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 134
No. 57116
MA-10522

(Beat Posting Grievance)

Appearances:

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

Mr. Carey L. Jackson, Personnel Director, 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 April 1, 1999. The hearing was not transcribed and the parties subsequently filed briefs and reply briefs that were received by June 1, 1999.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

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

Did the County violate Article 5 of the contract when it failed to post and to then award Unit #7 Beat to senior bidder James Thorn on a permanent basis and, if so, what is the appropriate remedy?

BACKGROUND

The County on May 11, 1998, (unless otherwise stated, all dates herein refer to 1998), posted the following job posting (Joint Exhibit 4) after Equipment Operator I Bobby Kecker, who previously was assigned to Unit #7 Beat, retired from his post at the Three Lakes shop:

. . .

There is an opening for the Unit #7 Beat position which originates out of the Three Lakes Shop. If you are interested, please sign below. The deadline is 3:00 p.m., May 19, 1998.

. . .

The job posting did not spell out that the Unit #7 position was within the Equipment Operator I classification.

A number of employes bid for that beat, including Equipment Operator I James Thorn who is also the Union's president. The County initially awarded the position to Thorn who had less seniority than certain other bidders, but it voided the posting after the Union on May 29 grieved and complained that the posting should have stated that it was for an Equipment Operator I position and that it should have been awarded to employe Jerome Alsteens, the most senior bidder (Joint Exhibit 2).

County Personnel Director Carey L. Jackson by memo dated June 19 subsequently informed Union President Thorn:

. . .

Yesterday afternoon, beginning at approximately 4:00 p.m., the Highway Committee and the Union met to discuss grievance #4-98 and other matters. As a result of and coming out of that meeting the following:

1. The Highway Commissioner will post a "Beat 7" opportunity.
2. The Union will drop grievance #4-98.

3. All postings, except for those specifically required by the Labor Agreement, are voluntarily on part of the Highway Department Management. The Highway Commissioner may decide not to post "beats", "assignments" and so forth and to eliminate those postings, as he/she deems appropriate. It is the current intent of Management to continue this type of posting to give the employees an opportunity to express their desire for specific assignments.

I would like to express our appreciation to the Union representatives, on behalf of the Highway Committee and Highway Commissioner, for the opportunity to meet and discuss issues of concern that impact the operation of the Highway Department. By your signature below the Union drops grievance #4-98.

The Union disagreed with the County's claim that postings need not list particular beats and Jackson in a July 20 memo informed Thorn:

. . .

In your memo dated July 15, 1998, you state that the County should post the "unit 7" state patrol section and that the Union would drop grievance #4-98. As you know, there is no requirement in the labor agreement that management makes such postings. Because your proposal to resolve grievance #4-98 does not contain recognition of management's rights to determine such postings, as described in my memo dated June 19, 1998, I have no option but to recommend to the Highway Commttee that the County cease posting any and all "beats".

. . .

The County reposted the position as an Equipment Operator I without designating any beat and awarded it to employe David McCarty who declined it. The County then awarded the position to Thorn, who now holds it on a temporary basis.

The record shows that except for the Sign Painter, shop employes cannot bid on beats; that shop employes can bid for Equipment Operator I and Equipment Operator II positions without any beats being designated; that the County recently assigned employes Tom Johnson, Michael Gengalo, and Mike Christie to certain assignments having no beat designations; and that employes have been assigned to temporary jobs without any beat designations to fill in for employes who were on sick leave, worker's compensation, vacation, etc. Furthermore, the County since at least 1981 on about 30 separate occasions has designated beats in its job postings (Union Exhibit 1) and it has awarded those beats in most cases over the signature of Highway Commissioner Robert H. Maass.

Both the Union and the County have recognized the importance of beats in a 1997 side letter which states in pertinent part:

LETTER OF AGREEMENT

HIGHWAY DEPARTMENT SENIORITY

I. For call-in purposes, except emergencies:

A. The individual normally assigned to the "beat", provided they are qualified to do the work, shall be called in first. (Emphasis added).

B. Shop seniority applies to shops in Monico, Rhinelander, Three Lakes and Minocqua. Whenever there is work in one of the four shops, the most senior employee (provided he/she is qualified to do the work) from the shop where the work is available, shall be called in first. If this person is not available or if there is more work than one person can handle, the next person with shop seniority, provided they are qualified to do the work, shall be called in. This shall continue until the shop seniority list has been exhausted.

C. When the shop seniority list has been exhausted, the work will be assigned by seniority from the Rhinelander shop to the most senior qualified person qualified to do the work.

D. A, B, and C above, does not pertain to Mechanics. Mechanics are called-in when A, B, and C have been exhausted.

II. For planned and scheduled overtime situations:

A. The individual normally assigned to the "beat", provided they are qualified to do the work, shall be scheduled to do the work. (Emphasis added).

B. When the person assigned to the "beat" is not available or when there is more than one person can handle, then Department seniority shall apply. The most senior employee within the Department, including all of the shops, who is qualified to do the work, shall be assigned to work the overtime. (Emphasis added).

C. "Shop" work, such as manning a hazardous waste drop-off site or piling salt, shall be assigned on the basis of shop seniority. The most senior employee, who is qualified to do the work, from the shop at which the work is available, shall be called in first. If this person is not available or if there is more work than one person can handle, the next person with shop seniority, provided they are qualified to do the work, shall be assigned. This shall continue until the shop seniority list has been exhausted. When shop seniority has been exhausted, Departmental seniority shall apply, with the most senior employee within the Department, including all of the shops, who is qualified to perform the work, being assigned.

D. A and B above, does not pertain to Mechanics. Mechanics are assigned when A and B have been exhausted. . . .

. . .

Thorn testified that he has been on Unit #7 Beat on a temporary basis; that except for Johnson and Gengalo's situations, all prior job postings over the last 10 years designated particular beats; that he was unaware of Johnson and Gengalo's situations until the very day of the instant hearing; that beats are assigned only for temporary openings; that some beats are better than others because they generate considerable overtime; and that getting better beats is viewed as a promotion.

Equipment Operator II Pat Hall, a Union officer, testified that the County in the past always posted beats; that the landfill, where Christie is sometimes assigned, is not considered a beat because the work there is sporadic; that some beats, including winter beats, are seasonal; that some beats in the past have been broken up; and that there are more employes than beats.

Highway Commissioner Maass testified that he can create, terminate, or split beats at will; that he can transfer employes between beats and that he regularly does so in snowstorms; that the Union never before grieved over the way he has dealt with beats; that "there is no hard and fast practice" relating to beat assignments; and that a beat is a "work station" whose length he determines. He added that a temporary vacancy means "some length of time" and that there are no limits "whatsoever" on how long temporary vacancies can last. He also explained how the Union in prior negotiations tried without success to change the contractual language in Article 5 dealing with promotions (Joint Exhibit 8).

POSITIONS OF THE PARTIES

The Union asserts that the County's failure to designate Unit #7 Beat on the posting violated Article 5 of the contract because the contract "requires that beats be filled through the posting process" and because there is a binding past practice to that effect. The Union also argues that:

> . . .There is a progression among beats. Generally, town beats get called in less than county beats, and county beats called in less than state beats. Employees typically begin in a town beat and, as they accrue seniority, post into a county or state beat. Also, employees may choose to post into a particular beat for other reasons, such as proximity to home. The County benefits as well, because the more experienced senior employees tend to wind up on the important state beats and the employees become very familiar with their posted beats. If the practice of posting beats were terminated, the County could reward favored employees by appointing them to state beats, or by "appointing" them to a different beat each time an overtime call-in situation was involved.

As a remedy, the Union requests that the County be ordered to award Unit #7 Beat to Thorn on a permanent basis and that it also be ordered to "fill all future beat vacancies through the posting procedure."

The County maintains that the grievance is without merit because the Union has changed the focus of its grievance; because the Union is trying "to obtain for its most senior members all the overtime it possibly can"; because bargaining history shows that the Union has been unsuccessful in trying to obtain contract language requiring that individual beats be posted; that there is no binding past practice on this issue because it in the past has not posted beats; and that management retains its authority under Article 14 of the contract to assign employes.

DISCUSSION

The County complains that the Union at the hearing unfairly changed its initial grievance which claimed that the County violated the contract by not assigning the posted position to a shop employe to what it now argues is the focus of its grievance, i.e., that the position should have been given to Thorn on a permanent basis. Hence, the County argues that the Union's new position represents a "complete metamorphosis from the first" and that the Union's "change in the grievance is reason enough for the Arbitrator to deny the grievance."

I disagree. The Union has explained that its initial grievance listed the name of the shop employe only because it assumed that, as the most senior shop employe, he wanted to bid for the posted position. Once it learned that he did not and that no other shop employe wanted the position, it then asked that the posting be awarded to the most senior employe who is Thorn. Moreover, there is no evidence that the County suffered any prejudice because of the Union's position, as the County was fully able at the hearing to mount its defense as to why the Union's grievance should be denied. Given all this, the grievance is properly before me.

Turning now to the merits of the grievance, Article 5 of the contract states in pertinent part:

Article 5 – Promotions

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 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 a 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.

. . .

On its face, there is nothing in this proviso - or any other part of the contract for that matter – which expressly addresses whether postings must list particular beats.

Elsewhere, Article 14 of the contract, entitled "Vested Rights of Management", provides in pertinent part:

> Section A: The right to employ, to promote, to transfer, to discipline and discharge employees and to establish work rules is reserved by and vested exclusively in the Oneida County Board through its duly elected Highway Committee and duly appointed Highway Commissioner. The reasonableness of the exercise of the aforementioned vested rights shall be subject to the grievance procedure.
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> . . .
>
> Section D: The Highway Committee and Highway Commissioner shall have the sole right to contract for any work it chooses. The Highway Committee and the Highway Commisisoner shall have the sole right to direct its employees to perform any work wherever located or contracted for in its jurisdiction.
>
> . . .

By stating that the Highway Commissioner shall have the sole right to direct its employes to perform any work wherever located or contracted for in its jurisdiction," this language appears to give the Highway Commission *carte blanche* to assign employes to wherever he wants and whenever he wants. However, other parts of the contract limit that right.

Article 5, Section A, (2), thus states that he can "shift employes into any lower or higher job classification or within any salary range where a temporary vacancy exists for the duration of the temporary vacancy." The key word here is "temporary" because it connotes that such assignments cannot be made on a permanent basis.

Moreover, Article 7 of the contract, entitled "Call Time", states:

> Section B: Overtime work shall be called for or assigned by seniority to employees who, in the judgment of the Highway Commissioner or direct supervisor, are well qualified to perform the available overtime work and who are not working on a regularly scheduled job. Employees may challenge the judgment of the commissioner or direct supervisor as provided for in Article 14, Section I. This shall not apply to employees working on a project at the end of the normal work day who are required to complete the work inclusive of overtime or to patrolmen or patrolmen's helpers who are assigned to a specific section or beat on a year-round or seasonal basis, inclusive of overtime work in their section or beat. All full-time employees shall be either on the job or not available before any part-time, temporary or seasonal employees are called or

> assigned. However, student employees may be used for flagging on construction projects regardless of seniority or overtime. (Emphasis added).

This language proves that "beats" exist and that employes are assigned to them.

Given the contract's overall failure to expressly state whether beats must be posted, it therefore is necessary to consider parol evidence.

On that score, I credit Thorn and Hall's testimony that, but for limited certain exceptions, the County has always posted beats involving permanent positions. Indeed, Union Exhibit 1 lists about 30 specific examples dating back to 1981 of where beats were posted for various job postings and where Highway Commissioner Maass himself in most of those situations personally awarded those beats on a permanent basis to successful applicants.

The limited exceptions to this universal past practice involved employes Johnson, Gengalo, and Christie. As to them, Thorn credibly testified that the Union did not object to Johnson and Gengalo's situations because they were temporary employes. Once they became permanent, he added, the Union grieved. As for Christie, he was never assigned a permanent beat at the landfill only because he was in training and because the work there only goes on sporadically.

In addition, the Union and the County signed the aforementioned Letter of Agreement relating to Highway Department seniority that expressly awarded overtime assignments based on an employe's beat (Joint Exhibit 10). This document establishes beyond a shadow of a doubt that the County has recognized that employes are assigned to certain beats.

Given all this, I find that a binding past practice has arisen to the effect that beats must be posted on certain job openings and that the County therefore violated that past practice when it failed to list Unit #7 Beat on the posting herein.

The County argues that no past practice exists by quoting Arbitrator Harry Shulman's opinion in FORD MOTOR CO. – UNITED AUTOMOBILE WORKERS, 19 LA 237, 241-242 1952), wherein he stated:

> . . .
>
> "A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice, but rather to the agreement in which it is based.

> But there are other practices, which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant term of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion. . .but there is no requirement of mutual agreement as a condition precedent to a change of a practice of this character.
>
> A contrary holding would place past practice on a par with written agreement and create the anomaly that, while the parties expend great energy and time in negotiating the details of the agreement, they unknowingly and unintentionally commit themselves to the unstated and perhaps more important matters which in the future may be found to have been past practice."

. . .

I agree completely with this analysis. I disagree, however, with the County's claim regarding its applicability here because the facts here establish that the prior posting of beats did not represent "mere happenstance", "the exercise of managerial discretion as to convenient methods at the time", or "merely present ways". Said postings, instead, reflected the parties' "joint determination" pursuant to: (1), Article 7 of the contract which expressly refers to beats; (2), the Letter of Agreement which states that certain employes will be called in to work on their beats, and (3), a past practice that dates back to 1981.

I also find no merit to the County's claim that it does not need to make Thorn's position permanent. For while Maass under certain situations is free to temporarily assign employes to different jobs just as he has in the past - a right the Union does not dispute - that is a separate question of whether Maass must award permanent jobs to employes who successfully bid on permanent vacancies.

Article 5, Section A, (1), defines a "permanent vacancy" as a "vacancy created in any salary range because of the death, retirement, or termination of employment of any employe. . ." Here, former Equipment Operator I Kecker retired from his job and Unit #7 Beat permanently. The posting for his vacant position thus was for a permanent vacancy which included his beat - one that had to be filled permanently just as all other beats had been permanently filled in the past. The County's contrary claim is without merit.

Also without merit is the County's claim that the grievance must be denied because the Union in recent contract negotiations unsuccessfully proposed contract language reading: "However, an appointment to a temporary vacancy expected to last five (5) working days or longer shall be offered by seniority to all qualified employees."

The Union correctly points out that it made its proposal to clarify the existing language relating to temporary positions and not to obtain a benefit that was not already provided regarding permanent vacancies. Thus, its proposal did not even refer to permanent vacancies as that term is defined in Article 5, Section (1) above, or to any of the three specific examples covered by it, thereby indicating that it was aimed at "temporary" vacancies that lasted more than five days. The Union's failure to obtain such clarifying language on that issue thus cannot be held against it regarding this issue. See *How Arbitration Works*, Elkouri and Elkouri, (BNA, 5th Ed., 1997), p. 505, which states "where a proposal in bargaining is made for the purpose of clarifying the contract, the matter may be viewed in a different light", as it then quotes Arbitrator Sidney A. Wolff's decision in HOSPITAL SERVICE PLAN, 47 LA 993, 993-94 (1966), wherein he ruled:

> If, in fact, the parties were in dispute on the proper interpretation of a contract clause and one of them unsuccessfully sought in collective bargaining to obtain clarification, it would not necessarily follow that the interpretation sought by the unsuccessful party was wrong."

The County's reliance on WAUSHARA COUNTY, MA-9817 (Greco, WERC, 1997), also is misplaced. The County argues that that case is on point because I there found that management had the right to assign two employes to outlying highway shops even though management had never before exercised its right to do so.

WAUSHARA COUNTY is distinguishable because the record here establishes through Union Exhibit 1 and Thorn and Hall's credited testimony that past beats have been posted for permanent vacancies since about 1981. That is in marked contrast to WAUSHARA COUNTY wherein I found, at page 3, that "the applicable position descriptions do not provide that employes must be assigned to only one shop. . ." Moreover, the employer in WAUSHARA COUNTY never signed the kind of Letter of Agreement referenced above (Joint Exhibit 8) which expressly recognizes that management must call in employes for certain overtime based upon their beats. Furthermore, I related in WAUSHARA COUNTY, at pp. 3-4, that the parties there had previously arbitrated whether a past practice existed relating to the selection of work sites and that Arbitrator Edmond J. Bielarczyk, Jr., had previously ruled that no such past practice existed. Here, there has been no prior arbitration award dealing with this issue.

For all the reasons stated above, I conclude that the County violated the contract when it: (1), failed to designate Unit #7 Beat on the job posting; and (2), failed to award that position to Thorn on a permanent basis. As a remedy, the County shall immediately award Unit #7 Beat to Thorn on a permanent basis and it in the future must list all beats on all applicable job postings. It also must permanently fill all posted permanent vacancies caused by "death, retirement, or termination" within five (5) days after the expiration of the posting period. There are no exceptions to this requirement.

In light of the above, it is my

AWARD

1. That the County violated Article 5 of the contract when it failed to post and then to not award Unit # 7 Beat to senior bidder James Thorn on a permanent basis.

2. That to rectify that contractual violation, the County shall: (1), award Unit #7 Beat to James Thorn on a permanent basis; (2), in the future list beats on all applicable job postings; and (3), permanently fill any posted vacancies caused by death, retirement, or termination within five (5) days after the expiration of the posting position.

3. That to resolve any questions arising over application of this Award, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 4th day of August, 1999.

Amedeo Greco /s/
Amedeo Greco, Examiner

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