

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ONEIDA COUNTY HIGHWAY EMPLOYEES,
LOCAL 79, AFSCME, AFL-CIO

and

ONEIDA COUNTY

Case 118
No. 53542
MA-9384

Appearances:

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

O'Brien, Anderson, Burgy & Garbowicz, Attorneys at Law, by Mr. John L. O'Brien, appearing on behalf of the County.

ARBITRATION AWARD

Oneida County Highway Employees, Local 79, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Oneida 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 parties waived the arbitration panel provided for in the agreement and concurred that the Wisconsin Employment Relations Commission designate a member of its staff to act as the sole 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 Rhinelander, Wisconsin, on February 29, 1996. The hearing was not transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on May 31, 1996.

BACKGROUND:

The basic facts underlying this case are not in dispute. On or about April 18, 1995, the County informed the Union by letter that it was eliminating the position of Shop Foreman and one Leadman position effective April 30, 1995. As of that date, it was creating two non-union supervisory positions: Shop Superintendent and Patrol Superintendent. The incumbents of the abolished positions were promoted into the newly created positions. Between May 19, 1995, and August 24, 1995, a Highway Department employe, Kirk Miller, was assigned Leadman duties and paid Leadman wages for a total of 103.75 hours. On September 23, 1995, the Union filed a grievance alleging that the County violated Article 5 by failing to post the Leadman position and paying a junior employe the Leadman rate. The grievance was denied and appealed to the instant arbitration.

ISSUE:

The parties were unable to agree on a statement of the issues. The Union stated the issue as follows:

Did the County violate the parties' collective bargaining agreement when it failed to post a Leadman position?

If so, what is the appropriate remedy?

The County states the issue as follows:

Does the County have the right to have an employee hired in one classification perform work in a higher classification on a temporary basis without posting in accordance with Article 5, Section A?

The undersigned adopts the issue as framed by the Union.

PERTINENT CONTRACTUAL PROVISIONS:

Article 5 - Promotions

Section A: Opportunity for advancement to higher classifications shall be provided for as follows: In the event of a permanent vacancy, or the creation of a new job classification, the Highway Commissioner shall cause to be posted on the main shop bulletin board and all outlying shop bulletin boards, a notice of such vacancy or new position. Said notice shall be posted for a five (5) day period. At the end of that five day period, the notice shall be removed and the position shall be filled within five (5) days.

(1) Permanent vacancy defined: A "permanent vacancy" means a vacancy created in any salary range because of the death, retirement, or termination of employment or (sic) any employee; all other vacancies are "temporary".

(2) The Commissioner shall have the right, without the requirement of posting, to shift employees into any lower or higher job classification or within any salary range where a temporary vacancy exists for the duration of the temporary vacancy.

. . .

Article 15 - Job Classifications and Rates of Pay

Section A: All employees will be classified by the job classification as listed in Addendum 1 and shall not receive less in pay while working in a job classification with a lower rate of pay. When required to work in a job classification with a higher rate of pay, the employee shall receive the higher rate of pay for that job classification.

UNION'S POSITION:

The Union contends that after the County eliminated the Leadman position and promoted Stern to Patrol Superintendent, the County decided it needed a Leadman as Paving Crew Chief and it should have posted the Leadman position under Article 5. It submits that the County's argument that because the Leadman position was abolished, there was no position to post is not persuasive, otherwise it could move employees between classifications by eliminating positions and filling "temporary vacancies" by whomever it chose. It argues that the County is attempting to circumvent Article 5 so it can select employees without considering seniority and to save substantial monies. It calculates that the County saved about \$1.00 per hour for 17 weeks less the 104 hours Miller worked. The Union distinguishes the Leadman pay Miller earned in 1992 and 1994 because Miller was replacing a Leadman while he was on vacation or sick leave and in 1995, he was replacing no one but doing the work of an eliminated position and it is irrelevant that Stern was on vacation for part of that time.

The Union contends that the County committed a prohibited practice under Section 111.70(3)(a)4, Stats., on the basis that the Union requested the names of all employees who received the Leadman rate in 1995, and were given Miller's name only, yet the County introduced at the hearing documentation that Freeman Bennett got such pay. It claims that the failure to provide such information constitutes a prohibited practice.

The Union maintains that even if the County was not obligated to post the Leadman position, it violated the agreement by its failure to assign the temporary position on the basis of seniority. It observes that the County is claiming that under Article 5, Section A, 2, it can select whatever employee it chooses to fill a temporary vacancy; however, according to the Union,

Article 5 merely allows the filling of a temporary vacancy without posting but still requires the County to abide by seniority in the selection of the employe to fill it.

The Union concludes that the County eliminated a Leadman position only to make temporary appointments to the position so it could circumvent the posting procedure and save money. It asks that the Leadman position be posted and the employe awarded it be paid all the hours paid to employes working out of classification.

COUNTY'S POSITION:

The County contends that although the contract requires posting in the event of a permanent vacancy or creation of a new job classification, no permanent vacancy occurred as defined in the contract so there was no vacancy to post. It notes that had the Leadman position not been abolished and Miller assigned it without a posting, the Union would have every right to grieve but that did not happen and there was no Leadman position, no vacancy and nothing to post, so no violation of the contract. The County observes that the contract allows it to shift employes into higher or lower classifications without posting and Miller was assigned from time to time to perform Leadman duties on an average of a little under one and one-hours per day, far short of a vacancy, even a temporary vacancy. It submits that the thrust of the grievance is that the County did not post the vacant Leadman position; however, it had been abolished and there was no vacancy to post. The County points out that in the past it has assigned employes to work in higher or lower classifications and this has not been grieved but is a practice clearly permitted by the contract.

The County insists the grievance is not well founded and the Union has failed to show any contractual violation as there was no permanent vacancy and Miller's assignment to Leadman duties on occasion does not constitute filling a position and was not a contract violation.

UNION'S REPLY:

The Union contends that a strict interpretation of Article 5, Section A would lead to harsh and absurd results because the County could create additional jobs in a class and not post them or not post a position held by someone who takes a promotion. It submits that in these two examples a vacancy is filled on a permanent basis by a permanent employe. It claims the intent is to post all vacancies to be filled by permanent employes. It further argues that the County's interpretation is an attack on job security and seniority, two of the Union's most basic and valued principles. It maintains that the literal application of Article 5 provides the County with a loophole to circumvent the job posting and seniority provisions.

The Union also asserts that the County's right to shift employes is restricted by Article 4,

Section C such that job seniority prevails. It submits that the issue presented here is not the creation of a new Leadman position but whether the County violated the agreement by eliminating the Leadman position and then unilaterally assigning the primary duties to Miller. It argues that merely because no grievances were filed in the past does not prove anything because the assignments may have been made when other senior employees turned the job down or the Union did not know a violation occurred. The Union concludes that the County violated Articles 4 and 5 of the contract and asks that the grievance be sustained and the appropriate remedy ordered.

COUNTY'S REPLY:

The County contends that the Union appears to be arbitrating a different issue than that which was grieved, namely, to post the Leadman position. The County asserts that the Union makes three arguments, one of which is to post the vacancy. The County responds that it argued this in its initial brief but there was no vacancy. It points out that the Union's argument that the County saved money, but it did so by eliminating a position and there is nothing wrong with that. The County claims there was no vacancy and so it was not required to post anything.

The County observes that a claim that it committed a prohibited practice is not in the proper forum and besides Bennett never worked as a Leadman; only Miller did in the time period requested by the Union.

As to the third argument, the County maintains that the Union is raising for the first time that seniority must be applied in making a temporary assignment. The County maintains that this argument was never raised in the grievance procedure and it has had no opportunity to present evidence opposing this argument. It states that the Union cannot be permitted to make this argument at this stage of the proceedings and it should be ignored. It asks that the grievance be dismissed.

DISCUSSION:

The crux of the parties' dispute here is whether the assignment of Miller to perform duties in the Leadman classification violated Articles 4 and 5 of the agreement by failing to post a Leadman vacancy. Article 5, Section 1 defines a "permanent" vacancy and states that all other vacancies are "temporary." The language of this section is not clear but is ambiguous. However, Article 15, Section A provides that when an employee is required to work in a job classification with a higher rate of pay, the employee receives the higher rate. This language anticipates that the County will make temporary transfers of employees to higher classifications, and vice versa, and addresses how employees will be paid but does not deal with who or how employees will be transferred. Article 15 merely speaks to an employee required to work in a higher classification. It does not state that there has to be a vacant position or someone must be absent from a position as

the term "position" is not used. The evidence indicates that Miller was assigned work in a higher classification in 1994 on June 2 and September 21 when it appears no one was on vacation or sick. 1/ Also, in 1995, Miller was assigned work of a higher classification on May 16, July 20 and August 23 and 24, when Stern was not on vacation. 2/ Freeman Bennett was assigned Operator II work in 1994 and 1995, where it appears no position was unfilled. 3/ This evidence establishes that the assignment of work of a higher classification does not create a vacancy, either temporary or permanent so the provisions of Article 5 are not applicable. Article 5 is applicable to vacancies or new positions that the County is going to fill on a permanent or temporary basis. However, the assignment of work for one day of a higher classification does not create a vacancy as the performance of work does not create a position, just a right to higher pay. This is logical because by the time the matter was posted or someone selected, the work would have been done already and no further work being required, the position would evaporate. Furthermore, an employer is not required to create a new position year round or even for four months just because an employe occasionally does work of a higher classification.

In other words, the mere fact that Miller occasionally worked in a higher classification, i.e., performed duties of a higher classification, did not create a position or vacancy, either permanent or temporary, that required the application of Article 5. There was no vacancy that required posting or assignment by seniority. Inasmuch as no posting was required, the County has not violated Articles 4 or 5.

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 parties collective bargaining agreement when it failed to post a Leadman position, and therefore, the grievance is denied and dismissed in all respects.

1/ Ex. 12.

2/ Ex. 4.

3/ Ex. 11. It is noted that Bennett worked in the Operator II classification, not Leadman, and the County was not asked to supply the Union with the names of employes who received Operator II pay.

Dated at Madison, Wisconsin, this 2nd day of August, 1996.

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