

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORTAGE COUNTY HIGHWAY EMPLOYEES LOCAL 311, AFSCME, AFL-CIO

and

PORTAGE COUNTY

Case 135
No. 55349
MA-9990

Appearances:

Mr. Jeffrey J. Wickland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Kelley, Weber, Pietz & Slater, S.C., Attorneys at Law, by **Mr. Richard J. Weber**, appearing on behalf of the County.

ARBITRATION AWARD

Portage County Highway Employees Local 311, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Portage 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 jointly requested that the Wisconsin Employment Relations Commission assign a member of its staff to act as an arbitrator to hear and decide a grievance over a written reprimand. The undersigned was so assigned. Hearing was held on October 30 and December 12, 1997. The hearing was not transcribed and the parties filed briefs and reply briefs, the last of which was received on February 17, 1998.

BACKGROUND

The grievant has been employed by the County since May 17, 1976, and is a patrolman and shovel operator. In the winter, he is assigned to winter maintenance and snow plowing and has 19-20 years' experience plowing snow. The County had a snowstorm on January 24 and 25, 1997. The grievant was assigned to plow snow in Section 19, an area that includes Highway P, the most heavily traveled county road connecting Wisconsin Rapids and Stevens Point. Highway P has the highest priority. Section 19 also includes County Roads C, E, II and PP. C is a main road and the others are secondary. The grievant punched in at

approximately 6:52 a.m. on January 24, 1997, and was assigned Truck #60. Truck #60 was an older truck and its battery was dead so it was jump started and the heater was hot-wired and the battery load tested. The truck was loaded with materials and gas and the grievant tested the plow but the hydraulics were not working so further repairs were made and the grievant arrived in Section 19 around 10:00 a.m. Another plow operator had been assigned to plow Highway P until the grievant arrived on the scene. The grievant plowed for less than an hour when an electrical short filled the truck with smoke. The grievant got out and was waiting outside the truck when the mechanic arrived in his service truck. The truck was temporarily repaired and it ran for a couple of hours and then quit. Another truck, #76, was sent out and the grievant switched trucks. The person who brought Truck #76 out told the grievant he was having problems with the wipers and the defroster. The grievant plowed for a couple of hours and returned to the shop reporting a headlight out and brakes needing adjustment. The truck needed 1 1/2 hours of repairs. The grievant then returned to Section 19 and plowed until sometime after 10:00 p.m. before returning to the shop. After returning, the grievant did not tell the mechanics about the wipers or the defroster problems. The grievant had put in 15 3/4 hours of work by his time card and estimated his trucks were non-usable for eight hours.

On January 25, 1997, the grievant punched in at about 5:26 a.m. and drove Truck #76 to Section 19. The grievant plowed in Section 19 for an hour or two and then returned to the shop to have the wipers and defroster repaired and to load more sand. The grievant went to the break room and wrote in his diary and then called his supervisor and told him he was sick and would be going home and punched out at 9:25 a.m.

The Highway Commissioner went to Section 19 the morning of January 25, 1997, and found that it was in very poor condition with some secondary roads appearing not to have been plowed at all and Highway P snow packed with only "wheel tracks." The Highway Commissioner then got Supervisor Dale Peterson and Union Vice President Tom Moss and they toured Section 19 and all agreed that Section 19 was in poor winter driving condition.

The Highway Commissioner held a meeting with the grievant on January 28, 1997, and the grievant was given the following written reprimand on February 14, 1997:

On 1/25/97, I reviewed section #19 and found it to be in poor winter driving condition. I then picked up Dale Petersen and Tom Moss. We drove the majority of your section and found that your secondary roads had not been opened and contained areas of high snow drifts. County Highway 'P' was snow packed and did not appear to have been salted. Complaints were received on the condition of Highway 'E', between Highway 10 and 'C', and this too had not been plowed.

An investigation as to the lack of winter maintenance performed on section #19 was then opened and consisted of interviews with Ken Gliszinski, Jeff Firkus, Jim Shevelson, Tom Porter and yourself. I also inspected the daily shop labor reports, county salt/sand inventory sheets, time cards, and your winter

maintenance time sheet for the period of 1/24 and 1/25/97.

The finding of the investigation shows there was an intentional work slow down on your part. Your substandard performance resulted in road conditions that endangered the lives of the general public and the reputation of this department. This level of service will not be tolerated. If immediate improvements on maintenance operations are not seen your dismissal from the Portage County Highway Department will be considered.

The investigation brought out areas where your productivity was lacking during this storm.

Down Time: You must notify a supervisor when your vehicle is out of service. This allows the supervisor to assign you a different truck or shift other workforces to your section.

You must notify shop mechanics of problems with equipment as soon as you are aware of them, much of this repair work can be done between shifts while you are at home.

Breaks:Maximum length 15 minutes, this includes time spent writing in your notebook.

Notebook: During the investigation you stated you routinely stop for a minute or two during the day to write in your notebook. This takes away from the productive time you spend on your section. If you feel you must take notes, do it during your two daily break periods.

As an experienced highway employee, management expects you to accomplish the duties of patrolman without close supervision. If you feel you are unclear as to the snow removal practices of this department, contact Dale Petersen or Ed Ewen from our management team and they will review these practices with you.

The letter of reprimand was grieved and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following issue:

Did the County have just cause for the written disciplinary warning issued to the grievant in February, 1997?

If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

SECTION 2 - MANAGEMENT RIGHTS

A. The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

. . .

4. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

. . .

COUNTY'S POSITION

The County contends that it was the grievant's primary duty to keep Highway P open and safe for travel during the 5-6 inch snowstorm on January 24, 1997. The County observes that the grievant's time card indicates that he worked just under 16 hours on January 24, 1997. With respect to the down time issue, the County submits that when Truck #76 was delivered to the grievant at 2:00 p.m., he was told about the wipers and defroster; yet when he came in at 5:00 p.m. he had a headlight replaced and the brakes adjusted but made no mention of the wipers or defroster. It further notes that when he brought the vehicle in at the end of his shift, he made no mention of these problems to either his supervisor or the mechanics who were on duty all night and could have effected the required repairs. The County contends that the next day the grievant checked in at 5:26 a.m. and at 7:00 a.m. called the mechanic and advised him there were problems with the wipers and defroster and he was returning to the shop for repairs. It disputes the grievant's assertion that he returned to the shop to get sand because he left with a full load that morning and he still had 3-4 yards of material on the truck. It maintains that the grievant went to the break room at 8:50 a.m. and at 9:20 a.m. called his supervisor and reported that he was ill and punched out at 9:25 a.m. It asserts that he was paid for 4 hours with no evident results of any road maintenance and having spread only half a load of sand. It states that the grievant's winter maintenance sheet for the period ending January 25, 1997, does not show any sanding or salting for either the 24th or 25th of January and the "material used" sheet shows none used. It questions whether the grievant spread any sand/salt on the roads on the morning of January 25, 1997. The County points out that it is undisputed that the roads in Section 19 were in terrible shape the morning of January 25, 1997. It argues that the grievant did minimal services during the four hours he was paid on January 25, 1997, and literally abandoned his post during a snow emergency without giving his supervisor the opportunity to assess the condition of the section.

With respect to taking breaks, the County points out that the contract states when and how long breaks may be taken. It submits that the grievant violated the break times and

amounts. It admits that a "safety break" may be taken with notice to and approval from a supervisor if it needs to be done for safety's sake but that was not the case with the grievant's actions on January 25, 1997.

With respect to the notebook issue, the County argues that the grievant acknowledged a violation of the rules concerning writing in notebooks while on duty by admitting that he would keep detailed notes by writing in his diary while the vehicle was being repaired and he would stop and do this at turn-around points while on patrol in his truck. It asserts that drivers who are operating large and expensive equipment on the highway have no duty and should not write personal notes to themselves in a diary.

The County argues that the grievant failed to notify his supervisor or the mechanics about the wipers and defroster on January 24, 1997, and he knew about these at approximately 2:00 p.m. with the result that he wasted four hours of time with deplorable conditions out in Section 19. It submits that the grievant ignored the contract with respect to break times. It states that the grievant is obsessed with the maintenance of his written diary which is not part of his work assignment. It cites a long list of reprimands and suspensions as well as a termination which resulted in reinstatement without back pay to show a continuing course of work slowdowns and substandard performance. It observes that his defenses in the past have been that he is being singled out and the problems are the fault of someone else or equipment failure. The County points out that these are the same defenses raised in this case. The County submits that it is not discharging him for his snow plowing activities on January 24 and 25, 1997, but reminding him that his substandard performance resulted in road conditions that endangered lives. It alleges that the reprimand rightly described areas where his productivity was lacking and offered to review practices as to snow removal in case the grievant is unclear. It insists that it acted reasonably and the grievance should be denied.

UNION'S POSITION

The Union contends that the discipline was unjust, the work rules are ambiguous and it was the weather and equipment that resulted in the road conditions in Section 19. The Union seeks application of the seven tests applied in ENTERPRISE WIRE CO., 46 LA 359 (DAUGHERTY, 1966) to the instant case. It asserts that the County has the burden of proof and if any of the seven tests are not met, just cause for the discipline does not exist. The Union observes that the grievant was charged with engaging in "an intentional work slow down." It also notes that the grievant was disciplined for failure to follow certain procedures relating to mechanical break downs, breaks and notebooks. It acknowledges that work slow downs are prohibited by rule and contract and a proven violation can result in discipline, however the policies concerning the other charges are unclear. As to breaks, the Union asserts that employees can take "safety breaks" and the break times set forth in the contract are not applicable to the weekend. The Union notes that there is no written rule on mechanical down time and minor problems are not reported to a supervisor when the down time is short. It also asserts that the rule relating to personal notebooks is unclear and employees have a different understanding than the County. The Union insists that it would be

unreasonable for the County to enforce its ill-defined rules.

The Union claims that the County's investigation of the grievant's conduct was inadequate to prove guilt. It states the investigation included the tour of Section 19, meetings on January 28, 1997, and the February 14, 1997 letter. It contends that the tour was incomplete as there was no comparison to Wood County or to Sections 20 and 21 to determine whether the conditions in Section 19 were unique or the same as other roads in the area, which would indicate weather and equipment were to blame. It concludes that the investigation was inadequate and should not have resulted in discipline.

The Union argues that the County did not conduct a fair investigation because it did not expand the geographic scope of its tour and did not interview more witnesses. The Union takes the position that the investigation should have been conducted by someone outside the department. It questions the objectivity of the supervisors who had previously discharged the grievant. It suggests that the Highway Commissioner was biased in statements that he made and for refusing to assign the grievant a regular truck as opposed to older, unreliable vehicles and failing to adequately respond to the grievant's problems in Section 19. It maintains that the conclusion that the grievant engaged in an "intentional work slow down" is implausible and the County's conclusion is unreasonable and reflects bias.

The Union submits that the evidence failed to prove the grievant was guilty as charged. It asserts that the allegation of a slow down is a sham. It claims the evidence proves the weather and equipment caused the conditions in Section 19 which received far less service than the other roads, 10 hours versus more than 20.

The Union insists that the grievant is a target and did not get equal treatment. The Union concludes that the County did not prove any offense and the discipline is not warranted. It suggests that the County should be penalized for abusing its rights. It asks that the grievance be sustained and the letter removed from the grievant's file and the County be directed to treat all employees equally.

COUNTY'S REPLY

The County contends that if the Union's allegations are taken literally, one would have to conclude that the grievant did not know the most basic departmental rules. It submits that the grievant has 20 years experience and knew that he had to report to his supervisor before returning to the shop for repairs and he also had to describe the road conditions. It submits that the grievant has been disciplined before for wasting time such as in 1990, where he wasted four hours to get plow blades on his truck. The County observes that the grievant's tactics are to blame everyone and ask that management apologize or be penalized. It notes that the discharge was termed unjust but the Arbitrator concluded the grievant's conduct in his discharge resulted in reinstatement but no back pay due to the grievant's culpability in the matter. The County claims that it has focused on the conduct such as the failure to report the problems with the wipers and defroster and his returning to the shop without permission with a half load of sand/salt on his truck. It believes that his actions were irresponsible and clearly in violation of the rules, especially when the roads in his

section were in terrible shape. It maintains that the

grievant's sole assignment was to keep the roads clean in Section 19; yet, his failure to follow the simple established rules is the reason that ten hours were squandered and his section not maintained. It observes that the grievant ignored the rules on breaks and note taking. The grievant, according to the County, was not on a "safety break" and his note taking had nothing to do with work. The County states that the Union attributed the Union's Vice President's statements to the Highway Commissioner to show bias and prejudice, therefore this argument amounts to sheer nonsense. It claims that it is easy to blame the weather for the bad roads, but weather is the reason that there is plowing, sanding and salting. It avers that the grievant's only job was to keep the roads in good winter driving condition and the County paid him for 20 hours when he spend only ten of these on the road doing his job and the rest of the time was wasted and the reprimand was appropriate.

UNION'S REPLY

The Union does not dispute the conditions in Section 19, but it does dispute that they were caused by the grievant. It refers to the County's assertion that Highway P is the most heavily traveled County highway and questions why the grievant would not be assigned a regular truck instead of a spare, old, small and unreliable truck to tend to such a high priority section. It blames the County for failing to provide the grievant with reliable and appropriate equipment to do the job.

It submits the County was aware of the equipment problems experienced by the grievant but did not adequately respond. The Union states that minor mechanical problems are tolerated in a snow emergency and it was unreasonable to discipline the grievant for failure to report the wiper and defroster problems at the end of his work day. The Union disputes the County's assertion that on Saturday the grievant returned to the shop for these repairs; rather, he returned to reload with road product and he returned an hour later than he would have if the primary purpose had been repairs. It insists that permission from management to return to the shop to reload product is not required. It argues that the grievant violated no rule.

The Union disputes the County's claim that the grievant failed to salt County Highways P and C. It contends that he did so but the weather conditions, equipment problems and directives from his supervisor account for the limited evidence of effect from the product on Saturday. The Union states that the County alleged that the Union vice president stated that "something had to be done to rectify the situation," inferring he was advocating discipline of the grievant, when in fact this statement was in reference to the roads in Section 19. The Union takes issue with the County's appearing to suggest that the grievant drove his section with his plow up and product distributor closed. The Union also explains that the grievant returned to the shop to load product when there was a partial load remaining because it is dangerous to run out of product in the middle of an application because accidents occur when drivers come to a stretch where sanding/salting abruptly stops. It disputes that the grievant did not salt or sand on Saturday because for this to have occurred, the grievant would have had to dump 4-5 yards of product. As to breaks, the Union insists that there is a lack of proof and of common understanding on the policy of breaks on

weekends and after normal hours and a lack of consistency with respect

to safety breaks. The Union disputes the amount of time the grievant was on break and denies that it was 35 minutes and indicates that it was 18 minutes with a call from the Highway Commissioner during this period, so the County is being unreasonable. As to writing in his notebook, it maintains that the grievant only wrote in the notebook when he was on break or not plowing. It insists that the grievant is trying to survive as an employee at Portage County and the notebook is an essential tool. The Union states that given the history between the grievant and the County, the letter of reprimand has serious implications for the grievant. The Union argues that the County's attempt to throw in the "kitchen sink" by listing the grievant's prior discipline must be rejected because these are of no probative value because the evidence fails to support the discipline. It states the discipline is not appropriate because the conditions in Section 19 were caused by weather, equipment and lack of managerial response and oversight. It infers that the County is attempting to complete unfinished business. It requests the grievance be sustained and the remedy it seeks be granted.

DISCUSSION

The issue presented in this case is whether there is just cause for the February 14, 1997 letter of reprimand. The County has the burden of proof that the letter was for just cause. A review of the letter is necessary to determine whether it is supported by the evidence. The first two paragraphs of the letter essentially describe the conditions of the roads in Section 19 on the morning of January 25, 1997, and the investigation conducted by the Highway Commissioner. The record supports and does not contradict these two paragraphs. The Union admits that the conditions in Section 19 were as alleged. In its reply brief, the Union states, "County and Union do not dispute the condition of the roadways in Section 19." The testimony of the Highway Commissioner, the Union's Vice President and even the grievant supported the conclusion that the roads in Section 19 were in bad condition. As to the people the Highway Commissioner spoke to and the documents he looked at as spelled out in paragraph 2, these were not disputed. These documents were placed in evidence. The winter maintenance report shows that the grievant did blading and plowing on the 24th and 25th of January, 1997 (Ex. 22). The materials used show nothing on the 24th and 25th of January (Ex. 23). On the other hand, the inventory sheets show that the grievant loaded eight yards of salt at 7:00 p.m. on the 24th and five yards of sand on the morning of January 24, 1997 (Ex. 24). It follows that the grievant used five yards of salt on the evening of the 24th; the grievant's replacement used only six yards of sand and salt on January 25, 1997 in 1.4 hours (Ex. 21). It is noted that County Highway C is not mentioned but there was testimony by Mr. Moss that it appeared that it had been salted and was in good condition. It follows that salt was put on Highway C sufficiently to make it in good condition. The grievant may have put some salt on Highway P but because the center line was not open and it appeared plowed with only wheel tracks, it follows that the conclusion that it appeared not to have been salted is established.

Turning to paragraph 3, the first sentence states: "The finding of the investigation shows that there was an intentional work slow down on your part." An intentional work slow down is a very serious offense, particularly during a snow storm emergency. The grievant had previously

been given an unpaid suspension from April, 1995, until September, 1996. Surely,

had the grievant engaged in an intentional slow down, he would have been discharged. Here, he was given a letter of reprimand. This simply does not follow so the County could not have meant what it said in this sentence. Furthermore, the evidence failed to show that the grievant engaged in any slow down. There was no evidence that the grievant drove slowly or did things such as fueling, loading or checking in an unreasonably slow manner to indicate a slow down. There was no evidence that he was protesting any policy by the County to support a conclusion that he was engaged in a deliberate slow down to accomplish a change in such policy. The inventory sheet shows he used 5 yards of salt and 4-5 yards of sand (Ex. 24). The mileage report on Truck #76 shows 135 miles traveled from 7:06 p.m. on the 24th until 10:35 a.m. on the 25th (183,625 miles - 183,490 miles = 135), whereas his replacement traveled only 107 miles (183,732 - 183,625 = 107 miles) (Ex. 30). This supports a conclusion that there was no slow down as Section 19 has only 50 lane miles. It must be concluded that the first sentence of paragraph 3 is not supported by any credible evidence.

The balance of paragraph 3 discusses substandard performance on the part of the grievant. The evidence established that Highway P was in bad shape and the secondary roads were not opened. The Union has asserted that weather conditions, bad equipment and poor management oversight were to blame and not the grievant. It is true that the grievant had some equipment problems, but on the morning of January 24, 1997, a substitute operator plowed Highway P until the grievant arrived. When further problems ensued, a substitute truck was sent out and the grievant was given clearance for further repairs. The grievant is not a novice but has been plowing snow for 20 years and with that much experience, it is expected that he would plow and sand/salt properly with little or no supervision. The mechanic's log indicates other equipment needed repairs and they even had to dump the load on #440 (Exs. 33-37). Apparently other drivers accomplished the job of getting their sections in good winter driving condition. It was admitted that Section 19 was in bad shape and even considering the weather and mechanical problems, there is no satisfactory explanation on the part of the grievant why Highway P was in such poor shape. At least part of it should have been properly attended to. This is a case where the condition of the roads speaks for themselves. With an experienced operator working on them, they were still in poor condition. The only explanation for this state of affairs is that for a skilled operator, the grievant performed his duties in an incompetent manner or used such bad judgment that his performance was simply unacceptable. Therefore, it is concluded that the rest of paragraph 3 is proven by the record and the County's comments are warranted.

The balance of the comments in the letter of reprimand are instructions as to future conduct which certainly are appropriate. These are simply job instructions as reminders that breaks are limited to 15 minutes and that note taking of the kind the grievant admitted to are not permitted. These items appear to be minor and the directives should take care of them. While the Union discussed "safety breaks" and job notes, these were not applicable to the grievant and these arguments are not persuasive enough to alter the balance of the letter of reprimand. If the grievant had been reprimanded solely for exceeding break times and note taking and the failure to notify the mechanics of the wipers and defroster at the end of the shift, the Union's assertions that a reprimand was unwarranted would have greater weight. Here, however, the reprimand was given because the grievant, an experienced snow plow operator, did not perform his job in

a satisfactory manner as others did in the same weather and under similar conditions. The grievant's performance did not measure up to that expected of an experienced operator and he deserved the written reprimand except for the first sentence of paragraph 3.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is upheld in part and denied in part. The County did not have just cause to issue the letter of reprimand dated February 14, 1997, as written, in that the first sentence of paragraph 3 has not been proven. The County is directed to remove the letter of reprimand from the grievant's file. The County had just cause to issue the balance of the letter of reprimand and may place an amended letter in the grievant's file where the first sentence of paragraph 3 has been removed.

Dated at Madison, Wisconsin, this 26th day of March, 1998.

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

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