BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TAYLOR COUNTY HIGHWAY EMPLOYEES
LOCAL 617, AFSCME, AFL-CIO

and

TAYLOR COUNTY

Case 83
No. 57580
MA-10681

Appearances:

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Mr. James Arkens, Personnel Director, Taylor County, on behalf of the County.

ARBITRATION AWARD

The Taylor County Highway Employees Local 617, AFSCME, AFL-CIO (herein the Union) and Taylor County (herein the County) are parties to a collective bargaining agreement, dated September 23, 1996, covering the period January 1, 1996 to December 31, 1998, and providing for binding arbitration of certain disputes between the parties. On May 19, 1999, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on a job posting issue and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on July 13, 1999. The parties filed briefs on August 20, 1999, and reply briefs on September 8, 1999.

ISSUE

The parties stipulated to the following statement of the issue:

Did the Employer violate the collective bargaining agreement when it refused to post the position of tandem truck driver, on or about March 24, 1999?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISION

ARTICLE 18 – WAGES

Section 2. Each employee will be permanently classified. The Commissioner shall establish the number of positions in each class. Employees shall not be paid less than their established base pay.

Vacancies in each class shall be filled as provided in Article 17. All promotions are for one (1) year probationary periods, at the end of which the employees (sic) shall be either returned to his/her original class, or become permanently reclassified.

The Commissioner may assign any employee to perform any task, but if the employee is assigned to perform a task (for more than one-half {1/2} of the work day), which is normally performed by employees in a higher class, he/she shall be paid at the higher class' pay rate for the entire day.

OTHER RELEVANT CONTRACT LANGUAGE

ARTICLE 1 – RECOGNITION

Section 3. The Union recognizes the rights and responsibilities of the County under the terms of this contract, and including, but not limited to, the right to hire, promote, discharge or discipline for cause any employee, the right to decide the nature and location of the work to be done, and the right to promote safety for the employee, the economy of operation, cleanliness and proper care of equipment and protection of property. The County reserves the full right to determine what layoffs are necessary and the number of employees to be laid off. When layoffs occur, the provisions of Article 9 shall apply.

The County reserves the right to establish reasonable work rules. The County may subcontract any work after a reasonable period of negotiation.

ARTICLE 17 – JOB POSTING

Section 1. All new and vacant positions shall be posted in a conspicuous place listing the pay, duties and qualifications. The notice of vacancy shall remain posted for seven (7) days. Employees interested shall apply in writing within the seven (7) day period. Within five (5) days of expiration of the posting period, the Employer will award the position to the most senior applicant qualified.

BACKGROUND

The County and the Union have been in a collective bargaining relationship for a number of years. Under the terms of the collective bargaining agreement, the employes in the Highway Department are permanently classified in specific job titles set forth in the contract, but may post into other classifications as vacancies arise. The Highway Commissioner determines the number of positions in each class. There are currently 37 positions in the Department. Since at least 1987, the County has consistently had between 10-12 tandem trucks and has maintained 4 tandem truck driver positions, although this number is not set forth in the contract. Over the past 20 years approximately 15-20 tandem truck drivers have retired and their positions have always been posted. Through attrition, however, the total number of employes in the unit has been reduced from a high of approximately 50 to the present number of 25. Prior to this grievance, the Union has not objected to the elimination of positions by the Commissioner, with one exception. Some of the remaining employes have posted into, and alternate between, multiple positions, and some of the positions are unfilled, accounting for the difference between the number of positions and the size of the workforce.

In 1997, a tandem truck driver, Ken Sperl, retired. At that time, the Highway Commissioner, Thomas Toepfer, didn't immediately post the position and the Union filed a grievance. Subsequently, the position was posted and ultimately was filled by John Zutavern. Zutavern retired in early 1999. Subsequent to Zutavern's retirement, Toepfer did not post the tandem truck driver position. Since then the County has had 3 tandem truck drivers in the Department. When additional drivers have been needed, the work has been assigned to common laborers within the Department. Laborers were assigned to drive tandem trucks on 23 occasions in the 75-day period between the filing of the grievance and the hearing. Under the contract, workers temporarily assigned to a higher paying position receive the higher rate of pay while working in that capacity, whereas workers assigned to a lower paying job remain at their standard rate of pay. In this case, however, common laborers are in the same pay rate classification as tandem truck drivers, so there is no pay differential.

On March 24, 1999, the Union filed a grievance on the grounds that the County had failed to post the tandem truck driver position as allegedly required by the contract. The

County denied the grievance on the dual basis that it was untimely and also that the Commissioner had exercised his prerogative under the contract and eliminated the position. The dispute was submitted for arbitration and a hearing was held on July 13, 1999.

POSITIONS OF THE PARTIES

The Union

The contract presents an apparent conflict between Articles 17 and 18. Article 17 requires that all vacancies be posted, but Article 18 provides that the Highway Commissioner establishes the number of positions in each classification. The Commissioner has used his authority under Article 18 to effectively eliminate a tandem truck driver position, although the work remains and has been redistributed to common laborers. During the period since the previous driver's retirement, common laborers have operated his tandem truck 23 of 75 days. What the County has done, therefore, is essentially reallocate the work to common laborers. This establishes a dangerous precedent because it makes it possible for the County, over time, to gradually eliminate the job classifications set forth in the contract and end up with all employes classified as common laborers. This would make it impossible for future employes to obtain the higher paying jobs because the Commissioner could eliminate them as they came open, rather than declare them vacant, and not post them.

The County contends that the tandem truck driver position was obsolete, but this does not comport with the evidence. The vacancy was created by retirement, not layoff, and, although the position was eliminated, the County still maintains all four of its tandem trucks. The work still remains, as evidenced by the fact that the truck has been in service, driven by common laborers, 23 of the 75 days prior to the hearing. This is not, therefore, the elimination of an obsolete position. It is, rather, an attempt to unilaterally restructure and reclassify the Department.

In general, contract principles give management the right to determine the size of the workforce and the work to be done, but this authority is not unfettered. Arbitral precedents dictate that it must be exercised reasonably and in good faith. Thus, where the job functions continue to exist, an employer cannot arbitrarily assign them to other employes merely to avoid the posting requirements of the contract. That is exactly the situation presented here – the work continues to exist, but is now assigned to common laborers rather than filling the tandem truck driver position.

The arbitrator should not construe the contract terms such that it would lead to a harsh, absurd, or nonsensical result. To adopt the construction proposed by the County would do just that, because it would allow the Commissioner to eventually phase out all Department positions and reclassify them as common laborers. It is not clear from the contract, however, what the

parties deem the term "vacancy" to mean and no evidence was offered on the point at the hearing. In such cases it is appropriate to refer to a standard dictionary for guidance. Webster's Ninth Collegiate Dictionary defines the term as "a vacating of an office, post, or piece of property," which is consistent with the situation here. The incumbent, John Zutavern, was not laid off because his position was eliminated. He retired. The work remains, but is now being done by common laborers.

Past practice also supports the Union's position. For at least 10–12 years there have been four tandem truck driver positions in Taylor County. Whenever in the past a truck driver has retired, in each instance the County has posted the position. This establishes the fact that the recognized practice is to post vacancies created by retirement. It is a long-standing principle that where the actions of the parties give meaning to ambiguous terms, such practices will be applied by arbitrators in construing those terms. The language of Articles 17 and 18 raises questions about when the Commissioner is required to post openings. Past practice discloses, however, that openings created by retirement, where the duties of the position continue to exist, are considered vacancies and are posted. Since the opening created here arose due to retirement, and since other employes are still doing the work, the job should have been posted. To hold otherwise would be inconsistent with the intent of the contract and would lead to an unreasonable result.

The County

The grievance should be denied in the first instance on procedural grounds because it was filed untimely. Article 3, Step 4, of the contract requires that "the employee shall take the grievance up with the Commissioner within fifteen (15) days of the employee's knowledge of the occurrence of the event causing the grievance." The incumbent, John Zutavern, retired on February 26, 1999, at which time the Commissioner eliminated his position. The Commissioner's intention in this regard was known within the Department even prior to Zutavern's retirement. Nevertheless, the Union did not file the grievance until twenty-six days later. While filing deadlines are occasionally overlooked for good cause, in this case there was no explanation or excuse for the Union's failure to file in a timely fashion and, therefore, the grievance should be denied.

The grievance should also be denied because the Commissioner's action was a valid exercise of his authority and was consistent with the language of the contract, past practice and basic concepts of management rights. Article 18, Section 2, of the collective bargaining agreement clearly gives the Commissioner the authority to establish the number of employes in each class. Consistent with this language, he determined that only three tandem truck drivers were needed and, therefore, eliminated a position. This action was within his discretion under the contract and should be sustained.

Even if the contract language is deemed to be ambiguous, however, past practice supports the County's position. The elimination of the position was based on the Commissioner's assessment that the position was superfluous and, therefore, was a waste of taxpayers' money. In the past, the County has eliminated positions without objection from the Union. The position of shovel operator was eliminated after the incumbent retired in 1990 and the position of crusher operator was eliminated in 1997. There is currently no tractor operator, although the County owns two tractors and the classification of grader operator has shifted from between four and six positions in recent years. The Union has objected to none of these changes.

In order to establish a binding past practice, 1) the practice must be long-standing and well established; 2) the other party must be aware of the practice; 3) the practice must be mutually accepted; and 4) the practice must not conflict with the clear language of the contract. The Union's own witness testified to the changes that have occurred in the make-up of the Department over the past years and the Union acquiesced in these changes without objection. This history clearly establishes the elements of a binding past practice in this area, supporting the Commissioner's action.

Finally, the Commissioner's action falls within the broad definition of management rights, which arbitrators have generally recognized. Defining the size of the workforce is a clearly established management prerogative and may only be challenged when it is exercised in bad faith.

Union Reply

The County's timeliness challenge should be rejected because it was never raised during the processing of the grievance through various step levels, nor at the hearing. The objection was only raised for the first time in post-hearing briefs. Had the objection been raised properly, the Union could have prepared a defense and presented evidence refuting the challenge, but by pursuing this tactic the County has impermissibly interfered with the Union's ability to adequately reply. Further, it is well settled that objections to arbitrability which are not raised before the hearing are waived cf. WINNEBAGO COUNTY, CASE 184, NO. 43883, MA-6098 (GRATZ, 8/22/90). Finally, the objection should be rejected because the record reflects that the grievance was filed in a timely fashion.

The County disparages the Union's concern that the Highway Commissioner may attempt to eliminate all classified positions and staff the Department entirely with common laborers. Nevertheless, the Commissioner testified that he believes he has such power under the collective bargaining agreement, and that is exactly what happened here. This would be an unreasonable, but not unforeseeable extension of his position.

It is notable that the County bases its position on the general grant of authority contained in the language of Article 18, but disregards the language of Article 17, which specifically requires all vacancies to be posted. It is an accepted arbitral principle, however, that where contract provisions appear to conflict, specific language controls over general language. Therefore, under Article 17, the Commissioner should have been required to post the position, notwithstanding his general powers under Article 18 to determine the number of positions in each classification.

Furthermore, past practice is more supportive of the Union's position than the County's. The one instance cited by the County, where a crusher operator position was eliminated, was a situation where the function had ceased to exist and the equipment was eventually sold, unlike here, where the truck remains and the work continues. In such situations, past practice is that vacant positions are posted and filled. That is what should have been done here and the grievance should be sustained.

County Reply

The record reflects that the grievance was untimely and for that reason it should be denied. While the retiring employe, Zutavern, was technically on vacation in February, the Union was aware he was retiring and that his position would be eliminated. Its failure to assert its claim in a timely fashion, without excuse, where clearly defined deadlines exist should bar its claim. Likewise, Union acquiescence in the past to the practice of using common laborers to fill in as truck drivers when needed operates as a waiver of any right to object now to this practice.

The Union's argument on the merits is also not well founded, for a variety of reasons. First, it argues that a fourth position continues to exist because the County continues to own and operate four trucks. The Union's own numbers reveal, however, that during construction season, when trucks get maximum use, the fourth truck was only used 30% of the time. The rest of the year it is not used at all. Furthermore, there is no evidence that other employees are working more overtime, or that other work is not getting done, since Zutavern's retirement. The record is clear, therefore, that there is, in fact, no ongoing need for a fourth tandem truck driver. Nor should any credence be given to the Union's concern that the County will continue to refuse to post vacancies until the entire department is populated with common laborers. This grievance should be decided on the evidence concerning the incident at hand, not on speculation about what may occur in the future.

There is, further, no support for the Union's claim that the County acted in bad faith. The Union concedes that management has the authority to control the size and composition of the workforce as long as it acts reasonably and in good faith. Nothing in the record indicates that the County acted otherwise. There is not enough work to justify maintaining the position,

and what work there is gets assigned to a worker within the same pay grade as a truck driver. There is nothing, therefore, to suggest either improper motives or lack of justification for the County's action.

Finally, the language of Articles 17 and 18 can be harmonized to rationally effectuate both. Under Article 17, vacancies must be posted, but if, under Article 18, the Commissioner eliminates a position, there is then no vacancy and no need for posting. Under the Union's interpretation, the Commissioner could never eliminate a position upon the retirement of an employe, which would be illogical. The Union is simply attempting to create ambiguity in order to raise the issue of past practice. Even were it successful, however, it still has failed to establish the existence of a past practice that meets the criteria necessary to make it binding upon the parties. There is no basis, therefore, for sustaining the grievance and it should be denied.

DISCUSSION

Timeliness

The County argues that the grievance should be dismissed because it was untimely. The Union objects on the basis that this argument was not raised at the hearing, nor was evidence offered on the issue; therefore, the objection is waived. In his Step 1 response to the grievance, dated March 29, 1999 (Joint Exhibit #3), however, the Commissioner states, in pertinent part:

> I am denying your grievance based on:
>
> **Article 3, Section 4, Step 1**
> Grievances shall be within [sic] 15 days of the employees' knowledge of the event. Mr. Zutavern retired over two months ago.

While it is true that the County offered no evidence on this point at the hearing, nevertheless the arbitrator holds that the issue was timely raised by the County and will be considered. In the first instance, therefore, the arbitrator must consider the question of whether the grievance was or was not timely, and, if it was not, whether the grievance should then be dismissed. Article 3, Section 4 of the agreement indicates that at step 1 of the procedure, "The employee shall take the grievance up in writing with the Commissioner within fifteen (15) days of the employee's knowledge of the occurrence of the event causing the grievance." Article 3, Section 4 also specifies that this time period does not include weekends or holidays. Zutavern retired on February 26, 1999, and the grievance was filed on March 24, excluding weekends a difference of 26 days. The County contends this delay is fatal.

Generally, where an agreement specifies time limits for filing grievances, these must be strictly adhered to, and failure to do so without good cause will result in dismissal. Due to the harshness of this rule, however, any ambiguity will be resolved in favor of allowing the grievance to progress. Here, it is not clear at what point the grievant, in this case the Union, had knowledge of the occurrence of the event causing the grievance, as specified in the agreement. Although Zutavern retired on February 26, the record does not reflect at what point the Union became aware that the Commissioner intended to eliminate the position. Although the County contends this was generally known, no evidence to this effect was adduced at the hearing.

This is further complicated by the fact that Article 17, which contains the posting provisions, sets no deadline for posting job vacancies after they arise. It is not clear from the contract, therefore, at what point the Union could conclude that the County had violated the posting requirement in order to trigger the filing deadline under Article 3. This combination of circumstances would make it very difficult for the Union to calculate exactly when its clock began running for the filing of the grievance. Since the contract is unclear as to when a position must be posted, and since the County produced no evidence establishing the point at which the Union knew that the position was to be eliminated, I find that the filing of the grievance was timely.

The Merits of the Dispute

As a general rule, absent clear contract language to the contrary, the Employer has broad discretion to determine whether vacancies exist and, if so, whether to fill them. AKRON GENERAL MEDICAL CENTER AND RUBBER WORKERS, LOCAL 1014, 94 LA 1183 (DWORKIN, 1990) In this instance, there is strong language in the contract supporting management's rights in this regard.

Article I, Section 3, states in part:

> The Union recognizes the rights and responsibilities of the County under the terms of this contract, and including, but not limited to, the right to hire, promote, discharge or discipline for cause any employee, the right to decide the nature and location of the work to be done . . . (and) . . . the economy of operation.

Article 18, Section 2, states in part:

> Each employee will be permanently classified. The Commissioner shall establish the number of positions in each class.

Taken together, these clauses give management the right to determine the size of the workforce. The County may increase the workforce by hiring or reduce it through layoffs or attrition. The Highway Commissioner establishes how many employes are needed in each classification, and can, therefore, determine whether vacancies exist, or whether one has been created by the loss of an employe.

The Union argues, however, that the language of Article 17 controls and requires the Commissioner to post positions vacated by retirement. The Union's concern is that otherwise the Commissioner may eliminate by attrition all positions save that of common laborer. I disagree.

It is a recognized principle of contract interpretation that contracts should be construed in such a way as to give effect to all the contract language. SCHOOL DISTRICT OF WEST ALLIS – WEST MILWAUKEE, 70 LA 387, (GRATZ, 1978) The Union's concern is that an overbroad interpretation of the language of Article 18 will have the effect of nullifying the posting requirements of Article 17 by allowing the County to simply eliminate positions when retirements occur and replace the employes with common laborers. Nevertheless, in the case at hand there is no evidence of that occurring. The Commissioner did not eliminate a classification, merely a position that was deemed unnecessary within a classification. There is no contention that the County hired an additional common laborer to replace the truck driver who retired, simply that the residual driving duties were assigned to existing employes and that, at best, there is only enough of such work for an additional truck to be utilized only 30% of the time during the peak construction season. Further, common laborers are on the same pay level as truck drivers, which undercuts the principal motive the County could be expected to have for such a scheme – assigning higher paying work to lower paid employes. There is, therefore, no indication of an underlying strategy on the County's part to gradually eliminate positions in the Highway Department and replace them with common laborers.

On the other hand, to interpret Article 17 as the Union suggests would effectively make the pertinent language of Article 18 moot by requiring the Commissioner to post any position vacated by retirement regardless of whether the workload justifies retaining it. This would also have the effect of forcing the Commissioner to reduce the workforce, when necessary, through layoffs alone, a harsher result than simply waiting for an underemployed worker to retire and then not hiring a replacement. In effect, whenever a position was vacated, the County would be required to post and fill the position, then declare a surplus and lay the new worker off, whereupon he would have to bump back into his original classification. Ambiguous language should not be interpreted so as to lead to harsh, absurd or nonsensical results SQUARE D CO., 99 LA 879 (GOODSTEIN, 1992) and clearly this cannot have been what was intended.

For Article 18 to say, as it does, that the Commissioner ". . . shall establish the number of positions in each class," must carry the authority to not only make an initial determination of how many positions are needed in each class, but then to also make adjustments over time as the County's needs change. Further, at the hearing the Union acknowledged the Commissioner's general authority to reduce positions by attrition by noting that the department workforce has been reduced in the past several years from approximately 50 to a current figure of 25, primarily by attrition, without apparent Union objection. The proper relationship between Articles 17 and 18, then, is that once the Commissioner makes a determination to create a new position or declare one vacant under Article 18, then the position must be posted and filled as set forth in Article 17.

The Union's objection, then, if any, must be not that the Commissioner acted outside his authority, but that he exercised his authority improperly in this case. Every contract imposes a duty of good faith and fair dealing on the parties. HAUER V. UNION STATE BANK OF WAUTOMA, 192 WIS2D 576, 598, 532 NW2D 456 (CTAPP. 1995) In this case, this duty imposes an obligation on the Commissioner that he not exercise his control over the size and makeup of the workforce arbitrarily or capriciously. The Union contends that he did so by failing to post a vacant position and then assigning the work to other employes. I disagree. As noted above, the position in question is at most a 30% position during the busiest time of the year. No new common laborers were hired to replace the truck driver who retired, nor is there evidence of significant additional overtime being created for other employes by the retirement or that other work is not being completed by the common laborers due to extra driving duties. When necessary, truck-driving work is assigned to common laborers, who are in the same pay classification as tandem truck drivers. On this record, therefore, the decision of the Commissioner to eliminate a tandem truck driver position was within the scope of his authority and appears reasonable on consideration of all the facts and circumstances.

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

AWARD

The County did not violate the collective bargaining agreement by failing to post the position of tandem truck driver after the retirement of the incumbent. The grievance is, therefore, denied.

Dated at Eau Claire, Wisconsin, this 1st day of November, 1999.

John R. Emery /s/
John R. Emery, Arbitrator

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