

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 119
No. 53543
MA-9385

Case 120
No. 53544
MA-9386

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 two grievances 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 June 4, 1996.

BACKGROUND:

In June, 1995, the County Highway Department's Stock Clerk took four consecutive weeks of approved vacation. During his absence, the Shop Superintendent, a supervisor, performed the Stock Clerk duties. The Union filed a grievance alleging the supervisor's performing Stock Clerk duties violated Article 5, Section J of the contract. At Step 3, the County sustained the grievance and agreed that supervisory personnel would not perform the work of any job classification within the bargaining unit except in an emergency.

On September 21, 1995, the Stock Clerk was off on sick leave and the Highway Department Secretary, a confidential employe, performed work of the Stock Clerk. The Union filed a grievance over the Secretary's performing such work.

One of the duties of the Stock Clerk is to do the fuel system report. The grievant was going on vacation the week of September 25, 1995, and requested 1 1/2 hours of overtime on September 22, 1995, to finish the fuel report. The supervisor told him to wait until he got back and he could finish it then. Upon his return, he found a copy of the fuel report with the printed notation "STANS (sic) Copy." Thereupon, a second grievance was filed alleging that supervisors were doing Stock Clerk work and 1 1/2 hours of overtime was requested for the grievant. The grievances were denied and processed to the instant arbitration.

ISSUES:

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

1. Is the Highway secretary excluded from performing bargaining unit work by Article V, Section J of the collective bargaining agreement?
2. Did the County violate the collective bargaining agreement when it had non-bargaining unit employees perform duties that are normally performed by bargaining unit position of stock clerk?

If so, what is the appropriate remedy?

The County framed the issues as follows:

Is it a violation of the collective bargaining agreement if a confidential employee performs some of the duties usually performed by the stockroom clerk on occasions such as during the clerk's absence due to illness or vacation?

The undersigned frames the issues as follows:

1. Did the County violate Article 5, Section J of the parties' collective bargaining agreement when the Highway Department Secretary performed some of the duties of the Stock Clerk when he was absent on sick leave on September 21, 1995?

If so, what is the appropriate remedy?

2. Did the County violate Article 5, Section J of the parties' collective bargaining agreement by having supervisors perform the duties of Stock Clerk during the week of September 25, 1995, when the Stock Clerk was on vacation?
If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

Article 1 - Recognition

Section A: The Committee hereby recognizes the Union as the exclusive collective bargaining representative for all permanent, regular part-time, and seasonal employees in the Oneida County Highway Department whose classifications are covered by this Agreement, but excluding the Highway Commissioner, Patrol Superintendent, Highway Department Secretary (effective May 22, 1993), temporary, part-time and student employees for the purposes of conferences and negotiations with the Employer or its lawfully authorized representatives on the questions of wages, hours, and conditions of employment.

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Article 5 - Promotions

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Section J: Supervisory personnel will not perform the work of any job classification that falls within the collective bargaining unit, except in case of an emergency.

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Article 14 - Vested Rights of Management

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Section D: The Highway Committee and Highway Commissioner shall have the sole right to contract for any work it chooses. The Highway Committee and the Highway Commissioner

shall have the sole right to direct its employees to perform any work wherever located or contracted for in its jurisdiction.

Section E: The County shall have the right to take whatever action is necessary to comply with State or Federal law.

Section F: The County shall have the right to layoff (sic) employees from their duties because of lack of work or for other legitimate reasons.

Section G: The Board and/or its representatives have the exclusive right, subject only to the provisions of Article 17, to determine the hours of employment and the length of the work week and to make changes in the detail of employment of the various employees from time to time as it deems necessary for the efficient operation of the Oneida County Highway Department. The Union and its members agree to cooperate with the Board and/or its representatives in all respects to protect the safe and efficient operation of the Highway Department.

Section H: The above condition shall be subject only to the restrictions imposed by the Agreement and the statutes of the State of Wisconsin.

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UNION'S POSITION:

The Union contends that the County violated the intent of Article 5, Section J by having the Secretary fill in for the Stockroom Clerk. It points to the testimony of Jim Hamilton that Article 5, Section J was negotiated into the agreement to prohibit the shop superintendent from performing work customarily performed in the Mechanic classification. It argues that the clear intent is to protect bargaining unit work. It notes that when this language was negotiated there were no confidential employees in the Highway Department. It also refers to a prior dispute over the Secretary as the backup on operation of the fuel system which was resolved by an agreement to train two bargaining unit employees to operate the fuel system and the Secretary refrained from doing it. Based on this resolution, according to the Union, it was under the belief that the Secretary was excluded from doing bargaining unit work and assigning her to replace the Stockroom Clerk was no different than using a supervisor to do the work because it has the same effect which is the loss of bargaining unit work. The Union argues that acceptance of the County's position would allow it to transfer bargaining unit work to non-unit classifications at its

whim.

The Union claims that the County bargained in bad faith by agreeing not to assign supervisors to do bargaining unit work in the grievance settlement and then assigning supervisory personnel to do the Stockroom Clerk's duties while he was on vacation. The Union points out that Article 5, Section J defines "bargaining unit work" which was designed to protect the integrity of the bargaining unit. It insists that this provision is applicable even when no employe is supplanted. It contends that even seemingly innocuous violations could lead to potentially serious damage to the job security of bargaining unit employes.

The Union asks for an order directing the County to cease and desist from having the confidential Secretary perform Stockroom Clerk duties or the work of any other job classification within the bargaining unit. With respect to supervisors doing bargaining unit work, the Union claims that Article 5, Section J could not be clearer and it asks that the grievance be sustained and the grievant be paid 1 1/2 hours of overtime as well as reimbursing the Union the \$25.00 filing fee.

COUNTY'S POSITION:

The County contends the grievances did not make clear what the County allegedly did wrong. It notes that Article 5, Section J deals with supervisory employes and nothing precludes the County from having non-bargaining unit employes do the work of bargaining unit employes. It notes that Article 14, Section D grants the County the right to contract for any work it chooses and the Recognition clause states that temporary, part-time and seasonal employes are not part of the bargaining unit but these do bargaining unit work. The County asserts that the contract does not define bargaining unit work, but only refers to work of a job classification, but no duties are listed and the County under Article 14, Section G has the right to assign employes any work and the County writes the job descriptions and changes them any time it wishes.

With respect to the Highway Secretary, the County submits that she is not a supervisor and does not fit the statutory definition of a supervisor but rather is a confidential employe. The County maintains that Article 5, Section J is crystal clear in that it only prohibits supervisory personnel from doing the work of a job classification in the bargaining unit. Inasmuch as the Secretary is not a supervisor, the County observes that there is no violation of the contract over what she might have done.

As far as supervisors doing work of a job classification in the bargaining unit, the County insists that after the grievance in August, 1995 was resolved, supervisors did not perform such work. The County points out that the supervisor orders specialized parts and tools and buys hardware on occasion but supervisors have been doing this for as long as can be remembered. It thinks that the instant grievance arose because the Union's chief steward believed that a supervisor

had worked on the fuel report but the evidence showed that he really didn't know whether this occurred. The County states that the record establishes that the supervisor did not work on the fuel report but merely picked it up from the Stock Clerk's desk, tore the different sections apart and left a copy on the desk. The County thought the Union had complained that the supervisor had operated the radio and telephone but these are within the supervisor's job description. It concludes that the supervisors did not do any work in violation of the contract. It argues that the Union is attempting to expand the intent of Article 5, Section J and should not be permitted to do so. It requests that both grievances be dismissed.

UNION'S REPLY:

The Union does not dispute that the Highway Department Secretary is not a supervisor and agrees she is a confidential employe and Article 5, Section J does not explicitly ban confidential employes from performing bargaining unit work but allowing her to do so has the same effect as allowing supervisors to do such work. It claims that in either case, the bargaining unit is deprived of its vested right to do work normally performed by its members. It argues that the County's argument that it has the right to contract unit work or to assign it to temporary and seasonal employes is irrelevant as neither grievance concerns those issues.

The Union alleges that the County's three main arguments are unreasonable and faulty. As to the argument that the agreement does not define bargaining unit work, the Union contends that it does and is defined in practical rather than theoretical terms as that work normally and historically performed by bargaining unit employes as a function of their specific job classification. As to the arguments that the County has the right to create job descriptions, the Union does not dispute this but observes that the right is not unconditional as snow plowing, grader operation or vehicle maintenance could be included in other job descriptions or taken out of bargaining unit descriptions, but putting it in writing doesn't make it so. It observes that these belong to job classifications in the bargaining unit and employes have a vested right to perform them. With respect to the fuel system report, the Union submits that the Stockroom Clerk's testimony that a supervisor completed the report was uncontroverted. For these reasons, and the arguments set forth in its initial brief, the Union requests that the grievances be sustained and the remedy specified in its initial brief be granted.

COUNTY'S REPLY:

The County contends that the factual issues are very clear but the conceptual issues are not. It claims that the Union's assertion that the definition of Union work is defined in Article 5, Section J is at best a quantum leap as it simply is not there. It points out that the County showed that non-union people answered the telephone, operated the radio and ordered certain parts and supplies, yet these are all within the job descriptions for these various non-union employes. As to the Union's claim that it was the "intent" of the agreement to exclude the confidential secretary from doing Union work, the County observes that this is not what the express contract language

provides and it insists that the arbitrator cannot modify, add to, or delete from the express terms of the agreement. It maintains that supervisory cannot be interpreted to mean supervisory and confidential. The County notes that the confidential secretary occasionally watches the stock room and answers the telephone, but the grievant admitted that when he left the stockroom, such as to go to the bathroom, he asked the secretary to perform these duties. It urges that nothing in the contract or the evidence presented establishes that the confidential secretary is prohibited from doing anything she has done.

As far as supervisors doing Union work, the County observes that the evidence failed to establish that any supervisor did the Stock Clerk's work. It refers to the grievant's testimony that someone had "finished" the fuel report but all the supervisor did was tear apart the various sections and write "Stan's Copy" on one but this is hardly "performing Union work." The County claims that the Union is attempting to get in the grievance process what it could not get at the bargaining table. It states that both grievances should be dismissed.

DISCUSSION:

The first issue to be decided is whether the County violated Article 5, Section J by assigning the Highway Secretary, a confidential employe, to fill in for the Stockroom Clerk on September 21, 1995. Article 5, Section J states that supervisory personnel will not perform the work of any job classification that falls within the collective bargaining unit. It is conceded that the Highway Secretary is not a supervisor. Arbitrators have held that non-unit employes who perform bargaining unit work do not violate a provision that prohibits supervisory employes from doing bargaining unit work. 1/ The Recognition clause excludes the Highway Department Secretary, temporary, part-time and student employes. There apparently is no objection to temporary, part-time or student employes performing bargaining unit work and these apparently do such work and because there is not a specific clause excluding the Highway Department Secretary, there is no reason to treat her differently than temporary, part-time or student employes.

More importantly, the facts presented here established that the Highway Department Secretary fills in for the Stockroom Clerk when he is temporarily absent. Additionally, there are certain duties which are overlapping, such as answering the phone or using the radio. These are somewhat generic duties which are part of both employes' job duties, so answering the Stock Clerk's phone would fall within the Secretary's normal duties. 2/ The evidence failed to prove that the Secretary performed all the clerk's duties but merely performed those similar to when he was temporarily absent. Even if the Secretary performed all his duties while the Stock Clerk was absent, nothing in the agreement prohibited her from doing so. Under these circumstances, there was no violation of Article 5, Section J of the agreement.

With respect to the second issue, Article 5, Section J prohibits supervisors from performing the work of the Stockroom Clerk, but in this case the evidence failed to establish that any supervisor did the Stockroom Clerk's duties. The grievant claimed that someone must have completed his fuel report. The grievant was on vacation so could not have observed any work being done and the Highway Commissioner and supervisor Pat Hall testified no work was done

1/ Ferranti-Packard Electric, Ltd., 55 LA 1157 (Wetherill, 1970).

2/ See Morton Thiokol, Inc., 88 LA 254 (Finan, 1987).

other than separating the parts of the report and leaving one copy. No one saw any supervisor do the Stockroom Clerk's duties and there was no proof that any supervisor finished or completed the fuel report. Thus, the evidence failed to establish that any substantive work was done on the fuel report and even if the tearing of the report by the supervisor is "unit work," it is de minimis and not a violation of Article 5, Section J.

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 Article 5, Section J when the Highway Department Secretary performed duties of the Stock Clerk when he was absent on September 21, 1995, due to illness and the evidence failed to prove that any supervisor performed the duties of the Stock Clerk when he was on vacation September 25-29, 1995, and therefore, the grievances are denied and dismissed in all respects.

Dated at Madison, Wisconsin, this 29th day of August, 1996.

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