

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

DOOR COUNTY HIGHWAY EMPLOYEES
UNION, LOCAL 1658, AFSCME, AFL-CIO

and

DOOR COUNTY (HIGHWAY DEPARTMENT)

Case 98
No. 52892
MA-9140

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 370, Manitowoc, Wisconsin 54221-0370, appearing on behalf of the Union.

Mr. Dennis D. Costello, Corporation Counsel, Door County, 421 Nebraska Street, P. O. Box 670, Sturgeon Bay, Wisconsin 54235-0670, appearing on behalf of the County.

ARBITRATION AWARD

Door County Highway Employees Union, Local 1658, AFSCME, AFL-CIO, hereafter Union, and Door County (Highway Department), hereafter County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as arbitrator to hear and decide a grievance. The undersigned was so designated. Hearing was held in Sturgeon Bay, Wisconsin, on October 31, 1995. The hearing was not transcribed. The parties filed post-hearing briefs and the record was closed on February 15, 1996.

ISSUE:

The Union frames the issue as follows:

Did the Employer fail to abide by the collective bargaining agreement when it did not recall the Bridgetenders prior to hiring a new employe?

If so, what is the remedy?

The County frames the issue as follows:

Did the Employer fail to abide by the collective bargaining agreement when it did not recall the grievant prior to hiring a new employe?

If so, what is the remedy?

The undersigned adopts the following statement of the issue:

Did the County violate the collective bargaining agreement when it did not recall the Bridgetenders prior to hiring a new employe to perform bargaining unit work other than bridgetending?
If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE I - MANAGEMENT RIGHTS RESERVED

A. Lawful Authority: Nothing in this Agreement shall be construed as divesting the Employer of any of its vested management rights or as delegating to others the authority conferred by the law on the Employer, or in any way abridging or reducing such authority.

This Agreement shall be construed as requiring the employees to follow the provisions in the exercise of the authority confirmed upon the Employer by law.

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ARTICLE VII - SENIORITY

A. Definition of Seniority: It shall be the policy of the department to recognize the seniority principle. Seniority time shall consist of the total calendar time elapsed since the date of original employment with the Employer, no time prior to a discharge for cause or a quit shall be included. Seniority shall not be diminished by temporary layoffs or leaves of absence or contingencies beyond the control of the parties to this Agreement.

B. Layoff:In the event of a layoff, employees shall be laid off in inverse order according to their length of service and whenever so laid off, shall possess reemployment rights as hereinafter defined.

For purposes of clarification, if a reduction of employee personnel is made, the last person hired shall be the first person laid off and the last person laid off shall be the first person called.

Seasonal employees shall be laid off before any employee in the bargaining unit is laid off. Employees shall receive a minimum notice of one (1) week's time prior to the layoff.

C. Recall: Upon recall, the employee shall notify the County within one (1) week of his intentions and shall report for work at the end of one (1) week after receiving notice of recall unless illness or other justifiable circumstances prevent him or her from doing so.

D. Job Posting: If the County decides to employ additional employees, either in vacancies or in a new positions (sic) subject to the provisions of this Agreement, former employees who have been laid off shall be entitled to be re-employed in such vacancies, provided, that such employees have the necessary qualifications under the particular job classification.

Whenever any vacancy occurs due to retirement, quit, new position, or for whatever reasons, the job vacancy shall be posted. The vacancy shall be posted on all bulletin boards for a minimum of three (3) working days. The job requirements, qualifications and wage rates shall be a part of the posting and sufficient space shall be provided for interested parties to sign said posting.

Job postings shall include permanent as well as seasonal assignments which are normally performed by regular employees.

. . .

ARTICLE XXVI - BRIDGETENDERS

A. Hours of Work and Work Week: The bridgetenders shall work on a schedule governed by the bridge operation agreement between the State Highway Commission of Wisconsin and Door County.

. . .

E. Layoff:For the purposes of layoff, the bridgetenders shall be laid off on the basis of seniority in the bridgetender classification.

F. Longevity: For purposes of longevity, the mandatory layoff period of bridgetenders shall be considered continuous service.

. . .

BACKGROUND:

The County staffs two bridges which are owned by the State of Wisconsin. Under an AFE (Authority for Expenditures) contract, the State reimburses the County for labor and other operational costs. Prior to 1995, the bridges have always been closed at the end of the shipping season and reopened at the beginning of the shipping season, i.e., January 1 through March 14.

Larry Heard, hereafter the Grievant, has been an employe of the County Highway Department for sixteen years. For the last nine years, the Grievant has been a Bridgetender. Approximately two weeks prior to January 1, 1995, the Grievant and the other Bridgetenders received notice that they would be laid off from January 1, 1995 through March 14, 1995. 1/

On February 1, 1995, the State issued a press release which stated, inter alia, that repair work on the Michigan Street Bridge would start on February 20, 1995, and that the contractor estimated that the repairs would be completed in six weeks. However, the repairs were not completed as estimated and the bridge did not reopen until May 7, 1995.

On March 14, 1995, the Grievant was called into the Highway Commissioner's office and advised that, because the Michigan Street Bridge remained closed for repairs, the Grievant would be laid off until further notice. At the time of this conversation, the Grievant understood that the Highway Commissioner did not know when the Michigan Street Bridge repairs would be

1/ The Head Bridgetenders were not laid off.

completed.

The Grievant did not receive any further communication regarding his return to work until early May of 1995, when the Grievant was told to report to work on May 3, 1995, to paint over the repaired portion of the bridge. When the Michigan Street Bridge was opened on May 7, 1995, the Grievant returned to his normal Bridgetender duties, as did the other two Bridgetenders assigned to the Michigan Street Bridge. 2/

In February, 1995, the County hired from outside the bargaining unit to fill several bargaining unit positions. Additionally, Donald Haen, who was also hired from outside the bargaining unit, began employment in a bargaining unit position on April 3, 1995. These new employees performed bargaining unit work other than bridgetending.

On April 11, 1995, a grievance was filed which stated that: "New Employee's (sic) were Hired and put to work when union members were Laidoff past the Mandatory Layoff period." The grievance alleged a violation of "Article VII page 5 paragraph A, B and D. And all other provisions which may apply." The grievance requested that affected Union members "receive pay difference from original recall date, including any Holiday pay during this period. (MAKE EMPLOYEE WHOLE)." The date of the alleged infraction was March 16, 1995.

The grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

The layoff notice received by the Grievant indicated that he was to return on March 15, 1995. The Grievant was not given notice of the extension of this layoff until March 14, 1995, the day before the extension took effect. Article VII, B, requires that employees receive a minimum of one week's notice of layoff.

The record does not demonstrate that the Employer could not comply with the contractual notice requirement. Since the Employer failed to notify the Grievant in a timely manner of the layoff which started March 15, 1995, the Grievant should be made whole from March 15, 1995, until the date that he was recalled to work.

2/ The Bridgetenders assigned to the other bridge staffed by the County returned to work on March 15, 1995.

Article XXVI references the "bridge operation agreement between the State Highway Commission of Wisconsin and Door County" when defining the work hours and work week of Bridgetenders. When investigating the current grievance, Union Steward Neinas asked Highway

Commissioner Malzahn for a copy of the "Bridge Operation Agreement" between the State Highway Commission of Wisconsin and Door County. Although Highway Commissioner Malzahn said he would try to get a copy of the document, it was never produced.

At hearing, District 3 Bridge Supervisor Brockington stated that there is no agreement between the State and County indicating when bridge operators start and quit, but rather, that operators are needed during the shipping season as determined by the Coast Guard. It is not evident that the shipping season did not begin on March 15, 1995.

The testimony of Union Steward Neinas demonstrates that the parties have bargained a mandatory layoff period, i.e., January 1 of each year through March 14. Article VII, B, states that "the last person hired shall be the first person laid off and the last person laid off shall be the first person called."

By hiring new employes, who have no seniority, to perform bargaining unit work while the Grievant, and other Bridgetenders, were laid off past the mandatory layoff period, the County has failed to abide by the labor contract. The senior Bridgetender should be made whole for wages and benefits lost from April 3, when Donald Haen commenced his employment, until the date the senior bridgetender was called back to work.

County

The two bridges in Sturgeon Bay are owned by the Wisconsin Department of Transportation (DOT). Under an agreement with DOT, the County Highway Department provides the personnel to operate the bridges; DOT reimburses the County for the labor costs of operating the bridges; and DOT determines when bridges will be opened and closed. DOT will not reimburse the County for wages or benefits of Bridgetenders called back to work prior to DOT's declaration that the bridges are open.

Bridgetenders are laid off pursuant to Article XXVI and not Article VII. Neither Article XXVI, nor any other provision of the contract, establishes a date upon which Bridgetenders are laid off and returned to work. Rather, the Bridgetender work schedule is one-hundred percent dependent upon the agreement between the State of Wisconsin-DOT and the Door County Highway Department.

Normally, the bridges are closed from January 1 until March 15, which dates coincide with the close of the normal shipping season. Bridges, however, may be closed for other reasons such as, in the instant case, bridge repairs.

The Highway Commissioner gave more than one week notice prior to the time of the Grievant's layoff. This layoff continued until such time as DOT authorized the Bridgetenders to

return to work. The County is not contractually required to provide a second layoff notice to the Grievant.

During the layoff of Bridgetender on the Michigan Street Bridge, a number of vacancies occurred in the Highway Department. The Grievant signed up for only one of these vacancies and, after being advised that he would be awarded this job, withdrew his name. It is evident that the Grievant did not really want the utility work which became available during his layoff.

The County did not violate the collective bargaining agreement. The grievance should be dismissed.

DISCUSSION

The parties agree that the County provided the Bridgetenders, including the Grievant, with a one week notice of layoff at the end of calendar year 1994. 3/ The Grievant's testimony establishes that this notice of layoff identified the layoff period as January 1 through March 14, 1995. It is undisputed that, at the time of the layoff notice, the County believed that the Grievant would be recalled to work on March 15, 1995.

On March 14, 1995, the County notified the Grievant that he would not be recalled to work on March 15, 1995, but rather, would remain on layoff until such time as the Michigan Street Bridge was repaired. 4/ The Union argues that this notification was not timely because Article VII, B, states that "Employee's shall receive a minimum notice of one (1) week's time prior to the layoff."

The Grievant received a timely notice of layoff in December, 1994. Since the notice of layoff provision does not require the County to identify the length of the layoff, the undersigned is persuaded that the notice provided to the Grievant in December, 1994, is effective until such time as the Grievant is recalled to work.

3/ The Grievant believes that this notice was received approximately two weeks prior to the layoff date of January 1, 1995. The parties agree that the Bridgetenders were entitled to receive a minimum of one weeks notice of layoff.

4/ Since the record fails to establish the date upon which the County learned that the Michigan Street Bridge would not be reopened on March 15, 1995, it is not evident that there was any undue delay in notifying the Grievant that he would not be recalled on March 15, 1995.

The Grievant had not been recalled to work at the time that the Grievant was advised that he would not be returning to work on March 15, 1995. Thus, the Grievant did not suffer a second layoff. Rather, the Grievant continued on the layoff which began on January 1, 1995. Contrary to the argument of the Union, the County did not violate the labor contract when it did not provide the Grievant with a second notice of layoff one week prior to March 15, 1995.

The Union argues that the parties have bargained a mandatory layoff period which runs from January 1 through March 14. The Union further argues that Bridgetenders who are laid off outside of this mandatory layoff period are entitled to be recalled to perform any available bargaining unit work. The undersigned turns first to the issue of whether or not the parties have bargained such a mandatory layoff period.

As the County argues, the labor contract contains only one reference to a mandatory layoff period. This reference is found in Article XXVI, F, which states that "For purposes of longevity, the mandatory layoff period of bridgetenders shall be considered continuous service." As the County further argues, this provision does not define "the mandatory layoff period" as January 1 through March 14.

Article XXVI, A, states that "The bridgetenders shall work on a schedule governed by the bridge operation agreement between the State Highway Commission of Wisconsin and Door County." Neither the contract language, nor any other evidence, demonstrates that the bridge operation agreement referenced in Article XXVI, A, is a "written" agreement.

Rather, the testimony of the State bridge supervisor, Gary Brockington, and the testimony of the Highway Commissioner establishes that bridges are opened, closed and manned pursuant to "oral" agreements between the State and the County. This testimony further demonstrates that, under these "oral" agreements, (1) the State, and not the County, determines when the bridges are opened and closed and (2) Bridgetenders are not scheduled to work when the State determines that the Bridgetenders are not needed to operate the bridges.

As the Union argues, prior to 1995, the State had never closed the bridges except during the winter shipping season, *i.e.*, from January 1 through March 14. However, the plain language of Article XXVI, A, provides the County and the State with the authority to determine the terms of the bridge operation agreement. Given this authority, the County and the State are not bound by any "past practice" of bridge operations. Rather, the County and the State have discretion to continue, or to not continue, previous bridge operations.

In 1995, under the bridge operation agreement between the State and the County, the State determined that the Michigan Street Bridge would be closed from January 1 to May 7, 1995, and that, as a result of this closure, Bridgetenders would not be needed to operate the Michigan Street

Bridge from January 1 to May 3, 1995. 5/ Given this bridge operation agreement, the County had the Article XXVI, A, right to not schedule the Grievant, or the other Michigan Street Bridgetenders, to perform bridgetending work between January 1 and May 3, 1995.

5/ Although the bridge did not re-open until May 7, 1995, the Grievant, and other Bridgetenders were recalled by the State and the County on May 3, 1995, to assist in painting the bridge.

Article XXVI, E, Layoff, states that Bridgetenders shall be laid off on the basis of seniority in the bridgetender classification. Since bridgetending work was not available to the Michigan Street Bridgetenders from January 1 to May 3, 1995, 6/ Article XXVI, E, provides the County with the right to lay off these Bridgetenders from January 1 to May 3, 1995.

In summary, the parties have not bargained a mandatory layoff period of January 1 through March 14. 7/ Rather, the parties have bargained language which recognizes that the Bridgetender work schedule, including layoff periods, is a function of the bridge operation agreement between the State and the County.

Article XXVI, E, does not provide laid off Bridgetenders with any contractual right to perform other types of bargaining unit work. The Union argues, however, that such a right is found in Article VII, B.

6/ Neither party argues, and the record does not demonstrate, that any of the laid off Michigan Street Bridgetenders were entitled to be recalled to work on the bridge which was opened on March 15, 1995.

7/ Despite the Union's argument to the contrary, the record does not establish that Union Steward Neinas was a member of the Union team which negotiated Article XXVI. Thus, Neinas' testimony that the parties had bargained a mandatory layoff period of January 1 through March 14, is not persuasive.

Assuming arguendo, that there had been a mutual understanding that the "mandatory layoff period" referenced in Article XXVI, F, was January 1 through March 14, such a fact would not limit the County's right to lay off at other times. Article XXVI, F, merely confirms that "the mandatory layoff period" does not cause a break in service. The language of Article XXVI, F, does not provide any limitation upon the County's Article XXVI, A, right to determine the Bridgetenders' work schedule.

The language of Article VII, B, relied upon by the Union, provides that, "In the event of a layoff, employees shall be laid off in inverse order according to their length of service and whenever so laid off, shall possess reemployment rights as hereinafter defined." (emphasis supplied) The "reemployment rights as hereinafter defined" include ". . . the last person hired shall be the first person laid off and the last person laid off shall be the first person called" and "If the County decides to employ additional employees, either in vacancies or in a new positions (sic) subject to the provisions of this Agreement, former employees who have been laid off shall be entitled to be re-employed in such vacancies, provided, that such employees have the necessary qualifications under the particular job classification."

Giving effect to the plain language of Article VII, the "reemployment" rights provided by Article VII are limited to employees who are laid off pursuant to Article VII. Since Bridgetenders are laid off pursuant to Article XXVI, E, and not Article VII, the undersigned rejects the Union's assertion that laid off Bridgetenders are contractually entitled to the "reemployment rights" provided in Article VII.

The testimony of Union Steward Neinas demonstrates that, prior to the adoption of Article XXVI, Bridgetenders went into the shop during the winter season, but that, after the adoption of Article XXVI, the Bridgetenders were laid off when the bridges were closed for the winter and did not perform any bargaining unit work. 8/ Thus, the evidence of past practice is consistent with the conclusion reached herein, i.e., that laid off Bridgetenders do not have a contractual right to be recalled to perform other types of bargaining unit work. 9/

In conclusion, the County had the Article XXVI right to lay off the Michigan Street Bridgetenders from January 1, 1995 to May 3, 1995. Bridgetenders, who are laid off by seniority within the Bridgetender classification, do not have a contractual right to be recalled to perform non-bridgetending work.

The employees hired while the Bridgetenders were on layoff were hired to perform bargaining unit work other than bridgetending. Accordingly, the County did not have a contractual obligation to recall the laid off Bridgetenders prior to hiring these new employees.

8/ Union President Neinas believes that many of the Bridgetenders were old, or infirm, and, thus, did not want to be obligated to work in the shop during the winter season.

9/ The County argues that a review of Union Exhibit 1, a seniority list, demonstrates that the County has a past practice of hiring new employees during the winter layoff of Bridgetenders and that the Union has never filed a grievance alleging that Bridgetenders should be recalled from layoff prior to hiring new employees. Union #1 was to have been entered into the record as a delayed exhibit. The undersigned, however, never received this exhibit.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The County did not violate the collective bargaining agreement when it did not recall the Bridgetenders prior to hiring a new employe to perform bargaining unit work other than bridgetending.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 4th day of September, 1996.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator