BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WAUPACA COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 1756, AFSCME, AFL-CIO

and

WAUPACA COUNTY

Case 104
No. 55423
MA-10011

Appearances:

Mr. Jeffrey J. Wickland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 44, Stevens Point, Wisconsin 54481-0044, appearing on behalf of the Union.

Godfrey & Kahn, S.C., by **Attorney James R. Macy,** 100 West Lawrence Street, P.O. Box 2728, Appleton, Wisconsin 54913-2728, appearing on behalf of the County.

ARBITRATION AWARD

Waupaca County Highway Department Employees, Local 1756, AFSCME, AFL-CIO, hereafter Union, and Waupaca County, hereafter County or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the Employer concurred, in the appointment of a Wisconsin Employment Relations Commission staff arbitrator to hear and decide the instant dispute. The undersigned was so appointed. The hearing was conducted at Waupaca, Wisconsin, on February 26, 1998. The hearing was transcribed and the record was closed on June 8, 1998, upon receipt of post-hearing written arguments.

ISSUES

The parties were unable to stipulate to a statement of the issue.

The Union frames the issue as follows:

> Did the County violate the contract when it failed to assign the Turnapault machine to its primary operator, Bill Krueger, on August 21, 1996? If so, direct the County to abide by the labor agreement by assigning such work to the primary operator.

The Employer frames the issue as follows:

Did the County violate Sec. 8.03 of the Collective Bargaining Agreement when it assigned Bill Krueger to assist with the Dyna-Plane on August 21, 1996?

The Arbitrator adopts the Union's statement of the issue.

RELEVANT CONTRACT LANGUAGE

Article II – Management Rights

2.01 The Waupaca County Board of Supervisors, through its duly elected Highway Commissioner, possesses the sole right to operate the Highway Department and all management rights repose in it, except as otherwise specifically provided in this Agreement and applicable law. These rights include, but are not limited to the following:

A) To direct all operations of the Highway Department;
B) To establish reasonable work rules and schedules of work;
C) To hire, promote, transfer, schedule and assign employees within the Highway Department;
D) To suspend, demote, transfer, discharge and take other disciplinary action against employees for just cause;
E) To layoff employees because of lack of work or other legitimate reason;
F) To maintain the efficiency of the Highway Department operations;
G) To take reasonable action, if necessary, to comply with State or Federal law;
H) To introduce new or improved methods or facilities or to change existing methods or facilities;
I) To determine the kinds and amounts of services to be performed as pertains to the Highway Department operations and the number and kinds of classifications to perform such services;
J) To contract out for goods and services, provided however, that no employee shall be on layoff or laid off or suffer a reduction of hours of work as a result of such subcontracting;
K) To take whatever action is necessary to carry out the functions of the Highway Department in situations of emergency.

2.02 Any dispute with respect to the reasonableness of the application of these management rights by the Employer shall be appealable by the Union or an employee through the grievance and arbitration procedure contained herein.

Article IV – Cooperation

4.01 The Employer and the Union agree that they will cooperate in every way possible to promote harmony and efficiency among all employees. (The Employer agrees to maintain certain conditions of work, primarily related to wages, hours and conditions of employment not specifically referred to in this Agreement in accord with previous practice.)

. . .

Article VIII – Job Posting & Seniority

8.03 All vacancies shall be posted on the bulletin board. Such notice shall be posted for at least ten (10) calendar days, and shall state the prerequisites and wage rate for the job. Such prerequisites shall be consistent with the requirements of the job classification. Employees securing a posting will be assigned vacated equipment if maintained in service by the County.

It is understood by the parties that the employee who has signed the posting for available equipment within the respective job classification shall be considered the primary operator; however, the County may reassign such equipment to other worksites to meet specific workload needs.

. . .

8.06 The Employer may make an immediate temporary assignment to fill any vacancy until the vacancy has been filled pursuant to the procedure herein outlined.

. . .

Article XIII – Job Classification & Wage Schedule

. . .

13.03 The number of employees to be assigned to any job classification and the job classification needed to operate the Waupaca County Highway Department shall be determined by the Employer and shall constitute the Table of Organization.

. . .

Article XXVII – Entire Memorandum of Agreement

27.01 This Agreement constitutes the entire Agreement between the parties and no verbal statement or practice shall supersede any of its provisions. Any amendment to this agreement shall be effective only when placed in writing and signed by the Employer (or designee) and the Union (or its designee).

To the extent that the provisions of this Agreement are in conflict with the existing ordinances, resolutions or rules, the Agreement controls.

BACKGROUND

In 1991, the parties were involved in litigation on a petition for declaratory ruling that had been filed by the County. At the time of this litigation, Sec. 8.03 of the parties' collective bargaining agreement stated as follows:

> 8.03 All vacancies shall be posted on the bulletin board. Such notice shall be posted for at least ten (10) calendar days, and shall state the prerequisites, (Equipment number) and wage rate for the job. Such prerequisites shall be consistent with the requirements of the job classification. It is understood by the parties that the employee who has signed the posting with an equipment number shall be considered the primary operator; however, the County may reassign such equipment to other worksites to meet specific workload needs.

During this litigation, the County and the Union entered into a settlement agreement. As a part of this settlement agreement, the parties agreed to replace the existing Sec. 8.03 with the current language.

In 1992, William Krueger, hereafter Grievant, posted for and received, the position of Turnapault operator. The Grievant continues to hold this position. On August 20, 1996, the Grievant's supervisor, Dennis Nieland, told the Grievant to report to Waupaca the following morning to go with fellow County employe Kevin Kreiser to the City of Menasha and assist Kreiser in the operation of the Dyna-Plane.

On August 21, 1996, the Grievant and Kreiser went to Menasha and operated the Dyna-Plane on a job that the County was performing for Winnebago County. The Grievant and Kreiser remained on this job for several days.

When the Grievant subsequently learned that fellow County employe Todd Niemuth had operated the Turnapault on August 21, 1996 for a period of six hours, he filed a grievance. This grievance states that the County erred when it "did not keep Bill in his assigned piece of equipment and put a lower classification operator in his assigned piece of equipment." The grievance requested the following corrective action: "If equipment is in operation - the person assigned should be the exclusive operator and not anyone from a lower classification." The Grievance was denied at all steps and, thereafter, submitted to arbitration.

POSITIONS OF THE PARTIES

The Union

Article VIII, Job Posting and Seniority, of the collective bargaining agreement recognizes that the employe who has signed the posting for available equipment within the respective job classification is to be considered the primary operator. The right to reassign "equipment" to other work sites is not synonymous with a right to reassign "primary operators" to a secondary or alternative assignment.

The need to reassign an operator to the Dyna-Plane was not caused by an absence due to a vacancy or a vacation, sickness, injury or other acute leave of absence contemplated by the parties during the 1991 declaratory ruling proceedings. It is improper to imply that the need to operate the Turnapault on August 21, 1996 was unforeseen by the County.

If the County determines that work is available within an employe's primary posted assignment, then the employe has a contractual right to perform this work. A reassignment of a primary operator is only acceptable where there is no work available in the employe's primary assignment or when other factors, such as weather or management determination, dictate a deferral of work in the employe's primary assignment. This is consistent with a longstanding past practice, which has not been modified by the prior litigation.

If the County determines that it is necessary to assign an employe to a piece of equipment that does not have a primary operator, the assignment must be made in a manner that is consistent with the labor agreement. The County must assign an employe from the pool of employes that do not have work in their primary posted assignment. This principle is affirmed in the County's job descriptions, which recognize reassignment "in the absence of the normally assigned operator."

The County exercised its Sec. 13.03 rights when it determined that it needed one posted Dyna-Plane operator and one posted Turnapault operator. The assignment in dispute is governed by the more specific language found in Article VIII.

The Grievant should have been allowed to remain in his primary posted assignment. Niemuth, the least senior qualified and available operator, could have been assigned to the Dyna-Plane. The grievance should be sustained and the remedy requested by the Union granted.

County

Section 2.01, Management Rights, expressly reserves to the County the right to make the assignment decision which was made in this case. This management right was exercised in a reasonable manner and for legitimate business purposes.

The term "primary" does not mean "exclusive." Section 8.03 of the collective bargaining agreement clearly and unambiguously recognizes that the County has the right to assign operators other than the primary operator.

The Grievant operated the Turnapault for most of the summer. Accordingly, he was the primary operator of the Turnapault.

Section 13.03 provides the County with the right to temporarily assign employes to different operations depending on their needs. The County also has the right to transfer employes as needed.

Section 27.01 recognizes that the current language of the contract constitutes the entire agreement. The Union should not gain in this grievance arbitration that which it did not obtain in bargaining.

During the declaratory ruling proceedings, the Union expressed its belief that the language of Sec. 8.03 permitted the County to assign a primary operator to a different machine while having another employe operate the equipment normally assigned to the primary operator. Section 8.03 was modified during the declaratory ruling proceedings and the Union may not argue that the County's "longstanding practice" is different from that expressed, agreed upon and acted upon by both parties at the declaratory ruling proceedings. The claim that Sec. 8.03 prevents the County from assigning a piece of equipment to anyone other than the primary operator, without the agreement of the primary operator, is inconsistent with the view expressed by Arbitrator Gallagher in a prior award.

The interpretation that the Union asks this Arbitrator to adopt leads to a harsh, absurd and nonsensical result. The Union misuses the concept of past practice as it relates to the application of Sec. 8.03 and ignores the prior litigation returning to the County the right to make the type of assignments made in this case. The grievance is without merit and should be denied.

DISCUSSION

On August 21, 1996, the County assigned the Grievant to assist Kevin Kreiser with the operation of the Dyna-Plane and assigned fellow employe Todd Niemuth to operate the Turnapault. The Union, contrary to the County, argues that this assignment of the Grievant violates the parties' collective bargaining agreement. It is undisputed that the Grievant did not lose any time or pay as a result of his August 21, 1996 assignment.

As Arbitrator Gallagher stated in her Award of June 24, 1993, "Sec. 8.06 applies solely to 'temporary assignments' into vacancies, which were previously found necessary by the County, during the period prior to the County's permanently filling the vacancy found." (Footnote 5) As the Union argues, the Dyna-Plane assignment of August 21, 1996 is not a "temporary assignment" within the meaning of Sec. 8.06. Contrary to the argument of the County, Sec. 8.06 is irrelevant to the disposition of this grievance.

When the Grievant was assigned to operate the Dyna-Plane on August 21, 1996, the Grievant remained in Classification VI. As the Union argues, this grievance does not raise an issue as to either the number of employes to be assigned to a job classification or the job classifications needed to operate the Highway Department. Contrary to the argument of the County, Sec. 13.03 of the collective bargaining agreement is irrelevant to the disposition of this grievance.

As the County argues, Sec. 2.01 of the collective bargaining agreement provides the County with a management right to "assign employees within the Highway Department." Section 2.02 of the parties' collective bargaining agreement requires the County to exercise this management right in a reasonable manner.

On August 21, 1996, Dennis Nieland was the County's Patrol Superintendent. Nieland, who retired on January 3, 1997, testified that he assigned the Grievant to the Dyna-Plane because the Grievant was the most experienced operator of that machine and Nieland wanted to do everything possible to ensure a good work product.

Prior to assuming the position of Turnapault Operator, the Grievant had been the primary operator of the Dyna-Plane for three years. On August 21, 1996, the Grievant was among a handful of County employes qualified to operate the Dyna-Plane. The Dyna-Plane is operated infrequently. Nieland's decision to assign the Grievant to assist Kreiser in the operation of the Dyna-Plane because the Grievant was the most experienced operator is a reasonable exercise of the County's Sec. 2.01 management rights, unless, as the Union argues, this assignment conflicts with another contractual right.

The Dyna-Plane requires a minimum of two employes to operate. Kreiser had posted for and obtained the position of Dyna-Plane operator pursuant to Sec. 8.03 and, thus, was the primary operator of the Dyna-Plane. It is not evident that any other employe had a Sec. 8.03 right to perform the work of the second Dyna-Plane operator.

The Union argues that the County should have assigned the least senior of the employes who were qualified Dyna-Plane operators to assist Kreiser on August 21, 1996. The Union, however, has not cited, and the undersigned has not found, any contract language which dictates such a result. Nor is it evident that, in the past, either the least senior qualified operator has been assigned to assist the primary operator of the Dyna-Plane, or that the County has made such assignment from a pool of employes whose services were not needed in their primary posted position.

In summary, the County is not contractually required to assign an employe other than the Grievant as second operator of the Dyna-Plane. The undersigned turns to the issue of whether or not the Grievant had a contractual right to operate the Turnapault, rather than the Dyna-Plane, on August 21, 1996.

As the Union argues, the Grievant obtained the position of Turnapault operator pursuant to Sec. 8.03 of the collective bargaining agreement. The first paragraph of Sec. 8.03

provides that "Employees securing a posting will be assigned vacated equipment if maintained in service by the County." This sentence supports the Union's argument that, if the County determines that it is necessary to operate the Turnapault, then the Grievant has the right to operate the Turnapault. This sentence, however, does not stand alone.

The second paragraph of Sec. 8.03 provides that "[I]t is understood by the parties that the employe who has signed the posting for available equipment within the respective job classification shall be considered the primary operator; however, the County may reassign such equipment to other worksites to meet specific workload needs." As the County argues, "primary" is not synonymous with "exclusive." Thus, the plain language of Sec. 8.03 recognizes that the Grievant does not have an absolute right to operate the Turnapault.

Prior to and after August 21, 1996, the Turnapault remained at the same worksite. Inasmuch as the Turnapault was not reassigned to another worksite, the clause that provides the County with the right to reassign the equipment of the primary operator to other worksites is not controlling.

By inserting the clause that states the County may reassign the equipment of the primary operator to other worksites to meet specific workload needs, the parties have made plain their understanding with respect to a particular factual situation. However, neither the language of this clause, nor its placement in Sec. 8.03, demonstrates that the parties have agreed that this is the only situation in which the County may assign someone other than the primary operator to operate his/her primary equipment.

Roger Hansen, who has been employed at the Highway Department for twenty-four years, has been either a Union Steward or Local President for at least the past eleven years. Hansen could not recall any other occasion during his tenure as Union Steward, or Local President, in which a primary operator was assigned other duties at the same time that another employe was performing the primary operator's duties. Hansen recalls that, during his tenure with the County Highway Department, employes have operated the equipment for which the employe posted, unless the equipment was not in use, or the employe was absent from work. Hansen's testimony is consistent with that of the Grievant and other Union witnesses. The Union's witnesses agree that, when the equipment for which the employe posted is not operating, the County may assign the employe to perform other work.

Patrol Superintendent Nieland recalled that, after 1990, he had assigned primary operators to other equipment. Nieland, however, did not clarify the conditions under which such assignments were made. Thus, Nieland's testimony does not contradict the testimony of the Union's witnesses, supra.

The evidence of "past practice" establishes that there are situations in which the Union and the County have agreed that the County need not assign the primary operator to operate the equipment for which the primary operator posted. However, neither the evidence of past practice, nor the language of Sec. 8.03, establishes that the parties have agreed that these are the only situations in which the County may assign another employe to operate the equipment for which the primary operator posted.

As the County argues, during the litigation of the declaratory ruling petition, the Union's representative made various statements concerning the Union's interpretation of Sec. 8.03 as it existed at that time. Notwithstanding the County's argument to the contrary, the Union's representative did not acknowledge that the County has the right to make the assignment that is the subject of this dispute. However, the fact that the Union's representative did not acknowledge that the County has the right to make the assignment in dispute does not mean that the collective bargaining agreement does not provide the County with such a right.

Union Exhibit #5 indicates that, between the period of July 29, 1996 through September 20, 1996, the Grievant operated the Turnapault on sixteen of the seventeen days that the Turnapault was operated, with the exception being August 21, 1996. Employer Exhibit #1 indicates that the Turnapault was operated on seventy-six days in 1996. According to the Grievant, he is not aware of any instance, other than August 21, 1996, in which he did not operate the Turnapault. The undersigned is satisfied that the Grievant is the primary operator of the Turnapault.

Conclusion

By assigning the Grievant to the Dyna-Plane, rather than to the Turnapault, on August 21, 1996, the County did not deny the Grievant his Sec. 8.03 right to be the primary operator of the Turnapault. The County's decision to assign the Grievant to the Dyna-Plane on August 21, 1996 is a reasonable exercise of the County's Sec. 2.01 management rights.

Based upon the above and foregoing, and the record as a whole, the undersigned issues the following

AWARD

The County did not violate the contract when it failed to assign the Turnapault machine to its primary operator, Bill Krueger, on August 21, 1996.

The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 15th day of October, 1998.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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