BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DUNN COUNTY JOINT COUNCIL OF UNIONS,
AFSCME, AFL-CIO, OF DUNN COUNTY, WISCONSIN

and

COUNTY OF DUNN, WISCONSIN

Case 99
No. 55880
MA-10114

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing on behalf of Dunn County Joint Council of Unions, AFSCME, AFL-CIO, of Dunn County, Wisconsin, referred to below as the Union.

Mr. Scott L. Cox, Dunn County Corporation Counsel, Dunn County Courthouse, 800 Wilson Avenue, Menomonie, Wisconsin 54751, appearing on behalf of County of Dunn, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission should appoint an Arbitrator to resolve a dispute reflected in a grievance captioned by the parties as 97-1. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the grievance was conducted in Menomonie, Wisconsin, on February 25, 1998. No transcript was made of the hearing. The parties filed written briefs by March 30, 1998.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

Did the County violate the collective bargaining agreement by assigning the Night Mechanic/Janitor to work as an Operator II between August 20 and September 5, 1997?

If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

AGREEMENT

. . .

THE COUNTY SHALL NOT:

. . .

f) The County shall not initiate, create, dominate, aid or support any employee or employee's group for any bargaining during the term of this contract.

. . .

ARTICLE 2 - GRIEVANCE PROCEDURE

. . .

Section 2. Arbitration:

. . .

d) Limitations on Arbitrator. The arbitrator shall have no right to amend, modify, nullify, ignore, or add provisions to this agreement. His/her authority shall be limited to the extent that he/she may only consider and decide the particular issue or issues presented to him/her by the Employer and/or the Union. Disputes or differences regarding negotiable issues are expressly not subject to arbitration.

. . .

ARTICLE 6 - HOURS

Section 1. Hours of Work. Hours and schedules for the respective departments are included in the appendix section of this agreement.

Section 2. Changes. Changes in schedules may be made by mutual agreement of the parties hereto.

ARTICLE 7 - MISCELLANEOUS PROVISIONS

Section 1. Management Rights. It is understood and agreed that management possesses the sole right to operate and govern this agency and that except as otherwise specifically provided in this agreement, the County retains all the rights and functions of management that it has by law. The exercise or non-exercise of rights hereby retained by the County shall not be deemed a waiver of any such right or prevent the County from exercising such rights in any way in the future. These rights include, but are not limited to, the following:

. . .

b) Direct the work forces;

. . .

d) Determine the methods, means, and number of personnel needed to carry out the County's mission;

. . .

i) Determine the size and composition of the work force;

j) To allocate work assignments;

. . .

m) To establish work assignments;

. . .

APPENDIX A - COMPENSATION

. . .

Article A-14: Overtime/Comp Time

Section 1. Overtime.

. . .

b) **Highway Department:** Overtime Pay Employees shall receive time and one-half (1 1/2) pay for all time worked outside of their regular hours of work, their regular work week, and on holidays.

. . .

APPENDIX E - HIGHWAY DEPARTMENT EMPLOYEES

Article E - 1: Work Schedule

Section 1. Hours of Work and Work Week. The standard daily and weekly work schedule for all employees shall be five (5), eight (8) hour days. The County shall make every reasonable effort to operate its projects so as to maintain a regularly scheduled work week.

The hourly work schedule for all employees shall be:

a) General Hours
Monday - Friday 7:00 a.m. - 12:00 noon and 12:30 p.m. - 3:30 p.m.

. . .

d) Night Mechanic/Janitor
Sunday - Thursday 9:30 p.m. - 6:00 a.m.

By signed mutual agreement, a ten (10) hour four (4) day work schedule may be extended with no changes in terms (except dates) for 1995, 1996, and/or 1997. . . .

BACKGROUND

Calvin Christianson is the President of Local 727 and serves as an Operator I for the County's Highway Department. He filed Grievance 97-1 after he learned from various unit members that Darryl Knospe, the Night Mechanic/Janitor, was working on the day shift as a screed operator.

The labor agreement provisions set forth above note the normal work hours of the Night Mechanic/Janitor. At all times relevant here, the Highway Department was working under the terms of an agreement authorized by Section 1 of Article E-1. That agreement is referred to below as the Side Letter, and reads thus:

1997 10 HOUR WORK DAY

> The regular work week will consist of four 10-hour days; Monday through Thursday.
>
> The hours of work will be from 6:00 a.m. to 4:00 p.m. April 27 through August 2, 1997 and 6:30 a.m. to 4:30 p.m. August 3 through August 30, 1997, with one 15 minute break taken at 9:00 a.m. and one 30 minute break taken at noon. That break schedule is for the shop crew and patch crews, the paving and sealcoating crews will rotate their breaks so the operation does not stop — each individual will be responsible for fitting in his/her breaks when possible or at the call of the Foreman. There will be no overtime paid for the daily 45 minutes of break time as these are paid breaks.
>
> . . .
>
> The night janitor will work Sunday through Wednesday from 8:00 p.m. to 6:00 a.m. The night mechanic will work from 6:00 p.m. Sunday to 4:00 a.m. Monday, then 2:00 p.m. to 12:00 a.m. Monday through Wednesday.
>
> . . .

Since at least 1989, the parties have worked under similar side agreements setting forth a ten hour day for the summer months.

Christianson signed and filed the grievance on behalf of the unit. He testified that he was not aware of any individual bargaining between Knospe and Highway Department management.

The grievance covers work performed by Knospe as a screed operator between August 20 and September 5 of 1997. Knospe has experience as a screed operator. The County's paving machine is manned by three employes including, typically, two screed operators. The screed operators perform the constant changes on a ten foot blade which makes the adjustments necessary to conform paving material to the pitch of the roadway. Knospe was removed from his night shift position of Night Mechanic/Janitor and placed as a screed operator on the day shift by the County's Highway Commissioner, M.O. Brenden.

Brenden discussed the County's paving needs with his Patrol Superintendent, Bob Falk. They concluded that Knospe was the only experienced, reliable screed operator who was available to assist paving crews. Other potential operators were available, but Brenden and Falk felt the County was better able to do without the work of the Night Mechanic/Janitor than without the work performed by other employes with screed operator experience. They agreed that Knospe should be moved to the day shift and work, on temporary assignment, as a screed operator.

While doing this work, Knospe was classified as an Operator II. At the time disputed here, the hourly pay rate for Operator II ranged from a start rate of $13.1963 to a 24 month rate of $14.7563. The pay range for Night Mechanic/Janitor ran from $13.1363 to $14.6963. No one performed as Night Mechanic/Janitor while Knospe performed as an Operator II. It is undisputed that the County performed paving work later in the fall of 1997 without using Knospe. It is also undisputed that while he worked as an Operator II, Knospe was paid overtime consistent with other members of the paving crew. This meant that his overtime was based on the normal work schedule of a day shift employe rather than on the normal work schedule of a Night Mechanic/Janitor. It is also undisputed that unit employes other than Knospe could have been assigned to screed operation. Some of these employes had at least some experience in screed operation. The County's unwillingness to use these employes turned on its adverse view of the employe's experience or its desire to keep them on other duties.

Knospe has attended safety training given during the day shift and has been paid overtime for doing so. He worked his normal shift prior to and after such training. The County has paid straight time wages to night shift employes assigned to training given during day shift hours. For example, the County sent Bill Thibado to a one-week paving school in Illinois. He was paid at his straight time rate for this training. Christianson was aware that Thibado had also attended a one-day seminar on hydraulics and had received straight time pay. Christianson did not file a grievance because no one complained to him about the payment.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Position

The Union states the issues for decision thus:

> Did the Employer violate the contract when it worked the Night Janitor on days without the payment of overtime? If so, what is the appropriate remedy?

Resolution of these issues does not, the Union contends, pose the interpretation of ambiguous language.

Section 1 of Article E-1 requires the County to maintain "a regularly scheduled work week." The provision also establishes that work week for the Night Mechanic/Janitor. If the County cannot maintain these schedules, the contract provides it with two options. The first, established by Article A-14, is to "pay the employees overtime." The second, established by Article 6, is to "attempt to negotiate a different schedule." The County chose neither option, thus provoking this grievance. Whether the change was acceptable to Knospe is, according to the Union, irrelevant as a contractual matter. The agreement precludes individual bargaining.

Nor can the County's arguments be accepted. This is not an assignment of duties case under Article 7, Section 1. The County's management rights are subject to other agreement provisions. The right to assign does not include "the unilateral right to change the employee's schedule." As noted above, a change of schedule must follow one of two contractually mandated paths.

Nor is it contractually significant if the County faced an emergency. That other employes were available to perform the work establishes that the "crisis" the County faced was simply their own desire to avoid the payment of overtime.

Nor can the County persuasively establish a past practice. Article 2, Section 2(d), limits the power of an arbitrator to find a binding practice. More significantly, the language at issue is unambiguous, thus making recourse to past practice inappropriate. Even if practice was relevant, the County has failed to establish a mutually recognized practice in effect "over a long period of time." What evidence there is of a practice is, in any event, irrelevant. The evidence put forth by the County concerns training, not equipment operation. That unit employes routinely receive overtime when they work outside of their schedule undermines the County's position. Finally, whatever practice exists underscores the Union's contention that changes in schedules must be bargained.

The grievance should not, the Union argues, be viewed as "simple." It potentially grants the County the authority to eviscerate "the bargained overtime provisions of the contract." The Union states its view of the appropriate remedy thus:

> (O)rder the Employer to pay Night Janitor Darryl Knospe the difference between the straight-time rate and the overtime rate for all hours of work performed during the period of August 20 through September 5, 1997. Any hours of work which were paid at the overtime rate during this period are exempt from the remedy.

The County's Position

The County states the issues for decision thus:

> Did Dunn County violate Article A-14, Section 1(b) of the Collective Bargaining Agreement? If so, what is the appropriate remedy?

After a review of the evidence, the County contends that the issue on the merits must be resolved in its favor.

Initially, the County argues that Article 7, Subsections 1(b) and (d), establish that it "unambiguously has the right to determine the method, means and number of personnel to carry out the County's mission and to direct the work forces." Beyond this, the County urges that Subsections (i), (j) and (m) of that Section grant it "the right to determine the size and composition of the work force, allocate work assignments and establish work assignments." Significantly, the "contract does not prohibit temporary assignments."

Knospe was appropriately assigned, on a temporary basis, to be a screed operator. The County contends that it "was short an experienced screed operator during the peak paving season;" had no other readily available employes to fill this need; and could afford to fill the need by vacating a position "not of vital importance to the operations of the Highway Department at that time of the year." The assignment was of less than a three-week duration. It was, the County concludes, an appropriate temporary assignment.

Nor can it be argued that Knospe was not appropriately compensated. He received the Operator II rate for all straight time and overtime hours. His schedule as a Night Mechanic/Janitor was not altered since it was vacant during his temporary assignment as an Operator II. That snowplow operators receive overtime when called in outside of normal shift hours has no relevance here, since Knospe was reassigned. The more appropriate analogy is to long-term training, where night shift employes receive straight time pay for long-term day shift training sessions. Overtime for such employes is paid only when they, like a snowplow operator called in off schedule, must work their regular shift in addition to the call-in.

The County concludes that it "must have some discretion in carrying on its operation," and that accepting the Union's conclusion "would put the County, its taxpayers and the Highway Commissioner in a straight jacket." It concludes that the grievance must be denied.

DISCUSSION

The issue stated above is an amalgam of the parties' conflicting views. The County accurately notes that the issue ultimately turns on the overtime entitlement of Article A-14, Section 1(b). The Union accurately notes that the interpretive issue spreads into other areas of the agreement. I have stated the issue more generally than the County's to highlight the significance of other agreement provisions. Unlike the Union's, my statement of the issue highlights the facts of the grievance. This reflects that the broad ramifications argued by both parties must not pull the conclusion stated in this award beyond the precise facts supporting it.

As preface to addressing this issue, it is appropriate to stress what is not in issue. The evidence does not establish that the County bargained individually with Knospe. Rather, Brenden and Falk reached a conclusion consistent with their own view of their management rights and communicated this to Knospe by moving him from Night Mechanic/Janitor to day shift Operator II. This does not make resolution of the issue on the merits any easier, but does clarify what is not at issue.

The interpretive issue is the reconciliation of the County's rights under Article 7 and limitations on those rights stated in Articles 6 and A-14. Appendix E and the Side Letter are relevant to this issue as a function of Article 6.

Article 7 states rights broad enough to authorize Knospe's temporary assignment. By its terms, however, Article 7 is limited "as otherwise specifically provided in this agreement." The interpretive issue is whether the provisions of Articles 6 and A-14 create a financial disincentive to the assignment posed here.

This issue has, as both parties note, potentially broad implications. The Union fears work schedules and overtime payment can be rendered meaningless. The County fears its ability to allocate resources cost effectively can be eviscerated.

The grievance cannot, however, be resolved on its broad implications. The language underlying this dispute will not permit the sweeping conclusions advanced by the parties. Brenden, for example, testified that a "temporary transfer" could be of virtually any duration. How this could occur without violating contract provisions on posting positions is not immediately apparent.

Nor is the Union's position without difficulty. It cites Article A-14, Section 1 as unequivocal support for its position that Knospe cannot be moved off the night shift without an overtime payment. That section grants overtime for work beyond the normal day and week. How it grants overtime for Knospe for day training or for a day shift Operator I for night shift snow plowing is apparent. How it governs the grievance is not so readily apparent. If his night schedule defines his entitlement to overtime for what are straight time hours for day shift employes, how are hours beyond the normal work day and week for his day shift work handled? The terms of Article A-14 distinguish between straight time and overtime by setting a premium for hours worked beyond a normal day and week. The inferences necessary to adapt it to cover Knospe's screed operator work make it apparent that although Article A-14 may be a relevant consideration, it does not clearly and unambiguously govern this grievance.

The parties' conflicting views of the broad implications of the grievance do not afford a reliable means to address the issue. This is not an indictment of those arguments, but a reflection of the uncertain relationship between the rights of Article 7 and the limitations on those rights in Articles 6 and A-14. The grievance must, then, be examined on its facts. The goal of the case-by-case analysis is to determine whether the County's exercise of its Section 7 rights violates other agreement provisions. Such an analysis is inevitably fact driven.

The grievance is troublesome in its implications and the Union's concern with those implications is forcefully stated. However, the facts of this case afford stronger support for the County's interpretation of Article 7 than for the Union's interpretation of Articles 6 and A-14.

The Union's citation of Article A-14 is not determinative on the facts posed here. If anything, that provision restates the parties' conflicting views. If the County possesses the right to assign which it asserts here, Knospe's "regular hours of work" and "regular work week" were those of a day shift Operator II. If the Union is correct that the County possesses no such right, then his "regular hours of work" and "regular work week" were those of a Night Mechanic/Janitor, and overtime must be paid. This does not resolve, but restates, the interpretive issue.

The issue becomes, then, whether Article 6 coupled with Appendix E and the Side Letter limit the County's right to assign Knospe as a screed operator between late August and early September of 1997. No such limitation is apparent on the facts posed here. Section 2 of Article 6 makes "mutual agreement" the vehicle to effect "(c)hanges in schedules." The County did not, however, change the schedules of Appendix E or the Side Letter. Crucial to this determination is that the County did not replace Knospe as Night Mechanic/Janitor. The issue posed, then, is not a schedule change, but a change in work assignment. Knospe was not a Night Mechanic/Janitor between August 20 and September 5. Rather, he was an Operator II, with the contractually set schedule of an Operator II. This assignment was limited to specific paving projects in late summer of 1997. Thus, it appears that the assignment was made for staffing purposes traceable to specific paving projects rather than for the purpose of circumventing the overtime requirements of Article A-14.

Nor can Section 1 of Article 6 be read to establish a County violation of the agreement on these facts. It states that the hours contained in the Appendices are "for the respective departments." This reference is impersonal and not directed to an individual employe. Beyond this, Section 1 incorporates the provisions of Section 1 of Appendix E, Article E-1. None of these provisions establish the personal guarantee the Union asserts. The second sentence of Article E-1, Section 1 requires the County to "make every reasonable effort to operate its projects so as to maintain a regularly scheduled work week." There is no evidence that the County failed to make such an effort here. Schedules traceable to the projects between August 20 and September 5 fell within the limits of Appendix E and the Side Letter. In sum, none of these provisions state a personal guarantee of hours to a specific employe. Rather, those provisions make a general statement addressing departmental positions as a group.

The Appendix does, however, specify what the "hourly work schedule . . . shall be" for "all employees" including the Night Mechanic/Janitor. This language does appear to address individual employes. It is undisputed that Knospe worked outside of the hours set for the Night Mechanic/Janitor. This states the strongest contractual and factual support for the Union's case.

The difficulty posed is that Knospe did not work outside the hours set for employes working as screed operators. Unless Knospe has been personally guaranteed the hours of a Night Mechanic/Janitor, it is not apparent that the County violated Article E-1. Article 7 grants the County the right to make work assignments. Knospe has the skills of a screed operator and of a Night Mechanic/Janitor. There is no demonstrated contractual provision guaranteeing Knospe the hours of the Night Mechanic/Janitor without regard to the duties he actually performs. The Union's contention that the language can be so construed has considerable force.

Doing so, however, ignores that the asserted personal guarantee of hours is never clearly stated as a guarantee of anything beyond a normal schedule to an employe performing the work of a Night Mechanic/Janitor. A personal guarantee of hours should rest on a more solid contractual footing than arbitral inference. There is, then, no proven contractual violation to the County's exercise of its Article 7 rights on these facts.

It must be stressed that this conclusion must be limited to the facts posed here. That the County did without the work of a Night Mechanic/Janitor while Knospe worked as an Operator II undercuts the force of many of the Union's arguments. That the assignment was limited in time and was carried out with minimal disruption to Knospe's schedule is of some significance. The evidence establishes he moved from one contractually set schedule to another. While the Union is correct that such a move cannot come about from individual bargaining, it is of some support for the County's case that there has been no demonstrated personal disruption of Knospe's or other unit employes' personal lives due to the change. This makes it difficult to conclude the regularity of schedules sought in Article 6 and Appendix E has been violated. Beyond this, the record does not indicate the County avoided overtime. If the County did not avoid overtime payment, it is difficult to conclude its exercise of its Article 7 rights undercut Article A-14. What evidence was submitted indicated Knospe may have worked more overtime as an Operator II than he would have as the Night Mechanic/Janitor. This also makes it difficult to conclude the County's use of its Article 7 rights undercut Article A-14.

The Award entered below cannot, in my opinion, be read to affirm the Union's assertion that important agreement rights have been lost. The reconciliation of the conflicting demands of Articles 6, 7 and A-14 effected in the Award makes it necessary to assess the impact of specific County actions on other agreement provisions. This means each exercise of Article 7 rights must be assessed on its facts. If, for example, the County had used Knospe on an irregular daily or hourly basis to move to day shift screed operation, arguable violations of Appendix E would have occurred. If Knospe were moved to the day shift routinely over a period of time to perform screed operation, then it is arguable that violations of posting provisions and Appendix E would have occurred. If the County had rearranged the schedules of a number of employes to reassign them in a fashion to limit its overtime obligation, then an arguable violation of Article A-14 would have occurred. Beyond the resolution of this grievance, the Award entered below points only to the need to evaluate future grievances on their unique facts.

Thus, the language of the provisions posed here cannot reliably support either party's broadest contractual claim. As a result, each County exercise of its Article 7 rights must be assessed to determine if it infringes on the scope of Articles 6 or A-14. This leaves the future problematic, but accurately reflects a contractual gap. If that gap is to be broadly addressed, the bargaining table is more suitable than grievance arbitration. The Union's claim that Article A-14 can afford a disincentive for inter-shift assignments would be more clearly addressed by a specific contract provision stating so, or by the addition of a shift differential for such assignments. These potential results are not, under Article 2, Section 2(d), entrusted to an arbitrator.

The Union has persuasively argued that past practice can play no effective role in resolving this grievance. The relationship of the County's Article 7 rights to Articles 6 and A-14 cannot, in my opinion, be said to be clear and unambiguous. This ambiguity makes past practice relevant, but cannot make the evidence posed here into a binding practice. The essence of the binding force of past practice evidence is the agreement manifested by the bargaining parties' conduct. In this case, no such agreement can be inferred. That Christianson did not grieve one of Thibado's training sessions may prove no more than that no one complained. This proves something less than Union agreement that the compensation was appropriate. There is no evidence the Union was aware of the payment afforded for the paving seminar in Illinois. The Award can be reconciled to the County's payment for training. That payment cannot, however, serve as a basis to support the Award.

AWARD

The County did not violate the collective bargaining agreement by assigning the Night Mechanic/Janitor to work as an Operator II between August 20 and September 5, 1997.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 29th day of April, 1998.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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