BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration<br>of a Dispute Between<br><br>LOCAL 1266, AFSCME, AFL-CIO<br><br>and<br><br>IOWA COUNTY | Case 90<br>No. 54566<br>MA-9724 |

Appearances:

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

Mr. Howard Goldberg, Attorney at Law, Brennan, Steil, Basting & MacDougal, S.C., Attorneys at Law, appearing on behalf of the County.

## ARBITRATION AWARD

The Union and the County named above are parties to a 1996-97 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to hear a dispute regarding seniority for seasonal employees. The undersigned was appointed and held a hearing on January 28, 1997, in Dodgeville, Wisconsin, at which time the parties presented their evidence and arguments. The parties made oral arguments in lieu of briefs and the record was closed on January 28, 1997.

## ISSUE:

The parties ask:

> Did the Employer violate the collective bargaining agreement when it denied Tyson Thielorn the County helper position? If so, what is the appropriate remedy?

## BACKGROUND:

The facts are not in dispute. The County Highway Department hires seasonal employees to work three months in the summer. The County gives preference to students who want some summer work. The seasonal employees are usually hired to flag traffic, but they have to have a commercial driver's license and often work on other equipment, such as patrol trucks or tandems.

In the summer of 1995, Tyson Thielorn and John Thronson both worked as seasonal employees for the Highway Department. Both were students. In the summer of 1996, Thielorn and Thronson worked as seasonal employees, as well as three others -- Greg Parman, Michael Hendrickson and Charles Dahl. During the summer of 1996, a mechanic's position opened up, and Dahl signed for it and got it. Later in the summer, around August 1st, three County helper positions became open. Four people signed for them -- Dahl, Hendrickson, Parman and Thielorn. Dahl took one of the three positions, as he got preference as a full-time employee. That left three seasonal employees vying for two jobs. The County hired Hendrickson and Parman. This is the source of the dispute. The Union believes the County should have hired Thielorn since he had more seniority than Hendrickson and Parman, and the County believes that all three had the same seniority date and it picked the other two based on their greater experience. Personnel records show that Thielorn and Parman and Hendrickson all have the same date for first day of employment -- May 28, 1996.

There was much discussion at the hearing about qualifications and whether or not the County would know who was the most qualified and how it would know that. However, the County agreed that Thielorn was qualified for the position he sought, and that all three seasonal employees were qualified. Thielorn would have been hired had there been a third position open. Before the positions were posted, Thielorn expressed his interest and asked the Highway Commissioner, Leo Klosterman, whether a position could be delayed until he finished school. Klosterman told him that was not an option. Thielorn posted for the job, knowing that condition.

CONTRACT LANGUAGE:

ARTICLE V - PROBATION

5.01 All newly hired employees shall serve a ninety (90) day probationary period. Upon mutual agreement between the Union and the County the probationary period may be extended for an additional period of not more than ninety (90) days. During such probationary period, they shall not attain any seniority rights and shall be subject to dismissal for any reason without recourse to the grievance procedure. Seasonal employees who, upon initial hire, work less than ninety (90) days before being laid off shall be entitled to credit for such probationary time if recalled to work the following seasons.

ARTICLE VI - SENIORITY

6.01 Upon completion of the ninety (90) day probationary period, the employee shall be granted seniority rights from the date

of original hire, and his/her hourly rate shall advance to the rate

shown in Appendix A for his/her classification. A seniority roster shall be posted on all shop bulletin boards and brought up to date in March and September of each year by the Employer.

6.02 It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring, provided however, that the application of seniority shall not materially affect the efficient operation of the Iowa County Highway Department.

6.03 Seniority shall be based upon the actual length of continuous service for which payment has been received by the employee.

## ARTICLE VI -- JOB POSTING

7.01 … The full-time employee with the greatest seniority who can qualify for the job, shall be given the job. If no full-time employee bidding can qualify for the job, it shall be given to the seasonal employee with the greatest seniority who can qualify.

. . .

7.04 An employee who quits, or is laid off for a period of twenty-four (24) months, or fails to report for work within fifteen (15) days from postmark on notice of recall, or is discharged, except those reinstated under Article IV, Grievance Procedure, shall lose all prior seniority rights.

## ARTICLE IX -- LAYOFF

9.01 There shall be two seniority groups; full-time employees and seasonal employees. Seasonal employees' seniority group shall be below that of the full-time employees, and all seasonal employees shall be laid off prior to any reduction in the full-time employee working force.

9.02 When laying off seasonal employees, the oldest in point of service shall be retained if qualified to perform the available work. When laying off full-time employees, the oldest in point of service shall be retained if the remaining personnel are qualified to perform the available work. The rehiring of employees that have been laid off shall be in inverse order to that of laying off.

THE PARTIES' POSITIONS:

The Union takes issue with the County's interpretation of Section 6.03 as applied to seasonal employees, that because the season ended, there was no continuous employment. The Union argues that Section 6.03 means that when someone is laid off, he does not accrue additional seniority. The Union asks why would the last sentence of Section 5.01 be there, if every time a seasonal employee came back, he started with a clean slate? Since Thielorn was qualified, he met the conditions of Section 7.01 and should have been given a job. The Union believes that the County's process of determining relative qualifications was flawed, in that references were not checked and Thielorn was not interviewed. The Union asks that Thielorn be given the position of County helper, that his back pay and benefits and seniority date go back to August 26, 1996.

The County disputes the Union's method of calculating seniority for seasonals and objects to going back into the previous year. The County argues that Section 6.03 sets up a simple test -- continuous service for which payment has been received by the employee. Since Parman, Hendrickson and Thielorn all had the same starting date, the County could select two of them based on a rational judgment regarding their qualifications. The County submits that Article V is not applicable, because Thielorn was not laid off in the summer of 1995, and the Union cannot drag Section 5.01 into Section 6.03.

DISCUSSION:

The job posting clause is a modified seniority clause, often called a "sufficient ability" clause because it gives preference to the senior employee who can qualify for the job. There is no dispute that Thielorn was qualified for the job he posted for – the dispute is whether he had more seniority than the other two seasonal employees who worked the 1996 season with him but not the 1995 season. If his greater time on the job could be counted as seniority under the contract, he should have received the job. While Thielorn had more time actually working for the County than Parman and Hendrickson, seniority rights are given by contract and the contract must determine how one counts time on the job.

In Section 5.01, the parties agreed to give seasonal employees credit toward probationary periods if they are laid off before they finish the 90 days of seasonal work. While the County is treating seasonal employees as if they start anew each season, that they accrue no seniority and have no credited time for their prior seasonal service, the collective bargaining agreement contemplates that seasonal employees receive credit for their time on the job at least in the instance noted in Section 5.01.

The Union asks -- why would the parties give credit toward a probationary period to a seasonal employee if seasonal employees started anew each year? After all, the probationary period is 90 days. Under the Employer's theory, a seasonal employee never gets off probation then, because he or she starts with a clean slate each season. But seasonal employees do get off probation – under at least one circumstance – when they are laid off before the end of the 90 days or their seasonal work. The next question is -- why would the parties not give seasonals who finished their 90 days credit toward a probationary period if they returned the next season? Or do they?

This contract needs some work in the area of seasonal employees.

There are two other sections of the contract that indicate that seasonal employees get seniority. In Section 7.01, the seasonal employee with the greatest seniority gets posting rights to a full-time job. In Section 9.02, the seasonal employees with the oldest point of service is retained when seasonal employees are laid off. The phrase "oldest point of service" sounds more like "original date of hire," and under that concept, Thielorn could have preference to retain his job over Parman and Hendrickson in a layoff situation, but not necessarily in posting for a full-time position.

The fact that seasonal employees accrue seniority still does not state what that seniority is, where it starts. The County argues that seniority has to be based upon the actual length of continuous service for which payment has been received, according to Section 6.03. Thielorn had a break in service between 1995 and 1996, ending his work with the Highway Department in August of 1995 and resuming it in May of 1996. There was no continuous service, says the Employer. This is true, but the Union argues that seasonal employees do not lose all prior seniority rights in a break of service, pursuant to Section 7.04, and particularly during a layoff period. Regular employees would clearly not lose credits for their prior work until they were laid off for 24 months.

The parties do not agree on whether seasonal employees are laid off or they just quit or end their season. The Union argues that seasonal employees are laid off, thus trying to bring them within the ambit of Section 7.04. The Employer says they quit, and Section 6.03 applies.

Clearly, Section 6.03 controls this case. The other sections of the contract that give seasonal employees certain seniority rights – in layoffs and job promotions and probationary status – do not in and of themselves ever state that seasonal employees carry over their seniority from season to season. It would have been a simple matter for the parties to include this somewhere, preferably in Section 6.03.

Section 6.03 defines seniority as the actual length of continuous service for which payment

has been received by the employee. This language is plain enough and would exclude Thielorn from claiming greater seniority than Parman and Hendrickson, where his service was not continuous. While logic or common sense tell us that a person who has worked two seasons has more "seniority" on a job than a person who has worked one season, seniority rights are only given by contract. The parties have not dealt with seniority for seasonal employees who have breaks in service from season to season. They could have specified in Section 6.03 that seasonals would be an exception to the rule of continuous service, but they did not do so. The Arbitrator cannot do so now without making inferences that are not in the plain language of Section 6.03 of the labor contract.

## AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 1st day of March, 1997.

By Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator