BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 1077, AFSCME, AFL-CIO

and

ROCK COUNTY

Case 332
No. 59900
MA-11453

Appearances:

Mr. Thomas Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Mr. Thomas Schroeder, Corporation Counsel, Rock County, appearing on behalf of the Employer.

WRITTEN CONFIRMATION OF BENCH AWARD

The Union and Employer named above are parties to a 1998-1999 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve the grievance of Dean Markee regarding a safety payment. The undersigned was appointed and held a hearing on June 15, 2001, in Janesville, Wisconsin. The parties presented their evidence and arguments, and the Arbitrator gave a bench decision, granting the grievance. This document is a confirmation of that bench decision.

The Grievant, Dean Markee, was employed for many years at the County's Highway Department until January 4, 2000, when he retired. He made plans to retire in advance of that date, and actually moved to Arizona sometime in November of 1999, but stayed on the County's payroll by using up accumulated paid time off. He intended to quit on January 1, 2000, but miscalculated his accumulated time off, and returned to work on December 27, 1999, for only one day. The County worked with him to allow him to carry over his paid time off into the year 2000 for pension purposes. The Grievant did not actually work during January of 2000, but used paid time off on January 3 and was officially terminated as of January 4, 2000.

The first paycheck covering the Grievant's final employment was issued January 21, 2000. It did not include a $200 safety equipment payment. There is some question as to when the Grievant learned that the County did not intend to pay him for the year 2000 for safety equipment. He filed a grievance on February 23, 2000.

The County first argued that the grievance was not timely, because the Grievant had 14 days to file a grievance. However, the Arbitrator ruled that it is uncertain what date the Grievant knew or should have known that the County's decision to not pay him was intentional, since there were some inquiries initially as to whether the matter was a mere oversight. Also, the County did not raise the issue of timeliness at prior steps. For those reasons, it is preferable that the grievance be decided on its merits.

The contract language at issue is in Section 19.01, which states:

> Effective January 1, 1998, the Employer shall pay to each employee a one-time annual payment $190.00, which will be increased to $200.00 effective January 1, 1999. In return each employee shall be required to wear approved safety glasses and safety shoes during all working hours in accordance with posted work rules.

The County made an excellent argument regarding the inequity of making a payment to a former employee who never actually worked during the year of 2000, who had moved out of state several weeks before January of 2000, and who only worked one day in December of 1999. Moreover, the County argued, the contract language calls for a *quid pro quo* – that an employee is required to wear approved safety glasses and safety shoes during all working hours. The Grievant was never present during 2000 to wear any safety equipment. The County also noted that in the 1981 and 1982 labor contracts, the parties used the term "employees of record" but dropped that term after 1982. If the term were still used, the County asserts, the Grievant was still an employee "of record" as of January 3, 2000, and he would have a stronger claim. The language now only refers to the word "employee."

Despite the equities involved, the Arbitrator agreed with the Union that the contract does not call for any pro-ration of the safety equipment payment, and there is no requirement that employees work for any specific period of time in order to receive it. While there is an obligation for employees to use safety equipment, the Grievant was not actually at work to use it, and there is no contention that the Grievant refused to wear safety equipment when actually on the job. If an employee used vacation or compensatory time off for the whole month of January, and then resigned, the County would agree that he was entitled to the safety equipment payment, even though he did not work during the year of the payment. While a case like this one leaves the door open for potential abuse, the parties can address that in future bargains. The Arbitrator should not add to the contract and impose any particular time to be worked to obtain the safety payment, where the parties have not done so themselves. What

would be the time one would have to work? It would be an arbitrary designation to impose some specific period of time now. Thus, the contract language should be adhered to strictly, despite the obvious inequity of it in this case.

The fact that the parties dropped the phrase "employees of record" and left "employees" in its place has no effect in this decision. The Grievant was an employee. He was also an employee of record. He was in pay status. I find no meaningful distinction between being an employee of record and an employee in determining that he was entitled to the safety payment under Section 19.01. The contract only demands that he be an employee. If an employee were hired the week before, he would be an employee entitled to the payment. The fact that the Grievant quit so shortly after the start of the year and had not been at work for weeks does not change the fact that he was an employee as of January 1, 2000 and entitled to the safety payment, based on the language of Section 19.01.

AWARD

The grievance is sustained.

The County violated the collective bargaining agreement when it failed to pay the Grievant the safety payment for the year 2000, and it is ordered to pay him that safety allowance as soon as feasible.

Dated at Elkhorn, Wisconsin this 20th day of June, 2001.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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