

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
WAUSHARA COUNTY HIGHWAY DEPARTMENT EMPLOYEES
represented by **COUNCIL 40, AFSCME, AFL-CIO**

and

WAUSHARA COUNTY

Case 65
No. 56966
MA-10475

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 639 West Scott Street #205, Fond du Lac, Wisconsin 54937, for Waushara County Highway Department Employees, represented by Council 40, AFSCME, AFL-CIO, referred to below as the Union.

Ms. Debra S. Behringer, Administrative Coordinator, Waushara County, P.O. Box 300, Wautoma, Wisconsin 54982, for Waushara County, referred to below as the Employer, or as the County.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute filed on behalf of "all highway department employees." The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on April 21, 1999, in Wautoma, Wisconsin. The hearing was transcribed and a transcript of the hearing was filed with the Commission on May 10, 1999. The parties filed briefs and a waiver of reply briefs by June 18, 1999.

ISSUES

The parties stipulated the following issues for decision:

Did Waushara County violate the contract when it eliminated past practice of allowing employees of the highway department to adjourn to the shop at approximately 3:15 p.m. at the end of their work assignments each day to wash up and fill out paperwork related to their work assignments that day?

If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

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;
- ...
- (f) To maintain efficiency of operations;
- ...
- (i) To change existing methods or facilities;
- ...

ARTICLE 12 – HOURS AND OVERTIME

12.01 – As in the past, the normal work week shall generally consist of eight (8) hours per day, Monday through Friday, generally from 7:00 a.m. to 3:30 p.m. with one-half (1/2) hours unpaid lunch period. This is not to be interpreted as any guarantee as to hours of work.

12.02 – Daily work schedules shall include a fifteen (15) minute paid break taken approximately from 9:00 a.m. to 9:15 a.m. . . .

12.04 – Overtime shall be paid for all hours worked in excess of forty (40) hours per week. Overtime shall also be paid at the rate of time and one-half (1 ½) for all hours worked beyond eight (8) hours per day. For the purpose of determining overtime, all paid time shall be considered time worked.

BACKGROUND

The Union filed the grievance, on behalf of “all highway dept. employees,” on September 29, 1998. The grievance form states the relevant circumstances thus:

Bob Bohn, Waushara County Highway Commissioner, eliminated the long standing practice of allowing employees to come into the shop prior to the end of the work day to wash up and write their daily reports. This occurred after Mr. Bohn received a letter from the Council 40 Staff Representative asking for information on a possible contract violation involving the working through of breaks.

The form seeks the following remedy:

1. Immediately reinstate the past practice concerning wash-up time and filling out reports during work time.
2. Pay all employees who work, or have worked, over 8 hours in a day to wash-up or do reports time-and-one-half for all hours worked over 8 hours in one day.
3. Cease any and all harassment or retaliation against union members which is occurring because the union is conducting business to enforce the contract.

The bulk of the facts underlying the grievance are undisputed.

It is undisputed that the parties, on a job by job basis, permit some flexibility in giving and taking of the morning break set forth in Section 12.02. Particularly in jobs involving paving or seal-coating, this flexibility can involve working through the break for a considerable time to permit the paving process to continue without interruption for as long as possible. Practice on giving breaks varies from foreman to foreman. Douglas Steuck is the Union’s President, but also serves, as needed, as a temporary foreman. He noted that when he works a crew through breaks, he tries to give them advance notice so that they know they will work through a break, but should take one as work permits. Tom Dahlke is the County’s Shop Foreman, and is not a member of the bargaining unit. He noted that he implicitly expects his crew to understand that if a job necessitates working through break, they should do so. He assumes his crew will take a break when they can, without being told to do so.

Sometime in August of 1998, the Union held a membership meeting. At that meeting, several members voiced concern that they were not being permitted to take a morning break. Steuck believed the complaining members wanted some advance notice when a job could be expected to require working through break or lunch hour. He hoped the matter could be addressed informally between Union leadership and management, but the membership decided that the matter should be addressed more formally.

In response, the Union's representative, James Miller, sent the following letter, dated August 21, to Bohn:

It has come to my attention that for a number of years the Waushara County Highway Department has, depending on the daily schedule of the department, required members of AFSCME Local 1824 to work through their 15 minute morning break. I further understand that when this occurs, the individuals are not given another opportunity to take their break nor are they receiving overtime pay for this time or being allowed to leave fifteen minutes early without any loss of pay. Each time this occurs is a violation of Section 12.02 of our contract.

Although it appears that breaks have been worked through for some time, that doesn't make it a past practice. The contract is very clear as to what the employees are entitled to: a fifteen minute paid break starting approximately at 9:00. When employees are required to work through this break, they not only lose their opportunity for rest time, they are also working an additional fifteen minutes which they should be paid for.

Please contact me so that we can discuss ways of rectifying this problem as soon as possible. If we cannot do so, the Union will file a grievance over this matter. Because of the nature of the contract violation, we will request back pay for all overtime not paid due to breaks not taken back to January 1, 1998.

The employees of the Department have always cooperated with the County when there is a need to work through this break, either during the summer season or during snow removal operations. Now that this is being brought to your attention, I would hope that you would show the same cooperation in resolving it. In addition, we would like to request that when the County determines that breaks need to be worked through, there be notification to the affected employees at the beginning of the work day.

I look forward to your response to these issues.

Bohn received the letter, and called his management team together to discuss whether any unit employees had been denied a morning break. He determined that this had not happened. At some point after this, Bohn determined that unit employees would not be permitted into the shop area before 3:30 p.m, thus terminating a practice known as “wash-up” time.

Debra Behringer is the County’s Administrative Coordinator, and formally responded to Miller’s letter in a letter dated August 27, which states:

Bob Bohn and I were quite surprised when reading your letter in regards to the nine o’clock break. We were not aware that the employees were not being allowed to take their morning breaks.

Please have your union membership provide us with as much data as possible relating to this issue so we can proceed accordingly.

We would like the following questions answered:

- On what dates were employees forced to go without a break?
- Which employees were affected by this?
- What were the employees doing that they could not take the break?
- Who was the supervisor at the time breaks were not allowed?

After receiving this information, we will thoroughly investigate this complaint and take appropriate measures to correct any problems.

Miller responded in a letter, dated September 9, 1998, to Behringer and Bohn, which states:

Both myself, the officers of the Highway local and the membership of the Union have had a chance to review Deb Behringer’s response to my August 27, 1998 letter to Bob Bohn. It is our reading of that letter that the County would agree with the Union that employees are entitled to a fifteen minute break somewhere around 9:00 a.m. and that the County will see that employees receive this break time from this point on.

The Union, therefore, does not see any reason to grieve this matter at this time. Given Deb’s letter, the Union is not interested to arguing about the past. As long as the employees are receiving their contractual breaks, there would be nothing to grieve. We trust that this letter will put this matter to rest.

As noted above, this did not “put this matter to rest,” and the Union filed a written grievance later in September.

The grievance linked the termination of “wash-up time” with the Union’s filing of the letter of August 21. At some point, the Union and the County met in Princeton to discuss these issues. The County informed the Union that it would recognize a ten-minute wash-up period preceding the end of the workday at 3:30 p.m. The Union took the position that the practice was to provide fifteen minutes. The County ultimately restored a ten-minute wash-up period for non-Mechanic unit members and a fifteen minute wash-up period for Mechanics. Bohn’s termination of the practice lasted roughly three weeks.

The parties do not dispute that the practice concerning wash-up time was to permit employees to fill out time records and clean up from the day’s work. Unit employees may have to fill out up to four forms to account for their time: a “state employee time card;” a “county employee time card;” a “machinery time card;” and a payroll form. Each form requires employees to account for their work hours. The state and county forms require employees use specified accounting categories to identify the project involved and the regular or overtime hours devoted to it. The machinery time card requires similar accounting, but without specified accounting categories. Not all of these forms are filled out by each employee on a daily basis. Some of the forms need not be filled out daily, and some work need not be accounted for on each card. It is undisputed that state work, including snowplowing on state roads, can require more paperwork than other jobs. Similarly, working on a variety of jobs which take a portion of the day is more difficult to account for than jobs that take entire workdays. Foremen may account for the time of their crew on certain jobs. It is undisputed that a wash-up practice has existed for many years. Under Bohn’s predecessor as Highway Commissioner, and for a time under Bohn, employees were expected to account for their time and perform certain truck maintenance outside of the Highway Department yard area. As traffic on roads increased, however, employees were permitted to fill out time cards “inside the gate.”

The balance of the evidentiary background is best set forth as an overview of witness testimony.

Robert Bohn

The County has employed Bohn for thirty years, including the past nineteen as its Highway Commissioner. He noted that he advised his foremen, after discussing Miller’s August 21 letter, that if the Union lacked flexibility on break times, the County lacked flexibility on work hours. He put the point thus:

I told them that the workday was from 7:00 until 3:30. They’d have to stick to the contract, but I had asked that we stick to the contract on the break time, and to not cause any problem. I thought we should stick to the contract also. Transcript (Tr.) at 19-20.

He noted the meeting at which he informed his foremen to enforce the terms of the contract regarding the end of the workday occurred before Miller's letter of September 9:

This letter was September 9. So when we received this letter, that had already been done, that we had the meeting, I told the foremen to stick to the contract because we had gotten this letter from you. Tr. at 20.

Ultimately, he met with Miller and Behringer concerning the Union's grievance. At that meeting, the County offered to permit unit employees, other than Mechanics, ten minutes at the end of the day, from 3:20 until 3:30 p.m., for wash-up. The County offered Mechanics fifteen minutes, recognizing that they required more time to clean up and to put away tools, the bulk of which are the Mechanic's personal property. The Union did not accept this offer, but Behringer told Bohn to reinstate the practice on the assumption it accurately reflected the practice.

Bohn noted that for roughly ten years, he has enforced a work rule prohibiting unit employees from coming into the truck repair shop, in which the mechanics work, unless they have a work related reason to do so. From his perspective, wash-up time does not include time spent gassing the truck, maintaining it, or preparing equipment for the next day's work. Such work is an assigned duty, which cannot be considered part of wash-up time. Thus defined, he believed ten minutes at the end of the day is more than sufficient, on average, to permit employees to fill out time records and clean up.

Douglas Steuck

Steuck has served as Union President for the past six years. He noted that he opposed sending a letter to the County concerning break time. Rather, he hoped to work the matter out informally. He was, however, outvoted on the point. He noted that after he became aware that Bohn had received the August 21 letter, he discussed the matter with Dahlke, then asked Bohn "to hold things as it is until I got a meeting together." (Tr. at 46). That meeting never came about, however, because the next day Bohn terminated the practice regarding wash-up time.

From Steuck's perspective, the wash-up practice permitted employees to come into the yard at roughly 3:15 p.m. to service their trucks, make out time cards and clean up. He noted the practice was difficult to define, however, because of necessity trucks left the job site at different times, and required varying degrees of maintenance on different days. He estimated that filling out time cards took, on average, from five to seven minutes a day. He estimated that it took roughly five minutes for employees to change clothes at the end of the day. He acknowledged that not all employees change clothes at the end of the day.

Gary Cotanch

Cotanch has worked for the County for roughly thirty-six years. He stated that since at least 1975, the County has permitted fifteen minutes of wash-up time. During that time, an employe would maintain their truck, make out time cards and clean up. Those tasks required, in his view, the entire fifteen minutes. He would not, however, estimate how long any part of these tasks took. He addressed the point thus:

- Q But at least since the inception of that building, do you recall what time you would come back to the shop at the end of the workday?
- A 3:15
- Q And what would you do when you got back?
- A Make time out, clean up.
- Q Did you do anything with the truck?
- A Clean them, windshields, yeah.

...

- Q How much time would that take?
- A I would say all of fifteen minutes.
- Q To clean the truck?
- A And time.
- Q Subtracting the time that it took to working on the truck, how much time did it take you to clean up, do your time, paperwork, and get ready to leave?
- A I would say the whole fifteen. (Tr. at 60).

He declined, through repeated questions, to state the time attributable to truck maintenance, time recording and cleaning up.

Jerry Cummings

Cummings stated that for the past twenty-five years, the County has permitted wash-up time of fifteen minutes at the close of the workday. He included in that period time spent cleaning up, filling out time cards and maintaining equipment. He noted that the fifteen minutes was sufficient, on average, to permit each task to be done. He declined to state what portion of that time was spent, on average, in each activity.

Gary Mitchell

Mitchell noted that for the entire twenty-four years of his employment with the County, it has permitted employes, on average, fifteen minutes at the close of the day for wash-up time. He

acknowledged that in response to a County questionnaire, he noted that wash-up time practice was limited to ten minutes at the end of the day. At hearing, he stated that it was impossible to attend to necessary maintenance duties, time accounting and cleaning in ten minutes. He noted that at least three foremen had advised him that fifteen minutes at the end of the workday were permitted for wash-up.

Tom Dahlke

Dahlke has worked for the County for roughly twelve years. He is currently the Shop Foreman, which is not part of the bargaining unit. None of his work for the County has been in a bargaining unit position. He denied that the County has ever had a consistent policy regarding when trucks are permitted to return to the Shop. Rather, trucks were dismissed as necessary from the job site. Employees were expected to perform maintenance or other work until 3:20 p.m., when they could attend to time records and cleaning up. He supervises Mechanics, and noted that the County tries to keep unit employees out of the area in which Mechanics work on equipment. Periodically, the County has to act to keep unit employees from congregating around the Mechanics near the end of the workday, or near the start of break times. He attributed this problem to a small minority of unit employees. He estimated that five minutes, on average, is more than ample for employees to complete their time records.

Larry Mankowski

Mankowski noted that in the past, the County permitted greater break time in winter than in summer, but that within the past year, winter breaks have been more strictly enforced. He noted that past practice was to come into the Shop area around 3:15 p.m., to maintain the trucks, complete time records and clean up. The time needed for each task varies with the job and by employee. To account for time spent plowing State roads could take ten to fifteen minutes, for example.

Steven Bray

Bray once served the County in a unit position, but now serves in the position of Foreman and Safety Coordinator. He noted that ten minutes at the close of the day was sufficient to permit employees to fill out time records and to clean up. He has noted employees congregating by the time clock, around 3:30 p.m., waiting to punch out.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Union's Position

The Union notes that the grievance “involves a number of distinct disputes that arose in August and September of 1998.” More specifically, the Union notes the grievance focuses on “wash-up time,” which “was only the last in” this “series of disputes.” Miller’s letter of August 21 prompted Bohn to question Union representatives regarding morning breaks and to eliminate established past practice regarding wash-up time. The Union contends that the grievance thus questions retaliation regarding the elimination of the practice, and precisely what the practice was.

The Union contends that this dispute, as opposed to many past practice disputes, involves a dispute on the extent, rather than the existence, of the practice. More specifically, “the County believed that this ‘wash-up time’ was for a period of ten minutes per day, while the Union stated that it believed that this practice was for a period of fifteen minutes.” The County’s survey is not, according to the Union, helpful in resolving this dispute. The testimony demonstrates the difficulty of establishing this point, since wash-up time arguably includes completing paperwork, servicing equipment and washing up. Beyond this the practice “is very likely to have been an approximate length of time varying by individual on any given date.”

The grievance is, according to the Union, composed of two elements. The first is “whether the contract was violated when Waushara County eliminated for a period of weeks the past practice . . . after they received a letter requesting information from the Union.” The second “is what is the nature of that practice and how much time it consisted of.” Since the evidence establishes the parties do not dispute the existence of the practice, the Union concludes that its termination constitutes a contract violation. The answer to the second element “is not that clear” because the evidence indicates the County, unlike the Union, does not consider the completion of truck maintenance part of the wash-up period.

The Union concludes by requesting “that the Arbitrator find that Waushara County violated the contract and rule in favor on the Union’s grievance dated September 29, 1998.”

The Employer's Position

After a review of the background to the grievance, the County notes that it “recognizes the practice of allowing employees to take time at the end of the day to complete paperwork and clean up.” The County disputes, however, that the practice is to release employees at 3:15 p.m. to permit employees “to stop work and to do paperwork and change clothes.”

The County notes that Miller's letter concerning employee breaks prompted Bohn to investigate the matter. Subsequent meetings and correspondence clarified that issue, but brought forward the issue concerning wash-up time. The Union questioned not just the amount of time available for wash-up, but also whether employees could use the break room during wash-up time. The County indicated it would permit ten minutes at the close of the day for wash-up, and would permit employees to use the break room. The Union responded by filing the grievance posed here. The County concludes that its response to the series of Union complaints regarding break time and wash-up time constitute nothing more than its legitimate use of its authority under Article 2.

The evidence manifests nothing more than "a definite communication problem" within the Union. Testimony that the practice involves fifteen minutes for wash-up presumes that time spent attending to vehicle maintenance and job preparation is included in wash-up time. The County contends that it regards such work as assigned duties, which is part of a typical day's work. Thus, such work does not count toward wash-up time, and this more than accounts for the five-minute difference between the Union and the County on the extent of wash-up time. Beyond this, the County notes that testimony manifests employee misunderstanding of "what the 'shop' is." Bohn's testimony establishes that he wants employees out of the "shop" area during wash-up time. This means that employees can come into the yard or into the warm vehicle storage area, but cannot go into the repair area unless their work requires them to do so. The Union's misunderstanding of what Bohn meant by excluding employees from the shop accounts for a significant part of the confusion underlying the grievance.

The County contends that the "Union has not shown that the County acted unreasonably," and concludes by requesting that "the arbitrator deny the grievance of the union."

DISCUSSION

The stipulated issue reflects that this dispute is unusual. The parties do not dispute that a wash-up practice exists, and was eliminated. Examination of the issue in light of the evidence only underscores the unique nature of the dispute. That examination must ultimately account for the fact that the practice is acknowledged and has been, at least in part, reinstated. That the stipulated issue sets the wash-up period at "approximately" 3:15 p.m. establishes that the scope of the practice must be determined to fully resolve it.

It is undisputed that the labor agreement is silent on the existence or scope of wash-up time. This means the acknowledged practice states a condition of employment established not through express terms in the labor agreement, but through mutually recognized practice. The most persuasive account I have found regarding the repudiation of a past practice is that of Richard Mittenthal, from a paper entitled "Past Practice and the Administration of Collective Bargaining Agreements" from The Proceedings of the 14th Annual Meeting of National Academy of Arbitrators, (BNA Books, 1961) at 56:

Once the parties become bound by a practice, they may wonder how long it will be binding and how it can be terminated.

Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For . . . if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.

The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, the other must have the practice written into the agreement if it is to continue to be binding.

In this case, the parties were not in collective bargaining for a labor agreement. Rather, Bohn terminated the practice during the effective term of the labor agreement, apparently angered by the Union's stated interest in pursuing the break time issue. As noted above, such in-term repudiation of a practice flies in the face of the agreement manifested by the practice. Against this background, the repudiation of the practice must be seen as a violation of the labor agreement.

This conclusion addresses, however, only part of the stipulated issue. As noted above, Bohn, on Behringer's direction, reinstated the practice. At their Princeton meeting, the County noted its willingness to reinstate a ten-minute wash-up period for non-Mechanic unit employees and a fifteen-minute wash-up period for the Mechanics. The County implemented this. Thus, the practice noted in the stipulated issue can be considered "eliminated" only to the extent the County's view of the practice is inaccurate.

The dispute, thus narrowed, is whether wash-up time for non-Mechanic unit employees starts at 3:15 or 3:20 p.m. The evidence establishes the validity of the County's implementation of a 3:20 p.m. wash-up time. Initially, it must be noted that the binding force of a practice is rooted in the agreement manifested by the bargaining parties' conduct. It is apparent the parties agree that wash-up time for non-Mechanic unit employees is at least ten minutes long. The issue thus becomes whether the evidence supports extending it an additional five minutes.

The evidence will not support such an extension. More specifically, the evidence makes it difficult to discern any factual dispute between the parties' views. The County acknowledges that time spent in maintaining trucks and preparing for the next day's work is not considered part of

wash-up time. Unit employe witnesses insisted on including this work in their view that the practice calls for fifteen minutes. Against this background, it is difficult to find a substantive difference between the parties' apparently conflicting views.

To the extent the Union contends there is a substantive difference, the evidence will not support it. The binding force of practice is agreement. The refusal of unit witnesses to separate time spent in completing time records and cleaning up from time spent maintaining trucks precludes finding agreement on this point. What evidence there is indicates, on average, ten minutes is sufficient for completing time cards and cleaning up. Different jobs may require more bookkeeping or more cleaning up, but it is impossible to go into that level of detail in determining the practice. It is undisputed among all testifying witnesses that the practice reflects flexibility on these points. More to the point here, accepting the Union's assertion in the absence of detailed testimony establishing how much time is spent on each function forces the County to accept the view of testifying witnesses on what constitutes an assigned duty and what constitutes wash-up duties. As already noted, there is no persuasive testimony to support this, and the terms of Article 2 place such distinctions in the hands of the County.

In sum, the evidence establishes Bohn terminated the wash-up practice in violation of the labor agreement. The County's subsequent reinstatement of the practice, however, addressed this point by permitting non-Mechanic unit employes to start wash-up duties at 3:20 p.m. and Mechanics to start wash-up duties at 3:15 p.m. Wash-up time includes completing time records and cleaning up from the day's work. This does not preclude performing other tasks during this period, expanding it or contracting it as necessary to reflect unique situations. Rather, it reflects the parties' legitimate "on-average" expectation under established practice.

Remedy, in this case, is difficult to determine. There is no evidence rebutting Bohn's testimony that no unit employes worked overtime during the period the practice was suspended. Against this background, there can be no make-whole component to the remedy. The grievance alleges retaliation and seeks a "cease and desist" order. The evidence establishes, however, that after investigation, Behringer directed the reinstatement of the practice as noted above. While the evidence may support an assertion Bohn acted in anger over Miller's letter, it falls short of establishing "retaliation," particularly in light of the subsequent reinstatement of the practice. Thus, no cease and desist order is appropriate. The record shows a basic disagreement on the scope of the practice. This decision and the Award entered below state the existence of a contract violation in the elimination of the practice and state what the evidence will support concerning the scope of the practice. This declaration of the parties' rights must stand as the only remedy appropriate to this record.

AWARD

Waushara County did violate the contract when it eliminated past practice of allowing employees of the highway department to adjourn to the shop at approximately 3:15 p.m. at the end of their work assignments each day to wash up and fill out paperwork related to their work assignments that day.

This declaration is the remedy appropriate to this violation because the County's determination that the practice consists of permitting wash-up time for non-Mechanic unit employees to start, on average, at 3:20 p.m. and for Mechanics to start, on average, at 3:15 p.m. does not violate the contract. This determination reflects that wash-up time includes filling out time records, cleaning up and duties beyond this only as time permits. The County's determination that truck maintenance is not a function of wash-up time does not violate the contract. The practice concerning wash-up time does not extend to permitting unit employees into the vehicle maintenance area during wash-up time, unless they are required to be there for work related reasons.

Dated at Madison, Wisconsin, this 8th day of September, 1999.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

