, changing the title of the position had been implemented. The position was reposted beginning April 24, 1995. The posting lists the shift hours as 3:00 p.m. to 11:30 p.m. On April 21, 1995, the Union filed a grievance protesting the posted hours. This grievance followed the first posting but preceded the second posting by a number of days. The posting brought two internal applicants, one of whom withdrew. Mr. Ketelboeter, who regarded the evening hours as desirable, was awarded the position.

Section 5.03 of the contract, set forth below, addresses the posting of "Night Man" assignments. It was the testimony of Steve Schmidt, Union President, and Steve Muchow, that the contractual reference to "Night Man" is to a position created in the Highway Department specifically for the winter months. The position is designed to facilitate the Department's reacting to winter road conditions, and is different from the janitor position which is the subject of this grievance.

ISSUE

The parties were unable to stipulate an issue. I regard the issue to be:

Does the County violate Article 14.02 or any other provision of the collective bargaining agreement when it posts and fills a janitor position whose hours are from 3:00 p.m. until 11:30 p.m.? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE 1993-1994 COLLECTIVE BARGAINING AGREEMENT

ARTICLE III - MANAGEMENT RIGHTS

3.01 The Union recognizes the prerogative of the Employer to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers or authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive right of the Employer to establish reasonable work rules. Any dispute with respect to these work rules shall not, in any way, be subject to advisory or final and binding arbitration, but any dispute with respect to reasonableness may be submitted to fact finding.

. . .

3.04 The Employer reserves the right to discipline or discharge for cause. The Employer reserves the right to lay-off for lack of work or funds, or the occurrence of conditions beyond the control of the Employer, or where such continuation of work would be wasteful and unproductive. The Employer shall have the right to determine reasonable schedules of work and to establish the methods and procedures by which such work is performed.

. . .

ARTICLE V - SENIORITY RIGHTS

. . .

5.03 Whenever a vacancy occurs, or a new job is created, it shall be posted on all shop bulletin boards for a period of five working days. Each employee interested in applying for the job shall endorse his/her name upon such notice in the space provided. The full-time employee with the greatest seniority who can qualify shall be given the job within ten (10) working days from the day that the vacancy or new job was posted.

. . .

"Night man" assignments shall be posted. If no qualified employee applies for the position, the junior qualified employee shall be assigned.

. . .

ARTICLE XIV - HOURS OF WORK & CLASSIFICATIONS

14.01 The hours of work for all regular, full-time employees shall be eight (8) hours per day, forty (40) hours per week, Monday through Friday.

14.02 The daily hours of work shall be 7:00 a.m. to 12:00 noon and from 12:30 p.m. to 3:30 p.m. Employees shall be provided a fifteen (15) minute rest break during the first half of each shift.

...

POSITIONS OF THE PARTIES

The Union acknowledges that it has never previously grieved the changes in hours that occurred. However, it cites Elkouri (How Arbitration Works, BNA Books, Fourth Edition, pages 348-349), for the proposition that clear and unambiguous contract language must be given its plain meaning. The Union points to the first sentence of Section 14.02, and contends that it clearly, unambiguously sets the hours of work from 7:00 a.m. to 12:00 noon and from 12:30 p.m. to 3:30 p.m. The fact that the Union has not previously enforced the contractual provisions does not mean they no longer exist. The Union notes that the modified hours have been the product of a series of private agreements in which it was not involved.

The County contends that the Union's view of Section 14.02 is myopic. In the view of the County, if 14.02 is read in the context of the balance of the agreement, the County is authorized to create an evening schedule for the janitor. Specifically, the County points to Section 3.04 which provides it the right ". . .The Employer shall have the right to determine reasonable schedules of work and to establish the methods and procedures by which such work is performed." The Union's construction of Section 14.02 renders the Employer's scheduling authority, contained in Section 3.04, meaningless.

The County goes on to point out that Section 5.03 specifically creates a "Night Man" assignment. Again, argues the County, the Union's narrow view of Section 14.02 operates to nullify the meaning of Section 5.03. Finally, the Employer points to Section 3.01, which sets forth general and residual managerial authority. Reading all of these terms together, the County contends that the reference to "daily" in Section 14.02 must be interpreted as prescribing the hours of work for employes working the day shift. The County is within its right to establish a "Maintenance/Night Man/Janitor" position as a swing shift job. By doing so, the County is outside the scope of the regulation of Section 14.02.

The County notes that it has operated a swing shift position for the last 15 years with no grievance from the Union. The County also points to Elkouri for the proposition that a primary rule in construing a collective bargaining agreement is to determine from the instrument as a whole, and not from a single word or phrase the true intent of the parties. Specifically, the County contends that the Union's construction constitutes not only a harsh result, but error. The latter is the function of the fact that the Union's construction renders Section 5.03 a nullity.

The County contends that the Union's interpretation of the contract requiring the janitor to work during the day will reap a harsh, absurd and nonsensical result. The County notes the unrefuted testimony of Marquardt and Ketelboeter to the effect that the job duties cannot be performed during the day.

The County contends that it has established a longstanding and binding practice. In the context of its longstanding history it argues that 14.02 was not intended to be an impediment to

establishing the janitor as a swing shift position. This practice has been longstanding and unequivocal. The postings occurred and were not grieved. The Union was admittedly aware that the Maintenance/Night Man worked night hours throughout this 15-year period.

DISCUSSION

I agree with the Union's contention that Article 14.02 is a clear and unambiguous declaration of the work hours of bargaining unit members. The common use of the term "daily" is as an adjective denoting something which occurs, is made, or is acted upon every day. That meaning is consistent with the reading of this Article to reflect the ongoing regular schedule of hours of the employees. The County's construction of the term "daily" is not only awkward and grammatically suspect, but also serves to emasculate what appears to be a rather substantial contractual provision.

The County is correct in asserting that Article 14.02 must be read in the context of the balance of the Agreement. Article 5.03 does refer to the "Night Man". The term is set out in quotations. This treatment suggests that it is a known, identified position, in contrast to a generic reference. Both the Union President and the Highway Commissioner testified that this reference is to a specific assignment created for winter hours in the Patrol Division. It simply does not address the Janitor position which is the subject of this dispute.

Article 3.01 is a very general declaration of management's rights. It retains those rights not otherwise delegated away. The question arising in this dispute is which rights have been delegated away by Article 14.02? Section 3.04 is more specific than is 3.01. Section 3.04 vests in the Employer the "right to determine reasonable schedules of work and to establish the methods and procedures by which such work is performed." It is at least noteworthy that this sentence does not refer to "hours" of work. The common use of the term "schedule" is as a reference to a list or inventory or a timetable. That is consistent with the traditional Employer role of establishing a timetable, schedule and priority of various work tasks and assignments. The extent that this Section is construed as a reference to the hours of the work day, it is at most, a general reference. In this regard, it is far less specific than is the very narrow, pointed and direct reference to hours of work contained within Article 14. I do not believe it appropriate to construe Article 3.04 as a blanket override for the Hours of Work provision contained within Section 14.02.

Read literally, there are no exceptions to the Hours of Work provision set forth in Article 14.02. However, the history of the filling of this position is that this language has been ignored without a grievance. The hours were changed in 1981. Mr. White appears to have gotten this job without posting. It appears that Mr. White got paid an extra-contractual amount while he held the position. The job, with altered hours, was again posted in 1984 and filled without a grievance. In 1986, Mr. Marquardt was given the job. According to his testimony, he did not sign a posting. There was no grievance filed. Marquardt worked at night. It appears that Geoghegan changed the hours at least once following 1986, and that Muchow changed the hours at

least once after that. There has been no enforcement of this provision.

The County claims that it has established a longstanding and binding practice. The record certainly supports the County's contention that an ongoing, universally known practice has existed for years. However, the spirit of accommodation allowing for the continuation of the practice evaporated, and a grievance was filed before the job was filled. The 1993-1994 collective bargaining agreement had expired. The Employer was on notice that the Union had raised an objection to the practice historically applied by the Employer. Given my view that the language is clear and unambiguous, I believe that the timely grievance served to terminate the practice, and any reliance the Employer may have placed on the practice. I believe the Employer proceeded at its peril from that point forward. I do not believe that a practice, even as long-standing as this one, can survive in the face of clear, unambiguous contract language to the contrary.

The Employer contends that the evening is a better time to get this work done, and they may well be right. However, the task of identifying the best and/or the most appropriate hours for a job is for these parties in their collective bargaining, not for this Arbitrator. The management's right to plan and direct the work is subject to other provisions of the Agreement. Having disregarded the provisions of the collective bargaining agreement in a variety of ways over the years the Employer is no position to raise equitable claims that the result that follows here is somehow unfair.

AWARD

The grievance is sustained.

REMEDY

The Employer is hereby directed to repost this position within thirty (30) days of the date of this Award, setting its hours in accordance with Article 14.02. I do not regard any other relief as warranted.

Dated at Madison, Wisconsin, this 31st day of May, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator