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 117
No. 53277
MA-9289

Appearances:
Mr. David Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Mr. John O'Brien, 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 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 a grievance. A hearing, which was not transcribed, was held on February 7, 1996, in Rhinelander, Wisconsin. Afterwards, the parties filed briefs and reply briefs which were received by April 24, 1996. Based on the entire record, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue to be decided in this case. The Union framed the issue as follows:

> Did the County violate the collective bargaining agreement when it scheduled the less senior employe for overtime hours on July 21 and 22, 1995? If so, what is the appropriate remedy?

The County framed the issue as follows:

> Did the County comply with the contract when it assigned scheduled overtime work to the operator assigned to the shop where the work was to be performed?

Having reviewed the record and arguments in this case, the undersigned hereby adopts the

County's wording of the proposed issue. Consequently, the County's proposed issue will be decided herein.

PERTINENT CONTRACT PROVISIONS

The parties' 1993-1995 collective bargaining agreement contained the following pertinent provisions:

> Article 4 - Seniority
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> Section C: In the event of a layoff, return to work or the filling of a vacancy in either the permanent, regular part-time, seasonal, temporary or new position, job seniority shall prevail. . .
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> . . .
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> Article 7 - Call-Time
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> Section B: Overtime work shall be called for or assigned by seniority to employees who, in the judgment of the Highway Commissioner or direct supervisor, are well qualified to perform the available overtime work and who are not working on a regularly scheduled job. Employees may challenge the judgment of the Commissioner or direct supervisor as provided for in Article 14, Section I. This shall not apply to employees working on a project at the end of the normal work day who are required to complete the work inclusive of overtime or to patrolman or patrolman's helpers who are assigned to a specific section or beat on a year-round or seasonal basis, inclusive of overtime work in their section or beat. All full-time employees shall be either on the job or not available before any part-time, temporary or seasonal employees are called or assigned. However, student employees may be used for flagging on construction projects regardless of seniority or overtime.
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> . . .

FACTS

As part of its governmental functions, the County operates a Highway Department. The Union represents the Department's employes. The Department operates four separate shops from which employes do road maintenance work. These four shops are located in Rhinelander, Minocqua, Monico and Three Lakes. The principal shop is the Rhinelander shop; the other three

are outlying shops. Each shop handles the routine maintenance of roads the County is responsible for. The patrolmen (formerly known as operators) who work at these shops have specific sections of road, known as a beat or a section, which they maintain.

In the summer months, highway employes work a schedule of four (4) ten (10) hour days, Monday through Thursday. Those employes who work on Friday, Saturday or Sunday receive overtime pay at the rate of time and one-half.

In the summer of 1995, the County instituted a clean sweep collection program whereby County residents could dispose of household hazardous waste materials such as old gasoline, solvents and chemicals. This was the first time the County conducted such a collection program. Three of the four County highway shops were used as hazardous waste collection sites. Hazardous waste was collected at the Rhinelander shop on June 16 and 17, at the Minocqua shop on June 23 and 24 and at the Three Lakes shop on July 21 and 22. When the collection occurred on these dates, the highway shops were kept open when they would normally be closed (i.e., Fridays and Saturdays). One or two highway department employes were assigned to be at each highway shop while it was open to collect hazardous waste. If the shop was manned on a Friday or Saturday, the employe or employes received overtime. The employes who worked the overtime at the Rhinelander shop on June 16 and 17 were Dave Richardson and Steve Skubal. Both men are assigned to the Rhinelander shop. The employes who worked the overtime at the Minocqua shop on June 23 and 24 were Tom Collier and Steve Skubal. Collier is assigned to the Minocqua shop while Skubal, as just noted, is assigned to the Rhinelander shop. Highway Commissioner Robert Maass testified that the reason Skubal was assigned the overtime at the Minocqua shop on June 23 and 24 was to avoid a grievance over same.

This grievance involves the overtime assignment at the Three Lakes shop for July 21 and 22. Highway Commissioner Robert Maass originally offered this scheduled overtime work for those two dates to Jim Hamilton of the Rhinelander shop, who accepted the overtime assignment. Before Hamilton could work the overtime though, Maass withdrew it. The reason Maass took the overtime assignment away from Hamilton will be detailed later in this section. After Maass took the aforementioned overtime assignment away from Hamilton, he gave it to Bobby Kecker to perform. Kecker, a patrolman, is the only employe assigned to the Three Lakes shop. Maass did not offer this overtime assignment to any department employe senior to Kecker. Kecker manned the Three Lakes shop for seven hours on Friday, July 21 and for four and a half hours on Saturday, July 22. He was paid overtime for his work.

The Union subsequently filed a grievance which alleged that a more senior employe from another shop should have been offered the July 21 and 22 overtime at the Three Lakes shop. The grievance was not resolved and later was appealed to arbitration.

The record indicates there have been numerous grievances in the past pertaining to the assignment of overtime work. Most of these grievances have been settled by the parties but

several have gone to arbitration. In 1994, the parties tried to resolve their recurring disagreements concerning how overtime was to be assigned. To that end, they negotiated a letter of agreement which detailed how overtime was to be assigned henceforth. Afterwards though, this letter of agreement was not signed by the parties or executed because of disagreements over a disputed paragraph. Thus, the letter of agreement had not been officially adopted by both sides as of the date of the hearing. Maass testified that the reason he withdrew the scheduled July 21 and 22 overtime work from Hamilton was because the Union would not sign the letter of agreement just referenced.

The parties dispute how overtime has historically been assigned. Union witnesses testified that overtime has been assigned by department seniority -- not shop seniority. Employer witnesses testified that overtime has been assigned by both department and shop seniority depending on the circumstances.

POSITIONS OF THE PARTIES

Union

The Union's position is that the County violated the labor agreement when it scheduled Kecker to man the hazardous waste collection site at the Three Lakes shop on July 21 and 22, 1995. According to the Union, that overtime was to be assigned by department seniority - not shop seniority. The Union therefore contends that Skubal should have gotten this overtime work since he is senior to Kecker. The Union makes the following arguments to support this contention.

First, the Union relies on the letter of agreement, specifically Section 2. Section 2 of that document provides that department seniority will be utilized for planned and scheduled overtime unless the work to be performed is on a beat. The Union asserts that the overtime work involved here was not on an assigned beat, so it should have been assigned on the basis of department seniority. The Union submits that what the County wants to do here is apply the language contained in Section 1 of the letter of agreement to the instant (Section 2) factual situation. In support thereof, it notes that Section 1 of the letter of agreement specifies that shop seniority will be utilized for non-emergency call-ins. The Union submits that the situation at the Three Lakes shop on July 21 and 22 did not involve a non-emergency call-in, so Section 1 has no bearing here.

Next, in the event that the letter of agreement is not found applicable, the Union relies on the contract language contained in Article 7, B. The Union reads that section to provide that scheduled overtime is to be assigned by seniority, provided the employe can perform the work. The Union asserts that the overtime involved here was scheduled overtime and that Skubal was qualified to perform that work. The Union interprets the reference to seniority in Article 7, B to mean department seniority - not shop seniority. To support this premise, it calls the Arbitrator's

attention to the fact that Article 4 (the seniority provision) makes no reference whatsoever to shop seniority. That being the case, the Union believes the contract does not recognize the existence of shop seniority.

Next, with regard to the parties' past practice, the Union disputes the County's assertion that the parties have a practice of assigning scheduled overtime on the basis of shop seniority. The Union also disputes the County's assertion that the parties have different rules regarding the assignment of planned overtime when construction work is involved. The Union avers that the first time it heard about any distinction between "shop" and "construction" work was at the hearing. According to the Union the parties' past practice has been to assign scheduled overtime on the basis of department seniority. As support for this contention it cites the fact that on seven occasions in the two months preceding the dates in question here the employer assigned scheduled overtime on the basis of department seniority. The Union believes the only exception to this principle is that "beat" overtime goes to the operator assigned to the beat or section in question. In the opinion of the Union, the County is trying to expand the scope of the exception just noted to include shop overtime. It argues that beat overtime and shop overtime are not synonymous or interchangeable. It therefore asks the Arbitrator to reject this expansion of the existing practice.

In order to remedy this contractual breach, the Union requests that the grievance be sustained and the grievant made whole for the 11 1/2 hours he would have worked on July 21 and 22, 1995 had this overtime not been improperly assigned to someone else. The Union also asks the Arbitrator to order the County to henceforth assign all scheduled or planned overtime by department seniority.

County

The County's position is that it complied with the contract when it assigned scheduled overtime at the Three Lakes shop on July 21 and 22, 1995 to the operator who is assigned to that shop (i.e., Kecker). According to the County, that overtime was to be assigned by shop seniority - not department seniority. The Employer therefore contends that Skubal was not contractually entitled to that overtime work. It makes the following arguments to support this contention.

First, the County initially notes that the overtime involved here was planned or scheduled overtime. The County contends that although Article 7, B provides that overtime work shall be assigned by seniority, the provision is silent as to whether seniority is to be applied department-wide or shop-wide. The County submits that such was the case when Arbitrator McLaughlin issued his arbitration award in 1986, and it avers it is still the case today. The County notes that Article 7, B then goes on to provide that: "This shall not apply to. . .patrolman. . .who are assigned to a specific section or beat. . ." The County believes this language is determinative of the outcome herein. The County argues that the term "beat" includes the shop from which the beat originates. In support thereof, it cites Maass' testimony to that effect. The County reasons that since Kecker was assigned to the Three Lakes shop, his beat includes that shop. The County

therefore argues it was correct in assigning the overtime work in question to Kecker. In the County's view it did not make any sense to call in an employe from one shop to go across the county to do work in or around another shop under the circumstances involved here.

Next, like the Union, the County also relies on the letter of agreement to support its position here. According to the County that document uses the terms "shop" and "beat" interchangeably, and also "establishes shop seniority in each instance where it is defined." The County further contends that Section 2, A of the letter of agreement establishes that overtime work shall be given to the individual normally assigned to the beat. The County repeats the contention previously made that the word "beat" includes the shop out of which the beat originates. The County therefore argues that since the overtime at issue involved shop work, the letter of agreement likewise mandated that the overtime be assigned to Kecker, which it was.

Finally, the County argues that the Union has not established that the parties have a past practice of assigning work around shops on the basis of department seniority. With regard to the evidence of past practice offered by the Union, the County contends that some of the overtime which occurred in the two months preceding the dates in question here involved construction work, and it avers that construction work has always been assigned by department seniority. According to the County, the reason for this is that construction work does not originate out of the shop.

Based on the foregoing arguments, the County requests that the grievance be denied.

DISCUSSION

At issue here is whether the County complied with the contract when it assigned scheduled overtime at the Three Lakes shop on July 21 and 22, 1995. The County contends that it did while the Union disputes that assertion.

What happened was that the County decided it needed an employe to man the County's highway shop at Three Lakes on those dates to collect household hazardous waste materials as part of the County's clean sweep collection program. Kecker was ultimately assigned to do this overtime work and he did it. Kecker is the only employe assigned to that shop. Since Kecker is the only employe assigned to the Three Lakes shop, it logically follows that he is also the most senior employe at that shop. That being so, one way to characterize Kecker's selection for the overtime assignment is to say that the County utilized shop seniority. The Union believes however that department seniority should have been utilized - not shop seniority. If department seniority had been utilized, Kecker would not have gotten the overtime work because he is not the department's most senior employe.

The record indicates that the parties have had numerous grievances concerning the assignment of overtime work. One reason for this is that the parties have had a long-standing disagreement over whether department seniority or shop seniority is to be utilized in assigning

overtime. This disagreement stems from the fact that the contract is silent concerning same.

The record also indicates that in an effort to resolve their recurring disagreements concerning overtime assignments, the parties negotiated a letter of agreement several years ago which detailed how overtime was to be assigned henceforth. That document applies shop seniority to certain overtime situations and department seniority to others. Both sides rely on the letter of agreement to support their position herein.

There is a problem however with using the letter of agreement as a basis to resolve the instant overtime dispute. That problem is that the letter of agreement was never signed or executed by the parties. The record indicates that the reason the document was not adopted by the parties was because of a dispute over its contents. Since the letter of agreement has not been officially adopted by the parties, it cannot be used by the undersigned as a basis for resolving the instant dispute. Consequently, the undersigned will need to look elsewhere for assistance in resolving this matter.

Next, both sides contend that a past practice exists which supports their position here. Past practice is a form of evidence commonly used to fill contractual gaps. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract language contains gaps or is silent on a particular point. In order to be binding on both parties, an alleged past practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

The undersigned is not satisfied that a practice exists here which is entitled to arbitral enforcement. To begin with, the parties disagree on what the practice is. The Union's witnesses testified that overtime has been assigned by department seniority, while the Employer's witnesses testified that overtime has been assigned by both department and shop seniority depending on the circumstances. However aside from that, there simply is not sufficient information in the record from which the undersigned can determine what the practice, if any, has been concerning overtime assignments (i.e., whether overtime has historically been assigned by department seniority, shop seniority or a combination thereof). Given the foregoing, it cannot be said that a past practice relative to the issue herein exists, and even if it does, what the scope and application of the practice are.

Having previously held that the letter of agreement is inapplicable here and that there is no binding past practice, attention is now turned to the contract language. Both sides agree that the contract language applicable here is Article 7, Section B. It provides as follows:

> Overtime work shall be called for or assigned by seniority to employees who, in the judgment of the Highway Commissioner or direct supervisor, are well qualified to perform the available overtime work and who are not working on a regularly scheduled job. Employees may challenge the judgment of the Commissioner or direct supervisor as provided for in Article 14, Section I. This shall not apply to employees working on a project at the end of the normal work day who are required to complete the work inclusive of overtime or to patrolman or patrolman's helpers who are assigned to a specific section or beat on a year-round or seasonal basis, inclusive of overtime work in their section or beat. All full-time employees shall be either on the job or not available before any part-time, temporary or seasonal employees are called or assigned. However, student employees may be used for flagging on construction projects regardless of seniority or overtime.

An overview of that provision follows. The first sentence provides that overtime work shall be assigned by seniority to employes who are qualified (in management's judgment) to perform it and are not working on another job. This sentence is silent though on whether department seniority or shop seniority is to be utilized in assigning overtime. The second sentence goes on to provide that if the Highway Commissioner finds an employe not qualified to perform the overtime work, then the employe can grieve it. The third sentence goes on to provide that the mandate of the first sentence (i.e., that overtime work will be assigned by seniority) does not apply in two expressly-named situations, to wit: employes working on a project at the end of a normal work day or to patrolmen who are assigned to a specific section or beat. The remaining two sentences in Section B have no bearing on this case and need not be summarized here.

As noted above, the third sentence of Article 7, Section B provides that overtime does not have to be assigned by seniority in the following two situations: 1) when the overtime is on a project at the end of a normal work day or 2) when the overtime is on a patrolman's or patrolman helper's section or beat. It is the second of these two named exceptions that is determinative of the outcome herein.

Based on the following rationale, the undersigned concludes that the assignment of the overtime work in question to Kecker conformed with the third sentence of Article 7, Section B. As previously noted, the Employer assigned the scheduled overtime to the operator assigned to the shop where the overtime work was to be performed. That operator, of course, was Kecker and the shop where the overtime work was performed was Three Lakes. There is no question that Kecker's "section or beat" includes the roads in and around the Three Lakes shop. In the opinion of the undersigned, it also includes the shop from which he operates and from which his "beat" originates. In my view, that is the only logical interpretation which can be reached. This is because maintaining a "beat" is not just plowing roads, cutting grass and filling potholes. It also

includes housing and maintaining the equipment needed to perform that work at the shop. It follows from this finding that the situation involved here falls into the second exception contained in the third sentence of Article 7, Section B. It is therefore held that the County was in compliance with Article 7, Section B when it assigned Kecker to perform the overtime work at the Three Lakes shop on July 21 and 22, 1995. Consequently, no contract violation has been found.

In so finding, the undersigned is well aware that the ruling reached above leaves unanswered the question of whether department seniority or shop seniority is to be used in assigning overtime. However, since the contract is silent on this point and the parties have lived with that silence for years, the undersigned concludes it is not for an arbitrator to decide whether overtime is to be assigned by department seniority, shop seniority, or a combination thereof; it is for the parties themselves to decide.

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

AWARD

That the County complied with the contract when it assigned scheduled overtime work to the operator assigned to the shop where the work was to be performed. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 23rd day of August, 1996.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator