BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHIPPEWA COUNTY HIGHWAY DEPARTMENT EMPLOYEES LOCAL 736, AFSCME, AFL-CIO

and

CHIPPEWA COUNTY

Case 216
No. 58678
MA-11029

Appearances:

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

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Victoria Seltun**, on behalf of the County.

ARBITRATION AWARD

At all times pertinent hereto, the Chippewa County Highway Department Employees Local 736, AFSCME, (herein the Union) and Chippewa County (herein the County) were parties to a collective bargaining agreement covering the period January 1, 1997, to December 31, 1999, and providing for binding arbitration of certain disputes between the parties. On March 16, 2000, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration on the County's failure to call in the most senior employees to plow snow on December 19, 1999, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute. The parties waived any procedural objections to arbitration and a hearing was conducted on June 20, 2000. The proceeding were not transcribed and the parties filed briefs on August 4, 2000.

ISSUE

The parties stipulated to the following framing of the issue:

Did the Employer violate the contract and/or past practice when it failed to call in two more senior employees on overtime to plow snow on December 19, 1999?

If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

The County possesses the sole right to determine the methods, means, and personnel by which the County operations are to be conducted. The rights include, but are not limited to, the following:

. . .

C. to hire, promote, schedule and assign employees;

. . .

F. to maintain efficiency of County operations;

. . .

I. to determine the methods and means in personnel by which County operations are to be conducted.

. . .

ARTICLE 4 – GRIEVANCE

. . .

Section 2. Subject Matter. Only one subject matter shall be covered in any one grievance and shall be filed on forms provided by the County. A written grievance shall contain the name and position of the grievant, a clear and concise statement of the grievance, the issue involved, the relief sought, the date the incident or violation took place, the specific section of the Agreement alleged to have been violated and the signature of the grievant and the date.

. . .

ARTICLE 8 – SENIORITY AND JOB POSTING

Section 1. Seniority. Seniority shall commence on the last date of hire in the Department. It shall be based upon actual length of continuous service, including approved paid leaves of absence. Employees on unpaid leaves shall retain their seniority prior to the date of leaves, and shall not accrue seniority while on leave except as provided for in Article 5 of this agreement; employees on layoffs shall retain seniority while on layoff, however, no benefits shall accrue to employees while on layoff status or unpaid leave (unless grandfathered by virtue of the voluntary layoff sideletter).

Seniority will terminate upon any of the following conditions:

1. Discharge for just cause or voluntary termination of employment.
2. Failure to report to work within 21 days after receiving adequate notice of being recalled from layoff.
3. Layoff of employment for a continuous period of more than one (1) year.
4. Failure to return to work on completion of leave of absence following adequate notice.

Adequate notice is defined as certified mail to the last known address as reported by the employee. It shall be the employee's responsibility to keep the County apprised of their current address.

In the event an employee is given a temporary layoff, i.e., one which is known in advance to be less than six months, the following conditions shall apply (for all except 3 grandfathered employees):

1. The employee shall continue to be treated as an active employee for health insurance purposes for the remainder of that month and the next two months.
2. Seniority shall continue to accrue.
3. There shall be no accrual of benefits.

. . .

ARTICLE 16 – HOURS OF WORK AND OVERTIME

. . .

Section 5. Overtime. Overtime shall be paid at time and one-half (1 ½) the regular rates for work performed in excess of eight (8) hours in a work day or Saturdays, Sundays and holidays.

. . .

BACKGROUND

The Chippewa County Highway Department maintains garages throughout the County, at which are stationed department trucks and equipment. Department employees are also assigned to the various garages. In the event of snowstorms, the State and County highways within the County are assigned to certain department employees to be plowed. Employees who do not have assigned routes are available to be called in situations where the assigned employees are unavailable or additional help is needed.

The Grievant, Jim Morning, is stationed at the Cornell garage. In the event of snow, he has an assigned route, which includes county highways R, ZZ, Z and part of County Highway E. On December 19, 1999, a snowstorm occurred in Chippewa County, moving West to East and the Highway Department employees were called out to plow their assigned routes as the storm reached their areas. On that day, the Grievant was not available to plow his section because his truck was being used by another employee. He was available, however, to be called as an additional employee, if needed, in which event he would have used an unassigned vehicle from another garage. Because some assigned employees were unavailable, Patrol Superintendent Louis Revoir began calling out relief employees. The Grievant was not called, but Curt Loew and Dale Konechney, both of whom have less seniority than the Grievant, were called. When the Grievant learned that Loew and Konechney had been called, he confronted Revoir and complained that he was entitled to be called before Loew and Konechney, but obtained no satisfaction. He and Union President Matt Hartman then met with Revoir and Highway Commissioner Bruce Stelzner, but again were unable to satisfactorily resolve the dispute.

On December 28, the Union filed a grievance on behalf of Morning and a number of other employees who had not been called on December 19. Later, the grievance was withdrawn as to all other employees besides Morning. The County denied the grievance on the grounds that it had no merit and that it was procedurally flawed and the matter proceeded to arbitration.

POSITIONS OF THE PARTIES

The Union

There is no merit in the County's procedural objections. The County alleges that the grievance is unclear as to which contract sections were allegedly violated, in that the grievance lists Articles 8-16 and Sections 1-5. A review of the contract shows that Article 8, Section 1, deals with seniority and Article 16, Section 5, deals with overtime, the very issues that arise in this dispute. Further, the Union sent a letter to the Employer shortly after the grievance was filed clarifying which provisions the grievance referred to (Union Ex. #1).

The County also objected to the fact that the grievance lists several grievants. In fact, it lists one grievant, the Union, seeking relief for several employees, but growing out of one incident, the December 19 snowstorm. Initially, the Union believed several employees to have been injured and named them all because there was little time to do an investigation before the deadline for filing the grievance passed. Later, the names of all but one employee were withdrawn, but this should not be considered a procedural flaw.

On the merits, the Union must prevail. For many years the County has used two call-in lists for snowplowing. The Section list (Union Ex. #2) lists employees who are assigned to patrol specific roadways as their normal duty and this is the priority list for calling out employees for plowing, based on location, not seniority. The second list is the "Extras" list (Union Ex. #3). It is based on seniority, not location and is to be used when there is a need to fill a Section route because the regularly assigned Section employee is unavailable.

The Grievant is assigned a route on the Section list, but did not have access to his truck and so was not called to plow his section. Nevertheless, under the existing practice he should have been called off the "Extras" list to fill in for another employee before Curt Loew and Dale Konechney, who are beneath him in seniority.

This case is based on the existence of a past practice which is clear, consistent, long-standing and mutually accepted. In the first place, the practice is not complicated. All Union witnesses testified that they understood the foregoing to be the accepted procedure, including Randy Michal and Jerry Asher, who actually assist with the call-in procedure at times. They further testified that the procedure has been in place throughout their employment with the County, which in one case is over 22 years. As to mutual acceptability, Union witnesses testified that the practice was consistently followed by management and employees alike. The contrary testimony of Bruce Stelzner and Louis Revoir is not credible. It is not possible that management did not know of the practice or of the existence of the "Extras" list, since the list was, in fact, produced by management.

Employer Exhibit 3 is the list that Revoir testified he uses to call-in employees for plowing. An examination of the document reveals that it is, in effect, the Section list, but instead of the "Extras" list it has attached to it a different seniority list, which only contains the names of employees not listed in the Section list.

The County denied the grievance because it was not a violation of the contract language, but the Union maintains that this is a past practice case. The County's response does not deny the existence of the practice and, in fact, in a subsequent meeting with Union representatives, Revoir admitted to having made a mistake. His later denial of knowledge of the practice, or of having made the statement, cannot be believed. Further, the County's rationale that employees are called out on a basis of proximity does not bear close scrutiny, because the Grievant lives much closer to the Bloomer garage than the two junior employees who were called in instead of him. In sum, the County violated a clear and long-standing past practice by failing to call in the Grievant and the grievance should be sustained.

The County

The grievance is procedurally defective. Article 4, Section 2, of the contract requires that a grievance be limited to one subject and identify with specificity both the grievant and the contract section(s) alleged to be violated. As drafted, the grievance here arguably alleges violations of Sections 1-5 of Articles 8-16, which is how the Highway Commissioner interpreted it. Further, the grievance lists seven individual grievants, although the contract allows for only one, and although only two employees could possibly be aggrieved since only two relief employees were called in on the day in question. Where such defects exist, the Arbitrator may dismiss the grievance , and should do so here MONROE MFG., INC., 107 LA 877, 879 (STEPHENS, 1996).

Substantively, the contract does not require that overtime snowplowing work be assigned according to seniority. Under the management rights clause, the County retains the sole right to schedule and assign employees, subject only to restrictions contained in the contract. There are none. Article 8 only addresses the effect of seniority in layoff and posting situations and makes no reference to plowing. The only reference to plowing in the contract is contained in Article 11 – Salting, Sanding and Plowing, which again makes no reference to seniority. Article 8, dealing with overtime, specifies that overtime shall be paid at time and a half, but also makes no reference to seniority. There is, therefore, no contractual support for the grievance.

Arbitral authority supports the County's right to assign employees to specific tasks based upon management rights. LANGLADE COUNTY, CASE 80, NO. 56614, MA-10352 (HEMPE, 3/12/99). Further, where there is no provision to the contrary, the County retains the right to allocate overtime and may determine in its discretion whether work shall be performed on an overtime basis. WAUPACA COUNTY (HIGHWAY), CASE 103, NO. 55422, MA-10010 (CROWLEY, 7/3/98). In this case, the County called in extra employees based upon location. The plowing to be done was in the Bloomer area, therefore, the employees called were those assigned to the Bloomer garage. Employees at the Cornell garage were then available to be called when the storm moved into the Cornell area. This was a rational scheme and was within the County's authority under the management rights clause.

The Union's past practice argument also fails. In order for a binding practice to exist, it must be unequivocal, clearly enunciated and acted upon and readily ascertainable for a reasonable period of time as a fixed and established practice accepted by both parties. According to the Union, the existing practice is that extra employees are called in, as needed, based upon unit wide seniority as set forth in Union Exhibit #3. Highway Commissioner Stelzner and Patrol Superintendent Revoir denied knowledge of such a practice. Further, Stelzner testified to never having seen the seniority list before and Revoir, while admitting familiarity with the list, denied ever using it for assigning extra plowing work. Rather, Revoir relies on the list appended to County Exhibit #3.

The record reveals that seven different persons have been involved in assigning extra plowing work, but that there is no consistently followed method for assigning the work among them. Stelzner and Revoir testified that they call in employees based upon location. Others use the list appended to the Section list, but not necessarily in order of seniority. Union witnesses testified that in their experience, call-ins were based on bargaining unit seniority. In short, there is no uniformity of method. There is no binding practice without acceptance by both parties, the Union's understanding of an existing practice notwithstanding. Conflicting evidence and testimony do not support the existence of a binding practice. The Union asserts that Union Exhibit #3 is the approved call-in list. The County maintains that County Exhibit #3 is a guideline for assigning plowing work dependent upon location. The Union has failed to meet its burden of establishing that its procedure is the accepted one, therefore, the grievance should be denied.

DISCUSSION

Procedural Arbitrability

The criteria for properly drafting a grievance are set forth in Article 4, Section 2, of the contract. The County alleges the Union did not comply with these requirements in a number of ways, thus warranting dismissal of the grievance. Specifically, the County maintains that the grievance is not limited to one subject matter and is vague as to the particular contract provisions at issue.

First, as to subject matter, I find that, in fact, the grievance is addressed to one subject – that of an alleged failure to properly offer overtime during the snow storm of December 19, 1999. The fact that several employees were potentially impacted by this action does not automatically require that each individual employee file a separate grievance. In fact, the grievance form itself, which is promulgated by the County, contemplates the possibility of multiple grievants. In this case, the grievance was initially brought by the Union on behalf of seven employees, who are all identified in the grievance. Under the terms of the contract, there is nothing inherently improper with this.

As to the proper identification of the contract provision in question, it is true that the fashion in which the grievance was drafted could, on its face, be viewed as ambiguous and somewhat confusing because it arguably alleges violations of Sections 1 through 5 of each of Articles 8 through 16. This is because the Union officer who drafted the grievance utilized hyphens, which usually denote inclusion of all the intervening provisions, rather than commas, which usually are viewed as limiting the subject matter to just the specifically identified provisions.

Initially, I would note that the form itself is somewhat confusing in that it calls for an enumeration of all applicable Articles on one line, and then all applicable Sections within those Articles on another. In any grievance involving multiple Sections of multiple Articles there

would be potential for confusion using this format and it would be difficult to draft the grievance in such a way as to eliminate the possibility of incorrect inferences regarding the alleged violations. According to the contract, however, this form is to be promulgated by the County. If it finds the format it has adopted to be confusing, therefore, it has the discretion to change it.

Going beyond that, however, it is also necessary to approach this process with a degree of common sense. County Exhibit #1 is a compilation of all the potentially involved Articles, many of which do not even contain 5 Sections. They are as follows: Article 8 – Seniority and Job Posting (6 Sections), Article 9 – Payroll (5 Sections), Article 10 – Work Curtailment (no Sections), Article 11 – Sanding, Salting and Plowing (no Sections), Article 12 – Union Business (4 Sections), Article 13 – Safety (3 Sections), Article 14 – Bulletin Board (no Sections), Article 15 – Highway Department Bargaining Unit Work (no Sections) and Article 16 – Hours of Work and Overtime (9 Sections). A cursory review of these provisions reveals that most of them have nothing to do with the allegations contained in the grievance. Even Article 11, which deals with sanding, salting and plowing only addresses how many employees may be in a truck at a given time. The language of the grievance itself states, "Management failed to call in employees for overtime to plow snow according to seniority and past practice." One would expect, therefore, the grievance to refer to those provisions in the contract which deal with seniority (Article 8, Section 1) and overtime (Article 16, Section 5).

Apparently there was communication between the parties regarding this misunderstanding because in his February 18, 2000 letter moving the grievance to Step 3, Union Representative Day specifically enumerated Article 8, Section 1, and Article 16, Section 5, as the provisions cited in the grievance, thus removing any remaining confusion. Taken as a whole, therefore, while the drafting of the grievance may not have been artful, I find that it was not done in bad faith, nor did it prejudice the County in its ability to address the grievance, therefore, I do not find grounds for dismissing the grievance on that basis.

The Merits

It should be noted at the outset that the contract does not mandate the offering of extra snowplowing work on the basis of seniority. Article 8, Section 1, cited in the grievance, acknowledges the principle of seniority, but only directly in the context of job posting and layoff situations. No specific reference to the applicability of seniority with respect to the assignment of overtime, snowplowing work, or the like is made. Likewise, Article 16, Section 5, which is addressed to the subject of overtime, only states that overtime will be paid at the rate of time and one-half for work in excess of eight hours per day or for weekend work, but no reference as to how overtime is to be assigned, whether by seniority or otherwise, is made. As previously noted, Article 11, which addresses sanding, salting and snowplowing makes no reference to how this work is to be assigned, but only covers how many employees are to be assigned per truck.

The Management Rights clause, contained in Article 1, sets forth the powers of management to the extent not otherwise limited by the contract or external law. Contained therein are rights to schedule and assign employees, maintain efficiency of County operations and determine the methods and personnel by which County operations are to be conducted. Inasmuch as the contract has not otherwise limited management's authority to control the assignment of overtime, therefore, such authority is contained within management's rights, unless management has otherwise abdicated some or all of that authority. GRAHAM BROTHERS, INC., 16 LA 83, 85 (CHENEY, 1951).

The Union, however, contends that there is an issue of past practice. Specifically, it claims the existence of a longstanding practice regarding the assigning of overtime snowplowing work, which is to first call in the employees on the Section list to plow their assigned routes. If employees on the Section list are unavailable, or if more drivers are needed, employees otherwise not already called in are to be called off the unit seniority list (Union Ex. #3). The County denies this practice and asserts that there is no fixed practice for assigning overtime snowplowing work beyond the Section list. When such occasions arise each supervisor has their own method of assigning overtime, but generally, in addition to seniority, location is considered, so that employees are only called to plow routes near their regular garage assignments.

The testimony of the Union President, Mathew Hartman, was to the effect that the unit seniority list has been the secondary call-in list for at least 20 years. He further testified that he attended the meeting with management where the grievance was discussed and that at that time Louis Revoir admitted to having made a mistake in failing to call the Grievant on the day in question. This testimony was supported by that of Archie Mooney, the Union Vice-President, and the Grievant, himself, both of whom also attended the meeting with Revoir and Stelzner.

Department employees Randall Michal and Jerry Asher also testified. They both indicated that the Extras list based upon unit seniority was to be used after all employees on the Section list had been called out. They stated, however, that on occasion management would deviate from the Extras list and call employees out of turn, either due to urgency and proximity or because a more senior employee was overworked.

Highway Commissioner Stelzner testified that at various times any of the Department supervisors could call-in employees for plowing work and that there is no set procedure for how this is to be done. On occasion, when no management personnel are available, call-ins could be done by bargaining unit employees, as well. In any event, according to Stelzner, seniority is never the deciding factor in calling in relief help. The size of the County and location of the employees dictates that those closest to the storm areas should be called because it is more efficient. Ultimately, however, who should be called is within the discretion of the individual supervisors.

Patrol Superintendent Revoir testified that proximity is a more appropriate criterion for calling in relief plowing help than seniority. He stated that on December 19, he called in the employees on the Section list and then instructed John Christianson, a bargaining unit employee, to call in the relief help. He has no recollection of admitting a mistake in not calling the Grievant and avers that, since he wasn't the one who called in the relief help, it is unlikely he would make such an admission.

Revoir's testimony is supported by County Exhibit #3, which is the call-in schedule utilized on the day in question, including both the Section list and an attached Extras list comprised of all bargaining unit employees not otherwise assigned to a section. The exhibit reveals that two of the Section list employees stationed at the Bloomer garage, Matt Hartman and Steve Schimmel, were unavailable and that Christianson then contacted Curt Loew and Dave Konechney to fill the openings. Loew and Konechney have less seniority than the Grievant, but are assigned to the Chippewa-Bloomer garages, whereas the Grievant is assigned to the Cornell garage.

Where an issue of past practice has been raised, in order to be binding ". . . the practice must be 1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by the parties." CITY OF CUMBERLAND, CASE 18 NO. 55310 MA-9976 (MEIER, 4/23/98), quoting CELANESE CORP. OF AMERICA, 24 LA 168, 174 (JUSTIN, 1954).

In this case, the evidence is conflicting as to exactly what, if any, standard practice exists. Clearly, there is no uniform understanding among the witnesses on this point. Both sides agree that the Section list is the primary method for calling in employees to plow snow, but there the understanding ends. The Union witnesses argue that relief workers have historically been called in order off the unit seniority list. Management witnesses maintain, however, that proximity and garage assignment are the primary factors in calling relief workers, not seniority.

County Exhibit #3, which I give significant weight, suggests that the actual practice may be a hybrid. This document has the appearance of a standard call-in form used by the County whenever call-in situations arise. It first contains the Section list, which is consistent with the testimony of all witnesses. Attached thereto is a modified unit seniority list, which lists all non-assigned bargaining unit employees in order of seniority. Significantly, however, it also lists the regular garage assignments of the employees. The testimony of the County witnesses was credible in that it makes logical sense to call the relief employees who are closest to the need. Were seniority the only criterion, if a storm arose on the West End of the County and the most senior employees were located on the East End, they would be called regardless. By the time the storm reached the East Side of the County, less senior employees, who might be stationed on the West Side would be called. This would clearly be inefficient and the exhibit indicates, therefore, that location is a key consideration. Nevertheless, the employees are also listed in order of seniority, and some are listed as being assigned to

multiple garages. This indicates that within zones the employees are to be called in order of seniority, which comports with the testimony of the Union witnesses. Thus, if need for a relief driver arises in the Bloomer area, the drivers assigned to the Bloomer shop would be called off the Extras list in order of seniority. That would be consistent with the evidence and appears to be what was done in this case.

Unfortunately, neither of the parties agree that this is the existing practice. The confusion is only increased, furthermore, by the fact that on the day in question the relief drivers were apparently called in off the modified list by a bargaining unit employee, which would appear to contradict the Union's position. That being the case, it fails the element of being an established practice mutually accepted by the parties. I cannot, therefore, find the existence of a binding past practice which would be dispositive of this case. Even were I to do so, however, in my view it would not avail the Grievant here. In the first place, because he is on the Section list, his name does not appear on the attached Extras list, because the underlying assumption is that all available employees on the Section list have already been called by the time the Extras list is employed. It is anomalous that on that particular day the Grievant was unavailable to plow his section because his truck was out of service, but that he could have filled in for another driver. In the second place, the Grievant is assigned to the Cornell garage and the relief workers were needed in the Bloomer area, and thus were called out of the Bloomer garage. In my view of the system that is in place, therefore, even were the Grievant listed on the Extras list, he would not have been entitled to precedence over the employees who were called.

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 or past practice by failing to call-in the Grievant to plow snow on December 19, 1999. The grievance is, therefore, denied.

Dated at Eau Claire, Wisconsin, this 30th day of November, 2000.

John R. Emery
John R. Emery, Arbitrator

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