

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 2717-C, AFSCME, AFL-CIO

and

JACKSON COUNTY (HIGHWAY DEPARTMENT)

Case 107

No. 52341

MA-8924

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. James Michael DeGracie, Corporation Counsel, Jackson County, appearing on behalf of the County.

ARBITRATION AWARD

The Union and County named above jointly requested that the Wisconsin Employment Relations Commission appoint the undersigned to hear a grievance about the posting of a foreman position. A hearing was held in Black River Falls, Wisconsin, on April 5, 1995, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs by November 13, 1997.

ISSUE

The issue is:

Did the County violate the collective bargaining agreement by not posting a foreman position? If so, what is the appropriate remedy?

BACKGROUND

The parties' labor contract includes the position of Foreman at Range 5 in the wage scale, the top range. There were three foremen in the bargaining unit at one time -- LeRoy Olstad, Loren Iverson, and Edward Chamberlin. Iverson was foreman for both state and county work, Olstad was foreman generally on county work, and Chamberlin was shop foreman.

Olstad gave notice that he was stepping down on May 7, 1992, and he went to a Range 2 position. Highway Commissioner Michael Hemp accepted Olstad's request to voluntarily step down. The Highway Department was reviewing its structure to see if it had enough supervision, and decided that since Olstad stepped down, it might take that opportunity to get another management position. The County took that foreman position and changed it to a non-union position of crew supervisor and appointed Donald Olsen to that position. The Union filed a unit clarification on this position, but the ruling went in favor of the County and the position was deemed to be supervisory.

Hemp noted that the duties of the crew supervisor is to mainly oversee the county trunk system and oversee crews out there. The crew supervisor cannot be with one crew at all times, and may be going in between crews, although he may spend more time with one crew. The foremen generally stayed with one crew all the time, although there may have been times where that foreman shifted between crews.

The Highway Department then assigned temporary foremen. State Patrol Superintendent Robert Gabriel made those assignments, starting with John Borek. Borek had been a foreman with a construction firm before coming to work for the County in 1987. Gabriel thought that with Borek's skills, it was to the County's advantage to give him more responsibility, since he was doing pricing and figuring. It worked well, so it was kept up. From September 28, 1993 to August 11, 1994, Borek worked 544 hours as temporary acting foreman and received foreman's pay.

Chris Emerson also acted as a temporary foreman for 800 hours between September 28, 1993 and August 11, 1994. Emerson had the greatest number of hours as temporary foreman. Mike VanKirk worked eight hours and Olstad worked 37 hours as temporary foremen.

Emerson spent more hours on that temporary foreman work in June and July of 1993 due to what's known in the area as the Father's Day Flood. Emerson has lots of experience in operating heavy equipment and has worked on a cat quite a lot. He has experience in rip rapping work, which covers banks with rocks to stop erosion.

Emerson was picked as a temporary foreman because of his previous work with heavy equipment and Gabriel's judgment that he would do the job well. The work following the flood of 1993 was the biggest job where a foreman was needed, because lot of ditches needed to be filled and the work needed to be accounted for purposes of federal aid.

THE PARTIES' POSITIONS

The Union

The Union argues that the County is making alleged "temporary" assignments to bypass the terms of the collective bargaining agreement and appointing whoever it wants to a position. The County had a road foreman but chose not to fill it as a regular position. If the County had filled it

as a regular position, it would have had to post that position and consider the seniority of the bargaining unit applicants. Since the County does not want to do this, it has accomplished picking its own choices without regard to seniority by making temporary foremen appointments.

One can see that Borek, Emerson, VanKirk and Olstad worked a total of 1389.5 hours as temporary foremen from September 28, 1993 to September 28, 1994. Once the County heard that the Union was going to file a grievance, it stopped using temporary foremen on August 11, 1994. The Union projects that if one takes that fact into consideration and adds the hours that someone would have worked as temporary foreman from August 11, 1994 to September 28, 1994, the number of hours worked would have been 1594.87 or approximately 77 percent of the time. Furthermore, a regular foreman may not even work an actual amount of 1595 hours per year when one figures vacation, holidays, sick leave and time spent performing other duties.

While the County has argued that the numbers were so large because of the flood of 1993, the flood occurred in June of 1993 and most of the work associated with the flood was completed by September 28, 1994, the date that the calculations were initiated.

The Union says the question then becomes – how often does the County need to fill a position before it has actually created a regular position? The Union does not believe that the Arbitrator has to have a specific answer to this question because the County assigned a foreman in excess of three-fourths of the time. By its own actions, the County created a regular foreman position which should have been posted.

The Union asks that the County be ordered to post a regular full-time foreman position with a make whole remedy.

The County

The County argues that it has the right to determine whether a vacancy exists and whether and when it shall be filled. Contractual provisions dealing with the posting of vacancies have been narrowly construed. Where insufficient work exists to justify the filling of a job, management is not required to post a job and can assign excess duties occasionally to another employee. The County here made temporary assignments to an “acting foreman” position, and the employees who filled that temporary assignment were paid at a higher rate for that job.

The County agrees that a Union member was promoted to a non-union supervisory position, and the Union position of foreman has not been filled and remains vacant. While four employees worked a total of 1389.5 hours, that is 690.5 less than the 2080 a Union employee is scheduled to work in the course of a year. Moreover, there was a mutual benefit to the County and to the employees, where the employees received higher wages, and the County received their expertise in certain areas.

It is generally acknowledged that management has a great deal of flexibility in making unscheduled and emergency changes in the work schedule, if made in good faith and for reasonable cause, the County asserts. The heavy rains and flooding in June of 1993 caused extensive damage that required significant repair or reconstruction. Emerson was used extensively during 1993 because of his knowledge and experience with heavy equipment and rip-rap for repairing the flood-damaged highways. Olstad and VanKirk substituted for him when he was unavailable. A total of 845 hours was for jobs directly related to the flood.

The County asks that the grievance be denied.

DISCUSSION

The collective bargaining agreement states in Article 7, Section 1:

When it becomes necessary to fill vacancies or new positions within the bargaining unit, the Employer will post such vacancies or new positions for five (5) working days, during which time interested employees may apply by signing the posting. Job postings shall state the job to be filled, qualifications for the job and the rate of pay. Posted positions shall be awarded as promptly as possible following the posting period to a qualified applicant. The qualified applicant with the most seniority shall be selected to fill the vacancy or new position. This Section does not prohibit the Employer from advertising vacancies during the job posting.

Significantly, the labor contract does not state how many foremen the County must have. The contract states at the end of the wage schedule: "There shall be four (4) posted full-time Heavy Equipment positions, exclusive of the Time Keeper/Stock Clerk position." There is no similar language regarding the foreman position or other positions, such as mechanics, laborers, or patrolman and state auxiliary positions.

It is true that the bargaining unit lost one position when Olsen was promoted to a management position, and that the County still needed some foreman duties performed from time to time. However, there is no evidence on the record that there is a full-time position being filled by temporary assignments to the position of acting foreman.

Even though the four temporary Foremen – Emerson, Borek, VanKirk and Olstad – work a total of 1389 hours, that would still not make a full-time position of 2080 hours. Furthermore, many of those hours were accumulated by Emerson following a natural disaster, the Father's Day Flood. Without such an event, the 1389 hours would have been reduced to less than a part-time position. In a normal year without a special circumstance like the flood, the acting foremen might have only worked between 500 and 600 hours a year, hardly enough to require a posting of a full-time position.

It is possible that the County should post temporary foreman positions when it has projects that need a significant amount of time. In those circumstances, there is no reason why the County could not post a temporary job and fill it according to Article 7, which calls for a qualified applicant with seniority to be selected. However, the question before me is whether the County should have replaced Olsen with a full-time foreman position and posted it. I find that the County did not violate the collective bargaining agreement under the facts of this case by not posting the position.

AWARD

The grievance is denied.

Dated at Elkhorn, Wisconsin this 11th day of December, 1997.

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

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