BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUSHARA COUNTY

and

WAUSHARA COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION LOCAL 1824, AFSCME, AFL-CIO

Case 63
No. 56392
MA-10261

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 639 West Scott Street, #205, Fond du Lac, Wisconsin 54937, appearing on behalf of the Union.

Ms. Debra Behringer, Administrative Coordinator, Waushara County, P.O. Box 300, Wautoma, Wisconsin 54982, appearing on behalf of the County.

ARBITRATION AWARD

Waushara County and Waushara County Highway Department Employees Union Local 1824 are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding. The agreement provides for binding arbitration of disputes. The Union, by request dated April 22, 1998, initiated grievance arbitration and requested the Commission to appoint either a Commissioner or a member of its staff to serve as Arbitrator. The Commission appointed Paul A. Hahn as Arbitrator. Hearing in this matter was held on July 9, 1998 in Wautoma, Wisconsin. No transcript was made of the hearing. The parties filed briefs with the Arbitrator for mutual exchange. Copies of the briefs were forwarded to the parties by the Arbitrator on August 25, 1998 and the record was closed.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this award.

ISSUE

Union

Did the Employer violate the collective bargaining agreement when it did not post both a Class III and a Class II position when these jobs became vacant, and instead assigned a Class IV employe, Tom Freese, to fill the Class III vacancy and a Class III employer, Bruce Wacholtz, to fill the Class II vacancy, respectively? If so, what is the remedy?

County

Does Waushara County Highway management have the right to determine the needs of the Department and assign as necessary? If not, what is the remedy?

Arbitrator

Did the County violate Article 11 – Job posting of the collective bargaining agreement when it failed to post jobs in Classifications II and III in the spring of 1998 and filled them with employes from other classifications? If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – RECOGNITION

1.01 – The Employer recognizes the Union as the exclusive representative pursuant to Section 111.70 of the Municipal Employment Relations Act for the purpose of collective bargaining on questions of wages, hours, and conditions of employment for all regular full-time and regular part-time employees of the Waushara County Highway Department excluding the Highway Commissioner, Street Superintendents, foremen, temporary, supervisory, managerial, confidential and craft employees as certified by the Wisconsin Employment Relations Commission on December 22, 1986, (Case 23 No. 37623 ME-2630 Decision No. 24047).

ARTICLE 2 – MANAGEMENT RIGHTS

2.01 – Except as otherwise herein provided, the operation and control of the Waushara County Highway Department is vested exclusively in the Employer and all management rights repose in it. These rights include, but are not limited to the following:

(a) To direct all operations of the Waushara County Highway Department.
(b) To establish reasonable work rules and schedules of work;
(c) To hire, promote, transfer, schedule and assign employees in positions within the Department;
(d) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
(e) To relieve employees from their duties for lack of work or other legitimate reasons;
(f) To maintain efficiency of operations;
(g) To take whatever reasonable action is necessary to comply with state or federal law;
(h) To introduce new or improved methods or facilities;
(i) To change existing methods or facilities;
(j) To determine the kinds and amounts of services to be performed as pertains to operations and the number and kind of classifications to perform such services;
(k) To contract out for goods or services as long as bargaining unit employees are not on layoff or reduced hours as a result of the subcontracting;
(l) To determine the methods, means and personnel by which operations are to be conducted;
(m) To take whatever reasonable action is necessary to carry out the functions of the Department in situations of emergency.

. . .

ARTICLE 9 – GRIEVANCE PROCEDURE

9.01 – Definition of Grievance: A grievance shall be defined as a dispute concerning the interpretation, application, and/or enforcement of the terms of this Agreement.

. . .

9.07 – Decision of the Arbitrator: The decision of the Arbitrator shall be in writing to the Employer and Union. The arbitration decision shall be final and binding upon the parties subject to judicial review. The Arbitrator shall not add to, delete from, nor modify the specific provisions of this Agreement.

. . .

ARTICLE 11 – JOB POSTING

11.01 – Posting: When the Employer deems it necessary to fill a vacancy or a new position, the Employer shall post a notice of such vacancy or new position

on the bulletin board in each shop for a period of five (5) working days. The posting shall contain the desired date of filling the position, the classification of the position, the job requirements, the rate of pay, and space for all interested parties to sign said posting. The posting will be filled within fourteen (14) calendar days after the selection of the successful applicant, or as may be mutually agreed.

11.02 – Job Award: The most qualified employee applying shall be assigned the position provided that where qualifications are relatively equal, seniority shall become the determining factor. Should no bargaining unit employee apply or qualify, the Employer may hire from outside the bargaining unit.

. . .

ARTICLE 25 –PAY POLICIES

. . .

25.02 – Working Out of Class: Employees required to work in a higher classification shall receive the rate of pay in the higher classification when assigned four (4) or more hours in the higher classification in any given day.

BACKGROUND

The parties combined two grievances for the Arbitrator to consider, the original grievance (Jt. 3) and a grievance the Union requested the County and the Arbitrator consider at the hearing to which the County and the Arbitrator agreed. The grievance involves the Waushara County Highway Department and Waushara County Highway Department Employees Union Local 1824, representing employes of the County set forth in Article 1 – Recognition. (Jt. 1) The Union alleges a contractual violation by the County for the refusal by the County to post jobs in Classification II and Classification III in the spring of 1998 when those positions became vacant due to the retirement of current employes. The County takes the position that it has the sole determination of when to fill a vacancy under the job posting procedures of the collective bargaining agreement. (Jt. 1, Article 11) The County did not post a job for Classification II because of inadequate work for the equipment being run in that classification and did post the job in Classification III in April of 1998. In April of 1998, County Highway Commissioner Bohn received permission from the County Board to fill positions in Classification III. The County takes the position that it has the right under the management rights clause (Jt. 1, Article 2) to temporarily assign employes to higher classifications which is provided for under the collective bargaining agreement. (Jt. 1, Article 25) Employes are awarded the pay of the higher classification when they work four or more hours in the higher classification.

The County Highway Department has had a hiring freeze in effect because of the reduction in the number of townships in the County contracting with it for services. The number of members in the bargaining unit has been reduced from a high of 35, when the Union organized, to 23 represented employes at the time of the grievance. The Highway Department no longer is as involved in construction which has caused the elimination of jobs in Class II, where employes operate the more sophisticated heavy equipment. The County contracts with the State of Wisconsin to provide highway maintenance on State roads located within Waushara County. The primary responsibility for those State highways occurs in the wintertime when the State roads located within Waushara County must be plowed. The plowing is normally done by employes in Classification III. (Jt. 1, Appendix A) Employes in Class III, who provide maintenance and snow plowing on State highways, are provided a section, or "beat" to plow in the winter time.

In the fall of 1997, Class III employe Robert Caves indicated that he would retire in January of 1998. Highway Commissioner Bohn was informed by the County Board that he would not be able to hire or post a Class III job to replace Mr. Caves, but that he should use Class IV employes on a temporary basis to cover the snow plowing on a day-by-day basis. In January of 1998, Highway Commissioner Bohn was informed that he would have three employes (including Caves) retiring in 1998; one in January, one in May and one in June. Commissioner Bohn realized that with the absence of employes due to vacation and sick leave he would not have enough employes available to plow snow, particularly on the State roads. Therefore, between January and April of 1998 Commissioner Bohn convinced the Highway Committee of the County Board to hire additional employes. In April of 1998 the County posted for four positions in Classification III. No current union-represented employes signed the Classification III posting. It has been the experience of the County and the Union that employes are reluctant to bid into Classification III because of the requirement that the job plows snow on State highways; employes consider that dangerous work. Experience has shown that employes will bid out of class III, even to a lower classification, in order to avoid the State highway work. Failing to have any current employes bid to the class III positions, the County advertised and hired four employes in June of 1998. The hiring was to work for the Waushara County Highway Department. In all probability, all four employes will be assigned to classification III.

In the meantime, when the employe retired in April or early May it was a class II position. Because of the small number of hours class II employes were working on equipment assigned to class II, the County made the decision not to fill that position and assigned a class III employe on a temporary, or an as-needed, basis to work in that classification. The County also from January of 1998 continued to fill the class III position employe Caves had held with class IV employes on a temporary basis until the posting of the class III positions in April of 1998.

It is the failure of the County to immediately in January of 1998 post the class III position and its failure in May to post the class II position that led to the filing of the grievance(s) and a request

to proceed to arbitration. (Jt. 3-5) The Union also objected to employes working on a temporary basis in another class when there were employes within that class available to do the work.

The parties processed the grievance through the contractual grievance procedure and were unable to resolve the grievance. (Jt. 2)

The hearing in this matter was held by the Arbitrator on July 9, 1998 in the City of Wautoma, Wisconsin. The hearing closed at 1:30 p.m. The hearing was not transcribed. The parties were given the opportunity to file briefs and did so with the exchange of briefs through the Arbitrator occurring on August 25, 1998. The record was closed on the same date.

POSITIONS OF THE PARTIES

Union

The Union does not argue that the Waushara County Board and Waushara County Highway Department do not have the managerial right to determine the needs of the Department and direct its operations. The Union acknowledges that since 1991 there have not been any job postings as positions within the Department were not filled. (Jt. 4) The Union acknowledges that the contract was not violated insofar as the job posting language (Article 11) during the period between 1991 and 1998 since the County ". . . did not determine there was a need to fill or replace these particular positions and consequently hired no one." (Union Brief p. 3) The Union argues that in January of 1998, when the County made a decision that it needed to hire new employes to replace a number of anticipated retirements, the posting of positions became an issue. The Union argues that the County violated the job posting provisions of the collective bargaining agreement when it did not post the open positions when the retirements actually took place in the spring of 1998 and instead posted the positions in late spring or early summer.

The Union takes issue with the County position that one of the reasons it did not post the class III position was that employes over the past years have not bid to that position. The Union takes the position that whether employes want to post to another job is an individual decision and has nothing to do with the County's obligation under the collective bargaining agreement to post class III positions or any other position. The Union points out that when the County decided in January of 1998 that it needed more class III employes it should have at that point posted a class III position rather than continue to have class IV employes fill the position. The Union makes the same argument when the County failed to fill a class II position and assigned a class III equipment operator. The Union argues that assigning a class III employe rather than assigning someone from within the class gives that employe advanced training on particular equipment for future assignments, as well as postings, in detriment to other employes within the collective bargaining unit. It is the Union's position that if the County was correct not to fill the class II vacancy because of lack of work in that class, then the remaining work should have been given to other operators within class II rather than someone

from outside of the class.

The Union takes the position that although the County ultimately in April of 1998 did post the class III job that this does not resolve the Union grievances. The Union's contention is that a violation of the posting language occurred when the County failed to post when each position in class III and class II was initially vacant and the County knew that it needed employes in those two classes. The Union again argues that, along with the posting, the second issue is that the positions in class II and class III should have been filled, even on a temporary basis, with employes from within those classes; all employes in a class must be able to perform all the specific job duties and operate the specific equipment within that class and there were employes available within the class to do class II and class III work.

In summary, the Union takes the position that the issues to be resolved by the Arbitrator are simple. One, the County has an obligation to post open positions once it knows those positions will be filled, and, two, the County should exercise its authority to temporarily fill any open positions by using employes from within the class since these employes are already trained to perform the jobs and are expected to perform them in the course of their normal duties. Only when there are not enough employes within the class to do the work should the County then fill the position from outside the class. This in essence is the Union's remedy that the County be directed to fill positions immediately upon there being a vacancy and the need for filling a job exists and secondly the County be directed to assign employes first from within the class before assigning employes on a temporary basis from outside the class.

County Position

The County takes the position that under the collective bargaining agreement the County is not required to fill a vacancy under any specific guideline and the County alone determines when a vacancy must be filled. Therefore the class III posting in April of 1998 settles the issue of the class III posting replacing class III employe Raymond Caves who officially retired in January of 1998. As to the class II position it is the position of the County that the equipment listed under class II of the labor agreement ran a total of 1,108 hours in an 18-month period, with 9,360 man hours available and that upon the retirement of the class II employe it did not need to replace that retirement in class II. (Co. 2-3) The County states that when Raymond Caves, in the fall of 1997, informed Highway Commissioner Bohn of his intent to retire in January of 1998 there were four class IV employes who were not assigned a winter section due to loss of Township work. Commissioner Bohn was required by the Highway Committee to fill Mr. Cave's position as necessary to remove snow from State highways, a class III duty, with class IV employes who were not assigned to a winter section. Mr. Bohn was not allowed by the County Board to fill this position as there was no need. A class IV employe was assigned to fill Mr. Cave's position on a work assignment day-to-day weather situation. The County takes the position that past practice illustrates that a class does not have any affect on which type of role the employe is assigned to and that class III workers have both state and county sections. The County argues that class IV employes have worked on both County and State sections.

In April of 1998, the County argues Commissioner Bohn was made aware of two more retirements and determined that along with vacation that would be taken in 1998 and the average amount of sick leave that would be used by the bargaining unit he would not have enough employes to honor the winter contracts with the State of Wisconsin for snow plow clearing of State highways. Commissioner Bohn convinced the Highway Committee to hire four additional class III workers. On April 21, 1998, the County posted for class III highway equipment operators; none of the current employes signed the posting. (Co. 4) The County then proceeded to hire employes from the outside and eventually hired four employes. The County points out that it has consistently over the years had a problem with current employes posting into class III because of snow removal on State highways. As to the class II position, it is the position of the County that because it no longer provides construction for the highways but maintenance only that the County no longer uses several of the pieces of equipment underneath the class II designation. The County was within its right to assign an employe from another classification on a day-to-day assignment to fill the needs as necessary for class II work. Lastly, the County argues that it has the right under the collective bargaining agreement to determine when it needs to fill a vacancy and to determine the work for each classification. The County argues that it has the right and needs the right to schedule and assign employes and make temporary assignments to maintain efficiency of the operation. Otherwise a strict use of employes only by classification would result in layoff of employes which would not provide for an efficient operation within the County. The County concludes by stating that it has not violated the collective bargaining agreement by its posting practice and that the grievance should therefore be dismissed.

DISCUSSION

The record establishes that there are few facts in dispute. The resolution of the grievance turns primarily on contract interpretation. The County has for a number of years been experiencing a downturn in the workload for its highway department. Many townships within Waushara County were doing their own work and the County was less involved in highway construction. This reduced workload resulted in fewer employes needed to handle the work. The Union did not dispute any of this record and recognized the right of the County to operate as efficiently as possible. The bulk of the work is in classification III. Classification III is responsible for the snow removal on State highways. As testified to by all witnesses, snow removal work is not favored by employes and some have bid to a lower classification, IV, in order not to do State highway snow removal which is considered dangerous. This has presented some problem for the County as employees do not want to bid for classification III, although new employes have been placed in the position. All class IV employes have had some experience with State highway snow removal. The downturn in work has also led to a policy of the County not filling vacancies as fewer employes were needed to do the work.

The two grievances, which I treat here as one, started in the fall of 1997 when employe Caves, a class III employe, announced that he was going to retire in January of 1998. Caves started to take vacation and use up his sick leave as he approached his retirement date. Since

Caves had State highway snow removal, it was necessary to fill in for him when that activity was

needed; the County did this by assigning employe Freese on a temporary basis. Freese is a class IV employe. Freese was not assigned fulltime and when he did work the higher classification he was paid the rate of classification III according to the contract. (Jt. 1)

The Union in its brief makes clear that it did not object to this assignment as Caves was still an employe. It was only in January when Caves retired and his job was not posted that the Union grieved, alleging a violation of the job posting provision of the contract. (Jt.1) The County takes the position that at that point the County Board still had on a hiring freeze and therefore there was no vacancy and it was only following past practice by assigning another class IV employe to do Caves' work on a day-to-day basis. It is unclear from the record exactly when highway commissioner Bohn received permission from the Highway Committee to hire based on the fact there were two more known retirements during 1998. I believe, however, that the record establishes that the Highway Committee's permission that resulted in the April posting (Co. 4) was given closer to April than to January.

In the meantime, a class II employe retired in May and his position was not filled. The County did not fill that position because there was not enough machine operator work for even the remaining employes in the class. (Co. 3) A class IV employe, Wacholtz, was assigned on a temporary basis to work in the higher class. This action by the County led to the second grievance.

The facts present a contract interpretation issue. The management rights clause gives the County wide latitude to operate efficiently and to determine the means and the personnel the County needs to operate the highway department. The Union does not dispute this general statement. However, the management rights clause is limited by other terms in the contract that require the County to take specific actions. This leads to the pivotal discussion of the County's obligation under the job posting article. The critical language is contained in section 11.01:

> 11.01 – Posting: When the Employer deems it necessary to fill a vacancy or a new position, the Employer shall post a notice of such vacancy or new position on the bulletin board in each shop for a period of five (5) working days. The posting shall contain the desired date of filling the position, the classification of the position, the job requirements, the rate of pay, and space for all interested parties to sign said posting. The posting will be filled within fourteen (14) calendar days after the selection of the successful applicant, or as may be mutually agreed.

Arbitrators with similar contract language have upheld the right of an employer to not fill jobs or to eliminate jobs based on less work. 1/ Arbitrators have also upheld the right of employers to make a reasonable determination when to fill a job vacancy as long as the action was not arbitrary or capricious. 2/ I find that the language before me in this contract supports a finding that the County has the discretion to determine when a vacancy must be filled and when its work needs justify the hiring of additional employes. 3/ It would be hard to find otherwise given the language of section 11.01. The County legitimately waited until their highway

commissioner told them of the need for additional employes because of more retirements to

make the decision to post to fill the class III jobs. I find this reasonable and not arbitrary or capricious. I believe the same reasoning and result is true for the County's failure to post the class II position in May of 1998. Clearly the workload for the remaining heavy equipment in class II that the County still operated did not justify replacing the retiring employe. While upholding the County's right to determine when a vacancy exists, once the County determines it is necessary to fill the vacancy, the posting procedure must be followed. I agree with the Union that the fact that current employes do not sign a job posting, as in this case, has no bearing on the County's obligation to post a vacancy.

1/ DRESSER INDUSTRIES, 96 LA 1063 (NICHOLS, 1991).

2/ In a case with a similar fact situation where an employe quit, the employer decided not to fill the job because the duties of the classification had been reduced to about three hours per day. The language of the labor agreement required that "when an opening develops" it was to be posted for twenty-four hours. The arbitrator ruled that it is a fundamental right of management to make the necessary decision concerning the efficient operation of the plant. As for the posting language, the arbitrator further ruled that management had the right to determine on a reasonable basis if an opening exists. To rule in favor of the Union would mean when any job incumbent left he would have to be automatically replaced without any consideration of whether enough work remained to fill the job. The arbitrator ruled that the employer was not compelled to fill the opening. RHEEM MANUFACTURING COMPANY, 46 LA 1027, 1029-1030 (BLOCK, 1966).

In a similar case, the arbitrator viewed job posting language that stated a job vacancy is one the employer "wished to fill," as not requiring a posting. This was true even where an employe died and his duties were transferred to other employes in his class and to employes from another class on a temporary basis. MANSBACH METAL COMPANY, 103 LA 385, 386-387 (HEEKIN, 1994)

3/ In DUQUESNE BREWING COMPANY, the job posting language required that "if a vacancy occurs" another employe "shall be promoted." Arbitrator Dworkin, in denying the grievance, stated that the language did not require the employer to fill the job as a matter of "contractual obligation." "In general, except as specifically prescribed by contract, the company is vested with the responsibility and discretion of determining when a vacancy is to be filled, or when its requirements are such as to justify hiring additional employees." The transfer of a truck driver, in that case, to another classification did not create a vacancy unless the Company so determined. DUQUESNE BREWING COMPANY, 35 LA 649, 653 (DWORKIN, 1960).

I then turn to the second part of the issue whether the County violated the contract by assigning work on a temporary basis to employes in another class. There again is nothing in the language of the contract that limits the County in making temporary assignments to another class. In fact, section 25.02 provides that if an employe works in a higher class over four hours the employe will be paid the higher rate of the class. There would be no reason for this language if the County did not have this right. While the Union alluded to a proposition that work should be assigned first to employees in the class in which the work is needed, there is nothing in the contract that requires this. Further, the testimony of the Union's own witnesses was clear that the County has always assigned employes out-of-class on a day by day basis. The Union has the recognized burden to prove that the County in this case violated the labor agreement. I find no

such violation. This does not mean the County has the unfettered right to fill jobs in another

classification with temporary employes if it is clear that the workload warrants another employe in that classification. But the Union did not offer any evidence that would prove the County acted unreasonably or arbitrarily in using employes in class IV to fill in for the retiring class III employe or a class III employe to fill in for the retiring class II employe. The County must act reasonably in that regard as the aforementioned cases establish.

The County has now posted for the class III position and because no current employes signed the posting the County went outside and has hired four employes who are now in their six month probation period and will be assigned to class III. As I have ruled, the County does not need to fill the class II position until there is sufficient need that a reasonable use of temporary employes will no longer do the job. I note the Union's concern that by assigning a class III employe to class II that the employe will have an advantage should a class II job ever be posted; I note also that the County assigned, at least at the time of the grievance, the most junior employe in class III. However, there is nothing in the contract that prevents the County from making this selection and the Union offered no evidence that this somehow violated a legitimate past practice or a specific provision of the contract.

The same can be said for the Union's argument that the work in a class should first be offered within the class. There is no evidence that any class II or class III employes were losing work or hours. There simply is no contract language requiring that work must first be offered to employes within the class. This might be the case if the evidence showed that the employes in the class were not working their regular hours or had a right to demand the extra work even if it resulted in overtime. I have no right and I am bound by the parties' labor agreement not to add to the terms of their agreement and I decline to do so. If the Union believes that it needs more protection as it relates to job posting and work assignments, that is for negotiation between the parties.

With the caveat that I have stated above that the County must act reasonably in administering the job posting provisions of the labor agreement, I find that the County has not violated the labor agreement and based on the record before me I cannot sustain the grievance(s).

AWARD

The grievance(s) is denied.

Dated at Madison, Wisconsin this 11th day of September, 1998.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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