BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LANGLADE COUNTY HIGHWAY EMPLOYEES
LOCAL 36, AFSCME, AFL-CIO

and

LANGLADE COUNTY

Case 77
No. 55468
MA-10023

Appearances:

Mr. David A. Campshure, Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, for the Union.

Ruder, Ware & Michler, S.C., by **Attorney Jeffrey T. Jones,** 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, for the County.

ARBITRATION AWARD

On August 18, 1997, Local 36, AFSCME, AFL-CIO filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission by appointing either a Commissioner or a member of its staff as the Arbitrator in the above-captioned case. The matter was subsequently assigned to the undersigned who conducted an evidentiary hearing on May 21, 1997. No transcript was made. Briefs and reply briefs have been filed and exchanged.

ISSUE

The Union proposed the issue as:

> Did the County violate the parties' agreement regarding Range 1 pay for shop work when it refused to pay the Grievant Range 1 pay for routine maintenance he performed on vehicles other than the one to which he was assigned? If so, what is the appropriate remedy?

The County proposed the issue as follows:

Whether the County violated the terms of the Agreement and the July 12, 1996 Side Agreement by failing to pay Grievant Range 1 pay for certain duties performed on April 2, 1997?

I have determined the issue to be:

Did the County violate the parties' agreement regarding Range 1 pay when it refused to pay the Grievant Range 1 pay for work performed on April 2, 1997? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

SIDE AGREEMENT

LANGLADE COUNTY HIGHWAY DEPARTMENT

Employees assigned to the Shop shall receive the Range 1 rate. Employees shall receive their regular rate of pay for performing the following tasks:

> Performing routine maintenance on assigned vehicles or equipment, including:
>
> oil changes.
> grease jobs
> changing fuel and oil filters
> changing wiper blades
> changing bulbs and fuses (if does not involve work on wiring)
> washing, cleaning and waxing
> underbody, moldboard, wing and chipper blade changes
> help change tires
> assist mechanic to adjust brakes
>
> Repairing tire chains
>
> Sharpening chain saw blades
>
> General shop cleanup, such as sweeping or mopping floors, emptying trash, etc.

POSITIONS OF THE PARTIES

Union's Position

A review of the bargaining history relative to the side letter agreement is warranted. In early 1995 the Union grieved on behalf of Schmidt for Range 1 pay for shop work. In an attempt to settle, the parties exchanged proposals. When the Union became aware that the County expected employees to receive non-Range 1 pay for minor maintenance on any vehicle, it broke off settlement discussions and communicated that reason to the Employer's Labor Counsel. Simultaneously, Schmidt settled a related age discrimination claim and the Union withdrew the grievances. Paul Schuman was Highway Commissioner.

In April, 1996 the Union filed four new grievances on the same issue. Jeff Freitag was Highway Commissioner. The parties took up the settlement discussion again with exchanges which culminated in the side letter agreement, on July 12, 1996, while Eugene Rojatzski was interim Highway Commissioner.

In April, 1997 the Union filed the instant grievance on behalf of Dave Devore alleging a violation of Article 12, Section E of the contract and the parties' Side Letter Agreement regarding shop work.

The language of the Side Agreement is clear, unambiguous and determinative. It provides: 1) that employees assigned to the shop would receive Range 1 pay for performing any tasks other than those specified on the list; and 2) that employees assigned to the shop would not receive the Range 1 rate for performing certain routine maintenance tasks on assigned vehicles or equipment. Therefore employees assigned to the shop who perform those same tasks on other than their assigned vehicles or equipment would get Range 1 pay.

Since the Grievant testified that he is assigned to truck 159 for summer work and vehicle 13 for snowplowing, he is entitled to Range 1 pay for work performed on other vehicles on April 2, 1997.

The County's contention that there are no assigned vehicles is absurd and asserted to circumvent the intent of the Side Agreement. In addition to the Grievant's testimony, the Union's past president and current president testified that employees have assigned vehicles or equipment. Even the Highway Commissioner and office manager testified that employees normally operate the same vehicle or equipment. The County's position that an employee assigned to the shop could have many assigned vehicles is patently absurd. Simply because employees may from time to time operate a different vehicle or piece of equipment does not mean that there are no assigned vehicles.

Bargaining history supports the Union's position. The first communication from the County would have the employees paid their regular rate for performing any tasks on the list on any vehicle. When the Union discovered that interpretation it communicated its disagreement and terminated settlement discussions by letter.

When settlement discussions regarding new grievances resurfaced, the Union faxed a proposal to the County that contained the phrase "assigned vehicles or equipment" as in Exhibits U-19, 22 and Jt-8A, and the language has been the same throughout. Since the language is not the same as the County originally proposed and is the same as proposed by the Union, the County's interpretation is an attempt to rewrite the language and substitute its own previously rejected language.

Neither the Union nor its officers were aware of the County's interpretation after the Side Agreement. Therefore it cannot be asserted that the Union waived its right to grieve even though the County followed its interpretation for nine months and presented time cards for nineteen employees who were paid their regular rate for working on vehicles they did not normally operate.

Citing Elkouri & Elkouri, there can be no waiver without knowledge that the right is being abridged. Further, for the sake of argument, even if the Union had acquiesced, arbitral authority holds that acquiescence with respect to past violations of a contractual provision does not prohibit enforcement of that same provision in the future.

Employer's Position

The Langlade County Highway Department employs many persons who normally drive and operate a specific vehicle. While that may cause the employee to believe that the vehicle is their "assigned" vehicle, no Highway Department policy exists to that effect. Employees often operate different vehicles for many different reasons and sometimes in the same day.

Regarding the February/March 1995 grievances, the most that can be said is that both parties disagreed with the position of the other relative to the rate of compensation for routine maintenance on vehicles or equipment other than that which the employee normally operates and that the dispute was resolved on non-precedential grounds.

A year later in April of 1996 new grievances on the same issue were filed. In May 1996 there were changes on the County Personnel Committee and Eugene Rogatzski was appointed Interim Highway Commissioner.

On June 4, 1996, Mr. Campshure faxed a draft Side Agreement to the County Personnel Committee Chair with a cover memo which did not state the Union's position and in fact would cause the reader to believe that the employees' regular rate would apply

for the tasks performed, regardless of the vehicle. Mr. Campshure did not include the County's legal counsel in this or subsequent settlement negotiations and he did not explain his interpretation of the language of the Side Agreement relative to the phrase "assigned vehicle." Further, even in the last communication to the Department on the Side Letter Agreement, Mr. Campshure used language consistent with the Department's interpretation when he stated "The Local requests that after the list of duties is agreed upon, Kirsch receive Range 1 pay retroactively for those dates in which he was assigned to the Shop and

performed tasks not on the list." Since no mention was made of Range 1 pay for tasks on the list performed on vehicles or equipment other than those Kirsch normally operates or which is assigned to Kirsch, the Department not only could not know of but was misled about the Union's apparent interpretation.

In interpreting the Side Agreement, ordinary principles of contract interpretation support the proposition that no contract violation occurred. First, citing Elkouri & Elkouri, ambiguous contract language should be interpreted against the party who proposed or drafted it. Since the language of the proposed Side Agreement as explained by the cover memo was ambiguous, it should be interpreted against the Union. This is particularly the case where Mr. Campshure knew that the Highway Commissioner was new and Mr. Campshure was not including the County's labor counsel in the discussions.

Past practice should be used as well to interpret the Side Agreement. Citing Elkouri & Elkouri to the effect that continued failure of a party to object to the other party's interpretation of an agreement is sometimes held to constitute acceptance, it follows that the County's consistent uncontested interpretation on twenty occasions from August 23, 1996 through March 1997, should be used to give effect to the County's understanding of the Agreement.

The Union's claim that Union officials were unaware of the County's interpretation should be ignored because Elkouri & Elkouri posits that a party is often assumed to know what is transpiring in the workplace. Further, the Union's assertion flies in the face of the evidence. For instance, the Grievant in this case, (who was also a grievant in April of 1996 which led to the Side Agreement) was paid his regular rate four times for shop work after July 1996 without complaint prior to filing the instant grievance. Further, the Grievant is a member of the Union's Legislative Committee.

The Union's explanation that the employees may not have known they were not paid Range 1 rate for shop work on other than their own "assigned" vehicles does not ring true since the employees would certainly be aware that their paychecks did not reflect the increased compensation they should have expected.

Finally, another principle of contract interpretation provides that an interpretation that leads to a just and reasonable result is preferred to one that leads to a harsh, absurd or nonsensical result. Paying a Range 5 employee a Range 1 Mechanic's rate for washing a vehicle would be absurd. It would also be absurd to pay a Range 5 employee his regular

rate for washing a vehicle he operates but a Mechanic's rate for washing a vehicle he does not operate. Employees should be paid based on the nature of duties performed, not based on the identity of the vehicle. As the County's interpretation is more reasonable, it is the preferred interpretation.

Union's Response

In reply to the County's arguments, the Union asserts that the bargaining history supports the Union's position that the Side Agreement is not ambiguous. Further the County's contention that the Union never informed the County of its interpretation is false. The Union's letter of June 5, 1995 (Ex. U-10) makes the Union's interpretation clear. Rather than the Union misleading the County, the fact is that the County never questioned or raised objection and the Union should not be faulted if the County failed to carefully read and understand the Side Agreement.

It is the County's interpretation of the language that is nonsensical, not the Union's. Further, why is it that the Union has the obligation to re-explain its position with each turnover of Highway Commissioners and two Interim Highway Commissioners during the period April 1995 through April 1997? The constant turnover of Commissioner caused this dispute because the new Commissioner did not agree with and chose to disregard an agreement made by one of his predecessors. As well, it is not the Union's fault that the County chose not to communicate with its Labor Counsel. The Union communicated with appropriate County officials.

Past practice is not relevant to the dispute. The language is clear and past practice cannot be used to change the explicit terms of an agreement. Even if the Side Agreement were open to interpretation, the practice asserted by the County was not shown to be unequivocal, was not shown to be clearly expressed to the Union or employees and fails for want of mutuality.

Further, contrary to the County's speculation, neither the Union nor its officers were aware that employees were not receiving Range 1 pay for performing routine maintenance on other than their assigned vehicle or equipment. Devore, although a member of the Legislative Committee, was not an officer of the Union and as set out by the Elkouris' in their discussion on agency, the knowledge of individual members cannot by itself be credited to the Union.

Finally, the results of the Union's interpretation of the Side Agreement are not unreasonable. Actually it is the County's interpretation that would be absurd.

Employer's Response

In response to the Union's arguments, the County asserted that the Union misstated the evidence, that the County's interpretation of the Side Agreement is reasonable, consistent with Mr. Campshure's communication and consistent with the County's position throughout.

The Union mischaracterizes the evidence by trying to create a concept of "assigned" vehicle out of the testimony of Boyle, Wensel, Every and Wells. Further, the Union's position ignores the fact that the phrase is "assigned vehicles or equipment" and anyone would know that pieces of equipment like chainsaws and spreaders are not "assigned" to a particular employee.

Contrary to the Union's assertion, the County's understanding of the settlement agreement is reasonable and the evidence demonstrates that the County did not adopt its interpretation to circumvent the agreement. The evidence is that the County never varied from its position from 1995 through the Side Agreement.

Further, the Union's contention that bargaining history supports its position and its attempt to link the abandoned settlement discussions of 1995 with the Side Agreement of 1996 are attempts to mislead the arbitrator.

The Union should be held to know the manner of the County's interpretation because it was consistent with its long held bargaining position and was consistently utilized on over twenty occasions without challenge.

DISCUSSION

Generally, where contract language is clear and unambiguous it shall be applied. The language to be interpreted is:

> Employees assigned to the Shop shall receive the Range 1 rate. Employees shall receive their regular rate of pay for performing the following tasks:
>
> Performing routine maintenance on assigned vehicles or equipment, including:
>
> oil changes
> . . .
>
> . . .

Relative to the meaning of the word "assigned," it first shows up in the record in Ex. U-18a, as part of the phrase "the employee's assigned vehicle or equipment."

Previous to that, the word "operator" was used by the Employer to refer to an employee in relationship to the vehicle he normally operates. The phrase "assigned vehicle" does not appear in any other document such as an employee handbook. Its use in this Side Agreement is the only use of the phrase by the parties.

Since the bargaining history here consists solely of exchanges of documents by fax and mail, there is no evidence of any oral discussion relative to its meaning.

It is true that employees normally operate the same vehicle and that it makes sense to refer to such a vehicle as "the employee's assigned vehicle," but that language was rejected by the County in its counter-proposal (Ex. U-19a). The Union asserts that the language "on assigned vehicles" means the vehicle that is assigned to the employee, i.e. that one which he normally operates. The Employer asserts that the language "on assigned vehicles or equipment" refers to the vehicles or equipment on which the employee is assigned to

perform routine maintenance. The record does not support the conclusion that the phrase "on assigned vehicles or equipment" in the larger phrase "performing routine maintenance on assigned vehicles or equipment, including:" means "that vehicle the employee is normally assigned to operate" rather than "that vehicle the employee is assigned to perform tasks on." Either interpretation is plausible. It is generally accepted that where language is subject to more than one reasonable interpretation it is ambiguous. When language is ambiguous, it is customary to consider past practice and bargaining history as an aid to determining the intention of the parties.

Past Practice

The Employer argues that because it implemented its interpretation of the language from July of 1996 until April of 1997 on many different occasions involving different employees that such an established past practice should determine the outcome of this case. In reply, the Union asserts that the language is clear, and therefore, past practice is irrelevant. But for argument sake, the Union asserts that the practice does not meet the criteria enunciated by Arbitrator Jules J. Justin in CALANESE CORPORATION OF AMERICA, 24LA 168, 172 (1954)**,** because the practice is not unequivocal, nor clearly expressed to the Union and therefore lacked mutuality.

I do not give much weight to the past practice argument of the Employer. First, nine months is not an extended period of time. Secondly, I accept the testimony that the practice was not actually known to the Union. It is true that the Grievant here, Devore, appeared to have been a grievant on the same issue in April, 1996, and was paid his regular rate on four previous occasions when he worked in the shop, but not every employee scrutinizes his paycheck expecting to catch the employer in an error. Further, even if Devore was aware that he received no Range 1 pay for working in the shop on other vehicles, it may indicate that the Union did not communicate its interpretation to Devore rather than that the Union agreed to the County's interpretation.

Bargaining History

Much of the bargaining history of the case is set out above in the section denominated "Positions of the Parties." In deciding this case, the Arbitrator has closely reviewed the record, and in particular the exhibits, with the goal of understanding which party successfully pursued its position to inclusion in the Side Agreement.

During settlement discussions on a previous grievance in May, 1995, with the County Personnel Committee, Mr. Campshure became aware of the County's position that employees would be expected to perform the duties on the task list on any vehicle without receiving Range 1 pay. (That was clear as well from a reading of the County's settlement proposal which read "the operator or any extra employee." (Ex. U-8a)) On June 5, 1995 Mr. Campshure wrote Attorney Jones and indicated that settlement discussions broke down because the Employer and Union could not agree on what rate would be paid to employees who perform routine maintenance on vehicles they do not operate. (Ex. U-10).

There is no evidence that the content of Mr. Campshure's letter of June 5 to Attorney Jones was ever communicated to the Personnel Committee. Since the letter communicated that settlement discussions were terminated and since the underlying dispute was independently resolved, there would be no reason for Jones to inform the County Committee of its content. Jones was not involved in the later settlement exchanges which led to the Side Agreement.

In April 1996 four new grievances were filed alleging the same contract violation. On June 4, 1996 Mr. Campshure faxed a settlement proposal (Ex. U-18 & 18a) to Alfred Shultz, the chair of the Langlade County Personnel Committee, with a copy to Larry Boyle, the Union President. It proposed in pertinent part that:

> Employees assigned to the Shop shall receive the Range 1 rate. However, employees shall receive their regular rate of pay for performing the following tasks:
>
> Performing routine maintenance on the employee's assigned vehicle or equipment, including:
>
> oil changes
> . . .
>
> . . .
>
> (Emphasis added)

By letter (Ex. U-19) dated June 7, 1996 to Union President Larry Boyle, with a copy to David Campshure, Crystal Wells, Langlade County Highway Department Office

Manager, sent a revised proposed Side Agreement (Ex. U 19a) which provided in pertinent part:

> Employees assigned to the Shop shall receive the Range 1 rate. Employees shall receive their regular rate of pay for performing the following tasks:
>
> Performing routine maintenance on assigned vehicles or equipment including:
>
> oil changes
> . . .
>
> . . .
>
> adjust brakes (does not apply to vehicles with automatic adjusters).

By a one-page fax (Ex. U-21) to Crystal Wells, David Campshure advised the Highway Department that it had only one concern with the document sent on June 7th and that concern had to do with adjusting brakes. The Union recommended alternate language regarding adjusting brakes.

The County agreed to the requested change relative to adjusting brakes and by letter (Ex. U-22) of June 20, 1996 Wells sent the amended Side Agreement (Ex. U-22a) to the Union. The only change between it and the previous version (Ex. U-19a) was that change requested by the Union to amend (1) i. to read "assist mechanic to adjust brakes."

On July 12, 1996, Union President Boyle, by letter (Ex. Jt-8) wrote the Langlade County Highway Committee that Local 36 "agreed with the list of tasks for the shop when working on assigned vehicles or equipment." Attached to the letter (Ex. Jt-8) is a copy of the Side Agreement (Ex. Jt-8a) with a note on the bottom which reads "this list and wording is O.K. by us." (emphasis added) The note is signed for Local 36 by Larry D. Boyle, President.

In the Union's proposal of June 4, 1996, the use of the words "the employee's" and "vehicle" in the phrase "the employee's assigned vehicle or equipment" is central to what the Union was attempting to accomplish in the Side Agreement; to have the employees receive their regular rate of pay when they work on the employees' assigned vehicle or equipment but Range 1 pay when they work on other than their "assigned vehicle." The words "the employee's" connote a sense of possession and make it clear that the vehicle referred to is the vehicle assigned to the employee.

The removal of the phrase "the employee's" and the amendment of the word "vehicle" to "vehicles" changes the meaning of the language the Union proposed. As amended by the County, the remaining phrase "Performing routine maintenance on assigned vehicles or equipment including:" means any vehicle on which the employee is assigned to perform the listed tasks.

The parties were negotiating a Side Agreement by exchange of written proposals. It is a central principle of that process that when one side does not respond to an amendment by the other, the implications of the amendment are acquiesced to. The County amended the language so that the sense of the employee's possession of a singular vehicle was removed. The Union accepted those amendments. From this I conclude that bargaining history strongly supports the County's position as to the meaning of the language.

Based on this bargaining history, I conclude the ambiguous language can most reasonably be interpreted in the manner asserted by the County.

AWARD

The County did not violate the Labor Agreement or Side Agreement. The grievance is dismissed.

Dated at Madison, Wisconsin this 17th day of April, 1998.

James R. Meier /s/

James R. Meier, Arbitrator

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