BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARATHON COUNTY HIGHWAY DEPARTMENT EMPLOYEES LOCAL 326, AFSCME, AFL-CIO

and

MARATHON COUNTY

Case 265
No. 57511
MA-10659

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, appearing on behalf of Marathon County Highway Department Employees Local 326, AFSCME, AFL-CIO.

Ruder, Ware & Michler, S.C, by **Attorney Dean R. Dietrich,** 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Marathon County.

ARBITRATION AWARD

Marathon County Highway Department Employees, Local 326, AFSCME, AFL-CIO, herein "Union," and County of Marathon, herein "County," are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on April 26, 1999, requested the Commission to appoint either a Commissioner or a member of its staff to serve as Arbitrator. The Commission appointed Paul A. Hahn as Arbitrator on July 8, 1999. (The case had been originally assigned to James R. Meier on April 30, 1999, but was transferred due to a scheduling conflict). Hearing in this matter was held on July 21, 1999 at the Personnel Department in the Marathon County Courthouse, Wausau, Wisconsin. The hearing was not transcribed. The parties filed post hearing briefs which were received by the Arbitrator on September 2, 1999. The parties were given the opportunity to file reply briefs but declined to do so. The record was closed on September 17, 1999.

ISSUE

Union

The Union did not submit a statement of the issue.

County

Whether the County violated the Labor Agreement when it called in another employe other than the Grievant to perform snow removal work on Sunday, January 24, on the same section of highway that the Grievant works as State Patrolman. If so, what is the appropriate remedy?

Arbitrator

I adopt the statement of issue as proposed by the County as being a fair representation of the issue which I must decide.

RELEVANT CONTRACT PROVISIONS

Article 1 – Recognition

The County recognizes the Union as the exclusive bargaining representative for all regular full-time and regular part-time employees of the Marathon County Highway Department excluding supervisory, professional and office personnel, the commissioner, assistant commissioner, engineer, assistant engineer, shop supervisor, patrol superintendent, assistant patrol superintendent, and purchasing agent for the purposes of conferences and negotiations with the employer or its authorized representative on questions of wages, hours and other conditions of employment.

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.

. . .

13. To take whatever action is necessary to carry out the functions of the County in situations of emergency.

Any unreasonable application of the management rights shall be appealable by the Union through the grievance and arbitration procedure.

Article 3 – Grievance Procedure

1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this contract.

. . .

6. Arbitration

. . .

C. Arbitration Hearing: the arbitrator shall meet with the parties at a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding upon both parties.

. . .

F. Decision of the Arbitrator: The arbitrator shall not modify, add to or delete from the express terms of the agreement.

. . .

Article 5 – Hours and Overtime

. . .

4. Overtime: Employees shall receive time and one-half (1 ½) their normal hourly rate for all hours worked in excess of eight (8) hours in a day, or forty (40) hours in a week, or for hours worked outside the normal hours of work. There shall be no "pyramiding" of overtime, overtime hours shall be

paid for only once. Time off for vacations and holidays shall be considered time worked when computing overtime. Employees shall receive time and one-half (1 ½) their normal hourly rate for all hours worked on Saturday and/or Sunday.

STATEMENT OF THE CASE

This grievance arbitration involves Highway Department Local 326, representing the employes set forth in the Article 1 – Recognition (Jt. 1) and Marathon County. The Union alleges a contract violation by the County for not calling the Grievant to plow snow on his regular section route on January 24, 1999. The County called in another bargaining unit employe to cover the shift on Grievant's regular route from 9:00 p.m. Sunday, January 24, 1999 through 4:00 a.m. on Monday, January 25, 1999. The Union alleges that a practice of "right of first refusal," required the County to give the Grievant the opportunity to work this overtime shift to plow snow on the Grievant's normal section route rather than the County making a unilateral decision to call in another employe. The County believed the Grievant would be too tired to work this shift plus his normal shift on Monday, January 25, 1999 which ran from 3:45 a.m. to 3:30 p.m.; this would have resulted in the Grievant working a straight 18 ½ hour shift.

The County and bargaining unit employes were engaged in snow removal from a major snow storm on the weekend of Friday, January 22, 1999 through Monday, January 25, 1999. As stipulated by the parties, the Grievant worked on Friday, January 22, 1999 from 5:15 a.m. to 10:30 p.m. performing winter maintenance work. The Grievant worked overtime on Saturday, January 23, 1999 from 4:30 a.m. to 12:30 p.m. continuing to perform winter maintenance work. The Grievant worked overtime snowplowing on Sunday, January 24, 1999 from 3:30 a.m. to 11:00 a.m. Employe Dave Shillinger (a bargaining unit employe) was called in to work overtime on the same snow removal route as Grievant on Sunday at 9:00 p.m. and worked until 4:00 a.m. on Monday, January 25, 1999. The Grievant returned to work at 3:45 a.m. on Monday, January 25, 1999 and worked until 3:30 p.m. on that same day performing snow plowing and winter maintenance work on the Grievant's normal route. (Jt. 2, 3 and 4)

On January 28, 1999, Grievant submitted a grievance to Marathon County Highway Commissioner Glenn Speich. The grievance stated that on January 24, 1999 a patrolman (Grievant) should have been called first to see if he wanted to work the overtime shift from 9:00 p.m. January 24, 1999 to 4:00 a.m. Monday, January 25, 1999 before calling in other Highway Department employes. (Jt. 2) The grievance was denied by the Highway Commissioner on February 1, 1999. (Jt. 2) The grievance was appealed through various steps of the parties' grievance procedure and was denied by the Marathon County Personnel Committee on April 5, 1999. (Jt. 2) Grievant was notified of this denial by County Personnel Director Brad Karger by memorandum to the Union on April 7, 1999. The Union appealed to arbitration on April 10, 1999. (Jt. 2)

No issue was raised at the hearing as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on July 21, 1999. Hearing closed at 11:15 a.m

POSITION OF THE PARTIES

Union

The Union argues that employes under the job posting article of the labor agreement are able to use their seniority to post for vacancies in the Marathon County Highway Department. Vacancies have traditionally included winter snow plow routes. The Union argues that the County does not dispute that the Grievant normally would have been given the opportunity to plow his regularly assigned route on January 24, 1999 from 9:00 p.m. to 4:00 a.m. Monday, January 25, 1999. The Union submits that the parties' labor agreement is either ambiguous (or silent) as to the provision of the benefit of "right of first refusal" for assignment to one's own shift for overtime purposes. The Union argues that there has been a past practice which is long-standing and is unequivocal which gives the employe normally assigned to a particular snow route the first opportunity to work that route or refuse the assignment. The determination as to fatigue, the Union submits, has traditionally been left to the discretion of the individual employe.

The Union points out that although the Grievant would have worked 19 hours if he had worked the shift in question, two weeks prior to that on January 11, 1999 the Grievant worked 19 straight hours. The Union suggests that if there was a compelling safety concern by the County on January 23 through January 24, why was there not such similar concern on January 11th?

Citing arbitration labor treatise and case law, the Union submits that where a contract is ambiguous or silent, past practice can be used by the Arbitrator to ascertain whether under the facts of this case the custom and practice of working overtime may be enforceable to the County even if there is no specific contract language in the labor agreement. The Union argues that it is accepted that long-standing practices can establish conditions of employment as binding as a written provision of the labor agreement and that even where the contract is completely silent, with respect to a given activity, the presence of a well-established practice may constitute in effect an unwritten principle on how a certain type of situation should be treated. Lastly, the Union argues that the benefit provision in the instant case (right of first refusal) is supported by the custom and practice of the parties and that the grievance should be sustained by the Arbitrator. The Union asks that the County provide the Grievant with all compensation lost as a result of the alleged contract violation and that the County be directed to cease and desist from such conduct in the future.

County

The County argument makes two essential points. One, the County argues that under Article 2, Management Rights, there is clear and unambiguous authority vested in the County to "utilize personnel, methods and means in the most appropriate and efficient manner possible," and "manage and direct the employees of the Department" and "take whatever action is necessary to carry out the functions of the County in situations of emergency." The County takes a strong position that the County has the right to assign employes to perform work, including the assignment of an employe to perform snow removal work on a particular section of highway regardless of whether the employe is a State Patrolman who is designated to work on that particular section of highway. The County argues that the contract language is clear that there is nothing within the labor agreement that interferes or restricts the County in making that assignment.

The second main argument of the County is that the Union cannot prove the existence of any past practice which limits the right of Highway Department supervisors to select employes and to assign work to employes. The County submits that the Union offered no convincing evidence that any such alleged practice existed and that the Grievant admitted on the record that he was aware of various instances where another employe, other than the patrolman assigned to a section of highway, actually performed work on that section of highway. In citing the testimony of the Union President, the County states that the Union offered no evidence to support a claim that a past practice existed. Both Union witnesses, the County avers, offered no testimony or proof that the Highway Department administration was aware of or agreed with the position stated by the Union that each patrolman was guaranteed all overtime work on their section of highway. The County states that absent clear proof by the Union of a mutually agreed upon practice, their past practice argument must fail.

As a third argument, the County argues that its decision to call in another employe to perform snow removal work on Sunday, January 24, 1999 was reasonable and appropriate under the circumstances. The County points out that Grievant worked 17.75 hours on Friday, January 22 and then after only a 6 hour break worked 8 hours on Saturday, January 23. The Grievant then worked 7.5 hours starting at 3:30 a.m. on Sunday, January 24, 1999 and at that time the supervisor had previously assigned him to start work at 4:00 a.m. on Monday, January 25, 1999 and work until 3:30 p.m. that day, a period of 11.5 hours. As a result it was reasonable for the supervisor not to call Grievant in to work a shift from 9:00 p.m. on Sunday, January 24, 1999 until the following Monday morning at 4:00 a.m. knowing that the Grievant had been directed to report to work exactly at 4:00 a.m. on Monday morning. Had Grievant worked the shift assigned to another employe, the Grievant would have worked a total of 18.5 straight hours. Therefore, the County submits it was a reasonable decision to have another employe work the Sunday evening snow removal hours as there were other employes available to do the work. The County points out that it receives support for the reasonableness of the supervisor's decision from the testimony of Grievant who testified that he asked his supervisor to find a replacement for him on Saturday, January 23rd, after he had worked 17.75 hours on

Friday and 8 hours on Saturday. The County argues that safety considerations and availability of workers should come into play when assigning work to employes of the Highway Department, which is what occurred in the situation of this particular Grievant and grievance.

For these reasons, the County requests that the Arbitrator should find that the Union has failed to meet its burden of proof of an alleged practice and find that the County has not violated the labor agreement. The County contends that the grievance should be dismissed.

DISCUSSION

The facts that brought this matter before the Arbitrator are not in dispute. (Jt.2) Behind the issue of whether the County violated the collective bargaining agreement by not allowing the Grievant to work the Sunday overtime are the issues of the right of the County to assign employes and whether that right is limited by the collective bargaining agreement or by past practice of the parties. It is clear from the Management Rights clause that the County has the right to assign employes unless that right is so limited. (Jt.1)

The Union did not introduce evidence of any clause of the labor agreement that would limit the right of the County to assign another employe to Grievant's snow removal section without first giving the Grievant the right to refuse the offer of this overtime work. In other words, there is no language in the labor agreement that specifically or even generally guarantees that an employe will have a "right of first refusal" as the Union describes it. From the testimony and the briefs of the parties, there does not seem to be agreement as to whether an employe is assigned to a section of road for snowplowing or whether an employe bids for it. Articles 5 (Overtime) and 7 (Job Posting) do not spell out any procedure for bidding for or being assigned the snow plowing routes or sections. However, I do not need to decide that question, if there is one, as it is clear from the record that employes normally snowplow one route and that is considered their regular route.

Having found that the labor agreement is silent, not ambiguous, on whether there is a right given to the employes to be offered overtime work on their route first before it is assigned to another employe, the Union must prove that right by other means. In this case, the Union argues that past practice gave the Grievant the right to be offered the overtime work on Sunday, January 24, 1999. The Union correctly cites various tenets of past practice law in its post hearing brief. There is little dispute as to what a party must prove to establish a past practice which in this case would have to be so well established as to become a provision of the parties' labor agreement. 1/ I find that in this case the Union has not established a past practice that gave the Grievant a right of first refusal of overtime work on his regular route.

1/ Definition of past practice:

1) *Clarity and consistency of the pattern of conduct,*
2) *Longevity and repetition of activity,*
3) *Acceptability of the pattern and*
4) *Mutual acknowledgement of the pattern by the parties.*

***The Common Law of the Workplace**, Theodore J. St. Antoine editor, pg. 82 (1998), citing Richard Mittenthal. **Past Practice and the Administration of Collective Bargaining Agreements**, 59 Mich. L Rev. 1017 (1961).*

The Union tried to establish past practice through the testimony of the Grievant. A careful analysis of Grievant's testimony cannot and does not meet the aforementioned standards necessary to prove a past practice in this case. Grievant on direct examination testified that he never heard anyone from County management say to any employe that the employe could not work his snow route, as his supervisor told Grievant in this case. On cross examination, however, the Grievant admitted that he did not know what happened on the other snow removal sections, that he did not keep track of the hours worked by other employes plowing snow, and that he only thought that employes were always offered the overtime first on their routes. Grievant also testified that he was aware of other employes being called in to plow routes to which other employes were assigned. It is also clear that neither the Grievant nor the Union President, who testified in rebuttal, had any written document or any oral understanding with County management that employes would be offered a right of first refusal for overtime on their routes.

The only witness for the County was Highway Commissioner Speich. Speich testified that the County makes a reasonable effort to see that patrolmen are given the work on their road sections or routes. Speich testified that there never has been any agreement or understanding with the employes or the Union that employes will always be guaranteed the overtime on their snow removal sections. Speich testified that how employes work during a snow storm depends on the circumstances and each storm is different. Speich stated that how many hours employes work depends on the number of sections that must be plowed, the number of shifts it will take to clear the snow, the number of hours employes are and have worked and whether there are enough employes to relieve people off their regular routes.

Grievant himself testified that he asked to be relieved on Saturday, January 23rd because he was tired from plowing snow 17.75 hours on Friday, January 22nd and 8 hours on Saturday, January 23rd. Speich further testified that he had conversations with Union President King that while the general feeling of the employes is that the practice is as the Union states it,

Speich testified that there is no guarantee that it will happen every time. I credit Speich's testimony, and, although King on rebuttal could not recall the conversations on this subject with Speich, he admitted that he had never said to Speich that it was the Union's position that employes should always have the right of first refusal of overtime on their routes.

The Union offered evidence that on the weekend of January 11, 1999 the Grievant had worked a shift of 19 hours. This fact goes less to a past practice argument than to a reasonableness position as clearly one incident does not establish a past practice. Speich testified in response to this fact, which I will assume, that again it depends on the snow storm; there may be circumstances where there are no other employes available to relieve and employes do not like to be called out if they are not going to get a full shift which often isn't known at 3:30 pm when the regular shift ends; in other words the developing snow storm dictates the decisions of the supervisors. As to the reasonableness argument, it is not for me to make decisions about management actions unless they are clearly unreasonable. In this case, I find that it was reasonable for a Highway Department supervisor to decide that it was not safe to allow the Grievant to work almost a 19 hour shift, which would have given him only 21 hours off over four days. This is particularly true when all of that time was behind the wheel plowing snow. The County's safety concern was reasonable.

The Grievant and Union would like the employes to be able to determine when they are too tired to drive and plow snow and when they will or will not work overtime. In this case and under this labor agreement and under these facts nothing gives them that right. Therefore, the grievance must be denied.

Based upon the foregoing and the record as a whole, I enter the following

AWARD

The County did not violate the collective bargaining agreement when it called in another employe other than the Grievant to perform the snow removal work on Sunday, January 24 on the same section of highway that the Grievant works as State Patrolman. The grievance of the Grievant is denied.

Dated at Madison, Wisconsin this 20th day of September, 1999.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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