

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**MARATHON COUNTY HIGHWAY EMPLOYEES, LOCAL 326,
AFSCME, AFL-CIO**

and

MARATHON COUNTY (HIGHWAY DEPARTMENT)

Case 262
No. 57447
MA-10627

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., by **Attorney Jeffrey T. Jones**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the County.

ARBITRATION AWARD

Marathon County Highway Employees, Local 326, AFSCME, AFL-CIO, hereinafter Union, and Marathon County (Highway Department), hereinafter County or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances arising thereunder. The Union requested, and the County concurred in, the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated on April 20, 1999. An arbitration hearing was held in Wausau, Wisconsin, on June 16, 1999. The hearing was not transcribed. The record was closed on August 13, 1999, upon receipt of post-hearing written argument.

ISSUE

The County frames the issue as follows:

Did Marathon County violate the terms of the collective bargaining agreement by not assigning the Grievant to the Marathon City snowplowing route?

If so, what is the appropriate remedy?

The Union frames the issue as follows:

Did the Employer violate the collective bargaining agreement by refusing to award the Marathon City winter section to the Grievant?

If so, what is the appropriate remedy?

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

RELEVANT CONTRACT LANGUAGE

Article 2 – Management Rights

Public policy and the law dictate clearly the Department's primary responsibility to the community as being that of managing the affairs efficiently and in the best interests of our clients, our employees, and the community. The employer's rights include, but are not limited to, the following, but such rights must be exercised consistent with the provisions of this contract.

1. To utilize personnel, methods and means in the most appropriate and efficient manner possible.
2. To manage and direct the employees of the department.
3. To hire, promote, transfer, assign, or retain employees in positions within the department.

. . .

6. To determine the size and composition of the work force.

. . .

11. To change existing methods or facilities.

. . .

Article 7 – Job Posting

1. Posting Period: Notices of vacancies due to retirement, quitting, new positions, or for whatever reason, shall be posted on all bulletin boards for five (5) working days (to overlap two consecutive weeks). The employer shall notify the union in writing in the event it decides not to fill a vacancy and/or abolish a position. The employer shall send a copy of the posting to the Union.

2. Requirements: The job requirements, qualifications, and rate of pay shall be part of the posting and sufficient space for interested parties to sign said posting.

3. Job Award: In filling a vacancy, the employee signing with the greatest seniority in the Department who can qualify shall be given the position. The County shall post on the bulletin boards the name of the employee who is awarded a posted job and also provide a copy to the Union.

There shall be a ten (10) day working trial period for any employee posting into a new position in the Highway Department where the employee may exercise the option of returning to the employee's former position.

4. Trial Period: Employees filling promotional vacancies shall be on a probationary period for thirty (30) days unless such employee has not yet completed an initial six (6) month probationary period as specified in Article 6(1). If such employee has not yet completed an initial six (6) month probationary period as specified in Article 6(1), such employee shall also remain on probationary status until that probationary period is successfully completed. The trial period may be extended by mutual agreement between the Union and management where there remains reasonable doubt regarding satisfactory performance.

5. Job Security: An employee who fails to qualify for the job obtained through job posting shall be reassigned to the employee's former level of employment at anytime during the employee's probationary period on such job.

6. Temporary Assignments: The County reserves the right to make immediate temporary assignments to fill any vacancy during the posting period.

7. No Penalty: There shall be no penalty for a lateral move within the classification system. No loss of permanent rate status will result from bid awards unless an employee bids down.

APPENDIX A-SALARY SCHEDULE

. . .

Employees assigned to snow removal duties (operating patrol trucks) shall be paid at Level 3 for time worked performing those duties.

RELEVANT BACKGROUND

In late October or early November of 1998, the County posted a "Notice of Available Winter Section" at Marathon City. This notice contained a map of the relevant area and stated: "Please sign below if you are interested in performing winter maintenance on the above winter section. The truck will be based at the Stratford shop."

The County has two principal Highway Department Shops. Shop I is located in Wausau and Shop II is located in Stratford. Shop I has two satellite shops, Hatley and Mosinee. Shop II has one satellite shop at Abbotsford. Marathon City falls within the work area of Shop II.

A winter section is a snowplow route. The Marathon City winter section became available when the County reconfigured its snowplow routes from four to five. The five routes covered the same area as the four routes.

James Karlen, hereafter the Grievant, is employed as an Equipment Operator II at Shop I. John Yessa is employed as a Trades Technician II at Shop II. Each of these employees applied for the Marathon City winter section. The Grievant, who has the ability to perform the Marathon City winter section work, was deemed ineligible for the Marathon City winter section because he was assigned to Shop I.

On November 4, 1998, the Grievant, who has more seniority than Yessa, filed a grievance alleging that the County had violated the terms of the collective bargaining agreement by awarding the Marathon City winter section to Yessa, rather than to the Grievant.

Glenn Speich, Commissioner of the Marathon County Highway Department, denied the grievance in a memorandum dated November 6, 1998, which states as follows:

There are no position openings at Stratford. The “plow section interest” posting is not an “open” posting. The posting was to allow existing employees a chance to change plowing assignments.

The contract has no provision for senior employees assigned to Wausau to bump an employee from an outlying shop.

The grievance is hereby denied because management has the right to determine assignments under Article 2 (1), (2), (3), (6), and (11) Management’s Rights.

On January 4, 1999, Personnel Director Brad Karger issued the following response to the grievance:

I have decided to deny Grievance #11-9 (Karlen) as there has been no violation of the Labor Agreement.

The grievance alleges a violation of Article 7 – Job Posting when John Yessa was assigned a new winter section around the Marathon City area. One of the areas of dispute is whether a notice entitled “Notice of Available Winter Section” constitutes a job posting as called for in Article 7. That portion of the Labor Agreement calls for the posting of “vacancies.” Glenn Speich, Highway Commissioner has made it clear that the new winter section is not a “vacancy”, no one retired or resigned. This is a new job assignment open to employees at the Stratford Shop which was created by reducing the size of other plowing routes, in order to enhance the level of service provided to these areas. The Highway Department does not need or want additional employees transferring to Stratford to perform the work; such a transfer would create a shortage of backup plow drivers in Wausau. The notice was prepared and distributed in order to see who at the Stratford Shop is interested in being responsible for plowing the newly created winter section.

Denying James Karlen the opportunity to transfer to Stratford is no reflection on the quality of his work. The managers of the Highway Department have advised me that James is one of the people the department consistently relies upon in winter emergencies. I can, also, understand why James Karlen thought that the new route assignment looked interesting. It is in James’ home area, Marathon City and the route is assigned a new vehicle.

Because this problem occurred because of confusion between the “Notice of Available Winter Section” and a job posting, I have advised the Highway Commissioner to stop creating and distributing these types of notices. In the

future, I think it best that if a new work assignment is available, either he sees if anyone is interested informally or he just assigns the new work to someone. That which was intended to be of benefit to the employees has not worked out well and seems to be creating more problems than it is solving.

Thereafter, the matter was submitted to grievance arbitration.

POSITIONS OF THE PARTIES

Union

A vacancy was created by the creation of a new position. The new position was posted and the Grievant signed the posting.

The clear and unambiguous language of Article 7-Job Posting provides that a new or vacant position be posted and awarded to the most senior qualified bidder. It is undisputed that the Grievant is both qualified and the most senior bidder. The arbitrator is without authority to ignore or amend clear and unambiguous contract language.

The Grievant should be awarded the new position. The County should be directed to make the Grievant whole for any loss incurred and to cease and desist from such actions in the future.

County

There is a difference between a job assignment and a job vacancy. The term "vacancy," as used in Article 7, Sec. 1, clearly means job vacancies.

Job vacancies refer to positions listed in the Wage Appendix of the collective bargaining agreement, or newly created positions that are to be incorporated within this Wage Appendix. No vacancy was created by an employee's retirement, quitting, or termination.

It is undisputed that job vacancies are posted on blue paper. The Marathon City winter section was posted on white paper and did not contain the information required to be listed under Article 7, Sec. 2.

The testimony of the Assistant Director of Highways demonstrates that fifteen to twenty snowplowing routes have been posted in the last five to six years and that these routes were posted in order to provide employees with an opportunity to indicate a preference for a

snowplowing assignment. This testimony further demonstrates that it was well understood that employees at Shop I could not apply for snowplowing routes at Shop II. The Union has never grieved this practice.

The contractual Management Rights clause provides the County with the right to utilize personnel in the most appropriate and efficient manner. By assigning available Shop II work to a Shop II employe, the County was utilizing personnel in the most appropriate and efficient manner.

An employer possesses the authority to determine whether a job vacancy exists, unless that authority has been bargained away. Consistent with its management rights, the County properly determined that the Marathon City winter section was not a job vacancy, but rather, was a job assignment and that such a job assignment need not be posted under Article 7, Sec. 1, or awarded under Article 7, Sec. 3. The grievance is without merit.

DISCUSSION

The undersigned agrees with Union President Mike King's conclusion that the County has posted a vacant winter section. The issue to be determined is whether or not a vacant winter section is a vacancy that must be posted in accordance with Article 7 of the parties' collective bargaining agreement.

As the County argues, no employe had resigned, retired or been terminated prior to the posting of the "Notice of Available Winter Section." Article 7, however, does not limit postings to vacancies caused by these three situations. Rather, a vacancy may occur "for whatever reason." Thus, the fact that there have not been any resignations, retirements, or terminations does not, in and of itself, establish that the vacant winter section is not a vacancy within the meaning of Article 7.

Article 7, Sec. 1, does not define a "vacancy." Article 7, Sec. 1, however, does not stand alone. Rather, it must be construed in a manner that is consistent with other sections of the provision.

The first sentence of Article 7, Sec. 3, equates "vacancy" with a "position." Thus, the most reasonable construction of Article 7, Sec. 1, is that a "vacancy" is a vacant position.

Appendix A to the parties' collective bargaining agreement states that "Employees assigned to snow removal duties (operating patrol trucks) shall be paid at Level 3 for time worked performing these duties." This language indicates that a winter section, which is a snowplow route, is a work assignment, rather than a position.

The testimony of the Assistant Director of Highway and Union President Mike King establishes that winter section work may be performed by a variety of bargaining unit classifications, but that full-time, year round employees, such as a Mechanic, cannot post for winter sections. A posting restriction based upon workload is further proof that a vacant winter section is a work assignment, rather than a position.

To be sure, it is not uncommon for an employer and a union to agree that work assignments are subject to bid. However, as discussed above, the contract language does not warrant the conclusion that a winter section is subject to the Article 7 bidding process. Nor, for the reasons discussed below, does the evidence of the parties' practices.

It is not evident that, prior to the instant dispute, any employee at Shop I posted for a winter section at Shop II, or vice-versa. This evidence is consistent with the County's argument that it was understood that employees at one shop could not apply for a winter section at another shop. However, this evidence is not sufficient to demonstrate the existence of such an understanding.

The Grievant confirmed at hearing that a white sheet posting denotes a work assignment, while a blue sheet posting denotes a job posting. Consistent with prior practice, the Marathon City winter section vacancy was posted on a white sheet.

A white sheet posting and a blue sheet posting are distinguished not only on the basis of color, but also on the basis of content. A blue sheet posting, unlike a white sheet posting, contains the information that is contractually required to be on Article 7 job postings, *i.e.*, job requirements, qualifications, and rate of pay.

As in the past, the County posted the "Notice of Available Winter Section" at all of its shops. This posting appears to be inconsistent with the County's position that the Marathon City winter section is a work assignment that is limited to employees assigned to Shop II. This apparent inconsistency, however, is explained by the testimony of Assistant Director of Highway Mokey, *i.e.*, that postings are placed at all the shops as a courtesy to employees because a few employees do not like to post at their own shop.

In summary, while vacant winter sections have been posted, they have not been posted in accordance with the requirements of Article 7, Sec. 2. This evidence of the parties' posting practices supports the conclusion that a vacant winter section is not a vacancy within the meaning of Article 7, Sec. 1.

Conclusion

Neither the language of the collective bargaining agreement, nor the evidence of past practice, demonstrates that the Marathon City winter section is a vacancy that is required to be posted under Article 7. Accordingly, the Grievant does not have an Article 7 seniority right to be awarded the Marathon City winter section.

By limiting eligibility for the Marathon City winter section to employees at Shop II, the County avoids paying travel pay to employees who are required to travel between Shop I and II and maintains the mix of bargaining unit classifications at each shop that it has determined to be appropriate. Thus, as the County argues, the County's decision to limit eligibility for the Marathon City winter section assignment is consistent with the County's Article 2 right "to utilize personnel, methods and means in the most appropriate and efficient manner possible."

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

AWARD

1. The Employer did not violate the collective bargaining agreement by refusing to award the Marathon City winter section to the Grievant.
2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 25th day of August, 1999.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator