

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**ONEIDA COUNTY HIGHWAY EMPLOYEES
LOCAL 79, AFSCME, AFL-CIO**

and

ONEIDA COUNTY

Case 129
No. 56398
MA-10267

(Backhoe Grievance)

and

Case 130
No. 56399
MA-10268

(Training Program Grievance)

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, on behalf of the Union.

O'Brien, Anderson, Burgy, Garbowicz and Brown, L.L.P., by **Mr. John L. O'Brien**, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Rhinelander, Wisconsin, on February 12, 1999. The hearing was not transcribed and the parties there agreed that I should retain my jurisdiction if the grievances

are sustained. The parties subsequently filed briefs and reply briefs that were received by May 14, 1999. Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUES

Since the parties were unable to jointly agree on the issues, I have framed them as follows:

1. Whether the County violated the October 27, 1994, Settlement Agreement when it failed to train certain employees on the backhoe and, if so, what is the appropriate remedy?
2. Whether the County violated Article 5 of the contract when it failed to award the Equipment Operator II position to the most senior bidder and, if so, what is the appropriate remedy?

BACKGROUND

The underlying dispute here dates back to the October 27, 1994, Settlement Agreement, (herein "Settlement Agreement"), between the parties, (Joint Exhibit 4), that states in pertinent part:

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1. The two most senior grievants will be trained for 16 hours off the pay clock within two months of this agreement. This time may be extended by mutual agreement.
2. After the 16-hour training, the above employees will receive all on-the-job training that is practical. They will be paid the Operator II rate while they perform the OTJ training.
3. The most senior grievant, Pat Hall, will be placed in an Operator II position when he is deemed qualified. If he is found not qualified, he can appeal to an independent evaluator chosen by Campshure and Jackson. If, after a maximum of two evaluations by an independent evaluator, or a 12-month training period, whichever comes first, he is still found unqualified, he will not receive further training.

4. An independent evaluator will be used in future qualification disputes chosen as described in paragraph 3, above. The cost will be divided between the parties.
5. In the future, every January 1, all Operator I will be asked to sign for training opportunity. At all times the two most senior on the list will be trained, which two persons will include person who have already received training.
6. When a new Operator II employee is assigned pursuant to this position, the County will automatically create a new position. That position will not be converted to an Operator II position until and unless Forrest Block leaves the ranks of Operator II. If the County eliminates an Op II position by layoff, the least senior Op II by department seniority will be bumped. This paragraph does not create lay off by classification.
7. The equipment to be trained on will be known to the employee, but will be determined by the County. The County will not unreasonably deny a request for a certain piece of equipment.

Pursuant to the terms of the Settlement Agreement, Pat Hall and Gustave Bramann – both of whom were classified as Equipment Operator I's - shortly thereafter were placed in the training program. The County later claimed that Hall was unqualified to be an Equipment Operator II, but he appealed that decision to an independent evaluator as provided for in the Agreement who, in turn, determined that Hall was qualified. Hence, the County promoted him to the Equipment Operator II position. At that time, Equipment Operator I Michael Christie was selected for the two-person training program provided for in the Settlement Agreement to replace Hall. Bramann subsequently was trained on the grader and bulldozer and Christie was trained on the bulldozer.

The County on January 10, 1997 (unless otherwise stated, all dates hereinafter refer to 1997), posted the following position after Equipment Operator II Jim Hamilton retired:

JOB POSTING – EQUIPMENT OPERATOR II/BACKHOE

This regular full-time position is located with the Oneida County Highway Department. 1997 starting salary is \$12.422 per hour and upon satisfactory completion of a probationary period, the hourly salary increases to \$12.953.

JOB SUMMARY: Performs skilled work of a varied nature involving the operation of various types of motorized heavy equipment.

Requires a high degree of skill. Standard procedures are followed. Performs a variety of other duties using hand tools using hand tools, mowers, chain saws, etc. Employee may be assigned to other levels of work.

ESSENTIAL JOB FUNCTIONS: (Illustrative Only)

- Shapes new roads, makes ditch cuts, shoulder cuts and back slopes using backhoe, Bulldozer and Motor Grader. Digs out ditches, tree stumps, rocks and installs culverts using backhoe.
- Plows snow off assigned roads and applies salt/sand as needed.
- Operates a front end loader at Hot Mix Plant during paving season.
- Saw cut brush along highway.
- Performs duties of Equipment Operator I as required.
- Any other duty as assigned.

KNOWLEDGE, SKILLS AND ABILITIES:

- Knowledge of the practices, methods and materials used in highway construction maintenance activities and related operations;
- Must be able to operate in a safe and efficient manner heavy equipment including but not limited to a backhoe.
- Must be able to operate in a safe and efficient manner Equipment Operator I machinery listed on Equipment Operator I job description.
- Must be able to operate in a safe and efficient manner a variety of hand tools, including but not limited to hammers, wrenches, chainsaws, saws, sanders, shovel and broom.
- Knowledge of and willingness to follow all safety rules and procedures.
- Ability to stand for extended periods of time and lift up to 50 pounds.
- Ability to work in extreme weather and in unpleasant conditions.
- Ability to prepare and maintain accurate and complete records/reports.
- Ability to communicate both orally and in writing.

EDUCATION AND EXPERIENCE:

- High School degree.
- Five years work experience performing road construction and maintenance.
- Commercial Drivers License with A, B, C, H and N endorsements.

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The County, which delayed filling the position because of the Union's grievance, on November 12 awarded that position to Equipment Operator I Freeman Bennett who had less seniority than several other bidders, including Christie, Bramann, and Union President James Thorn.

Highway Commissioner Robert H. Maass testified that he awarded the Equipment Operator II/Backhoe position to Bennett because no one else is qualified to operate the Ackerman backhoe, which is the most complex piece of machinery the County owns; because neither Bramann nor Christie were ever trained on the Ackerman backhoe; and because the opportunity never arose to train them. Maass added that the 1994 Settlement Agreement does not guarantee anyone a job; that no employees have ever specifically asked to be trained on the backhoe; that the County delayed filling the Equipment Operator II/Backhoe position because of internal discussions and because the Union had filed grievances; that the County "2-3 times" has promoted employees without following seniority; that he does not believe he ever told Hall or Bramann they never would be promoted; that he told Thorn at the time of his hire he could be promoted, but that there was no guarantee of that; and that he never spoke to Thorn about his background on a backhoe after Thorn bid for the Equipment Operator II/Backhoe position.

In response to questions as to what employees should do to obtain proper training, Maass replied that: (1), they must put in writing what specific piece of equipment they want to be trained on; (2), they should do so once a year; and (3), employees who retire should give one year's advance notice so that other employees have sufficient time to train on that person's job. Maass said that Christie will be ready to operate a bulldozer in "another year or so"; that Bramann is only marginally qualified to be a grader and that he may be qualified on the bulldozer in a year or two; that it would be a good idea to cover training in an employee's evaluation, which is not the case now; that neither Bramann nor Christie will get the Grader Operator/Paver Operator position being vacated by employee Cook in June, 1999; and that the disputed posting herein marks the first time a piece of equipment was listed on the posting. He also said Thorn could not be trained on the Ackerman backhoe within thirty (30) days.

The record shows, via the testimony of Highway Secretary Patti Wrycha, that Bramann and Christie in 1997-1998 had been trained for about 98.5 and 437 hours respectively. (Employer Exhibit 2).

Operator I Steve Schranke testified that Maass once told him that neither Hall nor Bramann would ever be promoted.

Grievant Thorn, an Equipment Operator I who also is the Union President, testified that he operated a backhoe for his brother's excavating company; that he filled out a questionnaire, (Union Exhibit 7), reflecting his experience; that he was never given a hands-on test on the backhoe; that prior job postings never listed specific pieces of equipment; that employees are not expected to perform all of the duties in their job description; that Bennett is the only employe who is allowed to operate the Ackerman backhoe; and that Maass told him at the time of his hire that he could move up to an Equipment Operator II position "rather rapidly". He also said that he is as qualified as Bennett to operate a backhoe and that no one asked him about his past experience and qualifications when he bid for the Equipment Operator II/Backhoe position. He acknowledged on cross-examination that he has never operated the Ackerman backhoe.

Equipment Operator I Bramann, who is one of the two employes in the training program, testified that he in the past asked Maass for additional training on "any equipment" including the backhoe; that his request was denied; and that he has worked on a backhoe about a couple hundred hours. He also said he assumed that the most senior employe would be awarded jobs under the terms of the Settlement Agreement and that Maass once told him that neither he nor Hall would ever be promoted to Equipment Operator II.

Pat Hall, an Equipment Operator II whose earlier grievance help lead the way to the 1994 Settlement Agreement, testified that but for two exceptions, the City has always awarded posted job positions to the most senior bidders; that Christie in the past was awarded a posted position and that he failed his trial period; that the job description for the Equipment Operator II (Joint Exhibit 7), is inaccurate because no employes perform all of the duties listed therein; and that Maass once told him and Bramann "in the early 90's" that neither one of them would ever make Equipment Operator II.

The Union filed the instant two grievances on December 1 (Joint Exhibits 2 and 3), wherein it claimed that the County had acted improperly by: (1), not awarding the Equipment Operator II/Backhoe position to the most senior qualified bargaining unit employe, by not filling the position within five days, and by misidentifying the position; and (2), not adhering to the training requirements set forth in the Settlement Agreement.

POSITIONS OF THE PARTIES

The Union claims that the County violated Article 4, Section C, of the contract by not awarding the position to the most senior bidder and by not according him a thirty (30) day trial period to determine if he is qualified for the posted position; that the County's actions "were arbitrary and capricious"; that the County can only reduce the significance of seniority "at the

bargaining table, not through unilateral action”; and that the County violated the contract by not filling the position within five days and by listing a “specific piece of equipment” on the job posting. It also asserts that the County violated the “clear intent” of the Settlement Agreement by not awarding the posted job to one of the two employees in the training program and that the County violated the “express terms” of the Settlement Agreement by not training either Bramann or Thorn on the backhoe.

The County contends that it did not violate the contract because Bennett is the only employee qualified to work on the Ackerman backhoe; because “the Union never took advantage of its opportunity in the Settlement Agreement to prove that either Bramann or Christie should be promoted”; and because the word “Backhoe” was added to the posting so applicants would be aware that one of the primary responsibilities of the new position would be operating the backhoe. The County also states that while the Settlement Agreement may not have been “a classic work of art”, it did not violate the Settlement Agreement because nothing therein “requires training on a particular piece of equipment.”

DISCUSSION

This case partly turns on Article 4 of the contract, entitled “Seniority”, which provides:

Section C: In the event of a layoff, return to work or the filling of a vacancy in either the regular full or regular part-time position, seasonal or new position, job seniority shall prevail. In the event of a layoff, the last person in such affected job shall be the first laid off and the last person so laid off shall be the first returned to work. The rules of seniority shall be applied by mutual consent of the parties to this Agreement through the consideration of two factors; namely length of service and competency of the employee affected. In the event of a general or partial layoff due to lack of work or other causes similar thereto, layoff shall be affected according to the department seniority as outlined above in all cases except where the application of such rules would impair the efficiency of the operation of the Highway Department. (Emphasis added).

The Union claims that this language supports its case because it states that “job seniority shall prevail” in “the filling of a vacancy. . .” Here, since the County admittedly did not follow seniority, it is easy to see why the Union believes this proviso has been violated.

However, the County rightfully points out that this proviso further states that the rules of seniority:

“shall be applied by mutual consent of the parties. . . through the consideration of two factors: namely, length of service and competency of the employee affected.”

This “competency” requirement is not defined: does it mean that a job bidder must be competent at the time the job is posted or does it refer to the competency that can be gained after a trial period? Much of this case hinges on the answer to this question.

Elsewhere, Article 5 of the contract, entitled “Promotions”, provides:

Section A: Opportunity for advancement to higher classifications shall be provided for as follows: In the event of a permanent vacancy, or the creation of a new job classification, the Highway Commissioner shall cause to be posted on the main shop bulletin board and all outlying shop bulletin boards, a notice of such vacancy or new position. Said notice shall be posted for a five (5) day period. At the end of that five day period, the notice shall be removed and the position shall be filled within five (5) days.

(1) Permanent vacancy defined: A “permanent vacancy” means the vacancy created in any salary range because of the death, retirement or termination of employment of any employee; all other vacancies are “temporary”.

(2) The Commissioner shall have the right, without the requirement of posting, to shift employees into any lower or higher job classification or within any salary range where a temporary vacancy exists for the duration of the temporary vacancy.

Section B: All employees interested in applying for such vacancy or new position, shall file application with the Highway Commisisoner.

Section C: Employees on vacation and sick leave shall be notified of such job opportunities so that they will have a chance to apply.

Section D: Assignments of employees to fill such job vacancies or new positions shall be made according to seniority providing the employee considered can qualify for the position to be filled. The secretary of Local #79 shall be notified of the employee chosen for the job. (Emphasis added)

Section E: Employees who are transferred or promoted within the bargaining unit, shall be given a thirty (30) day trial period for determination as to whether or not they can meet the job requirements. This trial period may be extended by mutual consent of the parties to this Agreement in cases requiring more than thirty (30) days. Employees may, at any time during this trial period, at their option, return to their former position without loss of seniority. The employee shall be returned to his/her former position if he/she does not satisfactorily complete the thirty (30) day trial period. (Emphasis added)

. . .

By requiring the County to award posted positions to the most senior employe who “can qualify”, Article 5, Section D, indicates that an employe need not be fully qualified at the time of the posting. Article 5, Section E, supports this interpretation because it gives employes a thirty (30) day trial period to learn how to perform any such posted jobs, thereby showing that an employe “can qualify” for a posted position by successfully passing his/her thirty (30) day trial period. After all, if that were not the case, why have a trial period?

The Ackerman backhoe is a very complex piece of machinery which requires extensive experience and skill. Indeed, Highway Commissioner Maas testified that it is the single most difficult piece of machinery to operate within the Highway Department. It therefore is an open question as to whether an inexperienced operator can master its operation in the thirty (30) day trial period provided for in the contract. But, that is a matter of conjecture which cannot be answered absent the contractually provided trial period. Standing alone then, Article 5, Section D, indicates that the County violated the contract when it failed to grant more senior applicants the contractually-provided thirty (30) day trial period to determine whether they could operate the Ackerman backhoe or any other piece of equipment.

But, this language does not stand alone since it must be read alongside the Settlement Agreement which states that an “independent evaluator” is to resolve posting grievances relating to Equipment Operator II openings. The County therefore argues that the grievances must be dismissed because the Union did not avail itself of that procedure. In response, the Union argues that the “independent evaluator” referenced in paragraph 4 of the Settlement Agreement set forth at pp. 2-3 above, is to be called in only to resolve disputes “as described in paragraph 3 above” and that, as a result, it has no application here.

The Settlement Agreement is hardly a model of clarity or - as the County puts it, not “a classic work of art” - since it fails to expressly state whether the “independent evaluator” is to be used for all promotional disputes, as claimed by the County, or only for those disputes relating to the training program, as claimed by the Union.

I conclude that the County under the unique facts of this case did not violate the Settlement Agreement when it failed to train Equipment Operators Christie and Bramann on the Ackerman backhoe because: (1), it is not at all clear that the two of them could have been trained in time given the condition of the ground and the non-use of the Ackerman backhoe in the winter; and (2), neither Bramann nor Christie at that time expressly asked to be trained on the Ackerman backhoe. (Bramann earlier had asked for backhoe training, but his request was not followed up at the time of Hamilton’s retirement).

I also agree with Maas’ testimony that:

1. Employees in the training program should identify in writing what specific pieces of equipment they want to be trained on.
2. Employees should express their preferences in writing for particular pieces of equipment twice a year.
3. Employees who intend to retire should give one year’s notice so that other employees have sufficient time to train on that person’s job.
4. Training henceforth should be covered in an employee’s evaluation.

I conclude that all these steps are needed to properly implement the Settlement Agreement.

However, even if one year’s notice is not given for a retirement or a quit, the spirit of the Settlement Agreement dictates that the County offer whatever training is needed on any particular piece of equipment so that Bramann or Christie – or whoever else is in the training program – can subsequently bid for those positions once they open up. Hence, once the County receives word of a pending retirement, quit, termination, or permanent vacancy in the Operator II classification, it shall immediately offer such training to whoever is in the training program and, if they post for any such openings, it shall give them the contractually mandated thirty (30) day trial period. Any subsequent disputes relating to their qualifications must be submitted to an “independent evaluator” as provided for in the Settlement Agreement.

The same procedure also must be followed for any other promotional disputes involving the filling of Operator II positions. In that way, the parties will be able to: (1), obtain a definitive answer much quicker than they can get in arbitration; and (2), obtain an expert opinion relating to any such disputes.

I also find that the County violated Article 5 of the contract when it posted for an "Equipment Operator II/Backhoe" position. The contract, in fact, contains no such classification. Instead, it in Addendum I only lists Equipment Operator I, Equipment Operator II, and various other classifications, none of which refer to any particular piece of equipment. Accordingly, and because Maas himself admitted that there has been a universal past practice of not including a particular piece of equipment on job postings, the County erred when it posted an "Equipment Operator II Backhoe" position.

The County also violated Article 5 of the contract by not filling this slot within 5 days because Article 5, Section A, mandates that at the end of the posting period, the "notice shall be removed and the position shall be filled within five (5) days". Here, the County did not fill the January, 1997, posting until November, 1997, because of the Union's grievance. A grievance however, unless otherwise expressly agreed to by the Union, does not absolve the County of its contractual duty to fill postings within five (5) days.

Given the County's wrongful posting, it now must repost the Equipment Operator II position without referring to a particular piece of equipment. It then shall award that position to the most senior applicant who will be granted a thirty (30) day trial period. If there is a dispute at the end of the trial period as to whether he/she is qualified, the matter shall be immediately submitted to the "independent evaluator" provided for in the Settlement Agreement. If that person is deemed unqualified by the "independent evaluator", the County shall repeat this process with the next most senior bidder until such time that a bidder is determined to be qualified.

In light of the above, it is my

AWARD

1. That while the County did not violate the October 27, 1994, Settlement Agreement when it failed to train certain employes on the backhoe, the following steps must be taken in order to properly apply the Settlement Agreement:

- a. Employes in the training program twice a year must put in writing on what specific pieces of equipment they want training.

- b. Operator II's who intend to retire or quit should give a year's notice, if at all practicable, so that other employes have sufficient time to train for their jobs.
- c. Training must be covered in an employe's evaluation.
- d. After receiving word of a pending retirement, quit or termination, and after having decided to fill any such vacancy, the County shall immediately offer training to whoever is in the training program and, if they post for any such openings, the County shall provide that person with the contractually-mandated thirty (30) day trial period to determine if he/she can perform that job. Any subsequent disputes relating to his/her qualifications must be submitted to an "independent evaluator" as provided for in the Settlement Agreement.

2. The County violated Article 5 of the contract when it failed to award the Equipment Operator II position to the most senior bidder; when it posted that position as "Equipment Operator II/Backhoe"; and when it did not fill that position within five days. To rectify those contract violations, the County shall immediately repost that position as an Equipment Operator II position and it shall award that position to the most senior bidder who will then be given a thirty (30) day trial period. If there are any disputes over whether that person is qualified, the matter shall be submitted to the "independent evaluator" provided for in the Settlement Agreement.

3. That to resolve any questions that may arise over application of this Award, I shall retain my jurisdiction for at least six (6) months.

Dated at Madison, Wisconsin this 22nd day of July, 1999.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

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