

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MARINETTE COUNTY HIGHWAY EMPLOYEES
UNION, INTERNATIONAL
UNION OF OPERATING ENGINEERS
LOCAL 300

and

MARINETTE COUNTY

Case 157
No. 53861
MA-9473

Appearances:

Mr. Robert L. Calkins, International Representative, International Union of Operating Engineers, appearing on behalf of the Union.

Mr. Chester C. Stauffacher, Corporation Counsel, Marinette County, appearing on behalf of the County.

ARBITRATION AWARD

Marinette County Highway Employees Union, International Union of Operating Engineers Local 300, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties.

Marinette County, herein the County, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Marinette, Wisconsin, on May 1, 1996. There was no transcript made of the hearing. The parties completed the filing of post-hearing briefs on June 20, 1996.

ISSUES:

The parties were unable to stipulate to the issues and agreed that the arbitrator would frame the issues in his award.

The undersigned believes that the following is an accurate statement of the issues:

Did the County violate the collective bargaining agreement when it failed to assign Carl Rocque to operate the roller during a paving

project on Marinette County Highway "W" in August of 1995? If so, what is the appropriate remedy?

BACKGROUND:

One of the functions of the County's Highway Department has been to pave roads with blacktop. Among the pieces of equipment used to lay blacktop are the hot and cold rollers. The hot roller operates just behind the blacktop paving machine and rolls the asphalt while it is still hot. Thus, the work environment can be hot for the hot roller operator. The vibration of the hot roller also produces considerable noise. The cold roller operates about 100 yards behind the hot roller, so the blacktop material is cooler. The cold roller does not have the vibrator function, so it is less noisy to operate than is the hot roller.

In early 1995, the County's Board of Supervisors was considering the disposal of the blacktop plant and the cessation of having County employees perform paving projects. County Highway W needed to be resurfaced in 1995. The management of the Highway Department assigned a crew to do the project as quickly as possible. The crew worked on the project for ten days and worked twelve (12) or thirteen (13) hours on each day. Chuck LaCoy was the County's foreman who was in charge of the paving of Highway W. Ron Netzel, who began working in the County Highway Department in 1983, was assigned to run the hot roller. Jerry Edelbeck, who began working in the County Highway Department in 1984, was assigned to run the cold roller.

The grievant, Carl Rocque, has been employed at the County's Highway Department since July 19, 1972. His regular job, at the time of the events resulting in the grievance, was a surveyor's helper. Rocque also works as a part-time grader operator and operated both the cold and hot rollers frequently during the construction seasons in the period of 1984 through 1993.

POSITIONS OF THE PARTIES:

The County argues that Section 1.02 of the contract clearly gives it the right to make judgments as to the qualifications of employees and to make work assignments based on those qualifications. The contract does not require the County to justify its determination of the employees' qualifications to the Union. Section 15.03 of the contract was designed for unscheduled overtime and does not apply to the instant matter because the overtime at issue was anticipated and scheduled. Neither were any additional employees called in to work on the project. Section 6.01 of the contract requires a position to be posted only if the position is to be refilled. The roller functions had not been posted for several years. Numerous other duties, e.g., brush cutting, equipment cleaning and cleaning right of ways, are assigned within the Highway Department without being posted for bid.

The Union asserts that there was a vacancy for a roller operator in 1995 and that said vacancy should have been posted, even if the vacancy was for a temporary or part-time position. Section 6.01(D) requires the posting of all jobs and vacancies. There is an existing practice of the County posting temporary or part-time jobs. The Union has requested the qualifications for the

positions in the Highway Department, but has never received those qualifications from the County. The County never advised the Union that Rocque was not qualified to be a roller operator. There have been prior grievances concerning overtime assignments which resulted in payments to employees when the County failed to assign overtime in accordance with Section 15.03 of the contract. The grievance should be sustained.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 1

RECOGNITION AND MANAGEMENT RIGHTS

. . .

1.02 Management Rights. The Employer possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this agreement and the employees' right of adjusting grievances or differences as hereinafter stated, and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations of the County; to maintain the efficiency of County operations; to determine the table of organization; to establish and enforce reasonable uniform work rules, conduct, safety and schedules of work;
- B) To manage and direct the work force, to make assignments of jobs; to determine the size and composition of the work force, to determine the work to be performed by Employees, and to determine the qualifications of Employees;

. . .

- E) To determine the kinds and amounts of services to be performed as pertains to County operations, and the number and kinds of classifications to perform such services.
- F) Such authority shall not be exercised in a manner

which will be used for the discrimination against an employee, the Union or circumvent the terms and provisions of this Agreement;

...

1.04 Scope. This Agreement constitutes the entire Agreement between the parties and no verbal statements shall supersede any of its provision. Any amendment or agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto.

...

ARTICLE 5

CONDITIONS AND EXISTING PRACTICES

...

5.02 Existing Practices. Existing practices primarily related to wages, hours and working conditions, which are mandatory subjects of bargaining, shall be continued unless changed by mutual agreement, or through the exercise of management prerogatives as restricted by the terms of this collective bargaining agreement. Nothing shall be construed as a practice unless it meets each of the following tests: It must be a) long continued; b) certain and uniform; c) consistently followed; d) generally known by the parties hereto; and e) must not be in opposition to the terms and conditions of this collective bargaining agreement.

ARTICLE 6

SENIORITY

6.01 Definition of Seniority. Seniority is defined as the length of time that the Employee has been employed by the Marinette County Highway Department, computed from the most recent hiring date, excluding unexcused absences and unpaid leaves of more than sixty (60) working days.

...

B) All applications for posted jobs must be submitted in writing. Employees on permanent jobs may bid in temporary jobs if his regular permanent job does not operate or is not interfered with. Employees on permanent jobs shall hold same

from year to year unless they bid in other jobs while their permanent job is in operation, thereby forfeiting all claim to such permanent job.

...

D) All jobs and vacancies shall be posted on the bulletin board at least four (4) work days. Employees older in seniority shall have preference on all jobs in the event that they have proper qualifications.

...

F) Any posted position which is not filled within six (6) months shall be reposted, if the position is to be refilled. For assignment purpose, job seniority shall prevail, but for other purposes, Highway Department seniority shall prevail.

...

ARTICLE 15

HOURS OF WORK

...

15.03 Unscheduled Overtime. For unscheduled overtime work such as snowplowing, outside the normal work week, the following procedure shall be used when calling in the necessary work force:

- A) The Employees holding a bid position or assigned to a bid position on a continuous basis will be the first called for the overtime.
- B) Should additional Employees be needed, Employees unassigned to a bid position from the particular highway shop from which the work is being performed on a regular basis, shall be called in by shop seniority.

...

DISCUSSION:

The County correctly asserts that Section 1.02 of the contract gives it the right to make judgments as to the qualification of employees and to make work assignments based on those qualifications. However, the County is not correct in asserting that it does not have to justify its determination of employees' qualifications to the Union. Such an assertion overlooks the language in Section 1.02 which specifies that the County's rights are subject to the provisions of the contract and to the employees' right to adjust grievances through the contractual grievance procedure. Section 6.01 is one of the contractual provisions containing restrictions on the County's right to make work assignments. Once the County has exercised its right to judge the qualifications of the applicants for a job, then that judgment is subject to the contractual grievance procedure.

Section 6.01(D) states that all jobs and vacancies shall be posted. Said language does not discuss whether temporary jobs are covered by the posting requirement. Support for the Union's position, that temporary jobs should be posted, is found in Section 6.01(B), which provision discusses the conditions under which an employee on a permanent job may bid on a temporary job. However, Section 6.01(D) requires a vacancy to be posted for at least four (4) work days. The need for a temporary assignment may arise with a shorter lead time than the four work days. Said language does not deal with such a situation. Further, Section 6.01(E) discusses a trial period of forty (40) working days for the successful bidder, which period of time frequently is greater than the time for which the temporary position is needed. Rocque asserts that the forty days do not have to be consecutive, but rather, that he has satisfied said requirement by having worked as a roller operator for more than forty days over a period of several years. The provision does not specify whether or not the forty-day period must be continuous or can be a total of multiple separate periods of time. Since the language is subject to more than one reasonable interpretation, the language cannot be considered clear and unambiguous in meaning. Accordingly, it is necessary to look to other factors to determine the meaning of the contested language.

Both parties argue that the past practice supports its respective interpretation of the provisions which provide for the job posting procedure. The Union furnished a number of postings for temporary positions during the period of December of 1958 through March of 1994. However, the County witnesses testified that, although some of the temporary jobs have been posted in the past, not all of the temporary jobs have been posted. Such testimony is supported by the fact that the County did not post for temporary roller positions in 1994, even though the rollers were operated in said year. In its brief, the Union asserts that the roller was posted for bid in 1993. It is true that the evidence shows that there was an employee assigned to the roller in 1993. The evidence did not establish whether said employee, Mark Stepien, was assigned to the roller by the County or whether Stepien bid for the position. Regardless of how Stepien was assigned to the roller, it is clear that 1995 was not the first time the County has assigned employees to operate the roller on a temporary basis without first posting the position for bid. Rocque testified that he

complained when he was not given the temporary assignment to the roller in 1994, but he did not file a grievance over the assignment. Thus, it is clear that the County has made some temporary assignments in the past without posting those assignments for bid. Accordingly, it is concluded that there is a mixed practice with respect to the posting of temporary positions, which practice does not support the grievance.

Since Netzel and Edelbeck were properly assigned to the rollers, the contract was not violated when said employes performed overtime work on the rollers. The County was not required to allow Rocque to work those overtime hours when the rollers were operated on the Highway W paving project in August of 1995.

Although LaCoy testified that he was not completely satisfied with Rocque's work on the cold roller in 1993, LaCoy did ask Rocque in April of 1995 if he would be interested in running the rollers in the coming summer season. Rocque apparently said that he would prefer to run the cold roller, because he disliked the heat and vibrations of the hot roller. LaCoy wanted a cold roller operator who could replace the hot roller operator when necessary and interpreted Rocque's statement to mean that he would not be willing to replace the hot roller operator. Such an interpretation of Rocque's statement may have been as much a reason for not assigning Rocque to the cold roller as was his expressed dissatisfaction with Rocque's work with the cold roller in 1993. Rocque testified, without contradiction, that LaCoy did not indicate any concerns over his work on the cold roller in 1993 and that he first learned of LaCoy's dissatisfaction in August of 1995. There is no indication in the evidence that LaCoy mentioned such concerns in April of 1995 when he asked Rocque if he was interested in running the rollers in the approaching construction season. It is unfortunate if there was a misunderstanding between Rocque and LaCoy as to whether or not Rocque would be willing to run the hot roller on occasion. Such a misunderstanding is not a basis to sustain the grievance.

Based on the foregoing, the undersigned enters the following

AWARD

That the County did not violate the collective bargaining agreement when it failed to assign Carl Rocque to operate the roller during a paving project on Marinette County Highway "W" in August of 1995; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 20th day of September, 1996.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator